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**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

WENDY DEL ROSA, *et al.*,  
Plaintiffs,

v.

RYAN ZINKE, Secretary of the United  
States Department of the Interior, *et al.*,  
Defendants.

CASE NO. 2:17-CV-01750-TLN-CMK

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION TO  
DISMISS COMPLAINT**

**Date: May 31, 2018**

**Time: 2:00 p.m.**

**Courtroom: 2, 15th Floor**

**Judge: Hon. Troy L. Nunley**

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## INTRODUCTION

In bringing this action, the plaintiffs, Wendy Del Rosa, Secretary-Treasurer of the Alturas Indian Rancheria (“Tribe”), on her own behalf and on behalf of the plaintiff Tribe (collectively “Wendy Del Rosa” or “Ms. Del Rosa”), are not requesting that the Court determine who is the lawful governing body of the Tribe, interpret tribal law to resolve an internal tribal leadership dispute or overturn the Interior Board of Indian Appeals (“IBIA”) decision recognizing the Tribe’s 2012 Business Committee for the limited purpose of allowing the Bureau of Indian Affairs (“BIA”) to carry out its essential government-to-government relations with the Tribe.

Instead, plaintiffs are requesting that the Court give comity to the decision (“Judgment”) of the Tribe’s General Council, sitting as a quasi-judicial body, the equivalent of a tribal court, removing Phillip Del Rosa (“Del Rosa”) as the Chairman of the Tribe and suspending his right to hold office or vote on tribal matters.

By refusing to give comity to the Tribe’s Judgment, the defendants, Secretary of the Interior, Ryan Zinke, Pacific Regional Director of the BIA, Amy Dutschke (“PR Director”), and Superintendent of the Northern California Agency (“Agency”) of the BIA, Virgil Akins (“Akins”) (collectively “Federal Officials”) effectively overturned and reversed the Tribe’s Judgment and reinstated Del Rosa as the Chairman of the Tribe with the right to vote on all matters that come before the Business Committee and General Council. In doing so, the Federal Officials impermissibly involved themselves in the internal affairs of the Tribe and directly interfered with the ability of the Tribe to govern itself, in violation of federal common law, which requires the BIA not to interfere in the internal affairs of an Indian tribe and to recognize and give comity to tribal court judgements.

In this brief, Ms. Del Rosa will demonstrate: (1) the Federal Officials had a fiduciary obligation to recognize and comply with the Tribe’s Judgment; (2) the BIA’s failure to recognize and abide by the Judgment constituted an impermissible

1 interference with the internal governmental affairs of the Tribe; (3) the Court has  
2 jurisdiction under principles of federal common law to recognize and enforce the  
3 Judgment; (4) the Administrative Procedure Act, 5 U.S.C. § 701 et. seq. waives the  
4 Federal Officials sovereign immunity from suit in this case; and (5) Ms. Del Rosa  
5 has standing to bring this action in this Court.

6 For all of these reasons, the Federal Officials' motion to dismiss must be  
7 denied.

### 8 STATEMENT OF FACTS

9 The relevant facts of this case are set forth in the allegations in the Complaint,  
10 which, on a motion to dismiss, the Court is required to accept as true. *See, Scheuer v.*  
11 *Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds* by *Davis v. Scherer*,  
12 468 U.S. 183 (1984); *Cruz v. Beto*, 405 U.S. 319, 322 (1972).

13 1. The Tribe is a federally recognized Indian tribe organized under the  
14 provisions of the Indian Reorganization Act, 25. U.S.C. § 476, under a written  
15 Constitution ("Constitution"), which has been approved by the Secretary and which  
16 designates the Tribe's General Council as the governing body of the Tribe.  
17 Complaint, p. 3, ¶ 10.

18 2. The Constitution also established a Business Committee consisting of  
19 the Tribe's duly elected Chair, Vice-Chair and Secretary-Treasurer. Under the  
20 Constitution, the Business Committee has the authority to conduct the day to day  
21 business affairs of the Tribe when the General Council is not in session. Under the  
22 Constitution, all decisions of the General Council are binding on the Business  
23 Committee. Complaint, p. 3, ¶ 10.

24 3. On March 20, 2012, the Tribe, pursuant to its Constitution and through  
25 its General Council, enacted a Code of Conduct ("Code") that established punishable  
26 offenses for members of the Tribe who engaged in misconduct as defined by the  
27 Code. Complaint, p. 3, ¶ 11.

1           4.     On July 9, 2012, the Tribe, pursuant to its Constitution and the Code, by  
2 and through its General Council, gave notice (“Notice”) to Del Rosa that the General  
3 Council had filed a petition (“Petition”) with the Business Committee seeking the  
4 removal of Del Rosa from the position of Chairman of the Tribe. Complaint, p. 3 ¶  
5 12.

6           5.     On October 22, 2013, the Tribe, pursuant to its Constitution and the  
7 Code, by and through its General Council, affirmed the July 9, 2012, decision  
8 removing Del Rosa as Chairman of the Tribe and Business Committee and  
9 suspended Del Rosa’s right to vote in any Tribal elections and all Business  
10 Committee and General Council matters. Complaint, p. 4, § 13.

11           6.     On January 27, 2015, the Tribe, by and through its General Council,  
12 sent a letter to Akins, requesting that, for Fiscal Year 2015, the DOI enter into a 638  
13 Contract (“638 Contract”), with the Tribe, pursuant to the provisions of the Indian  
14 Self-Determination, Education Assistance Act, 25. U.S.C. § 450 et seq.  
15 (“ISDEAA”). Complaint, p. 4, ¶ 14.

16           7.     On April 3, 2015, the Agency, sent a letter to the Tribe declining to  
17 enter into a 638 Contract with the Tribe for the Fiscal Year 2015 and instead issued a  
18 decision (“2015 Decision”) holding that the Business Committee elected on April 2,  
19 2012, Phillip Del Rosa, Chairman, Darren Rose, Vice-Chair and Wendy Del Rosa,  
20 Secretary-Treasurer, was the group that the BIA, would enter into a 638 Contract  
21 with on behalf of the Tribe. The BIA, Agency, made this 2015, Decision, reinstating  
22 Del Rosa as the Chairman of the Tribe and recognizing Del Rosa’s right to vote on  
23 items before the Business Committee, despite the fact that the General Council had  
24 removed Del Rosa from the position of Chairman and had suspended his voting  
25 rights. Complaint, p. 4, ¶ 15.

26           8.     On October 15, 2015, the BIA, PR Director, affirmed the 2015 Decision  
27 of the Agency, holding that the Business Committee elected on April 2, 2012,  
28 including Del Rosa, as Chairman, would be the group the BIA, Agency, would 638



1 Contract with on behalf of the Tribe, pursuant to the provisions of the ISDEAA.  
2 Complaint, p. 4, ¶ 16.

3 9. On April 19, 2016, the BIA, Agency, issued a written decision  
4 (“Decision I”) refusing to recognize any tribal members as representing the  
5 government of the Tribe for the purpose of carrying on the United States  
6 government-to-government relationship with the Tribe or for purposes of entering  
7 into any 638 Contract under the ISDEAA with the Tribe for Fiscal Year 2016.  
8 Complaint, p. 4, ¶ 17.

9 10. On January 13, 2017, the BIA, PR Director, affirmed Decision I of the  
10 Agency, issued on April 19, 2016, that the BIA would not recognize any group or  
11 individuals as representing the Tribal government of the Tribe for the purpose of  
12 carrying out the United States government-to-government relationship with the  
13 Tribe or entering into a 638 Contract with the Tribe for Fiscal Year 2016 ISDEAA  
14 funds. This decision (“Regional Director’s Decision I”) of the PR Director was not  
15 appealed by any member of the Tribe and is a final DOI decision. Complaint, p. 5, ¶  
16 18.

17 11. On February 28, 2017, the BIA, Agency, issued a decision (“Decision  
18 II”) affirming its prior Decision I refusing to recognize any group or individual as  
19 the Tribe’s governing body and refusing to enter into a 638 Contract with the Tribe  
20 for Fiscal Years 2016 and 2017, pursuant to the ISDEAA. Decision II was not  
21 appealed to the Regional Director and is now a final non-appealable decision of the  
22 DOI. Complaint, p. 5, ¶ 19.

23 12. On June 30, 2017, the IBIA, sitting on behalf of the Secretary, upheld  
24 the Regional Director’s Decision I of October 15, 2015, recognizing the Tribe’s  
25 Business Committee elected in 2012, for the limited purpose of entering into a 638  
26 Contract with the BIA, Agency, for Fiscal Year 2015 ISDEAA funds. The IBIA’s  
27 June 30, 2017 decision (“IBIA Decision”) recognized Del Rosa as the Chairman of  
28 the Tribe for purposes of 2015 638 Contracting. In its Decision, the IBIA affirmed

1 that the Agency's Decision II, refusing to recognize a tribal government for purposes  
2 of 638 contracting for Fiscal Years 2016 and 2017, was final and binding on the  
3 DOI. Complaint, p. 5, ¶ 20.

4 13. On July 6, 2017, Darren Rose ("Rose") and Del Rosa, purporting to  
5 represent the Tribe, sent a letter to Akins requesting that the Agency, allow them  
6 [Del Rosa and Rose] to "... drawdown funds for Fiscal Years 2016 and 2017, under  
7 the [proposed 638] contract between the BIA and the Tribe ..." Complaint, p. 6, ¶  
8 21.

9 14. On July 24, 2017, Rose and Del Rosa, purporting to represent the Tribe,  
10 sent a letter to the Agency requesting that the Agency "release the first quarter of  
11 contract funds [to Rose and Del Rosa] for 638 Contract Fiscal Year 2015. ..."   
12 Complaint, p. 6, ¶ 22.

13 15. On July 26, 2017, the Agency, issued a second decision ("Decision III")  
14 stating "... in response to the Tribe's ... letter of July 24, 2017, ... the Agency will  
15 be conducting business in its government-to-government relationship with the  
16 Alturas Indian Rancheria through the Tribe's Business Committee elected April 2,  
17 2012." The April 2, 2012, Business Committee consisted of Del Rosa as the  
18 Chairman of the Tribe. Complaint, p. 6, ¶ 23.

19 16. On August 1, 2017, the General Council of the Tribe, by and through  
20 Wendy Del Rosa, sent a letter to Akins, requesting clarification of the BIA's July 26,  
21 2017 Decision III. In the letter, Wendy Del Rosa requested that the BIA clarify  
22 whether the IBIA Decision only authorized the BIA to recognize the 2012 Business  
23 Committee for the limited purpose of contracting for 638 Contract funds for Fiscal  
24 Year 2015 and for no other purpose. Complaint, p. 6, ¶ 24.

25 17. On or about August 16, 2017, Wayne Smith, Tribal Administrator for  
26 the Tribe, recognized as such by Wendy Del Rosa and the majority of the Tribe's  
27 General Council, telephoned and spoke with Akins. In the call, Akins advised Mr.  
28 Smith that, based upon the IBIA Decision, the BIA Agency, was going to recognize,

for the purpose of the United States maintaining its government-to-government relationship with the Tribe, the Tribe's 2012 Business Committee, including Del Rosa, as Chairman of the Tribe. Akins' decision to interpret the IBIA's Decision as authorizing the BIA to recognize Del Rosa as the Tribe's Chairman, was made with the knowledge that the General Council had previously removed Del Rosa from the office of Chairman and had suspended Del Rosa's right to vote in all General Council and Business Committee matters. On August 16, 2017 the BIA also executed a 638 Contract for Fiscal Year 2016 and 2017 ISDEAA funds with Rose and Del Rosa. Complaint, p. 6, ¶ 25.

18. The BIA's Decision III, recognizing Del Rosa as the Chairman of the Tribe, with the right to vote in all matters that come before the Business Committee, is contrary to the Judgment of the General Council that removed Del Rosa from office and suspend Del Rosa's voting rights. Complaint, p. 7, ¶ 26.

## ARGUMENT

### **I. THE CONDUCT OF THE FEDERAL OFFICIALS IN THIS CASE MUST BE JUDGED BY THE HIGHEST FIDUCIARY STANDARDS.**

It is indisputable that the United States maintains a trust relationship with Indians and Indian tribes. "This principal has long dominated the Government's dealings with Indians." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). *See, United States v. Mason*, 412 U.S. 391, 398 (1973); *Minnesota v. United States*, 305 U.S. 382, 386 (1939); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118 (1938); *United States v. Candelaria*, 271 U.S. 432, 442 (1926); *McKay v. Kalyton*, 204 U.S. 458, 469 (1907); *Minnesota v. Hitchcock*, 185 U.S. 373, 396 (1902); *United States v. Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). The nature of that trust relationship was eloquently stated by the Supreme Court in *Seminole Nation v. United States*, 316 U.S. 286 (1942):

[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited

1 people. . . . In carrying out its treaty obligations with the Indian tribes the  
 2 Government is something more than a mere contracting party. Under a  
 3 humane and self-imposed policy which has found expression in many acts of  
 4 Congress and numerous decisions of this Court, it has charged itself with  
 5 moral obligations of the highest responsibility and trust. **Its conduct, as  
 disclosed in the acts of those who represent it in dealings with the Indians,  
 should therefore be judged by the most exacting fiduciary standards.**

6 *Id.*, at 296-297. (citation omitted); (emphasis added).

7 In its Brief in Support of Motion to Dismiss Complaint (“Opening Brief”) the  
 8 Federal Officials argue that Ms. Del Rosa has not cited to a statute that the Federal  
 9 Officials have violated that gives rise to the Federal Officials trust obligations in this  
 10 case. Opening Brief, p. 19, lls. 7-9. In support of its position, the Federal Officials  
 11 cite to *Menominee Indian Tribe of Wisconsin v. U.S.*, \_\_ U.S. \_\_, 136 S. Ct. 750  
 12 (2016) for a quote contained in *United States v. Jicarilla Apache Nation*, 564 U.S.  
 13 162, 165 (2011) (“*Jicarilla Apache*”). The *Jicarilla Apache* case, however, is clearly  
 14 distinguishable on its facts from this case.

15 In *Jicarilla Apache*, the Jicarilla Apache Nation filed suit against the United  
 16 States in the United States Claims Court seeking money damages for, among other  
 17 things, a breach of the United States’ trust obligation. In rejecting the Nation’s  
 18 breach of trust claim, the Court held that any duties arising from the Government’s  
 19 trust obligations had to be found in a specific statute that imposed certain duties on  
 20 the United States towards the Nation. *Id.* at 165.

21 The holding in *Jicarilla Apache* is consistent with a long line of Supreme  
 22 Court cases that have drawn a distinction between breach of trust claims brought by  
 23 Indian tribes against the United States for equitable relief and claims seeking money  
 24 damages. In the latter, the Court has consistently held that, in order for an Indian  
 25 tribe to maintain a lawsuit against the United States’ for money damages arising  
 26 from the Government’s breach of its trust obligations, the tribe had to cite to a statute  
 27 that imposed specific duties upon the United States that gave rise to the breach of  
 28 trust claims and waived the United States sovereign immunity from suit. *United*

1 *States v. Mitchell*, 463 U.S. 206 (1983) (holding that “a fiduciary relationship  
2 necessarily arises when the Government assumes” duties arising under a statute and  
3 that the Government “should be liable in damages for the breach of its fiduciary  
4 duties”. *Id.* at 225-226.

5 However, when tribes, as in this case, have sought equitable relief against the  
6 Government arising for a breach of its common law trust duty owed to tribes, the  
7 federal courts have consistently held that the existence of a fiduciary responsibility  
8 toward Indians exists, independent of an express provision of a treaty, agreement,  
9 executive order or statute.

10 Defendant [federal government] contends that no fiduciary obligation can  
11 arise unless there is an express provision of a treaty, agreement, executive  
12 order or statute creating such a trust relationship, and the trust relationship is  
13 limited by the precise terms of the document. **If by this the Government**  
14 **means that the document has to say in specific terms that a trust or**  
15 **fiduciary relationship exists or is created, we cannot agree.** The existence  
vel non of the relationship can be inferred from the nature of the transaction or  
activity.

16 *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980).  
17 (emphasis added). *See, United States v. Mitchell*, 463 U.S. 206, 225 (1983); *United*  
18 *States v. Mason*, 412 U.S. 391, 398 (1973); *Minnesota v. United States*, 305 U.S.  
19 382, 386 (1939); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118 (1938);  
20 *United States v. Candelaria*, 271 U.S. 432, 442 (1926); *McKay v. Kalyton*, 204 U.S.  
21 458, 469 (1907); *Minnesota v. Hitchcock*, 185 U.S. 373, 396 (1902); *United States v.*  
22 *Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation v. Georgia*, 30 U.S. 1  
23 (1831).

24 Furthermore, the trust duty, standing alone, independent from any duty  
25 imposed by federal statute upon the Executive Branch of the United States  
26 Government, can serve as an adequate legal basis for declaratory and injunctive  
27 relief sought by Indians:  
28

When the Congress legislates for Indians only, something more than a statutory entitlement is involved. **Congress is acting upon the premise that a special relation is involved, and is acting to meet the obligation inherent in that relationship.**

*White v. Califano*, 437 F. Supp. 543, 557 (D.S.D. 1977) (emphasis added). *See, Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C.1972).

Thus, in the exercise of its trust responsibility towards Ms. Del Rosa and the Tribe in this case, the Federal Officials conduct must be exercised with “great care,” *United States v. Mason*, 412 U.S. at, 398, in accordance with “moral obligations of the highest responsibility and trust,” and must be judged “by the highest fiduciary standards.” *Smith v. United States*, 515 F. Supp. 56, 60 (N.D. Cal. 1978).

## **II. THIS COURT HAS JURISDICTION OVER MS. DEL ROSA’S AND THE TRIBE’S CLAIMS PURSUANT TO 28 U.S.C. § 1331.**

Title 28 of the United States Code Section 1331 grants to the district courts jurisdiction to hear any claims arising under the **Constitution**, treaties and **laws** of the United States. The **laws** of the United States include the Indian Commerce Clause, Article I, § 8, cl. 3, and the decisions of the federal courts interpreting the Indian Commerce Clause as requiring federal agencies to recognize the right of Indian tribes to govern themselves and to recognize and enforce tribal laws under principles of comity. *Worcester v. Georgia*, 31 U.S. 515 (1832); *Attorney’s Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 943 (8th Cir. 2010).

It is a fundamental principle of Federal Indian Law that Indian tribes retain the right to self-government and that “the sovereignty retained by tribes includes ‘the power of regulating their internal and social relations.’” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)). This authority includes “the power to make their own



substantive law in internal matters and to enforce that law in their own forums.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (citations omitted); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982); *United States v. Wheeler*, 435 U.S. 313, 322 (1978); *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883); *Bowen v. Doyle*, 880 F. Supp. 99, 113 (W.D.N.Y. 1995). It is equally well-settled that tribal authority over internal matters is exclusive. *Talton v. Mayes*, 163 U.S. 376 (1896); *Bowen v. Doyle*, 880 F. Supp. at 113; *United States v. Charles*, 23 F. Supp. 346, 348 (W.D.N.Y. 1938). A decision by an agency or official of the federal government that a quasi-judicial decision of the governing body of a tribe suspending a tribal official from voting or holding public office, based on criteria selected by an official of the federal government, without any authority under tribal law, constitutes an impermissible infringement of the “right of the Indians to govern themselves.” *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Winnemucca Indian Colony*, 837 F. Supp. 2d 1184, 1191 (D. Nev. 2011).

In the present case, the General Council of the Tribe, sitting as a quasi-judicial body, entered a final, non-appealable decision, based entirely upon tribal law, that Phillip Del Rosa had embezzled money from the Tribe and, as punishment for engaging in such conduct, should be stripped of his right to hold office and to vote in Tribal elections until he made restitution and paid the money to the Tribe. AR, 025, Del Rosa Declaration, p. 14, ¶ 42. By recognizing the Interim Group from the *Salazar* Settlement, the PR Director has overruled the General Council’s decision and unilaterally reinstated Phillip Del Rosa as the Chairman of the Tribe with the authority to vote on the Business Committee and to administer the Tribe’s 638 Contract funds. This the PR Director cannot do consistent with the facts of this case and federal court precedent. *Winnemucca Indian Colony*, 837 F. Supp. 2d at 1191.

Pursuant to Article VII, Section 2(b) of the Tribe’s Constitution, the Business Committee enacted a Code of Conduct Ordinance. Complaint, p. 3, ¶ 11. Pursuant to

1 the Code of Conduct Ordinance, the General Council, on September 21, 2013,  
2 served Phillip Del Rosa with a “Notice of Hearing and Order to Appear” giving Del  
3 Rosa notice that he was being charged with violating the Tribe’s Code of Conduct  
4 Ordinance, specifically, theft of Tribal funds, misuse of Tribal credit cards and theft  
5 of Tribal equipment. The Notice set October 22, 2013, at the Tribal Offices for the  
6 hearing. The General Council served Phillip Del Rosa with a second Notice on  
7 October 7, 2013, changing the location of the hearing to the Peppermill Hotel in  
8 Reno, Nevada. Phillip Del Rosa acknowledged receipt of both notices. Complaint,  
9 p.p. 3-4, ¶ 12, Exhibit C.

10 Prior to the hearing, Phillip Del Rosa notified the General Council that he  
11 “would not be attending” the hearing. Despite his failure to attend, the General  
12 Council went forward with the hearing. Based upon the evidence presented at the  
13 hearing, the General Council found Phillip Del Rosa guilty of the charges and  
14 punished him by terminating his right to vote in all Tribal elections and to hold any  
15 tribal office until he repaid all of the money he embezzled to the Tribe. Complaint,  
16 p. 4, ¶ 12, Exhibits C and D.

17 Under the Code of Conduct Ordinance, Phillip Del Rosa, had the right to be  
18 present at the hearing, to be represented by legal counsel, to call and cross-examine  
19 witnesses, to present documents in support of his position and to appeal any decision  
20 entered against him. Complaint, p. 4, ¶ 12, Exhibits C and D. As such, the Phillip  
21 Del Rosa hearing met all of the due process requirements of the Indian Civil Rights  
22 Act, 25 U.S.C. § 1301 et. seq. Complaint, p. 4, ¶ 12, Exhibits C and D. Not only did  
23 Phillip Del Rosa not attend the hearing, but he also did not appeal the judgment  
24 entered against him.

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1 The hearing conducted by the General Council against Phillip Del Rosa, was a  
 2 quasi-judicial proceeding in which the General Council acted as a Tribal Court.<sup>1</sup> Its  
 3 decision, therefore, is binding on the BIA.

4 The awarding of the 638 Contract in this case does not require the BIA to  
 5 resolve the Tribe's internal leadership dispute. The Tribe must resolve its own  
 6 internal disputes. Neither the BIA, nor any federal court, has jurisdiction to resolve  
 7 those disputes. "[A] federal agency or court should not address the merits of a tribal  
 8 election dispute, so long as there is a functional tribal court that can sort out the  
 9 dispute internally." *Winnemucca Indian Colony*, 837 F. Supp. 2d at 1191.

10 A final judgment of a tribal tribunal interpreting and applying tribal law to  
 11 resolve an internal tribal dispute among members of a tribe is binding on the federal  
 12 government and the federal courts. Once a final tribal judgment has been entered  
 13 settling a leadership dispute, the federal government and federal courts must  
 14 recognize the tribal tribunal's determination. *Attorney's Process & Investigation*  
 15 *Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F. 3d 927, 943 (8th  
 16 Cir. 2010) ("The rule is clear that federal courts do not conduct de novo review over  
 17 tribal court rulings under tribal law. . ."); *Goodface v. Grassrope*, 708 F.2d 335, 339  
 18 (8th Cir. 1983) (upholding BIA determination to recognize the last undisputed  
 19 government as a matter of necessity until tribal court addressed the matter).

20 The issue of whether Del Rosa had the right to vote in Tribal elections and to  
 21 hold tribal offices was addressed and decided by the General Council sitting as a

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22 <sup>1</sup> Tribal courts have repeatedly been recognized as appropriate forums for the  
 23 exclusive adjudication of disputes affecting important personal and property  
 24 interests of both Indians and non-Indians. See, e. g., *Fisher v. District Court*, 424 U.  
 25 S. 66 (1976); *Williams v. Lee*, 358 U.S. 217 (1959). See also *Ex parte Crow*  
 26 *Dog*, 109 U.S. 556 (1883). Nonjudicial tribal institutions have also been recognized  
 27 as competent law-applying bodies. See *United States v. Mazurie*, 419 U.S. 544  
 28 (1975). Thus, the General Council Judgment is the equivalent of a Tribal Court  
 judgment. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

1 judicial tribunal or court. The General Council, based upon substantial evidence in  
 2 the record, including an outside audit report conducted at the Tribe's request, found  
 3 Del Rosa guilty of stealing Tribal money, misusing Tribal credit cards and misusing  
 4 Tribal property. Complaint, p. 4, ¶ 13, Exhibit D.

5 Del Rosa refused to appear at the hearing and did not challenge the General  
 6 Council's authority to hear the case, despite notice of the proceedings and service of  
 7 the charges against him. After the decision was rendered, Del Rosa did not seek  
 8 reconsideration of the judgment or file a notice of appeal of the decision to an  
 9 independent arbitrator. The General Council's Judgment is, therefore, a final, non-  
 10 appealable judgment. The issue of whether Del Rosa can vote or hold office has  
 11 been decided by a tribunal of competent jurisdiction, and that judgment is now final,  
 12 *res judicata*, and binding on all the parties, including the BIA and this Court.

13 The issue of whether the BIA and this Court must recognize and enforce the  
 14 Judgment of the General Council is a matter of comity arising under the Indian  
 15 Commerce Clause and the common law of the United States, and this Court has  
 16 jurisdiction over that issue. *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 903  
 17 (9th Cir. 2002) citing *Wilson v. Marchington*, 127 F.3d 805, 809-810 (9th Cir. 1997).

18 **III. THE BIA WAS REQUIRED TO RECOGNIZE AND COMPLY WITH**  
 19 **THE GENERAL COUNCIL'S DECISION SUSPENDING DEL ROSA**  
 20 **FROM OFFICE AND SUSPENDING HIS RIGHT TO VOTE IN**  
 21 **BUSINESS COMMITTEE AND GENERAL COUNCIL MATTERS.**

22 The fundamental issue in this case is whether the BIA was required to  
 23 recognize the orders of the Tribe's General Council sitting as a judicial body. "As a  
 24 general rule, federal courts must recognize and enforce tribal court judgments under  
 25 principles of comity." *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 903 (9th  
 26 Cir. 2002) citing *Wilson v. Marchington*, 127 F.3d 805, 809-810 (9th Cir. 1997)  
 27 ("*Marchington*"). "As a general policy, '[c]omity should be withheld only when its  
 28 acceptance would be contrary or prejudicial to the interest of the nation called upon

1 to give it effect.”” *Marchington*, 127 F.3d at 809. Federal agencies are similarly  
 2 compelled to respect tribal court decisions. *Winnemucca Indian Colony v. United*  
 3 *States ex rel. Dep’t of Interior*, 837 F. Supp. 2d at 1193.

4 Two factors preclude recognition of a tribal court judgment: “Federal and  
 5 state courts must neither recognize nor enforce tribal judgments if: (1) the tribal  
 6 court did not have both personal and subject matter jurisdiction; or (2) the defendant  
 7 was not afforded due process of law.” *Marchington*, 127 F.3d at 810. “[U]nless a  
 8 federal court determines that the tribal court lacked jurisdiction, . . . the proper  
 9 deference to the tribal court system precludes re-litigation of issues raised . . . and  
 10 resolved in the tribal courts.” *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18  
 11 (1987). Federal courts have also concluded that they may refuse to recognize tribal  
 12 court judgments on certain discretionary grounds. *Marchington*, 127 F.3d at 810.

13 When the *Marchington* criteria are applied to the present case, it is evident  
 14 that none of the circumstances that would support denial of the recognition by the  
 15 BIA or this Court of the General Council’s Judgment, sitting as a tribal court, are  
 16 present.

17 First, there is no question that the General Council had subject matter and  
 18 personal jurisdiction over Del Rosa. Complaint, p. 3, ¶ 12, Exhibit C. Del Rosa  
 19 cannot object to any of the findings or conclusions reached by the General Council  
 20 because Del Rosa was required by law to exhaust his tribal court remedies prior to  
 21 contesting the jurisdiction of the Tribal Court in another forum. *National Farmers*  
 22 *Union Ins. Companies v. Crow Tribe of Indians* 471 U.S. 845 (1985); *Bowen v.*  
 23 *Doyle*, 880 F. Supp. 99 (W.D.N.Y. 1995). Del Rosa never appeared in the case, filed  
 24 a timely appeal from the decision, or in any other fashion challenged the General  
 25 Council’s jurisdiction. Complaint p. 4, ¶ 13, Exhibit D. Because Del Rosa failed to  
 26 exhaust his tribal court remedies in his case, he is now precluded from challenging  
 27 the jurisdiction of the General Council or its Judgment. *Nat’l Farmers Union Inc.*  
 28 *Co. v. Crow Tribe*, supra; *Tillett v. Hodel*, 730 F. Supp. 381, 384 (W.D.O. 1990)

1 (“federal courts should not entertain a challenge to the jurisdiction of a tribal court  
2 until tribal court remedies have been exhausted.”).

3 Second, the General Council afforded Del Rosa due process. The General  
4 Council has adopted the Federal Rules of Civil Procedure under its Code of  
5 Conduct. Del Rosa was served with the charges and the notice of hearing and was  
6 given adequate notice prior to the hearing being held. Complaint, p. 3, ¶ 12, Exhibit  
7 C and p. 4, ¶ 13, Exhibit D.

8 Third, if Del Rosa was dissatisfied with the decision, he could have appealed  
9 the decision to a fair and impartial arbitrator. *Id.*

10 Fourth, none of the discretionary bases for denying recognition of the General  
11 Council’s Judgment are present here. There is no basis for concluding that the  
12 Judgment was obtained by fraud. The General Council relied on an audit report  
13 prepared by an independent auditing firm as evidence that Del Rosa was guilty of  
14 the charges. There was, therefore, substantial evidence in the record to support the  
15 Judgment. *Id.*

16 Fifth, recognition of the decision is not against the public policy of the United  
17 States. On the contrary, it is the longstanding policy of the federal government, as  
18 expressed through statutes such as 25 U.S.C. § 3601(5) and 25 U.S.C. § 3651(6), to  
19 “recognize tribal justice systems as the most appropriate forums for the adjudication  
20 of disputes affecting personal and property rights on Native lands . . .” 25 U.S.C. §  
21 3651(6).

22 Finally, the Judgment entered by the General Council does not conflict with  
23 any other court’s final judgment that is entitled to recognition nor any contractual  
24 choice of forum provision agreed to by the Tribe.

25 These facts prove beyond doubt that the General Council’s decision stripping  
26 Del Rosa of his right to vote and hold office is a final, non-appealable decision that  
27 is binding on Del Rosa, the BIA and this Court. The PR Director’s Decision  
28 recognizing Del Rosa as the Chairman of the Tribe is a clear example of the BIA

1 ignoring the tribal forum established by the Tribe to resolve membership and  
 2 leadership issues. The Tribe, acting through its General Council determined that Del  
 3 Rosa cannot vote in tribal elections or hold a tribal office. In contrast, the PR  
 4 Director's Decision directly overturns the General Council's decision and Judgment,  
 5 reinstates Del Rosa in office, reinstates his right to vote, and gives him access to  
 6 Tribal funds. Such a result clearly constitutes a direct, impermissible interference  
 7 with the ability of the Tribe to govern itself and a failure by the Federal Officials to  
 8 give comity to a Tribal Court Judgment entitled to comity.

9 **IV. AS AN ELECTED OFFICIAL OF THE TRIBE'S BUSINESS**  
 10 **COMMITTEE AND A MEMBER OF THE TRIBE'S GENERAL**  
 11 **COUNCIL, MS. DEL ROSA HAS STANDING TO BRING THIS**  
 12 **ACTION SEEKING TO HAVE THE COURT ORDER THE FEDERAL**  
 13 **OFFICIALS TO GIVE COMITY TO THE GENERAL COUNCIL'S**  
 14 **JUDGMENT.**

15 In its Opening Brief, the Federal Officials argue that Ms. Del Rosa does not  
 16 have standing to bring this action because she has not "demonstrated a cognizable  
 17 injury" "fairly traceable to Interior" that "this Court can redress". Opening Brief, pp.  
 18 10-12.

19 In order to have standing to bring an action against federal officials, a plaintiff  
 20 must show: "(1) that the plaintiff has suffered an actual injury that is (2) fairly  
 21 traceable to the defendants' action and (3) that would likely be redressed by a  
 22 favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

23 The Court can give short shrift to the Federal Officials argument that Ms. Del  
 24 Rosa lacks standing, for a number of reasons. First, the Federal Officials have  
 25 mischaracterized Ms. Del Rosa's case. She is not seeking, as the Federal Officials  
 26 falsely assert, to have this Court make a membership decision or resolve a tribal  
 27 leadership dispute. Instead, she only seeks to have the Court order the BIA to  
 28 recognized the Judgment entered by the General Council in this case.

1 Second, there is no doubt that the Tribe has standing to bring an action to  
2 enforce its Judgment. Ms. Del Rosa is a member of the General Council, which is  
3 the governing body of the Tribe. In addition, she is a member of the Tribe's  
4 Business Committee. Under the Tribe's Constitution, the powers of the General  
5 Council are delegated to the Business Committee for the purpose of carrying out the  
6 day to day business affairs of the Tribe. The Tribe is a governmental entity that can  
7 only speak and act through its elected officials. As an official of the Tribe, Ms. Del  
8 Rosa has the right to represent the interests of the Tribe to seek comity of the Tribe's  
9 General Council Judgment.

10 Third, the Decision of the PR Director has caused both the Tribe and Ms. Del  
11 Rosa herself to be injured in this case. Contrary to the General Council's Judgment,  
12 Ms. Del Rosa now has to allow Del Rosa to participate in Business Committee  
13 decisions and to have access to tribal funds. The reinstatement of Del Rosa on the  
14 Business Committee has diluted her vote on the Business Committee and denied her  
15 the right to govern the Tribe and carry out her duties under the laws of the Tribe.

16 While the standing requirement of Article III of the United States Constitution  
17 cannot be supported by the "independent action of some third party not before the  
18 court, . . . that does not exclude injury produced by determinative. . . effect upon the  
19 action of someone else." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) ("*Bennett*").

20 In *Bennett*, the Supreme Court held that ranchers in Oregon had standing to  
21 challenge a biological opinion ("Opinion") issued by the Oregon Fish and Wildlife  
22 Service, because the Opinion caused the Bureau to reduce water flows, which  
23 injured the ranchers. *Bennett*, 520 U.S. at 169-71. The Supreme Court reached this  
24 conclusion because the Opinion had a "determinative" effect on the Bureau's  
25 regulation of water flow. *Id.* at 169-70. Here, as discussed *supra*, the PR Directors  
26 Decision that Del Rosa is the Chairman of the Tribe and can vote in Tribal affairs  
27 not only violates the General Council's Judgment, but directly interferes in the  
28 ability of the Tribe, acting through its Business Committee, composed of Darren



1 Rosa and Ms. Del Rosa, to make governmental decision about how the Tribe's  
2 government will operate on a day-to-day basis. As a result, Ms. Del Rosa, herself  
3 has suffered and will continue to suffer an injury in fact. She has been denied the  
4 ability to participate in making decisions on the Business Committee for the Tribe in  
5 accordance with the Judgment of the General Council. As such, she possesses,  
6 separate and apart from the Tribe, standing to maintain this lawsuit.

7 Finally, there is no doubt that the relief Ms. Del Rosa seeks from the Court, a  
8 declaration and order directing the Federal Officials to recognize and enforce the  
9 General Council's Judgment, will remedy both Ms. Del Rosa's and the Tribe's  
10 injuries. An order issued by this Court directing the Federal Officials to afford  
11 comity to the General Council's Judgment will allow the Tribe and Ms. Del Rosa to  
12 be governed by tribal law in furtherance of the Tribe's sovereignty and will prevent  
13 the Federal Official's from interfering in the internal affairs of the Tribe.

#### 14 CONCLUSION

15 Without so much as a comment, and devoid of any reasoning, the PR Director  
16 Decision has unjustifiably intruded into the internal affairs of the Tribe, ignoring  
17 well established federal common law, and has imposed her vision of how the Tribe's  
18 government should be structured over that of the Tribe. There could be no greater  
19 example of an interference with the Tribe's sovereign authority. There is no dispute  
20 that this small tribe has struggled with its governance, but it is also well documented  
21 that the General Council, the governing body of the Tribe, enacted the Code of  
22 Conduct to insure that all members conduct themselves in an ethical and appropriate  
23 manner, especially its elected representatives, the Business Committee members.  
24 Toward this goal, the Tribe brought charges against its former Chairman, Phillip Del  
25 Rosa, for embezzlement, misappropriation, and theft of tribal funds. Del Rosa was  
26 afforded a full and fair hearing that met all of the requirements of the due process  
27 clause of the Indian Civil Rights Act, 25 U.S.C. § 1301 et. seq., and the Tribe's  
28 Constitution. He was found guilty by the General Council of crimes against the

1 Tribe, which, based upon the forensic audit conducted at the General Council's  
2 direction, showed that Del Rosa stole in excess of \$2 Million Dollars from the Tribe.

3 Nearly two years prior to the commencement of this inter-tribal dispute, Del  
4 Rosa was removed as Chairman and his right to vote was revoked until full  
5 restitution was made to the Tribe by Del Rosa. Despite the Judgment of the General  
6 Council, the PR Director has, reversed the General Council's Judgment, reinstated  
7 Del Rosa as the Chairman of the Tribe, restored his right to vote on the Business  
8 Committee, and given him access to and control over the very type of accounts and  
9 funds that Del Rosa stole in the past. In light of these facts, the PR Director's  
10 Decision is a profound intrusion into the internal governmental affairs of the Tribe  
11 that it can only be described as unconscionable.

12 If there was ever an example of the BIA unjustifiably intruding into the  
13 internal affairs of a tribe and imposing its unilateral vision of how a tribal  
14 government should be structured, this is it.

15 The law is clear. The BIA is to give comity to tribal court decisions, such as  
16 the Judgment of the General Council suspending Del Rosa's right to vote and to hold  
17 office. The PR Director violated Ninth Circuit precedent by refusing to recognize the  
18 final Judgment of the General Council taking away Del Rosa's right to vote and hold  
19 office.

20 Ms. Del Rosa has stated a claim against the Federal Official arising under the  
21 Constitution and common law of the United States that requires federal agencies and  
22 federal courts to recognize and enforce tribal court judgments. As such, Ms. Del  
23 Rosa's claims arise under the laws of the United States and this Court has  
24 jurisdiction over those claims.

25 In addition, as an official of the Tribe's governing body, Ms. Del Rosa has  
26 standing to bring these claims to prevent the Federal Officials from interfering with  
27 the ability of the Tribe to govern itself and to enforce the General Council's  
28 Judgment.



1 For all of these reasons, the Decision of the PR Director must be reversed, and  
2 the Regional Director must be ordered to recognize and enforce the General  
3 Council's Judgment.

4 Dated: May 7, 2018

Respectfully Submitted,  
RAPPORT AND MARSTON

6 By: /s/ Lester J. Marston  
7 LESTER J. MARSTON, Attorney for the  
8 plaintiffs, Alturas Indian Rancheria and  
9 Wendy Del Rosa  
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**CERTIFICATE OF SERVICE**

I am a citizen of the United States of America, over the age of 18 years, and not a party to the above-entitled action. My business address is 405 West Perkins Street, Ukiah CA 95482.

On May 7, 2018, I electronically filed using the CM/ECF System on behalf of our client, which generated and transmitted a notice of electronic filing to CM/ECF registrants.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; executed on May 7, 2018, at Ukiah, California.

/s/ Ericka Duncan

Ericka Duncan