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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

DOREEN BROWN, *et al.*,
Plaintiffs,
v.
DEB HAALAND, *et al.*,
Defendants,
WINNEMUCCA INDIAN COLONY,
Intervening Defendant.

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

I. SUMMARY

This action arises from alleged civil rights abuses tied to a series of evictions and demolitions on Winnemucca Indian Colony (“the Colony” or “WIC”) tribal land. Plaintiffs¹, ten now-former Colony residents, brought this action against federal official Defendants² (“the government”) for violations related to the performance of a self-determination contract formed under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5301, *et seq.* (“ISDEAA”). Since this action was filed in 2021—amidst evolving circumstances at the Colony and multiple requests for emergency relief—Plaintiffs have twice amended their complaint and the Court has addressed and limited the scope of Plaintiffs’ claims. (ECF Nos. 63, 65, 66, 97.) The Court ultimately

¹Plaintiffs are Doreen Brown, Louella Stanton, Eldon Brown, Dwight Brown, Elena Loya, Elisa Dick, Lovelle Brown, Kevin Dick, and Leslie Smartt, Jr. (ECF No. 66.)

²Defendants are Deb Haaland, Secretary of the United States Department of the Interior, in her official capacity; Bryan Newland, Assistant Secretary of the United States Bureau of Indian Affairs, in his official capacity; Darryl LaCounte, Director of the United States Bureau of Indian Affairs, in his official capacity; Rachael Larson, Superintendent of the Western Nevada Agency, United States Bureau of Indian Affairs, in her official capacity; and the United States Department of Interior, Bureau of Indian Affairs. (ECF Nos. 66, 100, 101.) WIC is an Intervenor Defendant in this action. (ECF No. 22.)

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1 granted in part and denied in part the government’s motion to dismiss Plaintiffs’ Second
2 Amended Complaint (ECF No. 66 (“SAC”)), allowing Plaintiffs to proceed with seven
3 narrow claims under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*
4 (ECF No. 97.) Plaintiffs’ surviving APA claims for injunctive and declaratory relief
5 include claims for failure to reassume WIC’s judicial services contract (“Contract”),
6 breach of federal trust responsibility and fiduciary duty, and violations of the *Accardi*
7 Doctrine. (ECF Nos. 66, 97.)

8 Now before the Court are Plaintiffs’ motion for summary judgment³ (ECF No. 100
9 (“Plaintiffs’ Motion”)), Defendants’ cross motion for summary judgment⁴ (ECF No. 101
10 (“Defendants’ Cross Motion”)), and Intervenor WIC’s counter motion for summary
11 judgment⁵ (ECF No. 102 (“WIC’s Counter Motion”)). The Court addresses these
12 motions according to the limited standard of review afforded under the APA and does
13 not find that the government abused its discretion based on the Administrative Record
14 (“AR”) now before it. As discussed below, the Court thus denies Plaintiffs’ Motion and
15 grants Defendants’ Cross Motion. The Court grants WIC’s Counter Motion only as to the
16 relief requested for the same reasons and to the same extent as it grants Defendants’
17 Cross Motion.⁶

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22 ³Intervenor WIC opposed Plaintiffs’ Motion in conjunction with its own counter
23 motion for summary judgment. (ECF No. 103). Defendants addressed Plaintiffs’ Motion
in their Cross Motion (ECF No. 101) and did not separately file a response.

24 ⁴Plaintiffs responded to Defendants’ Cross Motion (ECF No. 107) and
25 Defendants replied (ECF No. 111).

26 ⁵Plaintiffs responded to WIC’s Counter Motion (ECF No. 106) and WIC replied
(ECF No. 108).

27 ⁶Because WIC requests the same relief as the government and the Court awards
28 that relief for the reasons set forth in Defendants’ Cross Motion, the Court does not
address—or base its ruling—on WIC’s unique or independent arguments unless
otherwise noted.

1 **II. BACKGROUND**

2 **A. Procedural Posture**

3 The Court has previously described this action’s original procedural background
4 and has positioned the action in a constellation of litigation involving the Colony
5 spanning multiple decades. (ECF No. 65 at 2-13.) It incorporates that detailed
6 procedural history here, providing a brief summary and noting subsequent
7 developments before turning to the undisputed facts in the AR.

8 Plaintiffs filed their initial complaint on August 6, 2021. (ECF No. 6.) The
9 complaint alleged that the transfer of eviction cases from the Bureau of Indian Affairs’
10 (“BIA”) Court of Indian Appeals—which was addressing the cases on appeal from the
11 trial-level BIA Court Indian Offenses (“CFR Court”)—to Winnemucca Tribal Court
12 violated BIA regulations. (*Id.* at 11-12.) In November 2021, while a stay was in place
13 and in response to evictions and demolitions occurring on the Colony, Plaintiffs filed an
14 emergency motion requesting, among other relief, that the Court enjoin the BIA to
15 enforce Court of Indian Appeals’ orders halting evictions.⁷ (ECF Nos. 15, 65 at 11.) WIC
16 intervened. (ECF Nos. 18, 20, 22.) The Court denied Plaintiffs’ emergency motion,
17 finding that the agency courts lacked jurisdiction to issue the orders Plaintiffs sought to
18 enforce, because jurisdiction had been formally transferred to Tribal Court. (ECF Nos.
19 22, 25.) On appeal, the Ninth Circuit summarily denied Plaintiffs’ request for injunctive
20 relief. (ECF No. 24, 26.)

21 The Court ultimately lifted the stay and permitted Plaintiffs to file a first amended
22 complaint (“FAC”), seeking injunctive relief for violations of ISDEAA, the APA, the Fifth
23 Amendment, and a general fiduciary duty owed by the United States to Plaintiffs. (ECF
24 No. 63.) The Court then issued an order denying intervenor WIC’s motion to dismiss the
25 FAC but granting in part the government’s motion to dismiss. (ECF No. 65 (“First
26 Order”).) In the First Order, the Court allowed Plaintiffs’ APA claims to proceed, but
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28 ⁷The Court of Indian Appeals’ orders ostensibly halted evictions pending resolution of disputes regarding tribal leadership. (ECF Nos. 15, 65 at 11.)

1 dismissed their direct ISDEAA claims with prejudice, finding that amendment would be
2 futile because ISDEAA only permits direct claims by tribes against the government. (*Id.*
3 at 39-40.) The Court found that under ISDEAA, the Secretary of the Department of the
4 Interior has a nondiscretionary duty to consider whether complaints that raise concerns
5 about the safety and welfare of individual Indians warrant the reassumption of a self-
6 determination contract. (*Id.* at 22.) The Court dismissed Plaintiffs' Fifth Amendment and
7 breach of fiduciary duty claims with leave to amend.⁸ (*Id.* at 40-43.)

8 Plaintiffs filed their SAC, bringing seven claims and seeking declaratory and
9 injunctive relief. (ECF No. 66.) The Court subsequently issued an order granting in part
10 and denying in part Defendants' motion to dismiss the SAC. (ECF No. 97 ("Second
11 Order").) In the Second Order, the Court allowed Plaintiffs' APA and fiduciary duty
12 claims to proceed to the extent they comport with the limitations set out in the Court's
13 First Order, dismissing parts of those claims appearing to reallege direct ISDEAA
14 violations. (*Id.* at 2-7.) The Court also found that because the BIA had already
15 reassumed law enforcement services at the Colony, portions of the SAC which
16 reference those services exceeded the scope of the government's fiduciary duty as
17 defined by the First Order. (*Id.* at 7.) And the Court allowed Plaintiffs to proceed with an
18 *Accardi* claim under the APA, but made clear that Plaintiffs were not permitted to
19 proceed with an independent Fifth Amendment claim or to otherwise conflate the
20 *Accardi* claim with a constitutional claim. (*Id.* at 7-9.) As construed and limited by the
21 Court's Second Order, the SAC is the operative complaint now before the Court.

22 In November 2022, after Defendants moved to dismiss the SAC, Plaintiffs moved
23 for a preliminary injunction, arguing that they "now face imminent eviction and
24 demolition of their homes within the next 30 days." (ECF No. 84.) They sought an order
25 requiring Defendants to monitor and determine whether to reassume the ISDEAA
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27 ⁸The Court allowed Plaintiffs to amend their breach of fiduciary duty claim to
28 clarify the fiduciary duty that the BIA violated, and to amend their Fifth Amendment
claim to clarify the authority for waiver of sovereign immunity. (ECF No. 65 at 40-43, 45-
46.)

1 judicial services contract on an emergency or non-emergency basis, as defined by 25
2 C.F.R. § 900.247, “before any more evictions, demolitions, or arrests for trespass occur
3 against Plaintiffs.” (*Id.* at 28) (emphasis in original). The Court denied Plaintiffs’ request
4 for emergency relief, finding that they failed to show likelihood of success on the merits
5 or that the public interest favored an injunction, and that they thus failed to meet the
6 high threshold for granting injunctive relief.⁹ (ECF No. 96.)

7 After the Court denied Plaintiffs’ motion for a preliminary injunction, the case
8 preceded according to the Court’s scheduling order (ECF No. 83). Defendants produced
9 the AR. (ECF No. 98.)

10 Plaintiffs now move for summary judgment, seeking an order “forcing Defendants
11 to reassume the [judicial services] contract.” (ECF No. 100 at 12.) Defendants filed their
12 Cross Motion, asserting that Plaintiffs fail to establish any specific trust responsibility
13 and that Defendants wholly discharged their statutory obligations under ISDEAA and
14 thus that the Court should grant judgment for the government.¹⁰ (ECF No. 101.)

15 **B. Relevant Facts**

16 The AR reflects the following facts. In February 2021, WIC approved \$20,000 in
17 funding from the BIA for a tribal court program at the Colony, under the terms of a
18 settlement agreement entered into between WIC and the agency in an appeal to the
19 Interior Board of Indian Appeals (“IBIA”). (AR 000272-85.) The settlement required
20 WIC’s Interim Tribal Council, the contracting party, to supply a court system for criminal
21 and civil claims at the Colony and further provided for the transfer of case files from the
22 agency-run CFR Court to the Colony’s newly-formed Tribal Court. (AR 000274-76.)

23 ⁹Plaintiffs filed a status report noting that Winnemucca Tribal Court issued an oral
24 decision evicting them from the Colony as of December 9, 2022. (ECF No. 92.) In its
25 ruling denying a preliminary injunction, the Court also found that “[t]o the extent Plaintiffs
26 disagree with the Tribal Court’s decision or finding of mootness for the transferred
27 cases, Plaintiffs can challenge the ruling through the Inter-Tribal Court of Appeals of
28 Nevada (‘ITCAN’)” and noted that Plaintiffs’ status reports (ECF Nos. 94, 94-1) indicated
Plaintiffs were in fact seeking recourse by appealing to ITCAN. (ECF No. 96).

¹⁰WIC also opposed Plaintiffs’ motion and filed its Counter Motion asserting
numerous statutory, procedural, and policy grounds for summary judgment. (ECF No.
102.)

1 On June 1, 2021, incorporating the IBIA settlement, WIC and the BIA finalized a
2 judicial services contract under ISDEAA, 25 U.S.C. §§ 5321 *et. seq.* (AR 000204-05,
3 263-70.)

4 On July 12, 2021, Nevada Legal Services (“NLS”) attorneys sent a letter to BIA’s
5 Western Regional Director, Bryan Bowker, on behalf of Plaintiffs as Colony residents.
6 (AR 000191-215.) The letter challenged the BIA’s transfer of eviction cases and
7 jurisdiction from CFR Court to Winnemucca Tribal Court and alleged that the evictions
8 reflected an escalating campaign of harassment by WIC’s Interim Tribal Council against
9 Plaintiffs.¹¹ (*Id.*). Specifically, the letter asserted that on June 10, 2021, the WIC Interim
10 Tribal Council began serving fraudulent eviction notices on Plaintiffs through its
11 attorneys. (AR 000191-95.) The eviction notices directed Plaintiffs to remove
12 themselves and their property from the Colony within 30 days for failure to comply with
13 “the Residency Ordinance of the Winnemucca Indian Colony, Ordinance 601 (A)” and
14 stated that “[i]f you determine to challenge this removal, you are directed to file with the
15 Tribal Court.”¹² (AR 000193.) The July NLS letter also identified a specific concern that
16 per the address listed on the eviction notices, the Winnemucca Tribal Court was located
17 in Reno—far from the Colony—at the same address as the law office associated with
18 the Interim Tribal Council.¹³ (AR 000194.)

19 On July 27, 2021, Marlys Hubbard, Tribal Operations Officer of BIA, wrote WIC to
20 inform that she had been appointed as Awarding Official’s Technical Representative
21 (“AOTR”) for the Winnemucca Tribal Court program. (AR 000187.) She asked whether
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23 ¹¹NLS attached to its letter an order from the Court of Indian Appeals for the
24 Southern Plains and Western Regions, dated July 6, 2021, staying the transfer of cases
CIV-19-WR-15, 16, 17, 18, 19, and 20 to WIC Tribal Court. (AR 000206-07.)

25 ¹²Ordinance 601 (A) was adopted by the WIC Council in March 2020, and
26 provides that tribal members and non-members must maintain residency permits to live
on WIC tribal land. (AR 000208-10.)

27 ¹³In their statement of material facts, Plaintiffs assert that “by June of 2021 . . .
28 the newly funded WICTC tribal court . . . did not yet exist on the Colony.” (ECF No. 100
at 4.) The parties dispute the assertion that the Tribal Court did not exist at that time.
(ECF No. 102 at 7-8.)

1 the Tribal Court had received all cases from the CFR Court and sought to coordinate a
2 monitoring plan. (*Id.*) On July 29, WIC responded, asserting that Plaintiffs were involved
3 in a criminal enterprise involving hazardous and infectious waste and were not
4 members of the Colony. (AR 000188-89.) WIC further asserted that the Tribal Court
5 Judge had received the transfer from the CFR Court without an index or docket, and
6 provided contact information for the Tribal Court Judge and clerk for monitoring visits.
7 (*Id.*)

8 On August 6, 2021, NLS filed the initial complaint in this action in this Court.
9 (ECF No. 6.)

10 In October 2021, WIC Council adopted a housing ordinance allowing for self-help
11 evictions, authorizing the Colony's contractor to clear some lots of "all personal property
12 and trespassers." (AR 000175, 254-55.)

13 On November 2, 2021, acting under the new housing ordinance, WIC's
14 contractor began to remove property and people it deemed in trespass. (AR 000255,
15 ECF No. 15).¹⁴

16 On November 3, 2021, the BIA's Court of Indian Appeals for the Southern Plains
17 and Western Regions issued an emergency restraining order against WIC and its
18 agents, ordering the tribe to halt evictions. (ECF No. 15 at 6.) That day, NLS attorneys
19 also contacted BIA law enforcement to request that the CFR Court order be enforced
20 and that the Interim Tribal Council be removed. (AR 000185-86.) The following day, on
21 behalf of Plaintiffs, NLS filed an emergency motion in this Court to enforce the CFR
22 Court order. (ECF No. 15.)

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25 ¹⁴Plaintiffs emphasize that Contractors arrived at the Colony with heavy
26 machinery to remove Plaintiffs and property from a 20-acre parcel. (ECF No. 100 at 5.)
27 In their Motion they also cite to affidavits from Elisa Dick and Les Smartt, which include
28 statements about Plaintiffs' status as long-time residents of the Colony and about
homelessness following the evictions. (ECF Nos. 100-1, 100-2.) Defendants and WIC
dispute these facts as unsupported by the AR and as improper evidence at the
summary judgment stage. (ECF Nos. 101 at 7, 102 at 8.)

1 On November 4, in the midst of these events on the Colony and in federal court,
2 the BIA contacted the Tribal Court Judge regarding the eviction cases. (AR 000231.)
3 Sophia Torres, Acting BIA Tribal Operations Officer/Court Administrator, communicated
4 with others in the BIA that, per emails and phone calls with the Inter-Tribal Council of
5 Appeals for Nevada (“ITCAN”), WIC did not yet have an appellate court but that “[t]hey
6 have a very important case in the appellate process that should be heard but there is no
7 mechanism for it to be heard due to the issues going on right now.” (AR 000183-84.).¹⁵
8 Torres also asked for a phone call with AOTR Hubbard and noted in emails that WIC
9 had bulldozed houses without a court order and “plan[ned] on doing more,” that she had
10 spoken to the Tribal Court Judge, and that he was still reviewing the case file and no
11 orders were yet issued and no hearings were scheduled. (AR 000182, 185, 231.) Later
12 communications between the BIA and WIC revealed continued confusion as to whether
13 the Tribal Court had condoned the evictions: BIA officials emphasized that the situation
14 in early November “prompted questions regarding if the contractors [tearing down
15 structures on WIC land] had authority directed by the Winnemucca Tribal Court through
16 a court order.” (AR 000231.)

17 On November 5, 2021, Hubbard sent a Memorandum to Gerry Emm, Acting
18 Superintendent, and Marilyn Bitisillie, Awarding Official, stating that she was setting up
19 a monitoring visit at the Colony and had inquired as to the status of the Inter-Tribal
20 Council of Nevada as an appellate court, subsequently providing WIC’s resolution
21 adopting ITCAN as its appellate body to ITCAN officials. (AR 000070.) The initial
22 monitoring visit, scheduled for November 9, could not occur as planned because of
23 volatile “events on the Colony.” (AR 000231.)

24 On November 12, 2021, the BIA sent a letter to WIC regarding a monitoring visit.
25 (AR 000169.) Shortly thereafter, NLS attorneys sent another letter to BIA’s Bryan
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27 ¹⁵WIC believes the statement that no appellate body was empowered to oversee
28 WIC Tribal Court was an error, because ITCAN had been adopted as the appellate
body by resolution of the WIC Council immediately after the Contract was granted. (ECF
No. 102 at 4 n. 1.)

1 Bowker, demanding that the BIA reassume both law enforcement services and judicial
2 services under the ISDEAA Contract, according to the provisions of 25 U.S.C. § 5330.
3 (AR 000170-81.) Internal BIA emails indicate further discussion of the need to set up a
4 monitoring visit at the Colony and scheduling challenges because of the volatile
5 situation. (AR 000164-69, 231, 261-62.) Among other communications, Nancy Jones,
6 Acting Deputy Regional Director of Indian Services, pointed to the letter from NLS
7 attorneys in an email and noted that “the sooner there can be a meeting regarding the
8 Court the better.” (AR 000167-68.)

9 On November 17, 2021, the BIA again contacted the Tribal Court Judge to
10 discuss the status of the transferred eviction cases. (AR 000166.) The Judge clarified
11 that the transferred files were still under review and again that no eviction orders had
12 been issued. (*Id.*) On November 19, Superintendent Rachael Larson communicated
13 with WIC to confirm a December 8 meeting with herself as well as with the Deputy
14 Superintendent, Bitisillie, and Hubbard. (AR 000259-60.)

15 On November 30, 2021, BIA agents discussed a Tribal Court monitoring visit set
16 for the following month. (AR 000161-63.) In particular, BIA officials discussed whether
17 the agency was “aware of any other incidents that have occurred on the Colony since
18 the first week of November when we were given information about potential houses
19 being torn down.” (AR 000161.) Planning for the monitoring visit, Torres sought to
20 discuss next steps “as far as providing further technical assistance until the Colony fully
21 meets the requirements to have the full court or whether we will turn over full
22 jurisdiction,” noting that the CFR Court retained criminal but not civil jurisdiction on the
23 Colony. (*Id.*)

24 On December 1, 2021, the Western Region, Tribal Government Services,
25 prepared a memo regarding the upcoming December 8 meeting. (AR 000160.) The
26 memo focused partly on criminal jurisdiction, but addressed the November order from
27 the CFR Court and noted that the BIA had provided magistrates of that court with a
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1 memorandum directing them to cease exercising civil jurisdiction as they no longer had
2 it. (*Id.*)

3 On December 8, 2021, the BIA held the scheduled meeting with WIC to discuss
4 the tribal court program. (AR 00068-69.) According to a BIA report detailing this meeting
5 as well as three other meetings between agency officials and WIC, the “forum of the
6 meeting made it very difficult to conduct a review” and, among other issues, “[t]he Tribe
7 did not provide information of proper procedures being followed in their Tribal Court nor
8 did they verify if complaints are filed in Tribal Court.” (AR 000220-25.) “[T]he Colony
9 could not verify or demonstrate that their Tribal Court is functioning for both civil and
10 criminal cases . . . [the visit] was merely a question-and-answer format.” (AR 000221.)
11 In a memorandum Hubbard prepared on December 10 for Larson describing the
12 December 8 meeting, Hubbard noted that WIC had provided unsatisfactory information
13 about its court procedures, but that an emergent situation involving conflict with
14 Plaintiffs and protesters had required deferring the meeting until the situation on the
15 Colony was less volatile. (AR 00068-69.) Further follow up communications amongst
16 officials noted that the Tribal Court Judge attended the meeting and stated he was
17 getting caught up; the notes also indicate that the court building at Winnemucca was
18 ready for Tribal Court proceedings, but that protestor presence suggested the need for
19 a contingency court at the University of Nevada, Reno National Judicial College. (AR
20 000152-53, 155-57.)

21 On December 10, 2021, Nancy Jones on behalf of Bowker sent a letter to the
22 Tribal Court Judge to provide technical assistance. (AR 000082.)

23 On December 14, 2021, Larson sent a letter to the WIC Council’s Chairwoman
24 outlining areas of potential concern with the Tribal Court program. (AR 000231-32, 238-
25 42.) The letter requested information about the functioning of the Tribal Court in both
26 civil and criminal matters and noted that “[i]t has been over five months since the only
27 active civil case was transferred to the Winnemucca Tribal Court” and “no action since
28 that time on the case . . . we have reason to believe that there are issues requiring the

1 Winnemucca Tribal Council's attention, as the Contractor, to ensure the . . . Court is
2 currently functioning and performing the services of the Contract." (AR 000238-39.) The
3 BIA asked for answers to numerous questions regarding the Tribal Court plans involving
4 criminal matters (AR 000232-34.) It also noted that "[i]f the Colony is not able to
5 currently perform the services outlined in the Contract, the Colony may also consider a
6 temporary or partial retrocession of the Contract under 25 CFR § 900.240." (AR
7 000241.) The letter also states that the BIA "stand[s] prepared to offer additional
8 technical assistance as needed and available." (AR 000242.)

9 On December 15, 2021, WIC Council responded to the BIA's letter regarding
10 areas of potential concern. (AR 000243-47.) The Council expressed frustration that BIA
11 provided only \$20,000 in funding under the Contract and that BIA law enforcement had
12 not intervened adequately on the issue of alleged trespassers, who it asserted had
13 significant amounts of drugs and ammunition on their properties. (*Id.*) WIC disputed the
14 dates on which jurisdiction had been transferred from CFR Court and pointed towards
15 confusion about jurisdictional issues reflected in BIA courts' continued rulings (*Id.*) The
16 WIC Council also asserted that it had repeatedly asked for training on criminal and civil
17 procedure codes and on tribal court positions, and that the BIA had failed to provide any
18 requested support. (*Id.*)

19 Communications continued between the BIA and WIC through January 2022.
20 Among other communications, on January 20, Larson sent an additional letter to WIC
21 regarding the Tribal Court program and requesting a visit to complete Tribal Court
22 program review. (AR 000229, 237.) On January 21, WIC responded to this letter. (AR
23 000235-36.) The WIC Council emphasized that it believed it had complied with previous
24 reviews, that the Tribal Court "is extremely busy with the work being generated by the
25 trespassers on the Colony who have all filed pleadings in December and January," that
26 if the BIA were concerned about the functioning of the Tribal Court it would respond to
27 previous requests for start-up cost funding, and that BIA law enforcement had allowed
28 the Administration Building and Court Room to be vandalized by trespassers. (*Id.*) On

1 January 27, BIA officials held a teleconference with WIC to discuss the Tribal Court
2 program. (AR 000080.) On January 31, BIA police officer Joel Chino wrote an email to
3 the BIA noting that there was no solid foundation for charging individuals with crimes
4 occurring on the Colony in Tribal Court. (AR 000078.)

5 In February 2022, WIC Council sent a letter to Larson requesting additional
6 funding for the WIC Court and noting that BIA had not yet approved or disapproved
7 contract amendments proposed in June 2021. (AR 000226-28.)

8 On July 25, 2022, the BIA held another meeting with WIC Tribal Council
9 members via phone regarding the Tribal Court program, with particular focus on
10 auditing program finances. (AR 000221-222, 314-16.) WIC emphasized that it was
11 monitoring and recording all expenditures as required under the Contract. (AR 00314-
12 16.) The BIA's plans to meet with the Tribal Court Judge as part of its review were "met
13 with hesitation." (AR 000222.) The meeting notes indicate that the BIA believed more
14 information was needed on the judicial services process, and that "[t]here are a lot of
15 barriers because no tribal or colony members can safely enter the Colony . . . [t]he tribe
16 believes they have consulted with outside entities such as the state and county [and] . .
17 . [t]hey have posed public notices informing the public of ongoing events on the Colony."
18 (AR 000316.)

19 On August 19, 2022, the BIA held an in-person visit with the Tribal Court
20 temporary judge and Tribal Court clerk.¹⁶ (AR 000222-24.) BIA officials later reported
21 numerous issues discussed at the meeting, including that the Tribal Court had no case
22 management system, no working court facility or building, no clearly established
23 guidelines for proper service, and no confirmation that Tribal Court proceedings are
24 conducted in accordance with tribal law. (*Id.*) The BIA report from the meeting indicates
25 that the Tribal Court temporary judge requested agency assistance to follow up with the
26 BIA Tribal Justice Support Directorate. (AR 000223.) The temporary judge stated that

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28 ¹⁶At this time, the Colony had contracted with a temporary judge for the single
eviction-related civil case in Tribal Court, after the Chief Tribal Court Judge recused
himself due to possible conflicts of interest. (AR 000222.)

1 they had sent numerous requests to the BIA office for a thorough Tribal Court
2 assessment. (*Id.*) The BIA noted that the AOTR and Awarding Officer planned to visit
3 the Tribal Administration Office to verify administrative manuals and records
4 management system documents. (*Id.*)

5 On October 19, 2022, in part as a response to the August 19 meeting, BIA
6 officials attended a meeting scheduled by the Tribal Council with the purpose of
7 conducting review regarding the Tribal Courts program. (AR 000224.) At the meeting,
8 the officials requested documents from the tribe regarding WIC judges and attorneys, as
9 well as a bond list. (*Id.*) Hubbard stated in meetings notes that at this meeting, “[t]he
10 Colony invited both the AOTR and AO to observe the Tribal Court Assessment that was
11 to be conducted by the Tribal Justice Support team” during its visit later that month, and
12 noted that the team had to decline the invitation due to agency conflicts. (AR 000313.)
13 The BIA subsequently expressed concern that it had not received requested documents
14 because “this Tribal Court Program does not have a Program Director that can best
15 respond to and be available throughout the review process” and that “[t]he Agency was
16 expected to be under Tribal Council’s oversight at all monitoring visits” which meant that
17 “reviews were challenging and the outcomes are incomplete.” (AR 000224.)

18 On December 9, 2022, the BIA sent a written report to WIC tribal council detailing
19 content and concerns arising from four meetings with WIC—including those on
20 December 8, 2021, July 25, 2022, August 19, 2022 and October 19, 2022—regarding
21 the Tribal Court program. (AR 000220-25.)

22 **III. DISCUSSION**

23 The parties each move for summary judgment as to the claims asserted in
24 Plaintiffs’ SAC, as construed and limited by the Court’s Second Order. All of Plaintiffs’
25 remaining claims arise under the APA. They include (1) claims for reassumption of
26 judicial services (claims one through four); (2) claims for breach of trust/breach of
27 fiduciary duty (claims five and six); and (3) an *Accardi* claim for agency failure to follow
28 its own regulations (claim seven). (ECF Nos. 66, 97.)

1 The APA provides an avenue for judicial review of federal agency actions. See 5
2 U.S.C. §§ 701-706. A federal district court may not “substitute its judgment for that of
3 the agency.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971),
4 *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Accordingly, a
5 district court addressing APA claims does not apply the traditional summary judgment
6 analysis set out in Federal Rule of Civil Procedure 56. See *Occidental Engineering Co.*
7 *v. INS*, 753 F.2d 766, 769-70 (9th Cir. 1985). Instead, there are “no disputed facts that
8 the district court must resolve,” and a court’s role is to “determine whether or not as a
9 matter of law the evidence in the administrative record permitted the agency to make
10 the decision it did.” *Id.* In conducting this analysis, a district court must be “highly
11 deferential, presuming the agency action to be valid and affirming the agency action if a
12 reasonable basis exists for its decision.” *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife*
13 *Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (quoting *Independent Acceptance Co. v.*
14 *California*, 204 F.3d 1247, 1251 (9th Cir.2000)).

15 A federal court reviewing an administrative record under a deferential standard
16 may “compel agency action unlawfully withheld or unreasonably delayed” and may hold
17 unlawful and set aside agency action, findings, and conclusions found to be “(A)
18 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B)
19 contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of
20 statutory jurisdiction, authority, or limitations, or short of statutory right” 5 U.S.C. §
21 706. See also *Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007).
22 A plaintiff bears the burden of demonstrating that agency action is arbitrary and
23 capricious. See *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009)
24 (quoting *City of Olmsted Falls, Ohio v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002)). “To
25 have not acted in an arbitrary and capricious manner, the agency must present a
26 ‘rational connection between the facts found and the conclusions made.’” *Brong*, 492
27 F.3d at 1125 (quoting *Overton Park*, 401 U.S. at 415-16). Here, the Court determines
28

1 whether an agency's conclusions were based on consideration of relevant factors. See
2 *Nw. Ecosystem Alliance*, 475 F.3d at 1140.

3 Addressing the motions now before it, the Court first briefly discusses threshold
4 exhaustion requirements. It then applies a narrow summary judgment analysis to
5 Plaintiffs' APA claims, considering whether the AR adequately supports the agency's
6 decisions as a matter of law. See *Overton Park*, 401 U.S. at 415-16 (1971) (finding that
7 a court must engage in a "probing, in-depth review" to make this determination).

8 **A. Threshold Exhaustion Requirements**

9 The Court determined in the First Order—and reiterated in the Second Order—
10 that it has subject matter jurisdiction to hear Plaintiffs' APA claims, finding also that
11 prerequisites for judicial review of APA claims, such as finality, were satisfied. (ECF
12 Nos. 65 at 20-22, 30-31; 97 at 6.) Defendants do not directly discuss these preliminary
13 findings in their Cross Motion. WIC, however, revisits some of these questions in its
14 response to Plaintiffs' Motion and its Counter Motion, arguing in part that Defendants
15 are entitled to summary judgment because (1) Plaintiffs have not exhausted their
16 administrative remedies; (2) Plaintiffs have not exhausted their tribal court remedies;
17 and (3) this Court should not assume jurisdiction until administrative and tribal
18 processes are complete. (ECF Nos. 102, 103.) The Court has already noted that it
19 generally need not and does not address arguments unique to WIC's Counter Motion in
20 this order. But given that that exhaustion is entwined both with preliminary jurisdictional
21 questions and with the merits of this action as they relate to tribal sovereignty, the Court
22 briefly revisits the issues of administrative and tribal court exhaustion.

23 **1. Administrative remedies**

24 In the First Order, the Court found that failure to exhaust BIA's administrative
25 remedies was not a jurisdictional defect under the relevant regulations, and thus that the
26 Court has subject matter jurisdiction over this action. (ECF No. 65 at 31-33.) It reiterates
27
28

1 that finding here.¹⁷ The Court then proceeded to a non-jurisdictional analysis. (*Id.* at 32-
2 36.) Considering the factors laid out in *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992),
3 it held that Plaintiffs’ failure to exhaust was excused because (1) there was a risk that a
4 party would suffer irreparable harm without immediate judicial consideration, and (2) the
5 administrative agency was not empowered to grant effective relief, given that it was
6 unclear whether IBIA would have the power to review the Secretary’s decisions. (*Id.* at
7 33-35.) WIC argues that the first exception no longer applies because any emergency
8 has passed and Plaintiffs have long since left the Colony. (ECF No. 102 at 16-17.) And
9 it argues that the second exception does not apply because relevant case law now
10 supports that IBIA has authority to review non-emergency reassumptions. (*Id.* at 17.)

11 Without unnecessarily repeating its prior analysis, the Court finds that a
12 determination that Plaintiffs now must exhaust their administrative remedies—after
13 multiple years of litigation—would run counter to the purposes of the prudential doctrine
14

15 ¹⁷WIC primarily argues in its Counter Motion that, since the First Order, it has
16 become clear that exceptions to the non-jurisdictional but statutorily mandatory
17 exhaustion requirement do not properly apply. (ECF No. 102 at 16-17.) However, WIC
18 also appears to make a jurisdictional argument: It asserts that the propriety of the
19 evictions in this case is fundamentally connected to leadership of the tribe, and that this
20 Court “lacks jurisdiction to act on matters that are directly related to the validity of the
21 Council, including eviction.” (*Id.* at 17-18.) Here, WIC cites to the Ninth Circuit’s 2020
22 memorandum opinion in *Winnemucca Indian Colony v. United States ex rel. Dep’t of the*
23 *Interior*, 819 F. App’x 480, 482 (9th Cir. 2020), in which the appellate court held that the
24 district court lacked subject matter jurisdiction to decide questions regarding the rightful
25 leadership of the Colony, because at the time the complaint was filed, BIA had not
26 reached a final decision on whether to recognize any group as the Colony’s tribal
27 council. *See id.* At that time, BIA was complying with a remand order from IBIA to
28 answer leadership questions, and any decision by BIA would have been appealable to
IBIA. *See id.* These circumstances are not the same as the circumstances in the action
now before the Court. There, administrative exhaustion was directly tied to the related
but distinct finality requirement for judicial review: The same leadership questions
addressed in the district court were *concurrently* on appeal in a parallel administrative
process. *See Winnemucca Indian Colony*, 819 F. App’x at 482 (“[u]nder our cases, if
there is no final agency action, the court lacks subject matter jurisdiction.”). The case
now before the Court, by contrast, deals with agency inaction, and questions regarding
evictions and reassumption of the Contract—while certainly connected to questions
regarding tribal leadership—are distinct and several steps removed from such
leadership questions. As a result, there is no equivalent usurpation of agency processes
implicated. The Court already considered statutory requirements and regulations
impacting exhaustion in detail in the First Order and finds no reason to revise those
findings here.

1 of administrative exhaustion. See *Maronyan v. Toyota Motor Sales, U.S.A., Inc.*, 658
2 F.3d 1038, 1040 (9th Cir. 2011) (“[S]tatutorily created exhaustion requirements
3 ordinarily constitute prudential affirmative defenses that may be defeated by compelling
4 reasons for failure to exhaust.”); *Agua Caliente Tribe of Cupeño Indians of Pala*
5 *Reservation v. Sweeney*, 932 F.3d 1207, 1216 (9th Cir. 2019). At minimum, the Court
6 finds that the *McCarthy* exception as to the risk of irreparable harm applied at the
7 inception of this litigation; any subsequent reduction of such risk is not dispositive in a
8 non-jurisdictional analysis that takes judicial efficiency into account. The Court
9 emphasized in the First Order that obligating Plaintiffs to seek agency relief, given the
10 operating circumstances, would duplicate efforts rather than promote judicial efficiency.
11 (ECF No. 65 at 35.) That consideration is equally prominent now.

12 **2. Tribal Court remedies**

13 In the First Order, the Court found that WIC’s tribal court exhaustion arguments
14 were predicated on Plaintiffs’ original complaint in this action, and thus nonresponsive to
15 the claims asserted in the FAC. (ECF No. 65 at 43.) WIC argues that it is now clear that
16 the Winnemucca Tribal Court has jurisdiction over evictions on the Colony and that this
17 dispute should be resolved in Tribal Court. (ECF No. 102 at 14.) Most notably, WIC
18 notes that Plaintiffs reference Tribal Court Case No. 21-WINN-001 for the first time in
19 the SAC. (*Id.* at 14-15.) WIC emphasizes that that Winnemucca Tribal Court action, in
20 which Plaintiffs appear as defendants, has been appealed to the ITCAN. (*Id.* at 22.)
21 WIC also argues that if it does not dismiss the action, this Court should stay its hand
22 pending resolution of the Tribal Court proceedings. (*Id.* at 22-23.)

23 Here, it is not clear that new arguments regarding tribal exhaustion are
24 responsive to the SAC for much the same reason WIC’s original arguments were not
25 responsive to the FAC: Plaintiffs here seek reassumption of the Contract, which is not
26 the same as any remedy directly addressing evictions which could be obtained in Tribal
27 Court. Tribal court exhaustion is fundamentally a matter of comity meant to prevent
28 “direct competition” between federal and tribal courts; it is not a jurisdictional

1 prerequisite to federal court review. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16
2 (1987). See also *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S.
3 845, 857 (1985) (holding that whether a “federal action should be dismissed, or merely
4 held in abeyance pending the development of further Tribal Court proceedings” is a
5 question generally left to district courts’ discretion). In addition, many courts have found
6 that the tribal exhaustion doctrine applies only when there is a first-filed action in tribal
7 court. See, e.g., *Alzheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803 (7th Cir.
8 1993).

9 Because tribal exhaustion is a non-jurisdictional requirement—and because the
10 Tribal Court eviction cases were filed after this action commenced and those cases do
11 not address the remedy of reassumption of the Contract—the Court finds that it need
12 not refrain from addressing Plaintiffs’ claims on their merits. Moreover, to the extent
13 WIC asks the Court to stay proceedings pending resolution of the Tribal Court eviction
14 cases, the Court finds that such a stay would run counter to judicial efficiency given the
15 likelihood that the Court’s findings regarding the validity of the BIA’s decision would
16 remain the same regardless of the outcome of any ITCAN appeal.

17 The Court thus declines to dispose of this action on the basis of Plaintiffs’ failures
18 to exhaust administrative or tribal remedies. Plaintiffs seek a narrow remedy in this
19 action, and the Court does not sit aside merely because that narrow remedy is partially
20 connected to broader ongoing disputes about residency and leadership of the Colony. It
21 is important to note, however, that where Plaintiffs’ allegations of harm in the context of
22 reassumption of the Contract are tied to broader disputes, the Court considers this
23 broader picture in its review of the merits to the extent it implicates the reasonableness
24 of agency decisions under an APA analysis.

25 **B. Reassumption of Judicial Services (Claims One to Four)**

26 Plaintiffs’ first four claims address violations of the APA stemming from the
27 Defendants’ failure to monitor, investigate, and reassume WIC’s ISDEAA judicial
28

1 services contract on an emergency or non-emergency basis.¹⁸ (ECF No. 66 at 55-62.)
2 Plaintiffs argue that they are entitled to summary judgment because the government's
3 failure to reassume the Contract constituted arbitrary and capricious inaction in violation
4 of the APA. (ECF No. 100 at 10.) The government, by contrast, moves for summary
5 judgment on the basis that the Secretary, through the BIA, wholly satisfied her statutory
6 obligations to investigate WIC's performance under the Contract. (ECF No. 101 at 11-
7 12.) In light of the evidence in the AR, the Court agrees with the government.

8 To support a claim for agency inaction under the APA, a plaintiff must show the
9 agency had a nondiscretionary duty to act and that the agency's delay in acting was
10 unreasonable. See *Vaz v. Neal*, 33 F.4th 1131, 1135 (9th Cir. 2022) (“[A] court may
11 compel agency action under the APA when the agency (1) ‘has a clear, certain, and
12 mandatory duty,’ and (2) has unreasonably delayed in performing such duty.”) (internal
13 citation omitted); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004).¹⁹

14 The Court has already established and described in detail the contours of the
15 nondiscretionary agency duty at issue here. (ECF No. 65 at 22-29.) Under the
16 regulations promulgated under § 5330, the Secretary of the Interior is empowered to
17 reassume an ISDEAA self-determination contract on either an emergency or a non-
18 emergency basis.²⁰ See 25 C.F.R. §§ 900.246-256. In the First Order, reading

19 _____
20 ¹⁸The Court previously permitted these claims to proceed as alleged in the SAC
21 but dismissed parts of those claims appearing to reallege direct violations of the
ISDEAA. (ECF No. 97 at 2-4.) The Court thus addresses these claims as limited by the
Second Order.

22 ¹⁹The Ninth Circuit uses a six-factor balancing test to determine whether an
23 agency's delay in performing its nondiscretionary duty is unreasonable. See *Vaz*, 33
24 F.4th at 1137 (listing these six factors, which include (1) whether the time the agency
25 took to make the decision was governed by a “rule of reason”; (2) whether Congress
26 has provided a “timetable or other indication of the speed with which it expects the
27 agency to proceed” in the enabling statute; (3) whether the regulatory action involves
“human health and welfare,” which may make delays less tolerable; (4) whether the
expediting the allegedly delayed action would have an effect “on agency activities of a
higher or competing priority”; (5) “the nature and extent of the interests prejudiced by
delay”; and (6) that the reviewing court need not “find any impropriety lurking behind
agency lassitude” before finding an action is unreasonably delayed).

28 ²⁰A reassumption is an “emergency reassumption” if the tribe's failure to fulfill the
self-determination contract's requirements poses either “(1) [a]n immediate threat of

1 ISDEAA’s statutory provisions together, the Court found that the Secretary has a
2 nondiscretionary duty to (1) consider allegations that the health, safety, and welfare of
3 any persons are being endangered by a tribe’s performance under a self-determination
4 contract and (2) determine whether reassumption is warranted. (ECF No. 65 at 26.) See
5 25 U.S.C. §§ 5329-5330. The Court emphasized that ISDEAA does not contemplate the
6 BIA merely standing by with unfettered discretion to ignore any conceivable deficit in a
7 tribe’s performance under a contract. (ECF no. 65 at 22.) Importantly, however, the
8 Court also framed the Secretary’s nondiscretionary duty as primarily a responsibility to
9 fully address complaints and make relevant determinations, as opposed to a duty
10 extending to the *result* of those determinations. (*Id.* at 22-29.) See also 25 C.F.R. §
11 900.247 (imposing required action on the BIA in the case of an emergency
12 reassumption). The Court noted in the First Order that “[a]lthough the Secretary may
13 determine that grounds for reassumption do not exist, that further investigation is
14 necessary, or that grounds for an emergency or non-emergency reassumption do
15 exist—choosing not to consider the complaint . . . is not an option within her discretion.”
16 (ECF No. 65 at 28-29.) After considering both the Secretary’s duties imposed under
17 ISDEAA and the limitations of those duties, the Court allowed Plaintiffs’ APA claims for
18 reassumption of judicial services to survive dismissal because Plaintiffs also plausibly
19 alleged that the agency delay in making a determination was unreasonable. (*Id.* at 25-
20 31.)

21 Now at the summary judgment stage, the Court turns to the AR. See *Occidental*
22 *Engineering Co.*, 753 F.2d at 769-70 (describing a court’s role to determine whether as
23 *a matter of law* the evidence in the administrative record permitted the agency to decide

24 _____
25 imminent harm to the safety of any person; or (2) [i]mminent substantial and irreparable
26 harm to trust funds, trust lands, or interest in such lands.” 25 C.F.R. § 900.247(a). A
27 reassumption is a “non-emergency reassumption” if there has been either “(1) [a]
28 violation of the rights or endangerment of the health, safety, or welfare of any person; or
(2) [g]ross negligence or mismanagement” of contract or trust funds or lands. *Id.* at §
900.247(b). In an emergency reassumption, the Secretary is required to “immediately
rescind, in whole or in part, the contract” and “assume control or operation of all or part
of the program.” *Id.* at § 900.252.

1 as it did). The Court finds based on the record that the Secretary adequately discharged
2 her nondiscretionary duty and that action was not unreasonably delayed, given evolving
3 circumstances at the Colony. Taking the facts in the AR as undisputed, the Court finds
4 that Plaintiffs cannot as a matter of law demonstrate that the government's inaction was
5 arbitrary and capricious or otherwise unreasonable, because the BIA's decisions were
6 rationally tied to facts and because considering relevant factors, the agency was not
7 obligated to reach the conclusion that reassumption of the Contract was necessary. See
8 *Brong*, 492 F.3d at 1125 (quoting *Overton Park*, 401 U.S. at 415-16).

9 Plaintiffs argue that the government "failed to investigate and determine whether
10 reassumption was warranted despite knowing that Plaintiffs' homes were being
11 demolished." (ECF No. 100 at 10-12.) But taken as a whole, the AR suggests that
12 across relevant time periods, the BIA actively considered allegations that the health,
13 safety, and welfare of individuals on WIC tribal land were endangered by the tribe's
14 performance under the self-determination contract. Defendants' monitoring efforts
15 included (1) contacting WIC's Tribal Court Judge about transferred eviction cases from
16 CFR Court (AR 000166, 182, 231); (2) sending numerous letters and other
17 communications to WIC and Plaintiffs about judicial services issues (AR 000082,169,
18 229, 235, 243-47); (3) offering and providing technical assistance (AR 000082, 242); (4)
19 requesting information from WIC about problems with the Tribal Court and noting the
20 possibility of a temporary or partial retrocession of the Contract (AR 000241); (5)
21 conducting monitoring visits with WIC (AR 000169, 222); (6) holding meetings with WIC
22 Council and Tribal Court personnel (AR 000080, 152-53, 221-22, 314-16); (7)
23 discussing WIC's performance under the contract and next steps in intra-agency
24 communications (AR 000070, 160, 161-63, 182-45); and (8) communicating with ITCAN
25 to clarify appellate procedures (AR 000070, 183-84).

26 Moreover, the record does not support a finding that the agency's responses
27 were unreasonably delayed. Although risks to health and welfare make any agency
28 delay less tolerable, see *Vaz*, 33 F.4th at 1137, the BIA's monitoring and investigatory

1 efforts occurred in the context of rapidly shifting circumstances which make it
2 problematic to consider the Secretary's response to a single event in isolation. For
3 example, Plaintiffs' four reassumption claims, and in particular their two emergency
4 reassumption claims, focus extensively on the period between June 2021—when BIA
5 officials were put on notice of Plaintiffs' complaints—and November and December
6 2021—when evictions and demolitions occurred and conditions at the Colony
7 worsened. (ECF No. 66 at 55-62.) But reviewing the record from this period,²¹ the Court
8 notes that (1) over the summer of 2021, it was unclear exactly what role the Tribal
9 Court, as opposed to the Tribal Council and tribal law enforcement, would play in
10 furthering the evictions, partially because of the quagmire of technical issues with
11 transfer of CFR Court files; (2) when the WIC Council passed its self-help ordinance in
12 the fall of 2021 and the situation rapidly deteriorated at the Colony, the BIA attempted to
13 respond and monitor the situation; (3) volatile circumstances on the Colony—and
14 threats directed at the Tribal Court—may have made it difficult to ascertain whether or
15

16 ²¹The Court highlights several aspects of the sequence of events during this
17 period. To start, BIA's Marlys Hubbard, in her capacity as AOTR for the WIC Tribal
18 Court program, communicated with WIC on July 27, 2021, several weeks after receiving
19 Plaintiffs' first letter through their attorneys at NLS, inquiring as to the status of
20 transferred eviction cases from CFR Court and seeking to coordinate a monitoring plan.
21 (AR 000187). WIC responded forcefully, asserting that Plaintiffs were involved in a
22 criminal enterprise and noting that the Tribal Court Judge had received the transferred
23 cases without an index or docket. (AR 000188-89.) While Plaintiffs' original July letter
24 alleged that WIC's Interim Tribal Council served fraudulent eviction notices under the
25 auspices of the new Tribal Court, WIC Council did not adopt the housing ordinance
26 allowing specifically for self-help evictions until October 2021, the month before
27 evictions and demolitions occurred. (AR 000255.) When those evictions began shortly
28 thereafter, BIA Officials responded relatively quickly to attempt to investigate the
situation. Officials contacted the Tribal Court Judge on November 4 and re-initiated
efforts to set up monitoring visits on November 5. (AR 00070, 231.) The AR reflects
numerous communications, meetings, and monitoring events in November and
December 2021. (AR 000161-81, 231, 261-62.) The record also reflects chaotic
circumstances, including protests and threats of violence against the Tribal Court,
during the fall and winter of 2021 which interrupted scheduled meetings and monitoring
events. (AR 000231.) In December, BIA officials emphasized that the agency "stand[s]
prepared to offer additional technical assistance as needed and available" and told WIC
that a temporary or partial retrocession of the Contract was a possibility. (AR 000242.)
WIC again responded forcefully: it disputed dates on which jurisdiction had been
transferred from CFR Court, noted that BIA itself continued to seem confused over
jurisdiction, and noted that it had repeatedly asked for trainings and BIA had failed to
provide requested support (AR 000243-47.)

1 how the Tribal Court itself was causing harm; and (4) WIC regularly highlighted ways in
2 which the BIA's own practices had worsened the situation and noted BIA's own
3 confusions with regard to jurisdiction. Throughout this period, the Tribal Court Judge
4 and others at WIC asserted that no Tribal Court orders had been issued in the eviction
5 cases. (AR 000182, 185, 231.) Considering this developing sequence involving multiple
6 players, Plaintiffs do not conclusively point to a delay that is objectively unreasonable
7 with specific regard to the Judicial Services Contract under the highly deferential APA
8 standard.

9 A determination not to take further action towards reassumption following these
10 efforts and investigations was within the BIA's discretion. Plaintiffs argue extensively in
11 their Motion that the evictions alone constituted "immediate and irreparable harm." (ECF
12 No. 100 at 10-12.) But even setting aside the fact that the Court has warned Plaintiffs
13 against asserting constitutional arguments (ECF No. 97 at 7-9), Plaintiffs do not provide
14 adequate support for the position that the BIA not only *could* have but *must* have
15 determined that alleged harms were a result of the Judicial Services Contract. This is
16 especially true given the interrelated dynamics involving the Tribal Court, Tribal Council,
17 and BIA Law Enforcement. Plaintiffs argue that to prevail on their claims, they must only
18 establish that WIC failed to "fulfill the requirements of the contract" and that Defendants'
19 decision not to reassume was arbitrary and capricious. (ECF No. 107 at 3.) But this
20 logic is flawed: For the Court to find that an investigation and determination against
21 reassumption was arbitrary and capricious, the Secretary's inaction must have been
22 unreasonable *because* a tribe's failure in fulfilling contract requirements poses a threat
23 of harm or led to a violation of rights. Where causation is factually nebulous, a
24 determination not to reassume a contract is more reasonable as a result.

25 Even more importantly, at this stage of litigation, because Plaintiffs ask for
26 prospective injunctive and declaratory relief, they must demonstrate that the BIA has
27 continued to violate its nondiscretionary duty. But this Court denied Plaintiffs' motion for
28 a preliminary injunction in November 2022, holding at that time that Plaintiffs failed to

1 demonstrate likelihood of irreparable harm facing a new wave of evictions and noting
2 that the Tribal Court's performance has improved since 2021. (ECF No. 96.) "WIC Tribal
3 Court is currently functioning and provides a forum to adjudicate Plaintiffs' grievances,
4 but Plaintiffs seek recourse in this Court because they are dissatisfied with the Tribal
5 Court's decisions." (*Id.* at 3.) At that time, the Court also found that Plaintiffs failed to
6 show that compelling the BIA to monitor and determine whether to reassume judicial
7 services would provide any immediate relief. (*Id.* at 2.) "Plaintiffs' requested relief is
8 premised on mere speculation, and the connection between Plaintiffs' claims, their
9 requested relief, and the imminent irreparable harm of eviction are at best tenuous." (*Id.*
10 at 3.) Plaintiffs have not presented any argument to make the connection between their
11 claims and requested relief clearer at this stage. The BIA could have reasonably made
12 the determination that the central problems with the Winnemucca Tribal Court were
13 related to its rocky initiation and that later improvements resolved threats to public
14 welfare. Plaintiffs' general references to irreparable harms do not address the
15 continuing need for monitoring and reassumption.

16 The BIA is especially empowered to consider a Tribal Court's improvement in the
17 context of a non-emergency reassumption, where regulations require the Secretary to
18 request corrective action to be taken within a reasonable period of time and to offer and
19 provide technical assistance before reassumption occurs. See 25 C.F.R. § 900.248.
20 The regulations thus clearly envision a scenario where performance improves and
21 position this scenario as preferable to reassumption.²² Because this Court may only rule

22
23 ²²Plaintiffs assert in their non-emergency reassumption claims that the BIA
24 ignored letters, calls, and information supporting the fact that a violation of rights
25 occurred. (ECF No. 66 at 59-62.) Here again, the AR supports that the government did
26 not ignore such complaints. Plaintiffs' non-emergency reassumption claims also allege
27 that WIC's performance under the contract is deficient because of the particular
28 procedures and outcomes applied in Tribal Court cases—for example, suggesting that
there is a continued violation of rights because "the tribal court is now allowing the new
eviction complaint to proceed on the merits while ignoring Plaintiffs' motion to dismiss
for defective service." (*Id.* at 60.) But the Court notes that a non-emergency
reassumption is not merely a work-around tool to impose federal district court review
over the merits of every action taken by a tribal court and to apply its own understanding
of the Constitution to tribal proceedings. Appellate review through ITCAN exists for the
purpose of evaluating individual proceedings.

1 on a limited remedy in this action, Plaintiffs face a double bind: They do not meet their
2 burden to show that *current* threats mandate that the Court compel further investigation
3 and a reassumption determination as to their emergency claims, and they do not show
4 that past violations have gone uninvestigated or unremedied under the more
5 improvement-oriented regulations which apply to their non-emergency claims.

6 In making these findings, the Court does not overlook or minimize the flaws and
7 inefficiencies in the BIA's response to the situation on WIC tribal land. The BIA had
8 consistent knowledge of numerous serious problems with WIC's Tribal Court program.
9 The agency knew, for example, that for a long period of time the Tribal Court had no
10 case management system, no dedicated Court facility, and no program director. (AR
11 000220, 222-24.) The BIA also knew that WIC Council exerted extensive influence over
12 the Tribal Court, such that some attempts to distinguish legislative and judicial powers in
13 theory ring hollow in practice. (*Id.*) But many of the BIA's functional issues are directly
14 tied to the Winnemucca Tribal Court's functional issues—with shared problems
15 stemming from limited resources and bureaucratic inefficiencies. In addition to the
16 agency's own delays in transferring files efficiently and its own confusions over
17 jurisdiction, WIC representatives regularly expressed frustration that BIA did not provide
18 requested judicial trainings, technical assistance or adequate monetary resources to run
19 the Tribal Court program. (AR 000235-36, 243-47.)

20 The Court's role in reviewing APA claims is not to ensure that an agency's
21 decisions are each fundamentally correct in retrospect. *See George*, 577 F.3d at 1011
22 (quoting *City of Olmsted Falls*, 292 F.3d at 271) ("Indeed, even assuming the [agency]
23 made missteps ... the burden is on [the party alleging arbitrary and capricious action] to
24 demonstrate that the [agency's] ultimate conclusions are unreasonable."). The BIA's
25 mandate under ISDEAA is to carefully protect tribal sovereignty, and any action counter
26 to that sovereignty must be taken only with great care. *See Ramah Navajo Sch. Bd. v.*
27 *Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1998). Within this framework, to the extent that
28 the BIA contributed to the central problems associated with transfer of jurisdiction to the

1 Tribal Court, it does not follow that the BIA's *only* reasonable determination was and is
2 to take the drastic measure of undoing the Contract altogether. Such a conclusion
3 would risk the implication that when the federal government operates inefficiently in
4 performing its mandates, tribal sovereignty alone must pay the price.

5 In sum, the Court's APA analysis is limited to reviewing the rational relationship
6 between factual circumstances and the BIA's conclusions about those circumstances,
7 and it does not find that the Secretary's inaction was arbitrary or capricious as a matter
8 of law. The Secretary has a duty to consider and determine whether complaints *warrant*
9 the reassumption of the contract, a more complex analysis than one that starts and
10 ends with the per se validity of such complaints. The Court does not and cannot direct
11 the outcome of the Secretary's investigations under these circumstances. Accordingly,
12 the Court denies Plaintiffs' Motion as to claims one through four, and grants Defendants'
13 Cross Motion as to those claims.

14 **C. *Accardi* Claim (Claim Seven)**

15 The Court has allowed Plaintiffs' *Accardi* claim to proceed under the APA but has
16 emphasized that this claim is distinct from a constitutional due process claim and that
17 Plaintiffs may not conflate the two. (ECF No. 97 at 7-9.) As construed in the Second
18 Order, the core allegation of Plaintiffs' *Accardi* claim is that the government failed to
19 follow its own regulations, policies, and discrete procedures regarding reassumption
20 determinations and the timeliness of such determinations, where Plaintiffs' safety and
21 welfare were at risk. (ECF No. 66 at 74-78.)

22 In their motion for summary judgment, despite the Court's previous warning that
23 the *Accardi* claim is not a constitutional claim, Plaintiffs primarily argue that "[d]estroying
24 the Plaintiffs' homes without notice constitutes irreparable harm" because "an alleged
25 constitutional infringement will often along constitute irreparable harm." (ECF No. 100 at
26 10.) The Court has already addressed the BIA's delays in its analysis of claims one
27 through four, and Plaintiffs do not point to the AR to support that the government failed
28 to follow its own regulations or policies, separately from their arguments regarding those

1 direct APA reassumption claims.²³ As a result, the Court finds that Plaintiffs cannot as a
2 matter of law support an *Accardi* claim under the APA, and thus denies Plaintiffs' Motion
3 and grants Defendants' Cross Motion for summary judgment as to claim seven.

4 **D. Breach of Trust/Breach of Fiduciary Duty Claims (Claims Five & Six)**

5 The Court allowed Plaintiffs to proceed with their breach of federal trust
6 responsibility and breach of fiduciary duty claims under the APA but limited those claims
7 to the scope of the First Order. (ECF No. 97 at 4-5.) In cabining Plaintiffs claims, the
8 Court found that Plaintiffs had adequately identified a specific underlying fiduciary duty
9 to investigate and make a reassumption determination imparted on the Secretary by
10 ISDEAA. (ECF Nos. 65 at 42, 66 at 65-70, 97 at 5.) See *U.S. v. Jicarilla Apache Nation*,
11 564 U.S. 162, 177 (2011) (holding that parties seeking to bring breach of fiduciary duty
12 claims must "identify a specific, applicable, trust-creating statute or regulation that the
13 government violated") (citation omitted). Plaintiffs now argue for summary judgment on
14 the basis that "Defendants breached their trust responsibility to Plaintiffs by failing to
15 protect Plaintiffs' rights, safety, and welfare, and to preserve Plaintiffs' interest in the 20
16 acres of land on which they formerly resided." (ECF No. 100 at 3-4.) The government
17 argues, in turn, that Plaintiffs fail to support their continued vague assertions as to
18 alleged trust obligations, and that they do not cite to any part of the AR or any legal
19 precedent establishing the existence of a specific fiduciary duty owed to Plaintiffs by
20 Defendants. (ECF No. 101 at 10.) Although the Court has already found that ISDEAA
21 itself creates a specific fiduciary duty, it agrees with the government that Plaintiffs
22 cannot support their APA breach of trust and fiduciary duty claims under the contours of
23
24

25 ²³In the SAC, Defendants allege that *Accardi* violations stem from failure to
26 comply with the statutory duty to monitor contracts as determined by published
27 regulations, including 25 C.F.R. § 900.252, and the agency's own internal agency
28 handbook. (ECF No. 66 at 74-75.) They specifically point to Chapter 14 of the
handbook, which directs Defendants to begin determining whether reassumption is
required "at the earliest indication that re-assumption may be necessary." (*Id.* at 75.)
The Court has addressed the speed at which the BIA responded to complaints in its
discussion of claims one through four above.

1 the relevant statute and that their more general references to trust responsibilities are
2 inadequate.

3 As the Court has previously emphasized, without a specific trust-creating statute,
4 existence of a “general trust relationship between the United States and the Indian
5 people” does not, by itself, create legally enforceable obligations for the United States.
6 (ECF No. 101 at 10). See *Jicarilla Apache Nation*, 564 U.S. at 173 (quoting *United*
7 *States v. Mitchell*, 463 U.S. 206, 225 (1983)). By requiring action on the part of the
8 Secretary, ISDEAA is the trust-creating statute upon which Plaintiffs must rely to
9 support their claims here. See *id.* at 177. As a result, Plaintiffs’ breach of trust and
10 breach of fiduciary duty claims rest on and are limited to essentially the same
11 foundation as their other APA claims. And for many of the same reasons that Plaintiffs
12 fail to demonstrate that the Secretary violated her nondiscretionary duty as alleged in
13 their other APA claims, the Court finds that Plaintiffs fail to support their claims here.
14 The trust obligation requires the government to act with good faith and loyalty to the
15 interests of the beneficiaries. See *Manchester Band of Pomo Indians, Inc., v. United*
16 *States*, 363 F. Supp. 1238, 1246, 1249 (N.D. Cal. 1973). But because the BIA’s
17 decisions were ultimately rationally tied to factual circumstances and not an arbitrary
18 and capricious abuse of discretion, the Court does not find that Plaintiffs can support a
19 claim that Defendants acted in bad faith.

20 Moreover, the Court must take particular care to consider claims alleging
21 breaches of the United States’ fiduciary and trust obligations in a holistic context. While
22 the federal government has an obligation to individual Indians, the United States’
23 primary trust duty is owed collectively to all Indian tribes nationwide. See *Jicarilla*
24 *Apache Nation*, 564 U.S. at 182. Where there are conflicting interests between tribes
25 and individual Indians—a frequent occurrence between any sovereign and the
26 individuals over whom it exercises power—the government is within its authority to
27 prioritize tribal interests. See *id.* (quoting *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993))
28 (“Within the bounds of its ‘general trust relationship’ with the Indian people, we have

1 recognized that the Government has ‘discretion to reorder its priorities from serving a
2 subgroup of beneficiaries to serving the broader class of all Indians nationwide.’”);
3 *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986) (noting that the
4 government “does have a fiduciary obligation to the Indians; but it is a fiduciary
5 obligation that is owed to all Indian tribes”). For example, the government has
6 sometimes “enforced . . . trust statutes to dispose of Indian property contrary to the
7 wishes of those for whom it was nominally kept in trust.” See *Jicarilla Apache Nation*,
8 564 U.S. at 183. In this action, the Court cannot adequately consider any breach in
9 responsibility to Plaintiffs without acknowledging Defendants’ competing duty to WIC.

10 The AR and other filings upon which the parties rely in this case demonstrate that
11 Defendants’ decisions were tied not merely to Plaintiffs’ interests but to broader
12 considerations on tribal sovereignty—not least because the evictions implicate
13 complicated questions about leadership of the tribe which have been subject to decades
14 of debate. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982) (discussing
15 tribes’ sovereign authority to exclude non-members from tribal land). BIA officials
16 expressed consistent concern for protecting tribal sovereignty and were generally
17 hesitant about pathways which would require the BIA to severely interfere with
18 sovereignty or invalidate Colony elections. (ECF No. 66-46 at 15.) The government did
19 not violate its trust duty to Plaintiffs by approaching its mandate holistically. Accordingly,
20 the Court denies Plaintiffs’ Motion as to claims five and six, and grants Defendants’
21 Cross Motion as to those claims.

22 **IV. CONCLUSION**

23 The Court notes that the parties made several arguments and cited to several
24 cases not discussed above. The Court has reviewed these arguments and cases and
25 determines that they do not warrant discussion as they do not affect the outcome of the
26 issues before the Court.

27 It is therefore ordered that Plaintiffs’ motion for summary judgment (ECF No.
28 100) is denied.

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It is further ordered that the government's cross motion for summary judgment (ECF No. 101) is granted.

It is further ordered that Intervenor Winnemucca Indian Colony's counter motion for summary judgment (ECF No. 102) is granted only as to the relief requested, as specified herein.

The Clerk of Court is directed to enter judgment accordingly and close this case.

DATED THIS 28th Day of March 2024.



MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE