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9 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

10 Doreen Brown, Louella Stanton, Eldon
11 Brown, Dwight Brown, Elena Loya, Elisa
12 Dick, Lovelle Brown, Kevin Dick, & Leslie
Smartt Jr.,

13 Plaintiffs,

14 v.

15 Deb Haaland, Secretary, United States
16 Department of the Interior, in her official
Department of Interior, Assistant Secretary of
17 Indian Affairs, in his official capacity; Darryl
18 LaCounte, Director of the Bureau of Indian
Affairs, in his official capacity; Rachael
19 Larson, Superintendent of the Western
Nevada Agency, Bureau of Indian Affairs, in
20 her official capacity; and the United States
Department of Interior, Bureau of Indian
21 Affairs,

22 Defendants.

Case No. 3:21-cv-00344-MMD-CLB

**Defendants’ Reply in Support of Their
Motion for Summary Judgment**

23 **I. Introduction**

24 The Court should grant summary judgment in favor of Defendants. Plaintiffs’
25 arguments about a trust relationship and any breach thereof fall flat. Moreover, Plaintiffs fail
26 to establish that the harms they allege resulted from Defendants’ oversight of the Judicial
27 Services P.L. 93-638 contract (the “638 contract”) with the Winnemucca Indian Colony
28 (“WIC” or “Tribe”). Plaintiffs also fail to make a showing that the 638 contract should be

1 reassumed. And finally, Plaintiffs fail to establish that Defendants’ decision or indecision in
2 not reassuming the 638 contract was arbitrary or capricious. Accordingly, Plaintiffs’ motion
3 for summary judgment (ECF No. 100) should be denied, the Court should grant summary
4 judgment for Defendants, and the case should be dismissed.

5 **II. Argument**

6 Defendants moved for summary judgment arguing that Plaintiffs could not establish
7 a breach of any specific trust or fiduciary obligations (ECF No. 101 at 10–11). Defendants
8 further argued that Plaintiffs could not establish the Defendants failed to investigate
9 Plaintiffs’ claims thereby breaching any regulatory or statutory duty (ECF No. 101 at 11–
10 12). Finally, Defendants argued that Plaintiffs could not establish that their alleged harms
11 were caused by or facilitated by the 638 contract (ECF No. 101 at 12).

12 Plaintiffs respond by arguing that: (1) Defendants have a trust relationship; (2) a
13 connection between the 638 contract and their alleged harm is irrelevant; and (3) Defendants’
14 decision to not reassume the 638 contract was arbitrary and capricious (ECF No. 107 at 2–
15 5). As explained below, Plaintiffs’ arguments fall flat. Accordingly, the Court should grant
16 summary judgment in favor of Defendants.

17 **A. Plaintiffs’ Attempt to Establish a Trust Relationship Fails**

18 Plaintiffs first argue against summary judgment claiming that “Defendants have a
19 trust relationship with Plaintiffs.” (ECF No. 107 at 3). They cite 25 U.S.C. §§ 5329–30 and
20 20 C.F.R. Parts 900.240–940.256 to support this claim (ECF No. 107 at 3). Several problems
21 exist with this argument. First, Plaintiffs cite the Indian Self Determination and Education
22 Assistance Act (“ISDEAA”). However, the Court already dismissed, with prejudice, claims
23 Plaintiffs attempted to bring under the ISDEAA. *See* ECF No. 97 at 3 (“But to the extent
24 some of Plaintiffs’ allegations are trying to replead direct violations of the ISDEAA, those
25 parts of Plaintiffs’ APA claims are dismissed with prejudice.”). Furthermore, Plaintiffs
26 seemingly cannot overcome Defendants’ argument that Plaintiffs cannot merely assert a
27 general trust duty. Instead, Defendants argue that Plaintiffs must identify a specific trust duty
28 and breach thereof. *See* ECF No. 101 at 10–11. In response to this argument, Plaintiffs revert

1 to their reliance on the ISDEAA. *See* ECF No. 107 at 3. But, because this Court already
2 considered and rejected such arguments, Plaintiffs should be barred from attempting to
3 resurrect them now. In addition, for some unknown reason, Plaintiffs cite Chapter 20 of the
4 Code of Federal Regulations (ECF No. 107 at 3). Chapter 20 deals with employee benefits.
5 Obviously, such regulations are inapplicable here. To the extent Plaintiffs' citation is a typo
6 and meant to cite to Chapter 25, those regulations, again, deal with the ISDEAA and should
7 be disregarded by the Court for the reasons just discussed.

8 Plaintiffs' incorrect reading of regulations does not end there. In the last sentence of
9 their trust relationship section, Plaintiffs cite 24 C.F.R Part 247(a) (ECF No. 107 at 3).
10 Chapter 24 of the Code deals with Housing and Urban Development and generally discusses
11 landlord responsibilities. Notably, this is the first time in these proceedings that Plaintiffs cite
12 these inapplicable federal regulations. And although it is unclear, to the extent Plaintiffs are
13 attempting to establish some sort of landlord tenant relationship as a way to show a more
14 specific type of trust relationship, *see* ECF No. 107 at 3, that argument also misses the mark.
15 This is so because Plaintiffs again fail to cite a specific duty or an alleged breach of such duty
16 under 24 C.F.R. Part 247(a). Accordingly, the Court should disregard these arguments and
17 conclude that Plaintiffs' attempts to establish a trust relationship between themselves and
18 Defendants fail.

19 **B. Plaintiffs Fail to Establish That Their Harms Resulted From Defendants'**
20 **Oversight of the 638 Contract**

21 Plaintiffs claim they "need only show that WIC failed to 'fulfill the requirements of
22 the contract' and the Defendants' decision to not reassume the 638 Contract was arbitrary
23 and capricious." (ECF No. 107 at 3). Not only do Plaintiffs incorrectly describe what they
24 must establish to prevail in this action, they fail to meet even the lower, albeit incorrect, bar
25 they argue is necessary.

26 Plaintiffs omit any discussion of any provision within the 638 contract where the
27 Tribe fell short as to its contractual obligations in providing judicial services. Plaintiffs also
28 fail to point to anything within the administrative record where Defendants were made aware

1 that the Tribe breached the 638 contract and Defendants refused to do anything about it or
2 ignored it altogether. The administrative record provides the opposite. Namely, that any
3 happenings as to WIC’s performance with the 638 contract were known to Defendants and
4 being addressed in accordance with federal law and regulations.

5 Plaintiffs resort to discussing their alleged harm and inaccurately describe how it came
6 about (ECF No. 107 at 3). In essence, Plaintiffs conflate the actions of the Tribe (the
7 evictions) with Defendants’ inaction in not reassuming the 638 contract despite a lack of
8 record evidence showing reassumption was either necessary or warranted.

9 Plaintiffs presumably argue that the Tribe’s eviction actions constitute a constitutional
10 violation. Plaintiffs do so without supporting caselaw related to tribal rights to exercise self-
11 help evictions. As stated in Cohen’s Handbook of Federal Indian Law, tribes possess “the
12 inherent power of exclusion from tribal territory” and that this exclusionary power “is a
13 fundamental sovereign attribute intimately tied to a tribe’s ability to protect the integrity and
14 order of its territory.” Cohen’s Handbook at § 4.01[2][e]. Furthermore, “[a] tribe needs no
15 grant of authority from the federal government to exercise the inherent power of exclusion .
16 . . .” *Id.* Plaintiffs provide no authority establishing that the WIC went beyond the bounds of
17 its sovereign authority by evicting certain persons from the tribal lands.

18 Even if Plaintiffs successfully argued that a tribe exercising its sovereignty in this way
19 violated the constitution, they fail to show how the Tribe’s eviction actions are related to its
20 performance under the judicial services contract. Under the Plaintiffs’ theory, Defendants
21 could reassume every 638 contract between a particular tribe and the Bureau of Indian Affairs
22 (“BIA”) for any tribal action that may run afoul of the constitution, regardless of whether
23 that action is related to that tribe’s performance under the contract. For example, under
24 Plaintiffs theory, BIA would be justified in reassuming a tribe’s education 638 program every
25 time a tribal police officer made an improper arrest. This surely cannot be Congress’s intent
26 as to the ISDEAA.

27 Establishing a connection between Plaintiff’s “irreparable harm” and the judicial
28 services contract is essential to Plaintiffs’ APA claim. This Court, in denying Plaintiffs’

1 motion for preliminary injunction, found that Plaintiffs “fail[ed] to show that compelling the
2 BIA to ‘monitor and determine whether to reassume judicial services’ would provide any
3 immediate relief.” (ECF No. 96 at 2). Thus, this Court’s own findings support Defendants’
4 position that Plaintiffs must establish a connection between Defendants’ oversight of the
5 judicial services contract and the harm alleged. Otherwise, no action by this Court could
6 provide relief. As further acknowledged by this Court, Plaintiffs ultimately seek injunctive
7 relief, which “must be tailored to remedy the specific harm alleged . . . [a]n overbroad
8 injunction is an abuse of discretion.” ECF No. 96 at 2–3 (citing *Stormans, Inc. v. Selecky*, 586
9 F.3d 1109, 1119 (9th Cir. 2009)). Plaintiffs failed at the preliminary injunction stage, and
10 they present nothing new at this stage establishing how Defendants’ actions caused their
11 alleged harm or how enjoining Defendants, the relief currently sought by Plaintiffs, would
12 resolve, or prevent the harm alleged. Accordingly, the Court should grant summary
13 judgment for Defendants.

14 **C. Plaintiffs Fail to Establish That the 638 Contract Should be Reassumed**

15 Plaintiffs cannot establish Defendants’ justification to reassume the 638 contract for
16 judicial services with WIC, much less establish that Defendants must reassume on either an
17 emergency or non-emergency basis. Plaintiffs incorrectly argue that they need only show that
18 WIC “failed to fulfill the requirements of the contract.” (ECF No. 107 at 3). Plaintiffs do not
19 cite the regulations governing reassumption. If they had, they would recognize that an
20 emergency reassumption is justified only “if an Indian tribe or tribal organization fails to
21 fulfill the requirements of the contract *and this failure poses*: (1) an immediate threat of
22 imminent harm to the safety of any person; or (2) imminent substantial and irreparable harm¹
23

24 ¹ Plaintiffs rely extensively on an argument that because they faced “irreparable
25 harm” through the Tribe’s actions, Defendants should have reassumed the judicial services
26 contract. However, the regulations at 25 C.F.R. § 900, Subpart P, only use the term
27 “irreparable harm” in the context of trust assets, specifically trust funds, trust lands, or
28 interests in trust lands. 25 C.F.R. § 900.247(a). Plaintiffs are unable to establish that any
trust funds, trust lands, or interests in trust lands were harmed by the Tribe’s actions. To the
contrary, the evictions and demolitions were done, according to the Tribe, to protect tribal
lands. Thus, any alleged irreparable harm would have been to personal property.

1 to trust funds, trust lands, or interest in such lands.” 25 C.F.R. § 900.247 (emphasis added).
2 Plaintiffs fail to show how either of these two elements are met to justify an emergency
3 reassumption. To the extent Plaintiffs argue an immediate threat of imminent harm to the
4 safety of any person, they do not show how that threat results from the Tribe’s alleged failure
5 to fulfill the requirements of the judicial services contract. Again, not only do Plaintiffs not
6 show any link between their alleged harm and the 638 contract, they are unable to explain
7 how the Tribe specifically failed to fulfill the requirements of the contract.

8 Even assuming Plaintiffs argue that Defendants should have exercised a non-
9 emergency reassumption under a lower threshold, Plaintiffs still fail to show why Defendants
10 would be justified in such action, much less that they *must* take that action. Again, even a
11 non-emergency reassumption is not justified by a mere showing that a tribe is failing to fulfill
12 the requirements of the contract.

13 To justify a non-emergency reassumption, BIA must show that there has been a
14 violation of rights, or gross negligence or mismanagement of contract funds, trust fund, or
15 trust lands “under the contract.” These factors must be connected to a tribe’s performance
16 under the contract. Plaintiffs do not show any mismanagement of contract funds, trust funds,
17 or trust lands, and seemingly rely exclusively on an argument that their rights were violated.
18 Again, Plaintiffs provide no caselaw establishing that WIC’s actions constitute a violation of
19 rights, particularly in light of a tribe’s inherent sovereign authority to exclude persons from
20 its lands. Even if Plaintiffs could establish a violation of rights, they fail to show how that
21 alleged violation arose “under the contract.” Accordingly, the Court should grant summary
22 judgment for Defendants.

23 **D. Plaintiffs Fail to Establish that Defendants’ Decision was Arbitrary and**
24 **Capricious**

25 Plaintiffs cannot carry their burden to establish that Defendants acted arbitrarily or
26 capriciously in its oversight of the 638 contract with WIC. The administrative record is
27 replete with evidence showing Defendants’ efforts to monitor the program as presented in
28 the United States Motion for Summary Judgment (ECF No. 101 at 11–12). Plaintiffs do

1 not address these efforts and oversight and simply allege that these efforts do not support
2 the “conclusions made.” (ECF No. 107 at 4). These concessions alone should provide the
3 Court sufficient support to grant Defendants’ motion for summary judgment. However,
4 more reasons to grant the motion exists.

5 As stated by this Court, “[c]ourts have interpreted Congress’ intent as designing the
6 ISDEAA to ‘circumscribe as tightly as possible the discretion of the Secretary.’” ECF No.
7 65 at 19 (citing *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1998)).
8 “Nowhere is Congress’s attempt to limit the abuse of the Secretary’s discretion clearer than
9 in the reassumption process which, by its nature, involves an exercise of federal authority
10 over tribally administered programs without the tribe’s consent.” *Id.* This Court allowed
11 Plaintiffs’ claims to move forward based on its interpretation of ISDEAA as imposing a
12 non-discretionary duty to monitor the 638 contract and investigate allegations raised by
13 Plaintiffs. However, the Court now has the record before it. And the record demonstrates
14 that the BIA indeed monitored WIC’s efforts with the 638 contract, particularly in light of
15 the allegations Plaintiffs made to the Regional Director. *See* ECF No. 101 at 11–12. As
16 argued above, Plaintiffs are unable to establish that BIA would have been justified in
17 exercising a reassumption, much less would have been mandated to do so under the law.
18 Absent a showing that BIA must have reassumed the judicial services program, Plaintiffs
19 are unable to establish that BIA’s actions were arbitrary and capricious. Plaintiffs bear the
20 burden of demonstrating an agency’s action is arbitrary and capricious. *See George v. Bay*
21 *Area Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009) (quoting *City of Olmstead Falls, Ohio*
22 *v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002)). Because Plaintiffs fail to do so, their motion
23 for summary judgment should be denied and the Court should grant summary judgment
24 for Defendants.

25 Plaintiffs misconstrue Defendants’ argument by implying BIA relied solely on
26 respect for tribal sovereignty when deciding not to exercise a reassumption. As argued in its
27 motion for summary judgment (ECF No. 101), the administrative record demonstrates
28 BIA’s extensive monitoring efforts. Respect for tribal sovereignty, together with an absence

1 in the record of any clear justification for a reassumption as required by the regulations at
2 25 C.F.R. § 900, Subpart P, is enough to support BIA's actions, particularly given BIA's
3 extensive efforts to monitor the program.

4 **III. Conclusion**

5 For the foregoing reasons Plaintiffs' motion should be denied, the Court should
6 grant summary judgment for Defendants and dismiss this case.

7 Respectfully submitted this 28th day of August, 2023.

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