IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WINNEMUCCA INDIAN COLONY, a Federally-recognized Indian Colony;
Plaintiff,
v.

UNITED STATES OF AMERICA *ex rel.* SECRETARY OF THE DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS,

Defendants,

Case No.: 20-1618 L

OPPOSITION TO UNITED STATES' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

[HEARING REQUESTED]

The Winnemucca Indian Colony ("WIC," Colony," or "Tribe"), by and through its duly elected Council and its counsel, hereby opposes United States' Motion to Dismiss Plaintiff's Amended Complaint.

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 at any oral hearing on the Motion.

DATED this 20th day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2022, I served a true and correct copy of the above document, entitled **OPPOSITION TO UNITED STATES' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**, via the Court's electronic filing/service system (CM/ECF) to all parties on the current service list.

/s/ Arianna Pyon

An Employee of Maddox & Cisneros, LLP

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(E-filed May 20, 2022)

MEMORANDUM IN SUPPORT OF OPPOSITION TO UNITED STATES' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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PLAINTIFF'S LIST OF EXHIBITS TO OPPOSITION TO UNITED STATES' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

1. January 11, 2022, letter from Jessie Durham, Acting Regional Director, BIA, to Chairwoman Judy Rojo
2. April 19, 2022 letter from Chairwoman Judy Rojo, to Maria Wiseman, Associate Deputy Director, BIA, and Jason O'Neal, Director, BIA
3. April 5, 2022 email from Bob McNichols to Jessie Durham, with attachments
4. April 26, 2022 letter from Jessie Durham to Chairwoman Judy Rojo
5. 1971 Constitution and Bylaws of the Winnemucca Indian Colony Nevada
6. September 20, 2020 letter from DOI to Fred Drye, Tribal Government Advisor, including 1916 Indian Census Roll and 2018 Winnemucca Indian Colony Resolution
7. January 21, 1987 news release from BIA
8. United States' Notice of Appeal and Representation Statement – March 25, 2019
9. United States' Unopposed Motion to Voluntarily Dismiss Appeal – August 15, 2019
10. Order Granting Appellants' Motion to Dismiss Appeal – August 23, 2019
11. July 10, 2020 letter from Chairwoman Judy Rojo to Robert Eben, Superintendent, BIA Western Regional Office
12. May 17, 2022 Declaration of Chairwoman Judy Rojo
13. April 16, 2019 email from Robert Eben, Superintendent, BIA Western Regional Office, to Chairwoman Judy Rojo
14. April 15, 2015 letter from Marilyn Bitisillie, Acting Superintendent, BIA, to Chairwoman Judy Rojo
15. Executive Order – June 18, 1917
16. Map of Winnemucca Indian Colony identifying locations of hazardous waste

I. INTRODUCTION

Defendant's Motion begins with a misstatement, that this Court lacks jurisdiction because this action is brought on behalf of a tribe "by a tribal faction that does not constitute a BIA-recognized tribal government." *See* ECF No. 23, Memorandum of Points and Authorities ("Memo") at 1. On January 11, 2022, Jessie Durham, Acting Regional Director, BIA, wrote to Tribal Chairman Judy Rojo and others as follows:

> 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.

Exhibit 1.

This action is brought by WIC "by and through its duly appointed Council. . . ." ECF No. 22 at 1. WIC's Tribal Council Chairwoman is Judy Rojo. *Id.* at ¶ 92. The recognition is unequivocal and not made on any "interim" basis or with any conditions. Thus, on April 19, 2022, Ms. Rojo wrote to BIA, seeking assistance with eviction of trespassers. **Exhibit 2.** Ms. Durham is well aware that the trespassers are comprised of individuals belonging to what Defendant here describes as opposing "factions." *See* Email from Bob McNichols and attachments thereto, attached as **Exhibit 3.** On April 26, 2022, Ms. Durham responded by announcing that BIA would send a request to the Office of the Intermountain Regional Solicitor to "initiate[] litigation in federal district court to eject those individuals that the Colony has identified as trespassers . . . ." **Exhibit 4.**

Ms. Durham's letter is proof that Defendant recognizes the tribal government through which WIC brings its action. Defendant cannot, on the one hand, announce it is evicting members of the opposing "faction" and, on the other, argue that this case should be dismissed because the false narrative of a "faction" means this court lacks jurisdiction, or that the case is brought either too early or too late after "repudiation."

Ms. Durham's letter is evidence of tacit acknowledgment of prior wrongs committed. Her predecessor, Bryan Bowker, led an era of failure to provide much needed services to WIC under the pretense of doubt about who might qualify as Council. In its Motion, Defendant clings to an argument about Mr. Bowker's "interim tribal government recognition." *See* ECF No. 23 at 11 and ECF No. 16-1 at 9-12. But that "interim" status was misguided.

Defendant likewise argues incorrectly that this Court lacks jurisdiction because of a "pending" action, *Winnemucca Indian Colony v. United States ex. rel. Dep't of the Interior,* No. 3:11-cv-00622-RCJ-VPC ("District Court action") – an action to which the United States is not a party and an action that had no similar claims. Defendant dismissed its appeal of the District Court action long before this Court of Claims petition was filed. This fact, that Defendant is not part of any lawsuit challenging its arbitrary and capricious actions, demonstrates that there was no bona fide membership dispute that should stop this action from proceeding.

Defendant spends almost twenty pages attempting to argue a subject that the Regional Director of BIA has already conceded, that the Council bringing this litigation is the recognized government of WIC. Moreover, these pages are a smoke screen for what really happened: a diversion of funds earmarked for WIC. Defendant breached its trust obligation in three ways: 1) it failed to provide services to the Colony; 2) it failed to protect WIC's trust assets; and 3) it diverted money to its own discretionary use that was specifically approved by Congress and the President of the United States.

This Court should put an end to Defendant's tactics and allow this action for damages to proceed. Plaintiff's claims are grounded in the common sense precept that no matter the make-up of WIC Council, Defendant should have taken steps to protect Colony land and stop encroachment – if not by obvious non-members, then by cities and corporate giants.

None of Defendant's four "Questions Presented" provide grounds for dismissal. Plaintiff submits that this Court should answer them as follows:

1. Whether Plaintiff has established standing to bring this case on the Colony's behalf?

   Answer: Plaintiff has standing because it is federally recognized, and the Amended Complaint was filed by the Colony by and through its duly elected Council, which Defendant recognized.

2. Whether this Court lacks jurisdiction under 28 U.S.C. § 1500 because Plaintiff's related district court claims were "pending" for purposes of 28 U.S.C § 1500 when Plaintiff filed this action?

   Answer: Because Defendant dismissed its appeal and was no longer a party to the District Court action when the instant Complaint was first filed, this action is not precluded.

3. Whether Plaintiff's claims are time-barred under 28 U.S.C § 2501?

   Answer: The statute of limitations has not run, or in the alternative, did not accrue until December 13, 2020. Further, because BIA has done nothing to stop encroachments and theft of water and water rights, the claim continues each and every day.

4. Whether the *Winters* Doctrine, the Native American Housing Assistance and Self-Determination Act of 1996, or the Indian-Non-Intercourse Act create actionable money-mandating fiduciary duties giving this Court jurisdiction under the Tucker Act?

   Answer: The *Winters* Doctrine, the Native American Housing Assistance and Self-Determination Act of 1996, and the Indian-Non-Intercourse Act provide Defendant's money-mandated fiduciary duties.

5. Whether the Department of the Interior ("Interior" or "DOI") violated any specific money-mandating fiduciary duties by refusing to recognize Plaintiff's faction as the Tribal Council of the Winnemucca Indian Colony?

   Answer: The question is a red herring, as the issue here is not about BIA failure to recognize Council. BIA has breached its fiduciary and trust duty to the Colony, a federally recognized Tribe, and deprived the Colony and its members of property rights and resources.

6. Whether this Court can award Plaintiff the equitable and declaratory relief it seeks?

Answer: This Court can award such relief because it is concurrent with other relief, to aid in the judgment of liability.

II. FACTS

The following facts derive from the Amended Complaint.

A. Blood quantum determines membership eligibility in WIC.

In 1972, pursuant to the Indian Reorganization Act, the Colony adopted a Constitution that stated the requirements for enrollment in the Colony were to be 1/4 Paiute and/or Shoshone by blood quantum and to be a descendent of a person listed on the 1916 census and to not have taken money or land as a result of membership in another Tribe. ECF No. 22 at ¶ 11. These qualifications for membership were recommended by BIA. *Id.* The Secretarial election was organized and supervised by BIA. The 1916 Census Roll was used as it defines and lists those homeless Indians that are the beneficiaries of this Colony recognition by the United States.

B. William Bills, who claimed eligibility, had no Paiute and/or Shoshone blood, as he was an adopted Filipino; however, BIA recognized him as Chairman.

At a February 2000 council meeting, Chairman Glenn Wasson reported to the Council that Vice Chairman William Bills might not qualify as an Indian under the tribal constitution because of his adoption, and that he was interfering with colonial mail. *Id.* at ¶ 38. Indeed, William Bills is 100% Filipino by blood quantum. *Id.* at ¶ 88. On February 22, 2000, Chairman Glenn Wasson was stabbed to death on the steps of the Colonial Administration Building, and the United States has not yet arrested anyone for the murder. *Id.* at ¶ 39.

On March 1, 2000, William Bills had soil removed from WIC lands in and around the Administration Building, including the area where the murder occurred. *Id.* at ¶ 40. Bills acted without Council approval and without interference from federal law enforcement. *Id.* BIA received

evidence from Council that William Bills was not an Indian and had no blood quantum to qualify for membership. *Id.* at ¶ 42. BIA knew that the persons claiming to support William Bills as the Chairman were not qualified to be members of WIC based upon the membership eligibility requirements in the 1971 Constitution, **Exhibit 5;** the 1916 Base Roll, **Exhibit 6;** and BIA's own files from 1986, **Exhibit 7** (letter reflecting that BIA knew who the membership was. Membership research done in 1986-87). *Id.* at ¶ 43.

In 2000, BIA first recognized William Bills, then Sharon Wasson, then William Bills, and then withdrew recognition of the government. *Id.* at ¶ 44. When this dispute arose, the Western Nevada Agency of BIA declared the Tribe's government dysfunctional and did not recognize any government as of July 2000. *Id.* at ¶ 46.

In October 2000 when the government of WIC had an election on the Colony lands, BIA arrested Thomas Wasson and Sharon Wasson and the members of the election committee for trespass. *Id.* at ¶ 49. The election was eventually held and Sharon Wasson, Thomas Wasson, Elverine Castro, Thomas Magiera and Merlene Magiera were elected as Council members. *Id.* at ¶ 50.

In December 2000, the Regional Office overruled the Western Nevada Agency and made an affirmative finding that the Western Nevada Agency could not find the government to be dysfunctional, yet BIA continued its refusal to recognize a government for this federally recognized Tribe. *Id.* at ¶ 47. What appeared to be a vindictive act to punish the Colony for the litigation, was, in fact, subterfuge by the Regional Director to divert WIC funding to the BIA Regional Staff budget.

BIA failed to recognize a government of the Colony from July 2000 until ordered to so in the District Court action in December 2014. *Id.* at ¶ 48. But the BIA Regional office continued to divert the funding to which WIC was entitled.

C. Mr. Bills continued his futile claims in various courts.

Despite clear Constitutional rules regarding Colony membership, Mr. Bills fought on to regain Council membership. On August 16, 2002 a panel of judges (the "Minnesota Panel") convened and ruled that Wasson was the Chairman of the Colonial Council and that William Bills was a member. *Id.* at ¶ 63. The Inter–Tribal Court of Appeals of Nevada dismissed all appeals on May 17, 2007. *Id.* at ¶ 65. In a federal interpleader action filed by Bank of America to determine whether Wasson "faction" or Bills had the right to use a colonial bank account, *see Bank of Am. v. Bills,* No. 3:00–cv–450-BES-VPC, 2008 WL 682399 (D. Nev. 2008), Judge Brian E. Sandoval ruled that the parties had exhausted their tribal remedies, that a federal court must enforce tribal court orders under ordinary principles of comity, and that the order of a special panel of the Minnesota Panel to which the parties had stipulated controlled; therefore, the majority of the Council was granted the bank account. *Id.* at ¶ 67.

The result of the Sandoval Order was that the majority of the Council that were recognized were members with proven descendancy from the 1916 census and William Bills had no native American blood and had to be removed by Tribal process. This, then, should have been the end of a long and difficult litigation; however, the Regional office continued to fail to refuse to recognize a Council for this federally recognized Tribe. By this time, the Regional Director had been diverting the funding for the Colony for his own discretionary use for eight years.

D. BIA failed to stop encroachment.

In response to the Sandoval Order finally confirmed on appeal and the decision of the Interior Board of Indian Appeals, the BIA needed to recognize a government of this federally recognized Tribe. During May 2011, WIC members entered their lands and began work to rehabilitate the smoke shop located on the 320-acre parcel of WIC that was abandoned when Glenn Wasson was murdered.

Id. at ¶ 76. At this same time, the IBIA had directed the BIA Regional Office to determine if there was trespass on the Colony lands. *Id.* at ¶ 74.

On July 31, 2011, BIA police officers told contractors hired by WIC to help repair the smoke shop that they would have to leave the land or they would be arrested for trespass *Id.* at ¶¶ 77-78. BIA officers, however, failed to eject other persons from the Colony who did not have the right to be there, though BIA knew and had proof in its files that those persons had no right to be on WIC lands or to reside there. *Id.* at ¶ 79. Thus, WIC members were effectively excluded from their own lands by BIA, and in effect, BIA conveyed the possessory interest of the lands of this federally recognized Tribe to trespassers and those who had no right, title or interest to be on the lands. *Id.* at ¶ 80. WIC members were threatened by BIA with trespass, the trespassers were allowed to remain, even while the very issue being briefed before the Regional Office of BIA was whether there was trespass on Colony trust lands.

E. BIA recognized the WIC government in 2014.

On August 31, 2011, the District Court ordered BIA to stop it from interfering with the Colony re-entering its lands. *Id.* at ¶ 83. On September 1, 2011, the District Court ordered BIA to recognize a government of this federally recognized tribe. *Id.* at ¶ 84. On January 31, 2012, the District Court issued an Order finding that BIA's "continued refusal . . . to grant the Colony adequate interim recognition without restrictions . . . amounts to a de facto termination of the sovereign recognition granted by Congress, which is likely to lead to the irreparable political dissolution of the Colony's sovereign existence . . ." *Id.* at ¶ 86. On July 9, 2012, after hearing, the District Court gave BIA seven days to recognize either Thomas Wasson or William Bills – but not both – and that BIA should review the record in the case to make a reasonable decision. *Id.* at ¶ 87. Within seven days, BIA, having met exclusively with William Bills and his attorney and no other party, recognized only Mr. Bills – a

100% Filipino – as the government of this federally recognized tribe. *Id.* at ¶ 88. On September 25, 2012, the District Court found that the decision by BIA to recognize Bills on July 17, 2012 was an abuse of discretion. *Id.* at ¶ 89. Thomas Wasson, Judy Rojo, Misty Morning Dawn Rojo Alverez, Katherine Hasbrouck, and Eric Magiera were recognized as the government of the Colony by order of the Court on November 19, 2014. *Id.* at ¶ 90. On December 13, 2014, BIA in response to Court Order finally recognized the government of the Colony. *Id.* at ¶ 96.

After recognition and organization, in 2017, the Colony Council had the opportunity to discover the files and identify the funds diverted by the Regional Office that had been authorized for the Colony by Congress and then President Donald Trump. Those funds were denied to the Colony by BIA and diverted to the Regional Office of BIA. WIC needs the cooperation of Defendant to complete its analysis of the diverted funds, but Defendant has failed to provide an accounting, necessitating Plaintiff's Eighth Claim for Demand for Documents and Accounting. *See* ECF No. 22 at ¶ 210.[1]

III. RELEVANT PROCEDURAL FACTS

On March 25, 2019, Defendant filed a notice of Appeal and Representation Statement in the District Court action, but only with respect to attorney fees. **Exhibit 8.** On July 15, 2019, Defendant filed an Unopposed Motion to Voluntarily Dismiss Appeal. **Exhibit 9.** On July 23, 2019, the United States Court of Appeals for the Ninth Circuit granted said motion. **Exhibit 10.**

IV. LEGAL STANDARD

In assessing subject matter jurisdiction, the Court must accept as true all undisputed allegations of fact made by the non-moving party and draw all reasonable inferences from those facts in the non-

[1] Defendant ends its Fact Section by noting that Plaintiff filed its Amended Complaint on February 1, 2022. The Amended Complaint was the same as the proposed Amended Complaint attached to Plaintiff's Motion to Amend. *See* ECF No. 15-1. Defendant did not request an extension of time to file the instant Motion. Plaintiff submits any filing error was due to harmless error.

moving party's favor. *Trusted Integration, Inc. v. United States,* 659 F.3d 1159, 163 (Fed. Cir. 2011). The court may also consider undisputed facts contained in the record. *Herbert v. Nat'l Acad. Of Scis,* 974 F.2d 192, 197 (D.C.Cir. 1992). Plaintiff has the burden to show jurisdiction by a preponderance of the evidence. *Taylor v. United States,* 303 F.3d 1357, 1359 (Fed. Cir. 2002).

RCFC 8(a)(2) requires a complaint to provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." *See also* Fed. R. Civ. P. 8(a)(2). While the complaint may not need "detailed factual allegations . . . [it] requires more than labels and conclusions." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556 (2007). The complaint "must contain sufficient matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (internal quotations omitted) (discussing standard for Fed. R. Civ. P. 12(b)(6)).

V. LEGAL ARGUMENT

Defendant makes all of its arguments under RCFC 12(b)(1), with one exception, stating that claims related to Defendant's failure to prevent the construction of a road alongside Colony lands fall under its RCFC 12(b)(6) argument. *See* ECF No. 23, Memo at 37. The road actually runs across Colony land, as stated in the Amended Complaint. *See* ECF No. 22 at ¶ 152.

Defendant further argues that the Court should dismiss Plaintiff's *Winters* doctrine-based claims under RCFC 12(b)(6), *see* ECF No. 23 at 1, but makes no argument and provides no analysis to support its argument. Instead, all such arguments made thereunder are made under Rule 12(b)(1). Therefore, the Court should deny the Motion accordingly.

A. Plaintiff has standing.

Defendant acknowledges that the Colony "is a federally recognized Indian Tribe." ECF No. 23 at 4. Defendant therefore has no grounds to argue that the Colony lacks standing to sue. So instead, Defendant creates a fiction, that the Amended Complaint was brought by "Plaintiffs" whose rights to

serve as Council members are contested. Indeed, Defendant goes so far as to refer to Plaintiff in the plural throughout its Motion. Defendant argues that because such "Plaintiffs" have not identified themselves as part of a "faction" or alleged that they are authorized to speak for the Colony, the Court should dismiss the Amended Complaint for lack of standing. ECF No. 23 at 18. But as the Complaint states, the Colony brought the action, "by and through its duly appointed Council and their attorneys of record . . ." ECF No. 22 at 1. It was not the Council itself that brought the action.

There is only one Plaintiff – the Tribe. There is no requirement under any law requiring that a complaint brought by a federally recognized tribe identify by name its Council members, or to prove that Council members authorized the suit. Indeed, as this action proceeds, it is possible that Council members may change, given the two-year election cycle at the Colony. Nothing under the law suggests that the action would then be subject to dismissal for lack of standing.

The cases cited by Defendant do not support its position, as each was brought by a tribe and individual plaintiffs. *See, e.g., Timbisha Shoshone Tribe v. Salazar,* 678 F.3d 935 at 938 (D.C. 2012) ("Plaintiffs concede they lack standing to bring suit as individuals . . ."); *Cayuga Nation v. Tanner,* 824 F.3d 321, 324 (2d Cir. 2016) (suit filed by "a federally recognized Indian tribe, and individual officers, employees, and representatives of the Nation"). *See also* ECF No. 23 at 17-18. Here, Plaintiff agrees that this suit "must be brought by the Colony and cannot be brought by its individual members." *See* ECF No. 23 at 18. That is exactly what the Colony did.

The fact that Defendant has presented a question of standing as a reason to dismiss is part and parcel of its continuing wrong. The fact that "counsel for the United States requested that Plaintiffs' Amended Complaint specifically identify Plaintiffs," *see* ECF No. 23 at 13, assumes that Council membership is contested, when it is not. The question is further irrelevant, where Ms. Durham stated

that BIA was "unwilling to invalidate the elections." **Exhibit 1,** at 14. Ms. Durham's statement is a waiver of the arguments made in the Motion.

Further, the question itself is evidence of a continuous wrong – Defendant's refusal to abide by its own acknowledgement that Council members are comprised of Judy Rojo, Shannon Evans, Merlene Magiera, Eric Magiera, Misty Morning Dawn Rojo-Alvarez. It is this very refusal that grounds each and every claim brought by the Colony. In any event, the First Amended Complaint was obviously brought by WIC through these individuals in their capacity as "duly elected Council."

Defendant further alleges that, "At the time of the original Complaint in November 2020, BIA had not yet opined on the question of which faction had authority to speak for the Colony for the purposes of government-to-government relations." ECF No. 23 at 18. *Noosack Indian Tribe v. Zinke* does not support Defendant's arguments. *See* ECF No. 23 at 20. In *Noosack,* Indian plaintiffs sued to compel the United States to fund contracts awarded to the tribe. *Noosack Indian Tribe v. Zinke,* No. C17-0219-JCC, 2017 WL 1957076, at *1 (May 11, 2017). Defendant argued that absent recognition from the DOI and BIA, the Council lacked authority to file the action on behalf of the tribe. *Id.* at *4. The Court agreed and found that the tribal plaintiffs lacked standing to sue. *Id.*

By contrast here, BIA did acknowledge Judy Rojo, Shannon Evans, Merlene Magiera, Eric Magiera, Misty Morning Dawn Rojo-Alvarez as Tribal Council members in January 2021. ECF No. 16-1 at 12-13. These members were the same in November 2020, when the original Complaint was filed. The acknowledgement means that all actions taken by this Council were valid and legal. This distinction is important, as tribal sovereignty should be respected.

The statement is, again, an example of Defendant's continuing wrong. Defendant suggests that so long as it refuses to agree which "faction" has authority to speak, the Tribe cannot file suit.

Defendant could protect itself ad infinitum through its pretense. The Court should reject Defendant's arguments about standing and deny the Motion.

B. There is no pending jurisdiction that would bar this Court's jurisdiction.

Defendant's citation to 28 U.S.C. § 1500 suggests that this Court lacks jurisdiction when there is any earlier-filed suit pending, where the claims asserted are the same. ECF No. 23, Memo at 20. What Defendant leaves out is that the United States must be a live party in such a duplicate action. The statute explicitly provides:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process **against the United States** or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. § 1500 (emphasis added). Thus, the intended purpose of § 1500 is "to protect the United States from having to defend two lawsuits over the same matter simultaneously." *Winnebago Tribe of Nebraska v. United States,* 101 Fed. Cl. 229, 230 (2011). One of the requirements of § 1500 is that "defendant in both suits must be the United States or an entity acting under the authority of the United States . . . ." *Vero Technical Support, Inc. v. United States,* 94 Fed.Cl. 784, 790 (2010).

Here, Defendant is not part of any lawsuit challenging its own acknowledgment because it ceased to be a party to the 9th circuit appeal on July 15, 2019. *Supra,* Section III. This fact destroys Defendant's argument that 28 U.S.C. § 1500 bars Plaintiffs claims one through seven. *See* ECF No. 23, Memo at 22. Presumably the United States didn't authorize Mr. Bills or any other Defendant to act on its behalf to challenge the rights of a federally recognized Tribe under its trustee obligation.

Defendant's argument is without merit, as there was no earlier-filed suit that was pending with respect to Defendant in another court when this action was filed. The Attorney General fails in its obligation to be forthright with the Court by making any argument that the Council is in dispute when

the Agency has recognized the Council and in stating that there was an action pending when the United States had dismissed its appeal.

Defendant cites a 2013 Complaint brought by Willis Evans to suggest that even then, a membership dispute was pending, and that the instant action is "virtually indistinguishable." *See* ECF No. 23, Memo at 12, 14. Defendant's analysis fails because here, Defendant was not a party to any action involving a membership dispute when this action was filed.

C. Plaintiff's claims one through seven are timely.

28 U.S.C. § 2501 sets forth the statute of limitations for cases filed under the Tucker Act, 28 U.S.C. § 1491(a), and the Indian Tucker Act, 28 U.S.C. § 1505. The six-year statute begins to run when the "claim first accrues." 28 U.S.C. § 2501. Defendant wrongly argues that the statute has run with respect to all of plaintiff's claims not based in equity. Defendant is wrong for several reasons.

First, Defendant has not repudiated its relationship with WIC. Second, should Defendant argue in its Reply that Mr. Bowker's April 27, 2021, letter demonstrates failure to exhaust the administrative process, it is estopped from arguing that the statute of limitations has run. Third, the statute of limitations does not commence to run until an accounting is provided. Otherwise, the Court should find that the statute of limitations did not accrue until December 13, 2020. Further, the statute of limitations was tolled.

1. Defendant has not repudiated its relationship with WIC.

"[T]he universal rule is that 'a statute of limitation does not begin to run where there is a fiduciary relationship between the parties until the relationship is repudiated.'" *Manchester Band of Pomo Indians, Inc., v. United States,* 363 F.Supp. 1238, 1249 (N.D. Calif. 1973) (quoting *Kasey v. Molybdenum Corp. of America,* 336 F.2d 560, 569 (9th Cir. 1964). "'[T]he statute of limitations never runs in favor of a trustee as against a beneficiary while the latter is in possession of the property." *Manchester Band of Pomo Indians, Inc.* at 1249 (quoting *Stoll v. Selander,* 81 Cal.App.2d 286, 183

P.2d 935, 939 (1947)). Repudiation occurs when "entitlement to the corpus (or a portion thereof) is claimed adversely to the beneficiary . .. ." *Jones v. United States,* 9 Cl.Ct. 292, 295-96 (1985).

Here, there is no doubt that Defendant owes Plaintiff, an Indian tribe, "the highest responsibility and trust. [Defendant's] conduct, as disclosed in the acts of those who represent it in dealings with Indians should therefore be judged by the most exacting standards." *Manchester Band of Pomo Indians, Inc.* at 1243. This standard has "'found expression in many acts of Congress and numerous decisions'" before the United States Supreme Court. *Id.* (quoting *Seminole Nation v. United States,* 316 U.S. 286, 296-97, 62 S.Ct. 1049, 1054 (1942)).

Defendant, who has these exacting responsibilities, has not repudiated its relationship with Plaintiff, and thus, the statute of limitations has not begun to run. Plaintiff has never received actual or inquiry notice of any repudiation by Defendant. Defendant has stated over decades that it has acted in accordance with its alleged inability to determine Council members – not because it has repudiated its trust duties. In fact, Defendant acknowledges even in its Motion that WIC is a federally-recognized tribe. *See* ECF No. 23, Memo at 4. Furthermore, Defendant has always been in possession of the property. Furthermore, as recently as April 27, 2021, Mr. Bowker acknowledged the "duty" to provide services to the trust land. ECF No. 16-1 at 10. Ms. Durham's January 2022 letter is in accordance with that duty. **Exhibit 1.** The Court should therefore deny the Motion.

2. The statute of limitations does not commence to run until an accounting is provided.

In *Shoshone Indian Tribe of Wind River Reservation v. United States,* 364 F.3d 1339, 1348 (Fed. Cir. 2004), the court noted,

> It is often the case, however, that the trustee can breach his fiduciary responsibilities of managing trust property without placing the beneficiary on notice that a breach has occurred. It is therefore common for the statute of limitations to not commence to run against the beneficiaries until a final accounting has occurred that establishes the deficit

of the trust. 76 *Am.Jur.2d Trusts* § 440 (2000); *McDonald v. First Nat'l Bank of Boston,* 968 F.Supp. 9, 14 (D.Mass.1997).

After all, under fundamental trust law principles, "[b]eneficiaries of a trust are permitted to rely on the good faith and expertise of their trustees; because of this reliance, beneficiaries are under a lesser duty to discover malfeasance relating to their trust assets. *Id.* at 1347. (citing *Loudner v. United States,* 108 F.3d 896, 901 (8th Cir.1997); *Cobell v. Norton,* 260 F.Supp.2d. 98, 104 (D.D.C.2003); *Manchester Band of Pomo Indians v. United States,* 363 F.Supp. 1238 (N.D.Cal.1973)).

Here, Plaintiff seeks an accounting. Until such an accounting is provided, Plaintiff cannot determine the extent of an "misallocation of funds." *See* ECF No. 22 at ¶ 212. Plaintiff has grounds to suspect malfeasance, because money is allocated to WIC each year through the Budgeting process. BIA left WIC out of the budgeting process at the Regional level, which left those funds to be redistributed at the discretion of the Regional Director.

Defendant understands that Plaintiff's money losses have occurred as a result of failure to prevent encroachment. *See* ECF No. 23, Memo at 26.[23] The true extent of the damage is unknown at this time. Until such time as an accounting is provided, the statute of limitation does not begin to run.

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[2] Contrary to Defendant's arguments, the issue is not about Defendant failing to obtain "approval" from council about such encroachments. Defendant had the independent duty to stop third parties from encroaching upon the land that Defendant owns in trust for the benefit of the tribe, no matter who was on council or if no one was on Council. If Defendant truly could not understand that a Filipino wasn't a real council representative, Defendant had the duty to tell all third parties to get off Colony land.

[3] Further, Defendant stoops to citing – as if it were evidence – a sensationalized local blog suggesting that the removal of non-members is a "flashpoint." ECF No. 23, Memo at 29, fn. 12. The real facts are that non-members have overtaken the Colony and created a health and safety hazard. *See* **Exhibit 16**, vandalized the Administration Building/Tribal Court room, and have now committed arson that has burned two federally funded buildings. Defendant cannot and does not refute that it has a fiduciary responsibility to protect Indian land against such patently illegal activity.

3. Otherwise, the Court should find that the statute of limitations did not accrue until December 13, 2020.

As shown herein, the statute of limitations has not begun to run on Plaintiff's claims. However, out of an abundance of caution, Plaintiff filed its original Complaint on November 18, 2020. This is a month or so before December 13, 2020, which in turn is six years from the date upon which BIA recognized the tribal council. Plaintiff's Amended Complaint is timely under 28 U.S.C. § 2501. Defendant expressly recognized council on that date. Without waiving the arguments made herein, if there was inquiry notice of Defendant's repudiation of trust duties, it came into existence no sooner than December 13, 2020. This was the date when BIA declared that WIC Council consisted of the same members indicated in the November 19, 2014, U.S. District Court Order.[4]

Plaintiff waited until the December 9, 2014, BIA declaration because a court might find that it ends the administrative process. The trespassers may have contested the decision by filing the Ninth Circuit appeal, but the United States stipulated to dismiss itself as a party, thus allowing this action to proceed. The Court should therefore deny Defendant's Motion.

4. The Interior Appropriations Act tolls the statute of limitations.

A series of Interior Department Appropriations Acts include language that tolls the accrual of the statute of limitations for claims related to the mismanagement of tribal trust funds. *See Shoshone Indian Tribe*, 364 F.3d at 1354. The most recent such provision read:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected Indian tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss[.]

[4] In the alternative, should the Court dismiss this action because another action is pending or administrative remedies have not been exhausted, it would then follow that the statute of limitations has not yet begun to run.

Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat 5, 305-06 (Jan. 17, 2014).

This language "covers any claims that allege the Government mismanaged funds after they were collected, as well as any claims that allege the Government failed to timely collect amounts due and owing to the Tribes . . . ." *Shoshone Indian Tribe*, 364 F.3d at 1351. "[T]he Act provides that claims falling within its ambit shall not accrue, *i.e.*, 'shall not commence to run,' until the claimant is provided with a meaningful accounting." *Id.* at 1347.

Pub. L. No. 113-76 was in effect on November 19, 2014, when the District Court ordered BIA to recognize the counsel. Under Pub. L. No. 113-76, the statute of limitations does not run on any claim concerning mismanagement that occurred in that year, or in any year prior.

Here, an accounting is necessary to calculate the extent of loss. Plaintiff prays for a money judgment of more than $208 million according to proof. ECF No. 22 at Prayer for Relief, but the true extent of its losses in unknown until an accounting is provided.

5. The continuing claims doctrine tolls the six-year statute of limitations, if necessary.

In *Mitchell v. United States,* 10 Cl.Ct. 63, 73 (1986) *("Mitchell III")*, the court explained the two different ways that a court may apply the continuing claims doctrine to toll the statute of limitations. First:

> The tolling rule which the courts have endorsed in these circumstances is that "the statute of limitations does not begin to run * * * till the wrong is over and done with * * *." *Taylor v. Meirick,* 712 F.2d 1112, 1118 (7th Cir.1983). The general rule goes on to say that where a continuing wrong is found, a plaintiff can "reach back and get damages for the entire duration of the alleged violation." *Id.* at 1119. Further, the continuing wrong theory is not restricted simply to situations where a claimant may be unaware of a mounting injury as in, say, a case involving injurious drug treatment where the harm that occurs is caused over a period of time rather than at a single point in time. Rather, in the view of some courts, the continuing wrong theory dictates that the statute of limitations remains tolled until the last of the injurious acts takes place even though the plaintiff has knowledge of the injurious character of the defendant's actions. *Gross v. United States,* 676 F.2d 295, 300 (8th Cir.1982).

Mitchell III at 73. Plaintiff can thus recover damages dating from the first act of infringement, even though they occurred before the statute of limitations ran. *Id.* (citing *Meirick* at 1118-19).

Second, and in the alternative, a court may apply the continuing claims doctrine to sue for wrongs that occurred during the limitations period. *Mitchell III* at 75.

Plaintiff has suffered various harms in the past six years, as noted below. As one example and as Defendant concedes, Plaintiff's second claim is based on Defendant's failures in the last six years. *See* ECF No. 23, Memo at 37. The Court should allow Plaintiff to recover its full scope of damages as requested. Otherwise, the Court should allow Plaintiff to recover damages incurred over the past six years. Wrongs from the last six years include, but are not limited to, the items enumerated below. Plaintiff submits that it need not to have identified each and every violation in its Amended Complaint, which complies with notice pleading standards. *See Total Engineering v. United States,* 120 Fed. Cl. 10, 17 (2015). Otherwise, the Court should allow leave to amend, as wrong continue.

Furthermore, each continuing wrong below is one for which Congress intended remedies in money damages, as each wrong relates to a basic failure to preserve the trust land. The power to preserve trust land belongs exclusively to the United States and therefore survives the "control" analysis set forth in *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 123 S.Ct. 1126 (2003) *("White Mountain II"). See infra. See also HRI, Inc. v. E.P.A.,* 198 F.3d 1224, 1245 (2000) (citing Supreme Court cases that "emphasize a particular federal duty to safeguard Indian interests in land"), and *United States v. Jicarilla Apache Nation,* 564 U.S. 162, 179, 131 S.Ct. 2312, 2326-27 (2011) (Congress 'intended that the United States "hold the land . . . in trust" . . . because it wished to prevent alienation of the land."'") (quoting *United States v. Mitchell*, 445 U.S. 542, 544, 100 S.Ct. 1349 (1980) *("Mitchell I")).*

i. WIC was removed from the BIA Budget Formulation Process in 2018 (as it was in 2011). WIC was unable to receive ISDEAA funds and was prohibited by BIA line officials from receiving "direct services" for Federally funded BIA programs.

BIA line officials withdrew WIC from the BIA budget formulation process in 2014, 2015, 2016, and 2017 (as in 2011-2013). *See* July 10, 2020, letter from Chairman Rojo to BIA, attached as **Exhibit 11.** This is the budget process in which the 567 Federally Recognized Indian Tribes in the United States are engaged in the three-year budget formulation process and in which Tribes establish what individual and cumulative priorities are, the funding needed for basic services, etc.

WIC was prohibited from participating in this process 2011-2017, as BIA removed WIC from the BIA Budget Formulation data base. It wasn't until 2018 that BIA added WIC back into the budget formulation process again, but even then, only for a single ISDEAA Contract for Indian Child Welfare Contract for foster child placement which had been problematic for BIA and as of 2022, completely excluded the WIC from the budget and budget process. It wasn't until 2019 that BIA provided **any** funding for discretionary services, and then only $50,000 for an Aid to Tribal Government (ATG) ISDEAA contract.

Between the years 2000 through 2018, BIA did not provide any "direct services" to the WIC government or the members of the WIC. Typically, when a tribe does not contract or compact Federal services, the Federal Government provides direct services for Federally funded programs for such tribe. WIC was taken out of the process by BIA.

From 2010 through 2018, BIA withheld the Western Region and Western Nevada Agency personnel from providing any direct services for any BIA programs to WIC. BIA cut off WIC not only from funding but also from services that are provided to federally recognized Indian tribes throughout the country. WIC had no social services, no education funds, no aid to tribal government;

moreover, WIC had minimal police, no tribal court and was completely without the most minimal services to protect the Colony's lands and resources.

ii. $2,984,781 was budgeted through the 2020 BIA Budget Formulation Process for WIC by name, and in the 2020 President's Budget, Green Book Appendix 3, page 26, Tribal Priority Allocations, compared to $50,000 actually received by WIC.

Chairman Judy Rojo has provided a Declaration describing Defendant's refusal to approve ISDEAA Contract applications. **Exhibit 12.** Although a representative of the federally recognized tribes was successful in getting funds budgeted into the President's Budget specifically and expressly allocated for WIC, and enacted by Congress through the Department of the Interior's 2020 Appropriation Act, BIA did not execute the budget that had been approved for WIC even though it took three years to complete the BIA Budget Formulation Process. This was a continuing violation. The funding was designated by name, to WIC in the 2020 President's Budget, Green Book, Appendix 3, page 26, in the amount of $2,984,781. BIA line officials, namely the then Regional Director, Bryan Bowker, rejected this and refused to approve WIC's ISDEAA Contact applications and refused to provide direct services that were budgeted for the WIC. BIA failed to execute the approved appropriations for WIC and WIC was the only Tribe so excluded.

The failure to execute means that the budgeted amounts would have been available for BIA to use to support its agency or divert to other tribes' use. The base line for WIC as a result of this is $0 for Aid to Tribal Government and other contracts. Base line affects the Colony for three years at a time. $0 instead of $2.9 million is significant for three years. In fact, each and every contract submitted by WIC for services in 2019, 2020 and 2021 was denied by the Regional Office and WIC was required to expend monies to retain counsel to appeal the denials.

iii. BIA declined the 2020 WIC ISDEA Contract Application for Tribal Court Services even though WIC was budgeted by name for Tribal Courts (TPA) in 2020 for $520,972, under Public Safety and Justice in the Tribal Priority Allocations.

These funds, $520,972, are specifically budgeted in 2020 for WIC, and the budget was enacted by Congress in the 2020 Interior Appropriations Act - yet BIA failed to execute the enacted BIA Budget for WIC. Three years of budget formulation was ignored and rejected by BIA line officials for WIC.

WIC was forced to accept a $20,000 contract for 2021 in order to get the Tribal Court. Otherwise, BIA would have continued to force the Colony to use the ineffective and highly prejudiced CFR court that had a proven conflict of interest and engaged in forbidden ex parte communications with the Regional Director to enjoin any progress by the Colony on its lands. The only persons enforced against by this CFR court was the Colony and its Council thwarting further progress to reclaim its lands.

iv. BIA declined the WIC ISDEA Application for Law Enforcement, Uniformed Police, without a declination issue being confirmed.

BIA forced WIC to retrocede a contract for law enforcement on November 1, 2021. BIA-OJS said that WIC had not adequately staffed to have police protection 24/7, even though BIA-OJS had never until very recently ever staffed WIC with 24/7 protection. Only when two buildings were burned did BIA OJS offer more staffing.

v. From 2018 through December 2020, BIA WNA Superintendent, with support of the BIA Western Regional Director, has cut off the agency and region employees from providing technical assistance to the WIC by preventing communications between BIA and anyone representing the WIC, other than the Colony Council Chairwoman, and only then when accompanied by an enacted Colony Resolution.

BIA strictly prohibited communications from occurring between WIC Council, Winnemucca members, and contractors and consultants working with WIC. *See* **Exhibit 13.** BIA Branch Chiefs in Western Region including John Krause, Environmental Scientist; Cathy Wilson, Water and Land Director; Stan Webb, Real Estate Services, were not permitted to discuss WIC matters with anyone outside BIA. The Agency Superintendent restated the restriction on communications in a meeting between the Colony and Agency on May 14, 2019.

On May 14, 2019, in a meeting between BIA and WIC Council, Superintendent Eben informed participants that in the future BIA will only respond to duly adopted Resolutions of the Colony Council and will not respond to telephone calls, letters, emails and such. Mr. Eben told WIC that he will only deal with the elected Colony Council members and not with employees, representatives or associates of WIC. In fact, Mr. Eben threatened at that meeting that if WIC'S attorney, finance manager, or community development consultant, interrupted or asked questions, he would have them removed from the meeting.

BIA staff have told WIC that Mr. Eben directed them not to talk to anyone from WIC. WIC has been told that only he can communicate with WIC. This conduct violates the letter and spirit of the Order in the District Court action to recognize the Colony government and membership. Only when the new Western Nevada Agency Superintendent and the new Regional Director took their positions in 2022, was this communication ban lifted. In the meantime, WIC was foreclosed from three years of budget consultations.

Prohibiting all communications between the Trustee and WIC created negative and polarizing decisions and increases conflict and kills any trust between the governments of WIC and the United States. Instead of stopping discussions, both sides need to increase discussions. Moreover, the United States has an obligation to instruct WIC on applications for funding and this could occur with

the "resolution only" communication which will affect the Colony's budget for three years into the future. The result of this suppression of communication is money damages, as crucial work cannot be accomplished.

vi. BIA Denied the trust status of the 20-acre parcel in order to reduce trust responsibilities for protection of the Colony's trust assets.

On April 15, 2015, Marilyn Bitisillie, Acting Superintendent at BIA, wrote a letter to Chairman Rojo falsely stating that the Colony was on fee land. *See* **Exhibit 14** ("BIA records indicate that the Winnemucca Indian Colony (WIC) land is held in fee by the BIA."). The letter is one example of many wherein Defendants have failed to recognize WIC's federal trust lands. This pretense has allowed Defendants to avoid providing services to WIC, in violation of law cited in the First Amended Complaint.

D. Plaintiff's third, fourth, fifth, and sixth claims properly identify violations of money-mandated constitutional, statutory, or regulatory duties.

Plaintiff's claims three through six clear the two "hurdles" required before a tribe can invoke jurisdiction under the Indian Tucker Act: (1) the identification of "a substantive source of law that establishes specific fiduciary or other duties, and alleg[ation] that the Government has failed faithfully to perform those duties[,]" and (2) a determination by the court that "the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].'" *United States v. Navajo Nation,* 556 U.S. 287, 290 (2009) *("Navajo II")* (internal citations omitted). Showing for the "fair interpretation" rule is "demonstrably lower than the standard for initial waiver of sovereign immunity." *White Mountain II* at 472, 123 S.Ct. at 1132. Under the "fair interpretation" rule, "[i]t is enough, then, that a statute creating a Tucker Act right be reasonably amenable to the reading that is mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred,' a fair

inference will do." *White Mountain II* at 472-73 (quoting *United States v. Mitchell,* 463 U.S. 206, 103 S.Ct. 2961, 2962-63 (1983) *("Mitchell II")*).

Congressional intent regarding the availability of money damages can be demonstrated in different ways. Congressional use of the phrase, "shall pay," makes a statute money-mandating. *Agwiak v. United States,* 347 F.3d 1375, 1380 (Fed. Cir. 2003); *Britell v. United States,* 372 F.3d 1370, 1378 (Fed. Cir. 2004). However, no particular term or phrase is necessary for a statute to be money-mandating, and a statute can be money-mandating even if the United States enjoys some discretion under it. *Agwiak* at 1380. Even a statute that recites that the United States "may pay" can be money-mandating. *McBryde v. United States,* 299 F.3d 1357, 1364 (Fed. Cir. 2002). The determination is to be made on the "structure and purpose of the statute at hand." *Id.* at 1362. In other settings, courts have looked to agency practice and congressional knowledge of agency practice in determining Congressional intent. *See San Huan New Materials High Tech, Inc. v. Int'l Trade Comm'n,* 161 F.3d 1347, 1355 (Fed. Cir. 1998) (where Congress is aware of the agency's "regulations and practices at the time of legislating in their area, and absent some special circumstance the failure to change or refer to existing practices is reasonable viewed as ratification thereof") (quoting *Young v. Community Nutrition Inst.,* 476 U.S. 974, 983 (1986) ("congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is one intended by Congress").

1. The *Winters* Doctrine and 25 C.F.R. § 152.22, which gives the United States exclusive control over the disposition of water on Indian land, establishes the fiduciary relationship between the United States and Indians, breach of which gave rise to substantive claim for money damages against the United States.

Plaintiff's third claim for relief is for Breach of Trust – Water. ECF No. 22 at ¶¶ 163-172. Defendant wrongly argues that Plaintiff has neither identified any document providing a trust or fiduciary connection, nor a money-mandating source for its duties regarding water rights. ECF No.

23, Memo at 31-32. Defendant's argument is without merit, as Plaintiff's Amended Complaint cited *Hopi Tribe v. United States* for its indication that the federal government does in fact have a fiduciary duty where there is "third-party diversion or contamination." *Hopi Tribe v. United States,* 782 F.3d 662, 665 (Fed. Cir. 2015) (cited in ECF No. 22 at ¶ 166-167). *Hopi Tribe* did not involve such facts; instead, the tribe sued for BIA failure to ensure a safe water supply free of arsenic. *Hopi Tribe* at 665. The court held that "bare trust language" found in Executive Order of 1882 and the Act of 1958 establishing Hopi trust lands did not "establish any particular fiduciary duty to manage water resources on the land." *Id.* at 669. What such "bare trust language" does establish, however, is a more basic and obvious duty – preventing encroachment from others. The Court analyzed the Executive Order of 1882 and the Act of 1958 as interpreted under *Winters v. United States,* 207 U.S. 564, 577-78, 28 S.Ct. 207 (1908). *Id.* at 669. Under the *Winters* doctrine, when the United States reserves land for an Indian tribe, it also by implication "reserves [the] amount of water necessary to fulfill the purpose of the reservation." *Id.* (quoting *Cappaert v. United States,* 426 U.S. 128, 141, 96 S.Ct. 2062, 2071 (1976)). The court found the Hopi Tribe's arguments under *Winters* unavailing because the Hopi were not seeking an order to exclude others from diverting the water. The court explained that the reserved water right "gives the United States the power to exclude others from subsequently diverting waters that feed the reservation." *Id.* (citing *Winters* at 577-78 (upholding injunction granted to United States in suit to prevent private parties from building dams that diverted waters of the Milk River from an Indian reservation), and *United States v. Gila Valley Irrigation Dist.,* 920 F.Supp. 1444, 1454–55 (D.Ariz.1996) (enjoining upstream appropriators from practices that reduced the quality of water feeding a reservation)). "Thus," concluded the court, "even if Congress intended the term "land" in the Act of 1958 to include reserved water rights under the Winters doctrine, the

Act still does not impose a fiduciary duty to manage water quality on the Hopi Reservation, **absent third-party interference."** *Id.* (emphasis added).

Third party-interference is exactly why Plaintiffs bring their claim. Defendant allowed Offenhauser Development Company and now the City of Winnemucca to divert a stream before it can reach Colony lands, a stream that had been there since records were kept. ECF No. 22 at ¶ 168. The fiduciary duty to stop the encroachment derives from Executive Order of June 18, 1917:

> It is hereby ordered that the following described lands in Nevada be, and they are hereby reserved from entry, sale or other disposal and set aside for the use of two certain bands of homeless Shoshone Indians now residing near the towns of Winnemucca and Battle Mountain, Nevada.

Exhibit 15.

None of the cases cited by Defendant – *Navajo II,* nor *Jicarilla Apache Nation* – involved third parties. *See* ECF No. 23, Memo at 30. *Navajo II* involved the United States' failure to increase royalty rates for a tribe's coal mining revenues. *Navajo II* at 289, 129 S.Ct. at 1552. *Jicarilla* analyzed whether the fiduciary exception to the attorney-client privilege applied to the general trust relationship between the United States and Indian tribes. *Jicarilla Apache Nation* at 165.

Defendant further cites *Crow Creek Sioux Tribe v. United States,* 900 F.3d 1350 (Fed. Cir. 2018) to suggest that Plaintiff does not have standing as a result of not alleging that the amount of water flowing through the Colony is insufficient to fulfill the purposes of the Colony. *See* ECF No. 23 at 32 at fn 13. Plaintiff alleged in its Complaint, "Upon information and belief, Offenhauser Development Company diverted the water without obtaining permission from the SOI." ECF No. 22 at ¶ 169. "The water" means all the water. This fact is clear from the face of the Complaint. Also clear is that diversion of all water means that the purposes of the Colony cannot be fulfilled. The Colony has petitioned the City for more water, but the City of Winnemucca, even with the diverted

water belonging to the Colony does not have sufficient supply to furnish the Colony for its economic development and its residential use.

In *White Mountain II*, the Court held that the federal government's exclusive control over a building on Indian land raised the trust to the level of *United Mitchell II,* 463 U.S. at 211–12, 103 S.Ct. at 2962-63 (1983). In *Mitchell II,* the extent of that federal control was illustrated by statute and regulations giving federal government full responsibility to manage Indian forests and property for the benefit of Indians; that control established the fiduciary relationship between the United States and Indians, breach of which gave rise to substantive claim for money damages against the United States. *Mitchell II* at 228, 103 S.Ct. at 2974.

Here, Defendant has exclusive control over the disposition of Indian land. For example, 25 C.F.R. § 152.22 mandates that Secretarial approval is necessary to convey individual-owned trust or restricted lands or land owned by a tribe. This is control sufficient to establish a fiduciary responsibility under *Mitchell II:*

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Mitchell II at 225, 103 S.Ct. at 2972 (quoting *Navajo Tribe of Indians v. United States,* 224 Ct.Cl. 171, 183, 624 F.2d 981, 987 (1980)).

> Under the common law of trusts, it is indisputable that a trustee has an affirmative duty to act reasonably to preserve the trust property. As the Restatement makes clear, "[t]he trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property." *Restatement (Second) of Trusts* § 176 (1959). Comment (b) to this provision makes clear that this obligation extends to the protection of the trust property from loss or damage: "It is the duty of the trustee to use reasonable care to protect the trust property from loss or damage."

White Mountain Apache Tribe v. United States, 249 F.3d 1364, 1379 (Fed Cir. 2001) *(White Mountain Apache I).*

When BIA allowed Offenhauser Development Company to divert a stream on Colony land, BIA had a duty as trustee to stop such unauthorized diversion. 340 acres in the desert has little or no value without water rights. As in *White Mountain Apache II,* this Court should fairly interpret the sources of law cited herein as mandating compensation for damages sustained as a result of a breach of the duties the law imposes.

2. Plaintiff's NAHASDA claim is based on a money-mandating duty.

Plaintiff's fourth proposed claim alleges that in violation of the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), 25 U.S.C. §§ 4101–4243, "The BIA caused the Lovelock Housing Authority to convey to non-members the residential housing on the Colony without collection of any rents nor requiring that any rents be paid." ECF No. 22 at ¶ 174. In so doing, BIA refused to provide contract or grant money as required under NAHASDA. *Id.* at ¶ 176.

In *Lummi Tribe of Lummi Rsrv. v. U.S.,* 99 Fed.Cl. 584, 606 (2011), the Court of Federal Claims "determined that NAHASDA provides a money mandate." The court reasoned that NAHASDA "leaves no room for HUD to exercise discretion in making grants." *Id.* at 594. Further:

> As indicated above, NAHASDA provides that the Secretary "*shall* ... make grants" and "*shall* allocate any amounts" among Indian tribes that comply with certain requirements, 25 U.S.C. §§ 4111, 4151 (emphasis added), and directs that the funding allocation be made pursuant to a particular formula, 25 U.S.C. § 4152. The Secretary is thus bound by the statute to pay a qualifying tribe the amount to which it is entitled under the formula. NAHASDA, in other words, can fairly be interpreted as mandating the payment of compensation by the government. Eastport, 372 F.2d at 1009.

Id. Lummi Tribe was not reversed, but the Court of Appeals in *Lummi Tribe of the Lummi Rsrv., Washington v. United States,* 870 F.3d 1313, 1315, 1317 (Fed. Cir. 2017) vacated and dismissed a subsequent order by the Court of Federal Claims that had reaffirmed its prior ruling that

NAHASDA was money mandating. As Defendant notes, "earlier Court of Claims decisions held that to the extent Section 4111 of NAHASDA requires HUD to make housing grants (in wholly non-discretionary terms), the statute is "money mandating" for jurisdictional purposes. ECF No. 23 at 33, fn. 14 (citing *Lummi v. United States,* 99 Fed. Cl. 584, 594-97 (2011); *Yakama Nation Hous. Auth. v. United States,* 102 Fed. Cl. 478, 486 (2011)). Defendant concedes these decisions might "retain vitality" even after the Court of Appeals' 2017 *Lummi* decision. *Id.*

They do. The Court of Federal Claims decision was based on section 4111 of NAHASDA, whereas the Court of Appeals decision was based on analysis that the tribe's underlying claim was not for presently due money damages but rather sought equitable relief in form of strings-attached NAHASDA grants. *Lummi Tribe of the Lummi Rsrv., Washington v. United States,* 870 F.3d at 1318. Any money disbursed through grants the Lummi tribe sought could be later reduced or clawed back, and any property acquired with monies from grants would be held in trust by the Lummi as beneficiary of NAHASDA. *Id.*

Here, Plaintiff is not seeking equitable relief in the form of strings-attached NAHASDA grants. It is not suing to have money allotted into its account. It is seeking money damages because it never received the funding it was due. The Secretary was bound by the statute to pay a qualifying tribe the amount to which it is entitled, *Lummi Tribe of Lummi Rsrv. v. U.S.,* 99 Fed.Cl. at 594, but wholly failed. *See also Ft. McDermitt Paiute and Shoshone Tribe v. Becerra,* No. 19-5336, 6 4th 6, at *7-8 (D.C. Cir. July 23, 21) (court affirming the right of the tribe to the funds "that would have otherwise provided for the operation of the programs or portions thereof, but for the self-governance compact. 25 U.S.C. §5325(a)(1)").

Further, contrary to Defendant's assertions, *see* ECF No. 17 at 18, *Blackfeet Housing v. United States,* 106 Fed. Cl. 142 (2012) did not analyze whether NAHASDA was a money-mandating statute.

Dismissal was based instead on the statute of limitations and analysis of whether NAHASDA does or does not support claims for breach of trust. *Blackfeet* at 143.

Where this Court follows the requirements of a notice pleading, Plaintiff need not cite the specific provisions of section 4111. Citing NAHASDA is enough. The Court should deny the Motion.

3. The Indian Non-Intercourse Act and related codes of federal regulation further establish the fiduciary relationship between the United States and Indians, breach of which gave rise to substantive claim for money damages against the United States.

Plaintiff's fifth claim for relief is Breach of Trust pursuant to the Non-Intercourse Act, 25 U.S.C. § 177, which mandates:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.
>
> Plaintiff alleges damages in relation to:
>
> the failure to receive funds for the rights of way being utilized for (i) a road over Colony land; (ii) installation of overhead utility wires over Colony land; (iii) installation of a electrical substation on Colony land; and (iv) diversion of an actual stream in excess of 60 cfs running across the Colony lands; loss of funding; loss of economic development; loss of use of buildings; encroachment upon the lands; and further damages for loss of use of lands and loss of right to conduct governmental functions.

ECF No. 22 at ¶ 191.

Courts have allowed claims for money damages against the United States under the Indian Non-Intercourse Act. Here, the *Navajo II* test is satisfied because the Indian Non-Intercourse Act

"establishes specific fiduciary or other duties," and "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach" of those duties. *Navajo II at* 290-91.

The Non-Intercourse Act imposes a distinct duty. In *Onega v. United States,* 91 Fed.Ct. 629, 640 (2010), the court noted that plaintiff had identified a lease and substantive regulations under 25 C.F.R. Part 162 imposing a non-discretionary duty on the government to obtain compliance with the plaintiffs' lease and seek damages – as is the case here. *See Onega* at 640 (citing *United States v. Mitchell II* (contrasting the limited trust relationship created by the General Allotment Act with fuller fiduciary responsibilities imposed by substantive statutes mandating government management of Indian-owned assets); *Cherokee Nation of Oklahoma v. United States,* 21 Cl.Ct. 565, 575–76 (1990) (distinguishing *Mitchell II*-type control creating non-discretionary duties from a general fiduciary relationship imposing fewer substantive duties)).

Defendant has a fiduciary obligation on Defendant to protect WIC land:

> The obvious purpose of [the Non-Intercourse Act] is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, other than the United States, without the consent of Congress, and to enable the Government, acting as parens patriae for the Indians, to vacate any disposition of their lands made without its consent.

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960). The duty is not only "obvious" but undebatable:

> That the Nonintercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act seems to us beyond question, both from the history, wording and structure of the Act and from the cases cited above and in the district court's opinion.

Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975). In affirming federal fiduciary duty, the court cited *Fort Sill Apache Tribe v. United States,* 201 Ct.Cl. 630, 477 F.2d 1360 (1973); *United States v. Oneida Nation of New York,* 201 Ct.Cl. 546, 477 F.2d 939 (1973); and *Seneca Nation v. United States,* 173 Ct.Cl. 917 (1965), "while also finding support

in an extensive body of cases holding that when the federal government enters into a treaty with an Indian tribe or enacts a statute on its behalf, the Government commits itself to a guardian-ward relationship with that tribe." *Id.* (citing *Heckman v. United States,* 224 U.S. 413 (1912); *United States v. Kagama,* 118 U.S. 375 (1886); and *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832)).

In *Alabama-Coushatta Tribe of Texas v. United States,* the Court of Federal Claims noted:

> [I]n *Seneca [Nation v. United States,* 173 Ct.Cl. 917 (1965)], the Court of Claims held that the Indian Trade and Intercourse Act of 1790 created a special relationship between the Federal Government and those Indians covered by the legislation, with respect to the disposition of their lands, and that the United States assumed a special responsibility to protect and guard against unfair treatment in such transactions.... The concept is obviously one of full fiduciary responsibility, not solely of traditional market place morals.

Alabama-Coushatta Tribe of Texas v. United States, 2000 WL 1013532 at *62 (Fed. Cl. June 19, 2000) (unreported) (quoting *Seneca Nation,* 173 Ct.Cl. at 925). Thus, the Indian Non-Intercourse Act is a "guarantee" by the United States:

> to avoid improper and unfair disposition of Indian lands and to allow the federal government to act as parens patriae to effectuate this purpose . . . . [T]he relationship is more than that of a nonparticipating bystander, or of a sovereign toward its ordinary citizens. It is a special relationship necessitating a special responsibility.

Alabama-Coushatta at *65-66 (quoting *Oneida Nation of New York* at 943). "In light of that guarantee, the government may be statutorily obligated to protect the tribe's interests even if it did not actually participate in or assist a third party in the acts that harmed an Indian tribe." *Alabama-Coushatta* at *66 (citing *Oneida Nation of New York* at 944).

This weight of authority led the court in *Passamaquoddy* to proclaim: "The purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy . . . , and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances." *Passamaquoddy* at 379 (citing *United States v. Santa Fe Pac. R.R. Co.,* 314 U.S. 339, 348 (1941)).

Breach by the United States of its fiduciary obligations under the Non-Intercourse Act has been held to be compensable by an award of damages. *See Seneca Nation* at 919. In *Seneca Nation,* the Court of Claims held that the United States was liable for such breaches under the Indian Claims Commission Act of Aug. 13, 1946, c. 959, § 2, 60 Stat. 1049, formerly codified at 25 U.S.C. § 70a. The court reasoned that the United States would be liable, as a fiduciary with special responsibility, for vendee's failure to make a conscionable and just exchange. *Id.* at 925-26. *See also Oneida Nation of New York* at 941 (finding that the United States might be liable for land compensation under the Indian Non-Intercourse Act and clause 5 (fair and honorable dealings) of the Indian Claims Commission Act. These cases would survive analysis under *White Mountain Apache II.*

Defendant cites *Shinnecock Indian Nation v. United States,* 112 Fed.Cl. 369, 380-81 (2013) *("Shinnecock I"),* for the notion that the Indian Non-Intercourse Act does not impose money-mandating duties on the federal government and that therefore, the Court of Federal Claims lacks jurisdiction. But Defendant overlooks the fact that the *Shinnecock I* ruling as to jurisdiction was vacated in *Shinnecock Indian Nation v. United States,* 782 F.3d 1345, 1350-51 (Fed. Cir. 2015) *(Shinnecock II)*. In *Shinnecock II,* the court found that claims against the federal government were unripe, due to ongoing litigation in the district court against the State of New York, which had sold thousands of acres of Shinnecock land to a town. The *Shinnecock II* court explained:

> Until the litigation now pending in the Second Circuit is finally resolved—and the metes and bounds of the Nation's breach of trust claims against the United States are certain—we think it is premature in the circumstances of this case to make any determination as to whether the Non–Intercourse Act can be construed to provide a predicate for the exercise of jurisdiction over those claims.

Id. at 1351. Thus *Shinnecock* fails to support Defendant's position.

Neither does Defendant's citation to *Tuscarora.* There, the court found that the Non-Intercourse Act was "inapplicable to the United States nor, hence, to its licensees to whom Congress had

delegated federal eminent domain powers under s 21 of the Federal Power Act." *Tuscarora* at 120. Such a narrow holding has no application under the instant facts, which do not not involve a federal taking. Instead, the weight of authority cited herein demonstrates that the Non-Intercourse Act is "a source of substantive of law that 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Navajo II at* 503 (2003).

i. Indeed, several money-mandating federal regulations stem from the mandates of the Non-Intercourse Act.

Several United States Codes and the Code of Federal Regulations protect Indian lands by the broad authority of the Department of Interior to approve all leases of Indian lands. For example, 25 C.F.R. § 162.005 explains that any party other than WIC members was required to obtain a lease to possess the Indian lands, and 25 C.F.R. § 162.023 provides BIA the authority to evict or seek restitution for use of the lands without a lease. 25 U.S.C. § 415 gives BIA full authority to seek payment for leasing premises and seeking any remedies to protect the property. Its accompanying regulations provide:

> If the lessee does not cure a violation of a business lease within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether: . . . (1) We should cancel the lease . . . .

25 C.F.R. 162.467 (a). *See also Rosebud Sioux Tribe v. United States,* 75 Fed. Cl. 15, 28 (2007) (25 CFR § 162.11 *et seq.* may provide a statutory or regulatory provision that is money mandating, and therefore allowing a claim for breach of fiduciary duty by a tribe and against the United States to proceed). "'[G]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.'" *Id.* (quoting *Brown v. United States,* 86 F.3d 1554, 1563 (Fed. Cir. 1996); *see also Mitchell II* at 226.

"Congress adopted [25 U.S.C. §] 415 to encourage long-term commercial leases of Indian land and thereby to enhance its profitable development." *Yavapai-Prescott Indian Tribe v. Watt,* 707 F.2d 1072, 1074 (1983). The "Leasing Act was intended to protect 'Indian tribes and their members . . . the federal government's duty under the Leasing Act, through BIA, is to ensure that the parties to a lease of Indian land have given adequate consideration to the impacts of the lease on, *inter alia,* neighboring lands and the environment." *Nulankeyutmonen Nkihtaqmikon v. Impson,* 503 F.3d 18, 29 (1st Cir. 2007). BIA broke the law in allowing this occupation which had no documented lease and no consideration. BIA prevented the members of the Colony from protecting their lands and allowed the occupation to lay waste to the lands and reputation of WIC. Moreover, once BIA prohibited the members from entering their own Indian lands, BIA had an affirmative duty to protect the lands. *United States. v. Torlaw Realty, Inc.,* 348 Fed. Appx. 213, 216 (2009) (finding that operation of waste disposal facility on Indian land was unlawful, as only way to commercially occupy and use allotted land by anyone other than allottee was through a BIA-approved lease, pursuant to The Leasing Act, 25 U.S.C. § 415(a) and 25 C.F.R. Part 162. *See also Skull Valley Bank of Goshute Indians v. Davis,* 728 F. Supp.2d 1287, 1299 (D. Utah 2010) ([DOI]'s mandate is to "defer to the landowners' determination that the lease is in their best interest, to the maximum extent possible.")

Here, on April 26, 2022, the Regional Director of BIA referred the removal of trespassers from the Colony's lands to the Solicitor General for an eviction action. **Exhibit 4.** This, in itself, is a total admission by BIA that it has failed to protect the lands of the Colony.

4. Defendant failed to offer basic services.

Defendant argues that the 1975 Indian Self-Determination and Education Assistance Act (ISDA) does not create money-mandating duties. ECF No. 23 at 36. Defendant impliedly concedes that the

Amended Complaint need not cite every law that grounds its claims, based on the fact that Defendant failed to offer basic services.

5. Further codes establish the basic fiduciary relationship between Defendant and WIC.

Plaintiff's sixth claim is for Breach of Fiduciary Duty. ECF No. 22 at ¶¶ 193-202. Plaintiff has included thereunder, without limitation, the various codes that evidence Defendant's money-mandating duties. *Id.* at ¶ 199. Among other things, Plaintiff seeks redress for right-of-way violations. Ironically, *Mitchell II,* which Defendant cites, references codes that support denial of the Motion:

> The Department exercises comparable control over grants of rights-of-way on Indian lands held in trust. The Secretary is empowered to grant rights-of-way for all purposes across trust land, 25 U.S.C. § 323, provided that he obtains the consent of the tribal or individual Indian landowner, § 324, and that the Indian owners are paid appropriate compensation, § 325. Regulations detail the scope of federal supervision. 25 CFR Part 169 (1982).[27] For example, an applicant for a right-of-way must deposit with the Secretary an amount not less than the fair market value of the rights granted, plus an amount to cover potential damages associated with activity on the right-of-way. The Secretary must determine the adequacy of the compensation, and the amounts deposited must be held in a special account for distribution to Indian landowners. See 25 CFR §§ 169.12, 169.14 (1982).

Mitchell II at 223, 103 S. Ct. at 2971. Similarly here, Plaintiff has received no compensation for right-of-way violations, nor for compensation to Indian landowners.

Once the "focus" of money-mandating law becomes clear, "principles of trust law may be relevant in drawing the inference that Congress intended damages to remedy a breach." *U.S. v. Navajo II* at 291, 129 S.Ct. 1547, 1552 (2009). This trust responsibility remains sacred:

> [T]he fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. "One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets," *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.,* 472 U.S. 559, 572, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985) (citing G. Bogert & G. Bogert, Law of Trusts and Trustees § 582, p. 346 (rev.2d ed.1980)); see *United States v. Mason,* 412

> U.S. 391, 398, 93 S.Ct. 2202, 37 L.Ed.2d 22 (1973) (standard of responsibility is "such care and skill as a man of ordinary prudence would exercise in dealing with his own property" (quoting 2 A. Scott, Trusts 1408 (3d ed.1967) (internal quotation marks omitted))); Restatement (Second) of Trusts § 176 (1957) ("The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property"). Given this duty on the part of the trustee to preserve corpus, "it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties."[4] *Mitchell II, supra,* at 226, 103 S.Ct. 2961.

Id. at 475-76, 123 S.Ct. at 1133-34. Here, not only money-mandating law, but common-sense assumptions under basic trust law will not tolerate failure to preserve WIC land. Defendant has allowed hazardous solid waste contamination to wreck Colony land. **Exhibit 16.** Again, the claim is not about "failure to recognize a legitimate tribal government." *See* ECF No. 23 at 34. Instead, it is about Defendant's failure to act in accordance with its recognition of Tribal Council. The Court should allow WIC to pursue money damages.

E. WIC's second claim meets notice pleading requirements.

Defendant incorrectly argues that WIC's second claim, for Violation of 25 U.S.C § 323 et seq. – land use in relation to energy station, does not state sufficient facts. EFC No. 23 at 37-38. To the contrary, the claim sufficiently sets forth that Defendant "allowed NV Energy to grade a road alongside the lands of the Colony without authorization or notice to the Colony which road impeded water running onto the lands of the Colony and has caused erosion and disruption to the lands of the Colony." ECF No. 22 at ¶158. The claim is not about failure to grant the right of way to NV Energy, as Defendant suggests. *See* ECF No. 23 at 37. Instead, the claim is about failure to obtain "the consent of the proper tribal officials," *see* 25 U.S.C §324, and Defendant's misconduct in allowing the use of WIC land, without approval by, or compensation to, WIC. ECF No. 22 at ¶¶ 160-162. The claim is further not about a flooding easement. *See id.* at 37-38. The facts alleged and citation to 25 U.S.C. §323 et seq. suffice for the notice pleading requirements of RCFC 8(a)(2).

Defendant concedes the claim is not time barred. ECF No. 23 at 37. The Court should deny

the Motion and allow the claim to proceed.

E. This Court has jurisdiction over the equitable and declaratory claims.

Defendant argues the Court lacks jurisdiction to adjudicate Plaintiff's equitable/declaratory claims, eight through eleven. Defendant is incorrect, as 28 U.S.C. § 1491 (a) (2) provides:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States.

Thus, this Court has equity jurisdiction to entertain a suit for accounting "in aid of a judgment of liability against the government." *American Indians Residing on Maricopa-Ak Chin Reservation v. United States,* 667 F.2d 980, 983 (Ct. Cl. 1981) (citing *Klamath & Modoc Tribes v. United States,* 174 Ct.Cl. 483 (1966)). In *Western Shoshone National Council v. United States,* 73 Fed.Cl. 59, 68-69 (2006), the Court dismissed declarative relief claims only *after* dismissing claims of royalties for mined minerals and for breach of fiduciary duty.

Here, the Court should allow Plaintiff's claims eight through eleven to stand, to aid in the judgment of liability. If, however, the Court is inclined to dismiss claims eight through eleven, it should do so without prejudice. Generally, if a claim is not yet ripe for judicial review, it should be dismissed without prejudice. *Shinnecock II,* 782 F.3d at 1350 (Fed. Cir. 2015) (citing *Casitas Mun. Water Dist. v. United States,* 708 F.3d 1340, 1378 (Fed. Cir. 2013) (affirming the dismissal of a takings claim without prejudice after determining that it was unripe); *Morris v. United States,* 392 F.3d 1372, 1378 (Fed. Cir. 2004) (affirming the dismissal of a takings claim without prejudice because it was "not ripe as a matter of law"); *Barlow & Haun, Inc. v. United States,* 118 Fed.Cl. 597, 615 n. 20 (2014) (emphasizing that if a claim is moot or unripe it "should be dismissed as

nonjusticiable and not for lack of subject matter jurisdiction"); *Bannum, Inc. v. United States,* 56 Fed.Cl. 453, 462 (2003) ("If a claim is not ripe . . . it must be dismissed without prejudice.")).

VI. CONCLUSION

For the foregoing reasons, the Court should deny the Motion.

DATED this 20th day of May, 2022.

/s/ Norberto J. Cisneros

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