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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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

Plaintiffs,

v.

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

Defendants,

and

WINNEMUCCA INDIAN COLONY, a federally recognized Tribe,

Intervening Defendant.

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

INTERVENING DEFENDANT'S REPLY TO COUNTERMOTION FOR SUMMARY JUDGMENT

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Intervening Defendant, the Winnemucca Indian Colony ("WIC"), by and through its duly elected Council, and counsel of record, Maddox & Cisneros, LLP, and Reno Law Group, LLC, submits this Reply in Support of Countermotion for Summary Judgment (ECF No. 102). This Reply responds to Plaintiffs' Opposition (ECF No. 106) and 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.

MEMORANDUM OF POINTS AND AUTHORITIES

At each procedural step in this action, Plaintiffs have demonstrated that their action is nothing more than an effort to undermine WIC's tribal sovereignty. As shown below, the points made in Plaintiffs' Opposition make clear that they don't believe causation matters. Plaintiffs miscite the law, mischaracterize WIC's position, rely on disputed facts, and demand remedies that would result in gross unfairness to WIC, a federally recognized Indian tribe. This Court should grant summary judgment in favor of WIC and dismiss this action in the entirety.

I. Plaintiffs have utterly failed their burden of establishing causation.

25 U.S.C. § 5330 provides that the Secretary is to take certain action "where the appropriate Secretary determines that the tribal organization's performance under such contract or grant agreement involves . . . the violation of the rights or endangerment of the health, safety, or welfare of any persons . . . . " The statute thus requires a causal connection: the performance must be made "under," or pursuant to, a contract before the Secretary is to take any action.

Plaintiffs now contend that WIC has the burden to disprove a causal connection between the 638 contract for judicial services and the alleged harm. ECF No. 106 at 2:7-8. Plaintiffs' position is fatal to their action, as Plaintiffs have the onus to establish causation. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 2136 (1992). Plaintiffs' burden is not a light one: In response to a summary judgment motion, the plaintiff can no longer rest on mere allegations. *Id.* at 561, 112 S.Ct. at 2137.

In any event, to argue that WIC's conduct occurred while the contract was in existence is not enough. Plaintiffs have made a temporal connection, but not a causal one. Their Complaint

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demonstrates the logical fallacy of *post hoc ergo propter hoc* (after this therefor on account of this) reasoning. *Begay v. United States,* 16 Cl. Ct. 107, 137 (1987). *See also, e.g., Dreijer v. Girod Motor Co.,* 294 F.2d 549, 555 (5th Cir. 1961) ("when the facts are . . . so meager as they are here and an effect may follow from one of several causes it is a false generalization to suppose that because a sinking follows a collision thirty-nine days later, the sinking necessarily was an effect of the collision."). *"Post hoc ergo propter hoc* is neither good logic nor good law." *Volentine and Littleton v. United States,* 144 Ct. Cl. 723, 726, 169 F. Supp. 263, 265 (1959). Similarly, here Plaintiffs erroneously argue that because demolition occurred after the 638 contract was executed, the demolitions were an effect of the contract.

Plaintiffs cannot establish a causal nexus, as their Complaint rests on the allegation that WIC proceeded with demolitions "without a court order of any kind . . . ." Second Amended Complaint (ECF No. 66) at ¶ 113. Thus, WIC's "performance" – the demolition of houses on WIC's own property – was not done "under" the 638 grant. The "performance" was executive, not judicial, made under Tribal Resolution. *Id.* at ¶ 77. Plaintiffs' theories fail on their own terms. There is indeed no causal connection whatsoever between performance under the 638 contract and Plaintiff's alleged harm.

Without causation, Plaintiffs lack standing. "It is well established that 'the irreducible constitutional minimum of standing contains three elements': (1) a concrete and particularized injury that is 'actual or imminent, not conjectural or hypothetical'; (2) a causal connection between the injury and the defendant's challenged conduct; and (3) a likelihood that a favorable decision will redress that injury." *Pyramid Lake Paiute Tribe of Indians v. Nev. Dep't of Wildlife*, 724 F.3d 1181, 1187-88 (9th Cir. 2013) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). *See also* Order, ECF No. 59 at 5:1-7. [1] The Court should now grant summary judgement in favor of WIC and BIA because Plaintiffs have failed to establish that the 638 contract caused the alleged injuries, and Plaintiffs have thus failed to establish standing to sue.

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[1] The Court's previous analysis about whether Plaintiffs had standing rested on the finding that Plaintiffs were "persons" under 25 U.S.C. § 5330. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation, supra,* 497 U.S., at 889, 110 S.Ct., at 3189.

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Lack of causation also supports BIA's decision not to reassume the contract. Plaintiffs state that the Court's "inquiry centers around Defendants' decision to not assume the 638 Contract and whether this decision is arbitrary and capricious, not whether the Contract caused Plaintiffs' damages." *See* ECF No. 106 at 2:17-19. Plaintiffs' logic is appallingly incomplete: it is because the contract caused no damages that BIA has not reassumed the contract, and therefore, such BIA action is not arbitrary or capricious.

II. Plaintiffs must exhaust their administrative remedies under the Administrative Procedures Act.

Citing *Santos-Zacaria v. Garland,* 2023 U.S. LEXIS 1891, 143 S.Ct. 1103 (May 11, 2023) and *Wilkins v. United States,* ___ U.S. ___, ___, 143 S.Ct. 870, 875-876 (March 28, 2023), Plaintiffs argue that administrative exhaustion does not pose a jurisdictional bar unless mandated by Congress. *Santos-Zacharia* involved 8 U.S.C. § 1252(d)(1), an immigration statute. *Zacharia,* 143 S.Ct. at 1110. And *Wilkins* involved 28 U.S.C. § 2409a(g), a claims-processing rule under the Quiet Title Act. *Wilkins,* 143 S.Ct. at 875. Neither of these cases involved the process of administrative exhaustion before the BIA and IBIA, and Plaintiffs cite no case applying *Santos-Zacharia* or *Wilkins* to the Administrative Procedures Act. Indeed, the 9th Circuit recently found that a district court lacked subject matter jurisdiction as a result of failure to exhaust administrative remedies before the BIA. *Winnemucca Indian Colony v. United States,* 819 Fed.Appx. 480, 482. It remains law that:

> The Administrative Procedure Act (APA) provides for judicial review of final agency actions. 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). Under our cases, if there is no final agency action, the court lacks subject matter jurisdiction. *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008) ("[F]inality is a jurisdictional requirement to obtaining judicial review under the APA.").

Id. There is no indication to support the flat-out wrong assertion by Plaintiffs that *Fairbanks* has been "challenged or overruled." ECF No. 2:22-25.

Even if exhaustion were not a jurisdictional bar, courts still "should require compliance" unless the suit's colorable claim is "collateral to a substantive claim of entitlement" and "one whose resolution would not serve the purposes of resolution." *McBride Cotton & Cattle Corp. v. Veneman*, 290 F.3d 973, 980 (9th Cir. 2002). Plaintiffs' challenges in this action are not collateral to their claims

against the BIA. Plaintiff's claim is directly about agency action. Thus, the Court should grant summary judgment in favor of WIC and BIA on the basis that Plaintiffs must exhaust their administrative remedies.

III. Plaintiffs improperly rely on disputed facts.

Plaintiffs' argument about whether BIA violated its statutory duty is conclusory and speculative because it is not based on the administrative record. *See* ECF No. 106 at 3:11 – 4:16. Instead, Plaintiffs' argument is based upon *disputed* facts. Among other things, WIC disputes the statements contained in Plaintiff's improper affidavits, and whether the homes or land belonged to Plaintiffs. *See* ECF No. 106 at 3:14-19. In any event, in an APA case, "there are no disputed facts that the district court must resolve." *Occidental Eng'g Co.* v. *INS*, 753 F.2d 766, 769 (9th Cir. 1985). The court need not resolve such issues to arrive at the conclusion that "the evidence in the administrative record permitted the agency to make the decision it did." *Id.* Plaintiffs do not dispute the fact that they have all left the Colony. Thus, there is no "immediate threat of imminent harm" triggering 25 CFR § 900.247. Plaintiffs further have not disputed the administrative record. Plaintiffs' disputed factual allegations are irrelevant, and Plaintiffs have failed to disprove that this Court should grant summary judgment in favor of WIC and BIA.

Plaintiffs even rely on a disputed legal conclusion, that the demolitions resulted in a due process violation. *See* ECF No. 106 at 2:13-19. Plaintiff's continued insistence on raising Constitutional issues subverts this Court's warning, that they may not "conflate" their *Accardi* claim with a Constitutional claim. ECF No. 97 at 7:23-24.

IV. Without causation, a judgment in favor of Plaintiffs would be inequitable.

Plaintiffs state that "WIC argues that Plaintiffs' status as tribe members warrants a stay in this case." ECF No. 4:18-29. The statement is mischaracterization, as WIC never so stated. In fact, Plaintiffs are ***not*** tribal members. WIC's argument is that Court should stay its hand while the ITCN considers Plaintiffs' appeal of eviction.

In any event, the Court's analysis of WIC's standing in equity should be informed by Plaintiff's brazen headline, that "Causal Connection Between 638 Contract and Irreparable Harm Irrelevant." *Id.* at 2:6. Obviously, it would be grossly inequitable to allow Plaintiffs to prevail against

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a sovereign tribe where Plaintiffs cannot prove causation and even go so far as to show disdain towards this fundamental principle of law.

And Plaintiffs have now proved that their motives have always been to attack tribal sovereignty – the power of a tribe to govern through its Council. The power is executive, not judicial. As can be seen in Exhibit 40 that Plaintiffs attached to their Amended Complaint, WIC Council passed a resolution on October 26, 2021. ECF No. 66-40. Pursuant to the Resolution, the contractor for the Colony and Tribally appointed civil enforcement officers then towed away the trailer homes and lean to's no longer inhabited by Eliza Dick and Les Smart Jr on, respectively, November 2, 2021, and November 3, 2021. ECF No. 66 at ¶¶ 88 and 90. There had been no action filed with the Tribal Court at that time and no Order from the Tribal Court until more than one year later.

Any check on the Colony's executive power should move through the tribal courts – and that is exactly what is happening; to date, Plaintiffs and WIC await a decision from ITCN on the issue of whether Plaintiffs, who are tribal non-members, have any rights to reside on Colony land. Under such facts, and where Plaintiffs have not challenged the evidence proving that BIA is monitoring the 638 Contract, this Court should dismiss this action.

V. CONCLUSION

For the foregoing reasons, Intervening Defendant, the Winnemucca Indian Colony, asks the Court to grant WIC's Countermotion for Summary Judgment and dismiss this case in the entirety against all Defendants.

DATED this 28th day of July, 2023.

By: */s/ Norberto J. Cisneros*

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