Winnemuca Indian Colony v. United States, --- Fed. Cl. ---, 2023 WL 5498174 (August 25, 2023).

- **Holding**: Breach of trust claims for damages alleged to arise from BIA's failure to recognize tribal government during internal tribal leadership were dismissed because filed during other litigation presenting similar claims, and for failure to identify a money-mandating source of law imposing specific trust duties upon the BIA, with exception of claim alleging the BIA leased housing to nonmembers and never collected payments in violation of the Indian Long-Term Leasing Act.
- **Summary**: Following a long-running internal tribal dispute about the Winnemuca Indian Colony's membership and leadership, the Colony filed a breach of trust action against the United States, alleging that the failure of the Bureau of Indian Affairs (BIA) to recognize the rightful leadership faction of the Colony resulted in nonmembers unlawfully occupying the Colony's land, building unauthorized encroachments, unlawful diverting its water, and stifling economic development.

  The leadership dispute on the 360 acre Colony dates back 20 years, with competing factions claiming to be the legitimate tribal council. In 2000, the BIA withdrew its recognition of the tribal government pending resolution of the internal dispute, and did not recognize a tribal government until ordered to do so by a federal district court in 2014. That district court's order was appealed by the losing faction, and vacated by the Ninth Circuit. No tribal government was recognized until 2021, when the BIA, needing to administer contracts with the Colony, issued an interim tribal government recognition to one of the factions.

  Plaintiff alleged that because of the BIA's failure to permanently recognize a government of the Colony during the dispute, the BIA failed to fulfill its trust responsibilities to the Colony and prevented the Colony from managing and preserving its resources, leading to disrepair and decay of Colony lands and buildings. Plaintiff further alleged that the BIA allowed nonmembers to trespass and failed to collect rents from the nonmembers; the BIA allowed numerous encroachments and harms; the BIA and the nonmember residents failed to properly maintain the premises, resulting in open contamination of hazardous waste on the land; and the BIA allowed a developer to divert a stream off Colony lands in violation of the Colony's reserved water rights.

  The court concluded that it lacked subject matter jurisdiction over all but one count of the Colony's eleven-count complaint, because 28 U.S.C.A. § 1500 bars jurisdiction over a claim in the Court of Federal Claims "if the plaintiff has another suit for or in respect to that claim pending against the United States or its agent." An earlier action by the Colony making nearly identical claims has been dismissed by the Court of Federal Claims in 2014. The order of dismissal was vacated by the Ninth Circuit in 2020. The current action was filed after the Ninth Circuit's decision, but before issuance of its mandate. Because the claims presented were the subject of the earlier suit, with "the potential of continued proceedings in the district court if the Circuit had remanded for further proceedings," the appeal constituted a "suit or process" pending "against the United States" even though the United States had chosen not to participate in the appeal. The jurisdictional bar in § 1500 therefore applied.

In addition to § 1500, the court concluded it lacked jurisdiction over many of the claims because the Colony failed to identify violations of money-mandating fiduciary duties under the test established in *United States v. Navajo Nation*, 556 U.S. 287 (2009), i.e., "the tribe first must identify a substantive source of law that establishes specific fiduciary or other duties and allege that the Government has failed faithfully to perform those duties" (internal quotation marks omitted). 506). A statute is money-mandating in two circumstances: when (1) "it can fairly be interpreted as mandating compensation by the Federal Government for ... damages sustained," or (2) "it grants the claimant a right to recover damages either expressly or by implication." *Lummi Tribe of the Lummi Rsrv. v. United States*, 870 F.3d 1313, 1317 (Fed. Cir. 2017) (internal quotation marks and numbering omitted).

The court found no money-mandating source of law creating damages for the United States' failure to prevent a developer from interfering with the Colony's asserted federal reserved water rights, noting that the Supreme Court's recent decision in *Arizona v. Navajo Nation,* 143 S. Ct. 1804 (2023), "rejected the argument that the Government's purported control over reserved water rights created trust duties," and nothing in the Executive Order creating the Colony "impose[d] a duty upon the Government to prevent third-party diversion of water."

The court concluded the Native American Housing Assistance and Self-Determination Act, which obligates the U.S. to supply tribes with housing grants, was not money-mandating, and the Colony did not allege that it ever applied for a grant but only alleged that without a recognized tribal government, it lacked the ability to enter into contracts or receive grants.

The court concluded that the Indian Non-Intercourse Act was not a money-mandating source of law that may form a jurisdictional basis for a claim, because the Act grants the Government certain powers, but does not place upon the Government a duty to carry out any specific function. In contrast, the Indian Long-Term Leasing Act did provide a money-mandating source of law for claims arising from allegations that the Government wrongfully conveyed a possessory interest in Colony lands to nonmembers and allowed various encroachments on Colony lands.

The court concluded that 25 U.S.C.A. § 323, which provides the Secretary of the Interior the power to grant rights-of-way over Indian lands, may serve as a money-mandating source of law for its allegation that the Government failed to provide the Colony compensation for rights-of-way established to provide access to encroachments constructed within the Colony, but otherwise found no money-mandating source of law for claims that the Government failed to survey Colony lands as requested by the Colony; interfered with the Colony's efforts to reopen its smoke shop, and failed to recognize a tribal council for the Colony.

The court also concluded that the Colony's claims were barred by the six-year statute of limitations in 28 U.S.C.A. § 2501, rejecting various arguments, including the argument that the Colony's claims were continuing claims. The court concluded that the Government's alleged failures to prevent or prosecute physical encroachments onto Colony land, allowing nonmembers to occupy Colony housing and failing to set proper

rent rates, or its failure to remove trespassers living in unauthorized housing, constituted "singular alleged wrongs even if the Colony continues to suffer from the consequences of the Government's original decisions."

- **Relevant (2023) Deskbook Section**: 1:6