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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

DOREEN BROWN, LOUELLA STANTON  
ELDON BROWN, DWIGHT BROWN,  
GILBERT GEORGE, ELENA LOYA,  
ELISA DICK, LOVELLE BROWN, KEVIN  
DICK & LESLIE SMARTT, JR.;

Plaintiffs,

v.

DEB HAALAND, SECRETARY, UNITED  
STATES DEPARTMENT OF INTERIOR,  
in her official capacity,

Defendants,

and

WINNEMUCCA INDIAN COLONY, a  
federally recognized Tribe,

Intervening Defendant.

Case No.: 21-CV-00344-MMD-CLB

**INTERVENING DEFENDANT'S  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION**

**[HEARING REQUESTED]**

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Intervening Defendant, the Winnemucca Indian Colony (“Intervenor”), by and through its Chairman, Judy Rojo, and counsel of record, Maddox & Cisneros, LLP, and Reno Law Group, LLC, submits this Opposition to Plaintiff’s Motion for Preliminary Injunction. This Opposition is based on the following Memorandum of Points and Authorities, all pleadings and papers on file herein, and on such oral argument and documentary evidence that may be presented.

DATED this 28<sup>th</sup> day of November, 2022.

By: /s/ Norberto J. Cisneros

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### **MEMORANDUM OF POINTS AND AUTHORITIES**

Dismissing Plaintiffs’ claims under the ISDEAA (Indian Self-Determination and Educational Assistance Act, 25 U.S.C. Sections 5301 et seq.), this Court held:

Plaintiffs’ APA claims may proceed. Plaintiffs’ direct statutory claims are dismissed with prejudice, as amendment would be futile. Plaintiffs’ Fifth Amendment and breach of fiduciary duty claims are dismissed without prejudice. . .

ECF No. 65 at 46:1-5.

Plaintiffs have now filed a Motion for Preliminary Injunction pursuant to the ISDEAA, now dismissed, and make no reference to their only remaining claim, violation of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* (“APA”). The basis of the injunction expands the parameters of this case and makes requests outside the federal court’s jurisdiction. The Court should therefore deny the Motion as being without any basis in law.

Furthermore, a simple accounting of the facts present at WIC make clear that Plaintiff’s Motion would fail under any law. Simply put, WIC and BIA have met numerous times so that BIA

may monitor the contract. The most recent meeting, which occurred in October 2022, included discussion of the eviction/trespass action. As part of its monitoring, BIA did not find that the eviction/trespass action somehow warranted retrocession. Instead, BIA ensured WIC would receive services needed for said action. As such, there is no need for this Court's intervention.

# **I. RELEVANT FACTS**

As this Court is aware, *see* ECF No. 65 at 8:11-21, in February 2021, BIA entered into a settlement agreement with WIC Council, agreeing to enter into a self-determination contract with WIC that would permit funding of the Winnemucca Tribal Court ("Tribal Court") and withdrawal of tribal matters from the CFR Court and Inter-Tribal Court of Appeal's jurisdiction. On October 9, 2021, WIC Council adopted its housing ordinance. *Id.*<sup>1</sup>

Subsequent to the settlement agreement between WIC and BIA, a contract for judicial services was funded on June 1, 2021. *See* ECF No. 18-2. The Tribal Court was reaffirmed by Resolution of the Council on February 14, 2021. *Id.* Likewise, a Resolution of the Council was adopted the same date designating the Inter-Tribal Court of Appeals of Nevada as the appellate body for the Winnemucca Indian Colony Tribal Court. *Id.*

Thereafter, on November 23, 2021, WIC filed an action in the Tribal Court for eviction of defendants, including Plaintiffs herein, and other defendants who are non-parties to this action. *See* ECF No. 84-4.<sup>2</sup> The impetus for initiating the eviction action was not to secure WIC's legal right to evict. In fact, as a federally recognized Indian Tribe, WIC already had the power to do so. *See* WIC Constitution, attached as **Exhibit 1**, at Article III, Section 1 (providing that WIC's governing body is the Winnemucca Colony Council) and *id.* at Article VI, Section (b), (g), and (h) (giving Council the power, respectively, to prevent encumbrances, enact ordinances to exclude nonmembers, and

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<sup>1</sup> WIC's Mobile Home Ordinance, adopted earlier, allowed for evictions that covered most of the Plaintiffs.

<sup>2</sup> *Winnemucca Indian Colony v. Myrl Ayer, James Jay Ayer, Stormy Ayer, Linda Ayer, Kevin Dick, Brian Dick, Elena Loya, Les Smart, Jr., Dwight Brown, Louella Brown aka Louella Stanton, Eldon Brown, Gilbert George, Kyle Missouri, Residents of 232 South T. and all other Trespassers on the lands of the Winnemucca Indian Colony et al.*, Case No. 21-WINN-001, Winnemucca Indian Colony Tribal Court. Defendant Elisa Dick was left off the caption but was identified in the Parties section of the Complaint and has been represented by James Salvator, Nevada Legal Services. Louella [Lovel] Brown and Louella Stanton were later clarified to be two different people and are both represented by Mr. Salvator in the action.

enact ordinances to protect its property). *See also* WIC's Law & Order Code, Title 6, containing Mobile Home Ordinance, Residency Ordinance, and Housing Ordinance, attached, respectively, as **Exhibits 2, 3, and 4.**

Though the Ordinances were entirely within WIC's rights to enforce, acts of violence by Plaintiffs herein made eviction impossible without police support. WIC repeatedly sought the assistance of BIA police, to little avail. BIA's excuse for failure to protect was that "[n]o documentation or court orders have been obtained or provided showing these individuals do not have a legal right to be occupying their current residences on the Winnemucca Indian Colony." Email from Clinton Funk, BIA, May 15, 2019, attached as **Exhibit 5**. The statement was disturbing, given that BIA is well aware that the trespassers were not members of WIC. WIC's reasons for filing the eviction/trespass action was to put an Order from the Tribal Court into the hands of BIA police so they would, once and for all, provide much needed protection to WIC Council members and contractors during the eviction process.

WIC also added a declaratory relief claim to the eviction/trespass action that the WIC Council is the only qualified government of WIC. On December 22, 2021, Plaintiffs herein filed an Answer and a Motion to Dismiss but did not file any counterclaim alleging that WIC government was fraudulent. Neither did Plaintiffs herein submit any Declaration alleging a fraudulent government, or an argument about its protection of any interests.

**A. BIA now recognizes Council.**

On January 11, 2022, Jessie Durham, Regional Director of the BIA, issued a letter to WIC, proclaiming:

Recognition of Council

In summary, without interpreting tribal law to adjudicate apparent disagreements as to the most recent Colony elections, electing Judy Rojo (Chairwoman), Eric Magiera (Vice-Chairman), Misty Rojo-Alvarez (Secretary/Treasurer), Shannon Evans, and Merlene Magiera as the governing body, we will continue to recognize the results of those elections unless and until a tribal remedy requires us to change course. Unless the parties are willing to negotiate a more collaborative solution, the only alternative would require BIA to severely interfere in tribal sovereignty and invalidate multiple Colony elections. Any alleged outstanding challenges to the validity of this or any prior election should first be considered by a tribal forum. That forum exists, and we decline to adjudicate these challenges at this time.

Durham letter, ECF No. 84-2 at Exhibit 9, at 16. That said, Ms. Durham allowed the parties to appeal her decision to the IBIA. *Id.*

In the meantime, the eviction case proceeded. In additional briefing pursuant to Order, the parties presented additional argument on the potential application of adverse possession or equity, and if not, whether Plaintiffs herein had leases and whether ordinances applied. The presiding judge, the Honorable Mark Mausert, also asked if Plaintiffs herein should be allowed to remain if they were destroying the quiet enjoyment of others, vandalizing public property, or refusing to comply with tribal law.

As it turned out, the last question was prescient, as Judge Mausert shortly thereafter recused himself due to violence by Plaintiffs herein.

**B. The Honorable Judge Mausert recuses himself due to violence by Plaintiffs herein.**

Plaintiffs herein brought a Motion to Disqualify Judge Mausert. They hoped to disqualify him based on his previous work, but he granted the motion on entirely different grounds. In his May 5, 2022, Order granting said motion, Judge Mausert noted “extraordinary events, including especially the vandalism of the Colony’s courthouse, as well as repeated attacks on my integrity . . .” Notification of Recusal/Order for Reassignment, attached as **Exhibit 6**, at 1. Judge Mausert noted that said violence was not just to property, but to persons of the law. *See id.* (“Officers have been assaulted and beaten, and it is only via the admirable and self-imposed restraint of them and their brother and sister officers that very serious injuries or even deaths have been avoided.”). Judge Mausert made clear that the Tribal Court suspected Plaintiffs herein for such vandalism and attacks, stating:

Whether defendants, or their associates have been involved in the destruction of property has not been definitively established, but there is certainly the appearance of a possible connection, i.e., adverse inferences may be readily drawn.

*Id.* at 2. Sadly, such violence was successful in obtaining recusal, and was in fact the stated reason for the Order of recusal:

I balanced these considerations against preserving the appearance of impartiality and concluded there is no practical way to continue to preside over this case while maintaining the appearance of impartiality – certainly in the eyes of the defendants. And, in a case attended by such vitriol, maintenance of the appearance of impartiality may well be the dispositive factor which prevents or minimizes violence.

*Id.* at 1-2. Indeed, Judge Mausert noted that his recusal “may be viewed as a reward for the violence of destruction of property which has occurred.” *Id.* at 1.

**C. The actions of Plaintiffs themselves herein required WIC to hire a new Tribal judge.**

The reward of violence by Plaintiffs herein was that WIC was forced to delay the eviction action while a new judge could be found. After Judge Mausert’s recusal, WIC Council issued a Resolution to hire a temporary judge for the Tribal Court. *See* Rojo Declaration. In May 2022, WIC and the Honorable Patricia Lenzi executed a Professional Services Agreement, in which Judge Lenzi would serve as a Tribal Court temporary judge. *Id.* On May 6, 2022, Judge Lenzi was sworn in as temporary judge of the Tribal Court. *Id.* Thereafter, she began to preside over matters in the court, including the eviction action against Plaintiffs herein and others.

**D. The Tribal Court issued findings of fact and conclusions of law.**

On July 12, 2022, the Tribal Court held a hearing on the eviction matter, lasting approximately 1.5 hours. Therein the Tribal Court issued decisions on motions to dismiss, finding that: 1) the WIC Constitution and tribal ordinances were valid; 2) the Council, headed by Chairman Judy Rojo, was valid;<sup>3</sup> and 3) the C.F.R. court cases were moot. *See* Order After Hearing of July 12, 2022, attached as Exhibit 1 to Plaintiff’s Motion, respectively, at 5:24 – 6:9, 2:14-16 and 3:14-22; 3:24-25. Plaintiffs herein did not object to the Tribal Court’s findings of fact and conclusions of law. Plaintiffs herein did not file a motion for reconsideration. When, in later briefings, WIC asserted that the Tribal Court’s conclusions of law comprised the law of the case, *see* Plaintiff’s Motion for Summary Judgment, attached as **Exhibit 7**, Plaintiffs herein did not disagree, except to say that exceptions could apply. It is therefore risible that Plaintiffs complain to this Court that the

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<sup>3</sup> Contrary to Plaintiffs’ arguments, *see* ECF No. 84 at 8:8-10, 9:19-21, the Tribal Court did not base its decision only on the Durham letter. The Court reviewed all argument in Plaintiff’s two motions for dismissal, summary judgment, and motion to extend discovery, in which Plaintiffs argued again and again that Council was improperly seated. The Court’s decision that Council was properly seated was a rejection of Plaintiffs’ arguments. In short, they provided no persuasive argument.

“disappearance” of the CFR case gave WIC a “fresh opportunity” to sue “without concerns of issue preclusions, counterclaims and previously established evidence, facts and stipulations.” ECF No. 84 at 16:20-25. Plaintiffs could have, but did not, raise such issues in a motion to reconsider.

On August 29, 2022, the Tribal Court held a second hearing. *See* Order after Hearing of August 29, 2022, attached as **Exhibit 8**. Therein, the Tribal Court allowed discovery in excess of code requirements and time beyond what was usually permitted under the ordinance for evictions but allowed elsewhere in WIC code. *Id.* at 3:23-24.

On October 13, 2022, the Tribal Court held a third hearing as a status check regarding discovery. Plaintiffs herein did not raise objections or ask for reconsideration of the Tribal Court’s conclusions of law set forth on July 15, 2022.

**E. The Tribal Court heard oral argument for 2.5 hours on dispositive motions regarding WIC’s claims.**

On November 22, 2022, the Tribal Court held a hearing on multiple motions filed in the action. At the outset, the Tribal Court advised that all argument would be taken in advisement, with a written order to follow. The Tribal Court also set a hearing for December 2, 2022, to discuss the anticipated written order and any post-order requirements. If, for example, WIC’s motion for summary judgment is denied, preparations for trial on December 14, 2022, will occur.

The November 22, 2022, hearing began at 9:30 a.m. and ended after noon. The Tribal Court heard oral argument on the following:

1. Defendants’ Motion to Reopen Discovery and Extend Time; Motion to Strike December 14, 2022 Trial; and Motion to Modify Orders re Discovery;
2. WIC’s Motion for Summary Judgment;
3. Defendants’ Renewed Motion to Dismiss;
4. Defendants’ Motion for Summary Judgment.

The Tribal Court also heard motions by and against James Jay Ayer, a non-party to this action. The court allowed oral presentation of each motion, response, and reply.

**F. Plaintiffs herein demonstrated they have no right to remain on WIC land.**

Discovery in the Tribal Court action established certain undisputed facts, as follows:



1 1) None of the Plaintiffs herein produced evidence of any leases or permits allowing them  
 2 to remain at WIC.

3 2) None of the Plaintiffs herein produced evidence of any “custom” allowing them to  
 4 reside at WIC.

5 3) None of the Plaintiffs herein produced evidence that they eligible for membership in  
 6 WIC.

7 *See Exhibit 7.* The fact that none of the Plaintiffs herein produced any evidence to dispute WIC’s  
 8 facts proved that any disputes they had was not genuine.<sup>4</sup>

9 **G. BIA met in October 2022 to monitor the judicial services contract.**

10 BIA has met with WIC multiple times since the contract for judicial services was executed.  
 11 The first meeting occurred in December 2021 to set up a monitoring plan and to discuss funding.  
 12 *See Rojo Declaration.* A second meeting occurred in Spring 2022. *Id.* A third meeting occurred on  
 13 July 22, 2022. *Id.*

14 Most recently, on October 20-21, 2022, Bennie Francisco, Tribal Court Assessment  
 15 Director of the DOI, and other DOI and BIA/OJS representatives met with WIC to discuss  
 16 funding of the Tribal Court. *Id.* During said meetings, which occurred over two days, WIC  
 17 explained that an action against Plaintiffs herein was pending in the Tribal Court. *Id.* WIC explained  
 18 that due to threats of violence and destruction of the WIC tribal courthouse, that the trial, if held,  
 19 would need to occur at the Humboldt County Courthouse. *Id.* Further due to Plaintiffs’ violence,  
 20 WIC expressed that additional funding would be required for security. *Id.* The BIA responded by  
 21 stating that WIC could use emergency funds for such purpose. *Id.*

22 **II. RELEVANT PROCEDURAL FACTS IN THIS CASE**

23 On November 4, 2021, Plaintiffs filed Emergency Motion for Order Pursuant to LR 7-4,  
 24 complaining of demolitions at the Colony. ECF No. 15. On November 5, 2021, the Court denied  
 25 said motion. ECF No. 22.

26  
 27  
 28 <sup>4</sup> In Reply to Plaintiffs’ Motion for Summary Judgment in the eviction case, which is attached as  
**Exhibit 9**, WIC explained that Plaintiffs herein denied WIC’s evidence only through bald  
 assertions of counsel.



On May 26, 2022, this Court dismissed Plaintiffs’ claims under the ISDEAA with prejudice and allowed only claims under APA to proceed. ECF No. 65 at 46:1-5. On June 25, 2022, Plaintiffs filed a Second Amended Complaint, bringing claims again directly under ISDEAA. Doc 66 at ¶¶ 189- 225. On August 22, 2022, Defendant filed a Motion to Dismiss, stating:

To the extent Plaintiffs’ first four causes of action attempt to bolster Plaintiffs’ surviving Administrative Procedure Act (“APA”) claims, the Court should likewise dismiss them as violating the Court’s May 26, 2022 Order as no leave was provided to amend those claims.

ECF No. 74 at 3:9-12.

Defendants’ Motion to Dismiss is currently pending. In the meantime, on November 7, 2022, the parties submitted a Joint Proposed Scheduling Order, ECF No. 82. A joint statement was made therein that:

The parties assert that this case is brought pursuant to the Administrative Procedures Act and should be resolved on cross-motions for summary judgment based on the agency’s administrative record, in accordance with Local Rule 16-1(c)(1).

ECF No. 82 at 2:3-6. The parties then proposed that Defendant would file its administrative record by January 15, 2023. *Id.* at 2:7-8. Plaintiffs did not assert that their claims fell directly under the ISDEAA.

### **III. LEGAL STANDARD**

Plaintiffs’ requested injunction would require BIA to take affirmative action – to monitor and take back its contract for judicial services overseen by WIC. Courts treat such injunctions as mandatory injunctions, because it “orders a responsible party to ‘take action.’” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir.2009) (citation omitted). The Ninth Circuit has cautioned that a mandatory injunction “goes well beyond simply maintaining the status quo *pendente lite* [and] is particularly disfavored.”<sup>4</sup> *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir.1994) (internal citations omitted). The “district court should deny such relief ‘unless the facts and law clearly favor the moving party.’” *Id.* (quoting *Anderson v. United States*, 612 F.2d 1112, 1114

(9th Cir.1979)). In plain terms, mandatory injunctions should not issue in “doubtful cases.” *Park Vill. Apartment Tenants Ass’n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir.2011).

#### IV. LEGAL ARGUMENT

The Court should deny the Motion because Plaintiffs have not met the high legal standard for a mandatory preliminary injunction. Plaintiffs have failed in their heavy burden because the facts cited are unsubstantiated and incorrect. Plaintiffs have failed in proving that they can prevail on the merits of the underlying case because forcing a retrocession is an Administrative function not appropriate for this Court to order. Whether BIA has failed to retrocede the judicial services contract for Tribal Court services by an arbitrary and capricious action is reviewed by administrative record yet to be filed with this Court. The fact that Plaintiffs may be evicted through a Tribal Court proceeding does not change the analysis, as Plaintiffs bring their Motion under inapplicable statutory law, and they meet none of the elements they themselves cite for the granting of a preliminary injunction. *See* ECF No. 84 at 2:20 – 3:7.

##### A. Plaintiffs are not likely to succeed on the merits of their claim, as the law does not support their arguments.

The issue in this case is whether BIA make an arbitrary and capricious decision not to monitor the Tribal Court services contract with WIC, and whether BIA make an arbitrary and capricious decision not to inform Plaintiffs of the status of the Tribal Court services contract with WIC and whether, as a result, the Plaintiffs were disadvantaged.

“Subject matter jurisdiction must exist as of the time the action is commenced.” *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). If a court lacks subject matter jurisdiction, it must “dismiss the case, regardless of how long the litigation has been ongoing.” *Rainero v. Archon Corp.*, 844 F.3d 832, 841 (9th Cir. 2016).

The Administrative Procedure Act (APA) provides for judicial review of final agency actions. 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Under our cases, if there is no final agency action, the court lacks subject matter jurisdiction. *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 591 (9th Cir. 2008) (“[F]inality is a jurisdictional requirement to obtaining judicial review under the APA.”).

Pursuant to the Administrative Procedure Act, “the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(a). “(T)he Court must affirm if a rational basis for the agency’s decision exists.” *Bolden v. Blue Cross & Blue Shield Ass’n*, 848 F.2d 201,205 (D.C. Cir. 1988). “The degree of deference a court should pay an agency’s construction is, however, affected by the “the thoroughness, validity, and consistency of an agency’s reasoning.” *Fed. Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 US. 27, 37 102 S.Ct. 38 (1981). *See Aleutian Pribilof Islands Ass’n, Inc. v. Kempthorne*, 537 F.Supp.2d 1 (2008). Section 706 of the APA grants jurisdiction to a reviewing court to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

Generally in reviewing agency determinations, judicial review is limited to the administrative record. The Ninth Circuit has identified four exceptions allowing consideration of extra-record materials, however:

- (1) if necessary to determine whether the agency has considered all relevant factors and has explained its decision,
- (2) when the agency has relied on documents not in the record,
- (3) when supplementing the record is necessary to explain technical terms or complex subject matter, [or] . . .
- (4) when plaintiffs make a showing of agency bad faith.

*Biological Diversity v. U.S. Fish, Wildlife*, 450 F.3d 930, 943 (9th Cir.2006)

Further, the Ninth Circuit recently preserved the jurisdiction of the Agency (BIA) to proceed with an administrative process no matter how long it takes. In fact, the 9<sup>th</sup> Circuit found that the federal Court lacked jurisdiction to resolve agency actions until a final order was issued. Then, the challenger was directed to appeal to the Interior Board of Indian Appeals.

There was no final agency action here because at the time the complaint was filed, the Bureau of Indian Affairs (BIA) had not reached a final decision on whether it would recognize any group as the Colony’s tribal council, or whether any such recognition was warranted. Instead, the BIA was in the middle of complying with a remand order from the Interior Board of Indian

Appeals (IBIA) to answer those very questions. Any decision by the BIA would have been appealable to the IBIA. *See Winnemucca Indian Colony et al., v. United States of America et al.*, 18-17121 (9<sup>th</sup> Cir. 2020, Memorandum Opinion)

The decision by Jesse Durham recognizing the Colony Council as the government of this federally recognized Tribe is on appeal by Plaintiffs herein to the Interior Board of Indian Appeals. Until that matter is determined, this Court lacks jurisdiction to act on matters that are directly related to the validity of the Council. Because this Court lacks jurisdiction to consider the evictions, Plaintiffs' Motion must be denied.

**B. Plaintiffs are not likely to succeed on the merits of their claim, as the facts do not support the Motion.**

It is transparently clear that Plaintiffs bring their Motion only because they don't like the likely outcome of the Tribal Court action. Plaintiffs know that both BIA and the Tribal Court have determined that Council is properly seated. *Supra*, Section I.A, I.D. Plaintiffs know that their own violent actions brought about recusal of Judge Mausert, which resulted in Plaintiffs coming before Judge Lenzi. *Supra*, Section I.B., I.C. Plaintiffs know that Judge Lenzi gave them the opportunity to conduct discovery in excess of ordinance requirements. *Supra*, Section I.D. Plaintiffs know that Judge Lenzi allowed them the opportunity to file multiple motions, including two motions to dismiss, a motion for summary judgment, and a motion to extend discovery. Plaintiffs know that through the course of discovery, they were unable to produce any evidence of their purported rights to remain on Colony land. *Supra*, Section I.F.

In short, Plaintiffs know that the Tribal Court has provided them extensive due process as non-members to prove that they are somehow entitled to live rent-free at WIC. Indeed, Plaintiffs no longer allege in their Motion that their due process rights have been violated. Because they don't like the likely outcome of the case, they now improperly seek Federal intervention. However, two additional facts underscore the frivolity of their Motion: the fact that BIA acknowledged that the eviction dispute belongs in the Tribal Court, not any Federal fora; and the fact that BIA has monitored the judicial services contract, was apprised of the Tribal Court case, and determined that WIC, not Plaintiffs herein, needed assistance.

i. **The Agency’s January 11, 2022, letter supports denial of the Motion.**

Plaintiffs wrongly state that the January 11, 2022, Durham letter compels injunctive relief because Plaintiffs may soon be evicted. ECF No. 84 at 3:10-16. Plaintiffs complain that BIA “is ignoring the Durham decision regarding (1) membership disputes; and (2) transferred cases,” *see id.* at 3:16 – 4:3, but fail to say how. Indeed, Ms. Durham properly determined that membership disputes should be addressed at the Tribal Court. ECF No. 84-2 at Exhibit 9. *Supra*, Section I.A. Accordingly, the Tribal Court heard motions to dismiss the eviction case, including argument that the Colony Council was not qualified to be seated. *Supra*, Section I.D. The Tribal Court rejected the arguments, denied the motion to dismiss, and set forth the law of the case, that the Council headed by Chairwoman Judy Rojo is indeed properly seated. *Supra*, Section I.D. Plaintiffs herein never brought a motion for reconsideration before the Tribal Court, nor directly sued in Tribal Court for adjudication of some membership dispute. *Supra*, Section I.D.<sup>5</sup> “A tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71-72, 98 S.Ct. 1670, 1684, fn. 32 (1978); *see also Boe v. Fort Belknap Indian Cmty. of Fort Belknap Reservation*, 642 F.2d 276, 280 n.7 (9th Cir. 1981) (“attempt[s] to involve the federal courts in the regulation of tribal elections . . . lie at the heart of the continuing right of Indian tribes to govern their own internal affairs, a right which the IRA was meant to preserve, not destroy.”) Thus, there is no merit in the argument that BIA should now hear the membership dispute.

Neither do Plaintiffs set forth any reason why BIA is ignoring the Durham decision regarding “transferred cases.” ECF No. 84 at 3:16. In their Second Amended Complaint, Plaintiffs quoted from Ms. Durham:

“While under the jurisdiction of the Court of Indian Offenses, the civil eviction cases were pending on appeal in the Court of Indian Appeals. However, the Winnemucca Indian Colony submitted and finalized their contract for judicial services program June 1, 2021. The only active civil case file, the eviction case, was transferred to the

<sup>5</sup> WIC further stated in various discovery responses that it would provide personal information to the Tribal Court, if required, in camera. The reason was twofold: (1) Plaintiffs herein have no standing to challenge WIC Council membership; and (2) there was a concern for Council members’ safety, given a doxing campaign by Plaintiffs herein or their agents. *See* <https://www.indybay.org/newsitems/2022/08/03/18851386.php>.

1 Winnemucca Indian Colony Tribal Court, June 16, 2021. The appeal was transferred  
2 to the Colony's appellate court, Inter-Tribal Court of Appeals, July 23, 2021.”

3 ECF 66 at ¶ 59 (quoting Durham in ECF No. 66-46).

4 In short, Plaintiffs provide no argument whatsoever why the eviction action should be  
5 transferred to a court without jurisdiction.

6 **ii. The fact that BIA has monitored the Tribal Court since the eviction**  
7 **case was filed supports denial of the Motion.**

8 The Tribal Court has been reviewed by BIA multiple times – four times since the date of  
9 the contract. *Supra*, Section I.G. It is simply false to say that BIA has “fail[ed] to monitor and  
10 determine whether reassumption of judicial services is now required.” ECF No. 84 at 3:11-16. For  
11 two days, the Tribal Court Assessment Director of DOI and other representatives of DOI, BIA,  
12 and OJS met to discuss tribal court services. *Supra*, Section I.G. WIC explained the  
13 eviction/trespass action, and none of Defendants’ representatives thought it was necessary to  
14 retrocede the contract. *Id.* To the contrary, the representatives analyzed the situation and  
15 determined that, due to Plaintiff’s violence, additional money would be needed for security should  
16 the trial proceed. *Id.*

17 **C. Plaintiffs are not likely to suffer irreparable harm in the absence of**  
18 **preliminary relief.**

19 Plaintiffs must have rights in order to experience irreparable harm. But through the course  
20 of discovery in the eviction action, Plaintiffs have proven that they have never had rights to reside  
21 at WIC because they are non-members. **Exhibits 8 and 9.** “[T]ribes have the authority to exclude  
22 non-members from tribal land. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142, 102 S.Ct. 894  
23 (1982) (recognizing tribes’ authority to exclude non-members); *Hardin v. White Mountain Apache*  
24 *Tribe*, 779 F.2d 476, 479 (9th Cir. 1985) (same). Thus, federal courts lack jurisdiction over matters  
25 of tribal exclusion. *Tavares v. Whitehouse*, 851 F.3d 863, 876 (2017).

26 Plaintiffs accuse WIC of “demolishing” homes. ECF No. 84 at 4:1-3. To the contrary,  
27 Plaintiffs are welcome to remove their homes – trailer homes, mobile homes, etc. – from land that  
28 does not belong to them.



Plaintiffs have long been aware that they have no rights to challenge the makeup of Colony Council. In 2017, the Inter-Tribal Court of Appeals of Nevada entered an Order that non-members had no standing to intervene in Tribal matters and no standing to challenge the Tribe's Council, membership and elections. *See* Memorandum Decision and Order, February 24, 2016, *Amelia Ayer et al. v. Interim Council et al.*, No. ITCN-AC/CV- 15-011, ECF No. 18-5. Plaintiffs herein have no standing to challenge the makeup of Colony Council in any Tribal Court, Federal court, or before the BIA. Thus, this Court cannot compel BIA to take any action, where BIA has already monitored the judicial contract and found no reason to retrocede.

**D. Plaintiffs argue that they should be allowed to pick their own forum.**

It should be apparent that the real reason Plaintiffs bring their Motion is to argue that the only forum for their challenge is the CFR Court in Oklahoma and the Southern Plains Appellate Court also located in Oklahoma. ECF No. 84 at 5, fn. 8. But WIC's Tribal Court has made allowances beyond what is necessary for any eviction matter in order to afford due process to the evictees, *see Exhibit 7* at 3:23-24, even when eviction is provided for in the Housing Code by summary proceeding in the Law & Order Code of the Winnemucca Indian Colony. Plaintiffs have been afforded time for discovery when, in fact, the Court could have denied it under the Code. The Plaintiffs have filed multiple motions in the Tribal Court in opposition to the evictions. *Supra*, Section I.D.<sup>1</sup> The States of the United States provide for summary evictions, *i.e.*, NRS Chapter 40 and Colorado Revised Statutes Chapter 13. For the very reasons stated above, the management and control of the Tribe's property is essential to its existence. "[a] trespass claim . . . at least arguably implicates the Tribe's core sovereign rights to exclude and to self-govern." *Norton v. Ute Tribe of the Uintah and Ouray Reservation*, 862 F. 3d 1236, 1241 (10<sup>th</sup> Cir. 2017). "Trespass regulations plainly concern a property owner's right to exclude. . ." *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 849, 850 (9<sup>th</sup> Cir. 2009).

To suggest that being before the Tribal Court is not adequate due process is unsupported and unavailing. Tribal Courts have been challenged before by parties who assail the sovereignty of a

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federally recognized Tribe because it appoints its own court.<sup>6</sup> The substitute judge hearing the matter in Tribal Court is from the Washoe Tribe and is sitting on this matter because of the recusal of the Chief Judge of the Winnemucca Indian Colony. A Nevada Tribal Judge from a different Tribe acting in a temporary capacity certainly doesn't deserve the inherent prejudice argument that was frivolous from the start.

Plaintiffs allege in their Second Amended Complaint that, "[b]y transferring a case on appeal to the lower WIC Tribal Court, Defendants allowed the Rojo interim council to easily engage in a fraudulent 'fresh start' issuing brand-new eviction notices, thereby avoiding Plaintiffs answers and appeals in the pending eviction case, as well as pending compulsory counter-claims." ECF No. 66 at ¶ 59. But Plaintiffs have produced not a shred of evidence of fraud. Getting an unfavorable outcome is not fraud.

Plaintiffs suggest that they should be paid something from the federal dollars WIC receives as an Indian tribe. ECF No. 84 at 7, fn. 9. Plaintiffs suggest that the funding "may have been misdirected or even induced by fraud . . . ." To make such a statement without any evidence whatsoever is, again, an affront to tribal sovereignty. Plaintiffs, who are non-members, apparently don't realize that federal law requires the tribe to hire an independent auditor whose reports are subject to BIA review; WIC is compliant. *See* Rojo Declaration. WIC Council takes its oversight responsibilities seriously and has hired an independent contractor, Bob McNichols, to improve the Colony for its members and lawful residents. *See* Declaration of Robert R. McNichols, attached as **Exhibit 10**. Plaintiffs herein are not entitled to any money from WIC. Money is allocated based on membership. *See* Rojo Declaration. Plaintiffs' tribes received money on their behalf during

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<sup>6</sup> "Making good on these due process guarantees, nearly five decades of tribal cases applying ICRA show that tribal courts protect the rights of both member and nonmember litigants in much the same way as do federal and state courts. *See* Matthew L.M. Fletcher, Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited, 84 u. Colo. L. Rev. 59, 75 (2013) (in a 2008 study) . . . ." And tribal courts often provide litigants with due process that "exceeds the protections offered by state and federal courts." *Id.* *See, Norton v. Ute Indian Tribe of Utah and Ouray*, cited *infra*, at p. 1250. *See also, "Indian Tribes, Civil Rights and Federal Courts,"* 7 Tex. Wesleyan Rev. 119 (2001) which agrees that separation of executive and judicial branches in tribal government might be less obvious than in the State government setting yet has not been a civil rights problem because The tribal court decisions are universally recognized by the Tribal government. *Id.* at 152.

COVID, and WIC assumes that Plaintiffs took that money as members of those tribes. WIC didn't get money for non-member residents except for the general funds to improve habitation on the Colony which it did, and has environmental funds to further improve the colony if Plaintiffs herein will get off the land so that clean up can proceed. *Id.* In short, without any basis in law or fact, Plaintiffs resort to simple mud-slinging.

It is moreover patently untrue and insulting that the Tribal Court "has refused to hear the dispute, and the Agency does nothing, despite the history of violence surrounding membership disputes at WIC, including the unsolved murder of former leader Glen Wasson." ECF No. 84 at 5:4-8. Plaintiffs have never brought any case of fraud in the Tribal Court. Further, the history of violence surrounding membership disputes at WIC has been impugned to them by the Tribal Court. *Supra*, Section I.B. Plaintiffs' careless and untrue statement that WIC has "defamed" them, *see* ECF No. 84 at 19:20-22, is beyond the pale. Indeed, Plaintiffs have never attached a Declaration in either this action or the Tribal Court action.

**E. The balance of equities tips in WIC's favor, such that the Court should deny the Motion.**

A complainant's wrongful conduct respecting the matter for which injunctive relief is sought precludes the complainant from obtaining such relief. *Nat'l Fire Ins. Co. of Hartford v. Thompson*, 281 U.S. 331, 50 S. Ct. 288 (1930).

Here, the Tribal Court has made the adverse inference that Plaintiffs have engaged in threats of violence, demonstrations, assault on police officers, threats to the Council, arson and vandalism. **Exhibit 6.** Plaintiff's actions are all the more unclean when contrasted with seven families who are non-members and who have agreements with the Colony Council to remain. *See* Rojo Declaration. These seven families occupy newly rehabilitated homes, new trailers, employment opportunities, new roads, and proper utilities. *Id.* But what they do not get is peace and tranquility. The Council has been unable until now to rid the Colony of the violent protestors who don't want to pay rent and don't want to obey any laws or have law enforcement on the Colony.

**F. Where the Colony's rightful members have been alienated from their land, equity demands denial of the Motion.**

Plaintiffs herein learned through the course of discovery in the eviction matter that WIC Council members intend to reside on WIC. *See* Rojo Declaration. The only reason they have not thus far is that they fear Plaintiffs herein. *Id.* Such fear is not fabricated. It has been noted by the Tribal Court. **Exhibit 6.** The balance of equities demands that Council members be allowed to enter and reside on the land they rightly govern. The Court should deny the Motion.

**G. An injunction is not in the public interest, as it would go against public interest and Federal policy to usurp the sovereignty of a tribe.**

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

*Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18, 107 S.Ct. 971, 1977 (1987) (citations omitted).

WIC is a sovereign government and must act on behalf of the members and lawful residents to protect their health and safety. If Plaintiffs have a complaint, a Winnemucca Indian Colony Tribal Court is available for their grievances. Those Tribal processes, however, have not been respected or accepted by the Plaintiffs. These Plaintiffs, knowing that they have most likely lost the legal arguments to remain on the Colony which were frivolous and unsupported, now want this Court to intervene in Tribal matters before a final Order can be issued.

**H. The Agency in this instance has monitored the Winnemucca Indian Colony Tribal Court ISDEAA contract during the eviction action.**

The Winnemucca Indian Colony had a Tribal Court from 1990 to 2000 totally funded by the Colony itself. When the government of the Colony was again recognized in 2014, a Tribal Judge was appointed. BIA didn't recognize the Tribal Court because it hadn't funded it. Rather, BIA imposed the CFR Court upon the Colony.

CFR court was hearing the eviction matters. WIC moved for the transfer of the matter to the Tribal Court and that the CFR Court make no further decisions based on ex parte contact with the BIA Regional Office and other unlawful considerations. The CFR court turned down the transfer saying it had no authority to make such a transfer. WIC appealed. The Southern Plains

1 refused the appeal because there had been no court record, no transcripts of court hearings, and no  
 2 docket created for transfer to the appellate court.

3 Before any process was accomplished so that the appeal could have been accepted, the  
 4 transfer to the Tribal Court was made by agreement and settlement of an appeal to the IBIA. The  
 5 only transfer by the Clerk of the CFR Court was to Tribal Court because the Appeal had not been  
 6 accepted.

7 The Court has jurisdiction to determine if the BIA has met its obligation to the Plaintiffs by  
 8 monitoring the Tribal Court Contract. Assuredly, BIA has monitored all contracts awarded to the  
 9 Winnemucca Indian Colony with expanded oversight. BIA staff have met with the Council on four  
 10 occasions, three times in person and once on the phone. *Supra*, Section I.G. The Court assessment  
 11 group from BIA have spent two days with the Colony Council and judges to determine the funding  
 12 necessary to re-open the Tribal Court on Colony and to assess the needs of the Court.

13 None of this can be accepted by Plaintiffs or they lose, as they have lost these arguments  
 14 for the last twenty-one years. Plaintiffs refuse to acknowledge what they have known for decades  
 15 years, that they are members of other tribes and were mere opportunists who moved onto the  
 16 Colony when there was no recognized government. Plaintiffs refuse to accept that they have no  
 17 right to remain on the Colony perpetrating violence, not recognizing the government, assaulting  
 18 police officers, burning buildings funded with government allocations. Public policy supports denial  
 19 of the Motion.<sup>7</sup>

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27 <sup>7</sup> The Court should further reject the request to waive a bond, as the Motion is frivolous. And not  
 28 only is it frivolous, but the Motion has exceeded L.R. 7-3 providing a 24-page limit, excluding  
 exhibits, to motions that are not summary judgment motions.

1 **V. CONCLUSION**

2 Plaintiffs have now demonstrated they are not WIC members, don't have leases or permits  
3 and have caused violence upon the land. Frivolity, lack of jurisdiction, and failure to exhaust tribal  
4 remedies are all reasons to deny the Motion. For the foregoing reasons, Intervening Defendant asks  
5 the Court to deny the Motion.

6 DATED this 28<sup>th</sup> day of November, 2022.

7  
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**DECLARATION OF JUDY ROJO,  
CHAIRWOMAN OF THE WINNEMUCCA INDIAN COLONY**

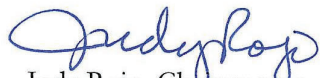
I, Judy Rojo, affirm under penalty of perjury that the following statements are true and correct.

1. I am more than twenty-one years of age.
2. I am the present duly elected and serving Chairwoman of the Winnemucca Indian Colony ("WIC").
3. This Declaration is in support of Intervening Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction ("Opposition").
4. The documents attached to the Opposition are true and correct copies of documents as described therein.
5. After Judge Mausert's recusal, WIC Council issued a Resolution to hire a temporary judge for the Tribal Court.
6. In May 2022, WIC and the Honorable Patricia Lenzi executed a Professional Services Agreement, in which Judge Lenzi would serve as a Tribal Court temporary judge.
7. On May 6, 2022, Judge Lenzi was sworn in as temporary judge of the Tribal Court *Id.*
8. BIA has met with WIC multiple times since the contract for judicial services was executed. The first meeting occurred in December 2021 to set up a monitoring plan and to discuss funding. A second meeting occurred in Spring 2022. A third meeting occurred on July 22, 2022.
9. WIC complies with federal law requiring WIC to hire an independent auditor whose reports are subject to BIA review.
10. Federal money WIC receives is allocated based on membership. WIC did not receive money for non-member residents except for the general funds to improve habitation on the Colony which it did, and has environmental funds to further improve the colony if Plaintiffs herein will get off the land so that clean up can proceed.
11. Seven families who are non-members have agreements with the Colony Council to remain. These seven families occupy newly rehabilitated homes, new trailers, employment opportunities, new roads, and proper utilities.

Declaration of Judy Rojo  
November 2022  
Page 2

12. Members of WIC Council have stated in response to Requests for Admission in the eviction matter that they intend to reside at WIC. They currently cannot, due to threats against them.

DATED THIS 28<sup>th</sup> day of November, 2022.



Judy Rojo, Chairwoman  
Winnemucca Indian Colony