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10
11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**
13

14 DOREEN BROWN, LOUELLA
15 STANTON, ELDON BROWN, DWIGHT
16 BROWN, ELENA LOYA, ELISA DICK,
17 LOVELLE BROWN, KEVIN DICK &
18 LESLIE SMARTT, JR.,

19 Plaintiffs,

20 v.

21 THE UNITED STATES OF AMERICA;
22 THE UNITED STATES DEPARTMENT
23 OF INTERIOR, BUREAU OF INDIAN
24 AFFAIRS; DEB HAALAND,
25 SECRETARY, UNITED STATES
26 DEPARTMENT OF INTERIOR, in her
27 official capacity; BRYAN NEWLAND,
28 ASSISTANT SECRETARY,
DEPARTMENT OF INTERIOR, INDIAN
AFFAIRS, in his official capacity; RACHEL
LARSON, SUPERINTENDENT,
WESTERN AGENCY, BUREAU OF
INDIAN AFFAIRS, in her official capacity.

Defendants.

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

MOTION FOR SUMMARY JUDGMENT

1 Plaintiffs, DOREEN BROWN, LOUELLA STANTON, ELDON BROWN, DWIGHT
2 BROWN, ELENA LOYA, ELISA DICK, LOVELLE BROWN, KEVIN DICK & LESLIE
3 SMARTT, JR. [hereinafter “Plaintiffs”] by their attorneys, file their Motion for Summary
4 Judgment under Fed. R. Civ. P. 56 and Local Rule 56-1. Plaintiffs seek relief against
5 Defendants, THE UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT
6 OF INTERIOR, BUREAU OF INDIAN AFFAIRS; DEB HAALAND, SECRETARY, UNITED
7 STATES DEPARTMENT OF INTERIOR, in her official capacity; BRYAN NEWLAND,
8 ASSISTANT SECRETARY, DEPARTMENT OF INTERIOR, INDIAN AFFAIRS, in his
9 official capacity; RACHEL LARSON, SUPERINTENDENT, WESTERN AGENCY, BUREAU
10 OF INDIAN AFFAIRS, in her official capacity [“Defendants”], requiring Defendants to
11 investigate and reassume the contract with the WINNEMUCCA INDIAN COLONY TRIBAL
12 COUNCIL [“WICTC”] under their trust and fiduciary duty, and to reassume the court services
13 contract under the Indian Self-Determination and Education Assistance [“ISDEAA”], and the
14 statutory obligation of 25 U.S.C. §5329 and 5330 as Plaintiffs’ health, safety, and welfare were
15 endangered by WICTC, causing irreparable harm.
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19 Plaintiffs also allege that Defendants violated the *Accardi Doctrine* by not following its
20 own regulations, policies, and discrete procedures regarding reassumption determinations and the
21 timeliness of those determinations when Plaintiffs’ health and safety were at risk.
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23 ///

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1 Plaintiffs’ seek an order requiring Defendants to follow its own regulations, investigate
2 Plaintiffs’ complaint, and make a reassumption determination. This motion is based on the
3 following memorandum of points and authorities.
4

5 DATED this 12th day of May, 2023.

6 Respectfully Submitted,

7 /s/ Peter Wetherall

8 PETER WETHERALL, ESQ.

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13 Attorneys for Plaintiffs

14 POINTS AND AUTHORITIES

15 BACKGROUND

16 The Plaintiffs are elderly and disabled individual Shoshone and Paiute Indians and
17 their family members. They have resided for four to five decades on the 20-acre parcel of
18 Indian trust land known as the Winnemucca Indian Colony [“WIC”] located in Winnemucca,
19 Nevada, having settled there in 1917 at the invitation of Defendants. Plaintiffs filed suit after
20 WICTC, the group representing the governing body of the tracts of land located in
21 Winnemucca, Nevada, began destroying Plaintiffs’ homesites and confiscating their land.
22

23 Plaintiffs seek and order from this Court to compel Defendants to take over and
24 reassume the ISDEAA court services contract entered into with WICTC. Plaintiffs seek this
25 relief upon the three issues the Court preserved: that the Defendants breached their trust
26 responsibility to Plaintiffs by failing to protect Plaintiffs’ rights, safety, and welfare, and to
27

1 preserve Plaintiffs’ interest in the 20 acres of trust land on which they formerly resided; (2) that
2 Defendants failed to investigate and determine whether reassumption was warranted despite
3 knowing that Plaintiffs’ homes were being demolished and Plaintiffs faced irreparable harm;
4 and (3) that under 25 U.S.C. §§5329 and 5330, Defendants had a nondiscretionary, discrete
5 duty to consider whether Plaintiffs’ written complaints raised concerns about the health, safety
6 and welfare of Plaintiffs and whether these complaints warranted reassumption of the Indian
7 self-determination contracts the Defendants entered into with WICTC.
8

9 Plaintiffs seek declaratory relief requiring the Defendants to reassume the court
10 services contract with WICTC.
11

12 Concise Statement of Material Facts

13 Pursuant to LR 56-1, Plaintiffs provide this Concise Statement of Material Facts, of
14 which none is genuinely in issue:
15

16 On February 19, 2021, WICTC approved the Tribal Courts Program funding of
17 \$20,000 distributed by Defendants. ROA at 29, 30, and 50. This Contract required WICTC to
18 supply a court system for criminal and civil claims on the Winnemucca Indian Colony. ROA at
19 49.

20 On or about June 13, 2019, WICTC brought eviction actions against all Plaintiffs in
21 the Bureau of Indian Affairs Court of Indian Offenses (CFR Court) by filing numerous trespass
22 actions. ROA at 255. By June of 2021, WICTC began serving Plaintiffs with eviction notices
23 linked to the newly funded WICTC tribal court, which did not yet exist on the Colony. *Id.* On
24 October 9, 2021, Defendants allowed WICTC to adopt a housing ordinance, which authorized
25 for “self-help summary evictions” of any person who did not have a written tenancy agreement
26 with WICTC. *Id.*
27
28

1 On the morning of November 2, 2021, WICTC, through its agents (non-Indian
2 subcontractor Robert “Bob” McNichols and his workers acting through McNichols’ company
3 named ReZbuilders, LLC, arrived at the Colony with heavy machinery to begin a long-planned
4 effort to remove persons and property from the 20-acre parcel. The goal was to “clear some
5 lots . . . of all personal property and trespassers.” ROA at 255, 231. That same afternoon
6 McNichols and his workers demolished long-time resident Elisa Dick’s mobile home.
7 Declaration of Elisa Dick at ¶3 (Exhibit 1). Elisa and her two children were made homeless. *Id.*
8 at ¶3. Elisa received no prior notice of the demolition and she received no compensation for
9 her lost home and possessions. *Id.* at ¶ 4.
10
11

12 On November 3, 2021, McNichols and his workers returned to demolish long-time
13 resident Leslie Smartt Jr.’s mobile home without notice, compensation, and without an order
14 from any court. Declaration of Leslie Smartt, Jr. at ¶ 3 (Exhibit 2). Leslie Smartt Jr.’s home
15 and the personal property around his home was all loaded into a dumpster and taken away. *Id.*
16 Everything was removed from Leslie Smartt Jr.’s property except a small trailer. *Id.* at ¶ 4
17

18 McNichols wanted to demolish the small trailer along with the rest of the Smartt
19 property but a caretaker remained inside the trailer and refused to leave. *Id.* McNichols was
20 aware that the caretaker was inside the trailer but he used heavy machinery to demolish and
21 remove everything to within inches of the trailer’s front door. *Id.*
22

23 McNichols later returned with Defendants BIA law enforcement who forced the
24 caretaker to leave by threatening to arrest him for trespass, even though the caretaker was
25 employed on the lot at the request of Leslie Smartt, Jr. Declaration at ¶ 4 McNichols
26 demolished the trailer and carted it away in a dumpster. *Id.* No court order from any court
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28

1 permitted the Defendants and RezBuilders to evict the caretaker and demolish the trailer. ROA
2 at 255.

3 On November 3, 2021, the CFR Court of Indian Appeals issued an Emergency
4 Restraining Order against WICTC, and its agents, such as ReZbuilders, to halt evictions and
5 demolitions on the Colony. Also, according the emergency order, WICTC and its agents were
6 barred from entering the 20-acre parcel until further order of the CFR Court of Indian Appeals
7 ECF No. 66 at Ex. 38. WICTC's agents ignored the CFR Court of Indian Appeals restraining
8 order and continued with its demolition of Plaintiffs' homes and confiscation of property.

9
10 ROA at 182

11
12 On November 4, 2021, Plaintiffs filed an emergency motion asking the U.S. District
13 Court of Nevada to enjoin the BIA to enforce the orders from the CFR Court of Indian Appeals
14 and thereby temporarily halt the ongoing demolitions and evictions. ECF No. 15 at Ex. A.
15 Responses to Plaintiffs' emergency motion produced two documents into the record for the first
16 time: (1) Settlement and Release Agreement, and (2) a Model P.L. 93-638 Contract between
17 the BIA and WICTC. ECF No. 20 at Exs. 2 and 3.

18
19 On November 5, 2021, the U.S. District Court of Nevada held an expedited hearing to
20 address the Plaintiff's emergency motion for injunctive relief. During the hearing, this Court
21 ruled that the demolition of Plaintiffs' mobile homes and confiscation of other property
22 constituted irreparable harm. ECF No. 25 at 12. This Court denied injunctive relief because
23 the CFR Court of Indian Appeals had likely been divested of jurisdiction when Defendants
24 contracted with WICTC for judicial services. *See* ROA at 166. Therefore, the Emergency
25 Restraining Order issued by the CFR Court of Indian Appeals did not need to be enforced by
26 the Defendants. ECF No. 25 at 26. The Court also ruled that there was an effective P.L. 93-
27

1 638 contract between Defendants and WICTC triggering the Defendants' duty to determine
2 whether WICTC caused irreparable harm to Plaintiffs requiring re-assumption by operation of
3 law.

4 SUMMARY JUDGMENT STANDARD

5 Fed. R. Civ. P. 56 allows Plaintiffs to file a motion requesting summary judgment.
6 Summary judgment is inappropriate if a reasonable trier of fact, "drawing all inferences in
7 favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *Diaz v.*
8 *Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008). A principal purpose of
9 summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp.*
10 *v. Catrett*, 477 U.S. 317, 323-24 (1986).

11 Plaintiffs must support their motion with credible evidence, as defined in Rule 56(c), which
12 would entitle them to a directed verdict if not controverted at trial. *Aubrey v. Thomas (In re*
13 *Aubrey)*, 111 B.R. 268, 272 (9th Cir. BAP 1990). All of the facts posited by Plaintiffs have
14 been admitted by Defendants.

15 In determining summary judgment, a court applies a burden-shifting analysis:

16 When the party moving for summary judgment would bear the burden of proof at
17 trial, it must come forward with evidence which would entitle it to a directed
18 verdict if the evidence went uncontroverted at trial. In such a case, the moving
19 party has the initial burden of establishing the absence of a genuine issue of fact
20 on each issue material to its case.

21 *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000).

22 If the moving party fails to meet its initial burden, summary judgment must be denied and the
23 court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398
24 U.S. 144, 157 (1970).

1 If the moving party satisfies its initial burden, the burden then shifts to the opposing
2 party to establish that a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v.*
3 *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). To establish the existence of a factual dispute,
4 the opposing party need not establish a material issue of fact conclusively in its favor. It is
5 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
6 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
7 *Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
8 summary judgment by relying solely on conclusory allegations that are unsupported by factual
9 data. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go
10 beyond the assertions and allegations of the pleadings and designate specific facts that show a
11 genuine issue for trial. *Celotex*, 477 U.S. at 324.

14 A fact is material only if is one that “under the governing substantive law . . . could
15 affect the outcome of the case.” *Caneva v. Sun Communities Operating Ltd. P’Ship (In re*
16 *Caneva)*, 550 F.3d 755, 760 (9th Cir. 2008). A factual issue is genuine if “a jury could
17 reasonably find in the nonmovant’s favor. . . . *Emeldi v. Univ. of Oregon*, 698 F.3d 715, 730
18 (9th Cir. 2012).

20 At summary judgment, this Court’s function is not to weigh the evidence and determine
21 the truth, but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby*,
22 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all justifiable
23 inferences are to be drawn in his favor.” *Id.*, 477 U.S. at 255. But if the evidence of the
24 nonmoving party is merely colorable or is not significantly probative, summary judgment may
25 be granted. *Id.*, 477 U.S. at 249-50. Plaintiffs will show that Defendants’ failure to reassume
26 the ISDEAA contract based on irreparable harm was arbitrary and capricious based on the
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1 Defendants breach of their trust responsibility, the failure to investigate, and the non-
2 discretionary duty under 25 U.S.C. §§5329 and 5330 to reassume the IDEAA contract.

3
4 STANDARD OF REVIEW UNDER APA

5 Under the Administrative Procedure Act (APA), a “reviewing court shall . . . hold
6 unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary,
7 capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to
8 constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction,
9 authority, or limitations, or short of statutory right” 5 U.S.C. § 706(2); *Citizens to*
10 *Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971); *Natural Res. Council Fund v.*
11 *Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007). “To have not acted in an arbitrary and capricious
12 manner, the agency must present a ‘rational connection between the facts found and the
13 conclusions made.’” *Brong*, 492 F.3d at 1125 (internal citation omitted). These standards
14 require the court to engage in a substantial inquiry and a “probing, in-depth review.” *Citizens to*
15 *Preserve Overton Park*, 401 U.S. at 415-16.

16
17 A court reviewing agency action under the arbitrary and capricious standard must
18 ascertain whether the agency “considered the relevant factors and articulated a rational
19 connection between the facts found and the choice made.” *Nat’l Ass’n of Home Builders v.*
20 *Norton*, 340 F.3d 835, 841 (9th Cir. 2003). Agency action should be set aside “if the agency
21 relied on factors which Congress has not intended for it to consider, entirely failed to consider
22 an important aspect of the problem, offered an explanation for its decision that runs counter to
23 the evidence before the agency, or is so implausible that it could not be ascribed to a difference
24 in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins.*
25 *Co.*, 463 U.S. 29, 43 (1983). The ‘arbitrary and capricious’ standard requires an agency’s action
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1 to be supported by the facts in the record. *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*
2 *Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001). Questions of law, including constitutional claims,
3 require *de novo* review. *Partridge v. Reich*, 141 F.3d 920, 923 (9th Cir. 1998); *Custer County*
4 *Action Ass'n v. Garvey*, 256 F.3d 1024, 1030 (10th Cir. 2001).

5
6 Here, the Defendants' inactivity represents arbitrary and capricious actions if
7 emergency re-assumption was required. 25 C.F.R. §900.252. Emergency re-assumption is
8 required if Defendants determined that the tribal organization's performance under such
9 contract or grant agreement involved "an immediate threat of imminent harm to the safety of
10 any person, or imminent, substantial, and irreparable harm to trust funds, trust lands, or interest
11 in such lands." 25 U.S.C. §5330; *see also* accompanying regulations at 25 C.F.R. § 900.252(a)
12 (where the Secretary must "[i]mmediately rescind, in whole or in part, the contract[]").

13 14 WICTC's Action Constituted Irreparable Harm

15 Destroying the Plaintiffs' homes without notice constitutes irreparable harm because
16 "an alleged constitutional infringement will often alone constitute irreparable harm." *Monterey*
17 *Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997), *citing Associated General*
18 *Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991). "[C]ourts
19 have generally held that interference with constitutional rights 'supports a finding of irreparable
20 injury.'" *Perez-Funez v. District Director*, 611 F.Supp. 990, 1003 n. 29 (C.D. Cal. 1984),
21 *citing Planned Parenthood v. Citizens for Com. Action*, 558 F.2d 861, 867 (8th Cir. 1977).
22 Federal courts recognize that "seizing and destroying Appellees' unabandoned legal papers,
23 shelters, and personal effects" constituted a violation of the 4th Amendment. *Lavan v. City of*
24 *LA*, 693 F.3d 1022, 1038 (9th Cir. 2012). Clearly, the Plaintiffs' status as alleged trespassers
25 have no bearing on Plaintiffs' right to a pre-hearing *before* property is destroyed. *Id.*, 693 F.3d
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1 at 1027 (citing the district court case). In the district court case, the court held the destruction
2 of property without a hearing violated the constitution and constitute irreparable harm. *Lavan*
3 *v. City of Los Angeles*, 797 F.Supp.2d 1005, 1019 (C.D. Cal. 2011).

4
5 The Nevada Supreme Court has held “that a *foreclosure* may result in irreparable harm
6 “[b]ecause real property and its attributes are considered unique[.]” *Hamm v. Arrowcreek*
7 *Homeowners’ Ass’n*, 124 Nev. 290, 297, 183 P.3d 895, 901 (2008). The loss of a home has
8 been repeatedly found to be irreparable harm under Nevada law. *See, e.g., Dixon v. Thatcher*,
9 103 Nev. 414, 415-16, 742 P.2d 1029, 1030 (1987); *Nevada Escrow Service, Inc. v. Crocket*, 91
10 Nev. 201, 203, 533 P.2d 471, 472 (1975). Several other courts have held that wrongful eviction
11 results in immediate, irreparable injury. *Johnson v. Macy*, 145 F.Supp.3d 907, 919 (C.D. Cal.
12 2015); *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004).

13
14 Eviction or the forcible removal of a tenant on real property is “the most drastic remedy
15 we know of cases of this kind.” *Farnow v. Dist. Ct.*, 64 Nev. 109, 113, 178 P.2d 371, 373
16 (1947). In overturning Nevada’s plenary eviction process that allowed eviction *without a*
17 *hearing*, the Nevada Supreme Court held that due process required a hearing where the
18 landlord had to establish a “clear right to immediate possession of the property involved.”
19 *Farnow*, 64 Nev. at 126, 178 P.2d at 379. The Nevada Court also approved of a Cherokee
20 eviction law that allowed for eviction without a hearing, *but only if the tenant did not respond*.
21 *Farnow*, 64 Nev. at 116, 178 P.2d at 374, *citing Mehlin v. Ice*, 56 F. 12, 15 (8th Cir. 1893).
22 Even personal property is afforded due process protection of a hearing *before* repossession or a
23 lien attaches. *Adams v. Joseph Sanson Inv. Co.*, 376 F.Supp. 61, 68-70 (D. Nev. 1974).

24
25
26 Clearly, WICTC’s actions in bulldozing Plaintiffs’ homes, destroying their personal
27 property, and confiscating their land without notice or a hearing constituted irreparable harm
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1 warranting re-assumption of the ISDEAA contract. Because the destruction of Plaintiffs'
2 homes and confiscation of their property without a hearing violates the constitutional rights of
3 Plaintiffs', they suffered irreparable harm. This irreparable harm triggered the obligation to re-
4 assumption under 25 U.S.C. §§5329 and 5330 and 25 C.F.R. §900.252.

6 CONCLUSION

7 The Defendants breached their trust responsibility to Plaintiffs by failing to protect
8 Plaintiffs' rights, safety, and welfare, and to preserve Plaintiffs' interest in the 20 acres of trust
9 land on which they formerly resided. Defendants also failed to investigate and determine
10 whether re-assumption was warranted despite knowing that Plaintiffs' homes were being
11 demolished and Plaintiffs faced irreparable harm. Finally, under 25 U.S.C. §§5329 and 5330,
12 Defendants had a nondiscretionary, discrete duty to re-assumption of the court services contract
13 with WICTC and their failure warrants an Order from this Court forcing Defendants to
14 reassume the contract.
15

16 DATED this 12th day of May, 2023.

17 Respectfully Submitted,

18 /s/ Peter C. Wetherall

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day May, 2023, I served the foregoing MOTION FOR SUMMARY JUDGMENT upon the following person(s), in the following manner:
(ELECTRONIC SERVICE) Pursuant to Fed. R. Civ. P. 5(b)(3) and LR 5-4, the above referenced document was electronically filed and served upon the parties listed below through the Court’s Case Management and Electronic Case Filing (CM/ECF) system:

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An Employee of Nevada Legal Services