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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CLIFFORD M. LEWIS, et al.,

Plaintiffs,

v.

KEN SALAZAR, Secretary of the Interior for the United States of America, et al.,

Defendants.

CASE NO. 1:10-CV-01281-OWW-DLB

THE SECRETARY OF THE DEPARTMENT OF THE INTERIOR'S REPLY TO PLAINTIFFS' OPPOSITION TO THE SECRETARY'S MOTION TO DISMISS

[Fed. R. Civ. P. 12(b)(1) and (b)(6)]

Date: August 1, 2011
Time: 10:00 a.m.
Place: Courtroom 3, 7th Floor
Judge: Honorable Oliver W. Wanger

I. INTRODUCTION

The Secretary of the Department of the Interior ("Secretary") hereby submits his Reply to plaintiffs' Opposition to the Secretary's motion to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

II. DISCUSSION

A. The Court Lacks Subject Matter Jurisdiction Over This Action

On the question of subject matter jurisdiction, plaintiffs assert in their Opposition that their Second Amended Complaint "clearly alleges jurisdiction pursuant to an Act of Congress, namely the California Rancheria Act, [Pub. L.] 85-671, 72 Stat. 619, *amended by* [Pub. L. 88-419,] 78 Stat. 390." Plaintiffs' Opposition at 6. This assertion is apparently a response to the Secretary's argument that the

Court lacks jurisdiction under 28 U.S.C. § 1343(a)(4) (which provides jurisdiction "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote") because plaintiffs have not identified an Act of Congress providing for the protection of civil rights. Plaintiffs' reliance on the California Rancheria Act is misplaced because that statute is not an Act of Congress "providing for the protection of civil rights" within the meaning of 28 U.S.C. § 1343(a)(4). Instead, the California Rancheria Act was enacted to facilitate the termination of the trust relationship between the United States and the Indian people on 41 enumerated rancherias in California, including the Table Mountain Rancheria. *See Alvarado*, 509 F.3d at 1012.

Plaintiffs also contend that the Court has subject matter jurisdiction under 5 U.S.C. § 702. This contention lacks merit because 5 U.S.C. § 702 only provides jurisdiction for actions seeking relief "other than money damages." *See* 5 U.S.C. § 702 ("An action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."); *see also Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1066 (9th Cir. 2008) ("Under the APA, federal sovereign immunity is waived for suits against the federal government in which the plaintiff is 'seeking relief other than money damages.'") (internal citation omitted). In this case, plaintiffs seek only money damages. *See* Second Amended Complaint ¶¶ 53, 64-65 and Plaintiffs' Prayer for Damages. Accordingly, 5 U.S.C. § 702 does not provide the Court with subject matter jurisdiction.

In their Opposition, plaintiffs have not responded to the Secretary's arguments that the Court lacks subject matter jurisdiction under the remaining statutory provisions and cases cited in the plaintiffs' Second Amended Complaint, including *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), 42 U.S.C. § 1983, 28 U.S.C. § 1343(a)(1), (a)(2) and (a)(3), 28 U.S.C. § 1357, 28 U.S.C. § 1361, 25 U.S.C. § 13, and 25 U.S.C. § 1901 *et seq*. Accordingly, any attempt by plaintiffs to assert that the Court has jurisdiction under these provisions should deemed abandoned.

B. Plaintiffs' Claims Are Barred By Sovereign Immunity

On the question of sovereign immunity, plaintiffs state only the following in their Opposition: "Plaintiffs have pleaded § 702 which not only grants jurisdiction to this Court but also abrogates the sovereign immunity of the United States." *See* Plaintiffs' Opposition at 7. Plaintiffs' argument that 5 U.S.C. § 702 waives the United States' sovereign immunity in this case is incorrect because plaintiffs are only seeking money relief, not injunctive relief. *See Cabrera v. Martin*, 973 F.2d 735, 741 (9th Cir. 1992) ("§ 702 waives sovereign immunity in all actions seeking relief from official misconduct except for money damages.") (quoting *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 524-25 (9th Cir. 1989)); Second Amended Complaint ¶¶ 53, 64-65 and Plaintiffs' Prayer for Damages. Plaintiffs have not pointed to an unequivocal waiver of the United States' sovereign immunity and, accordingly, the Court lacks jurisdiction over plaintiffs' claims against the Secretary. *See Blue v. Widnall*, 162 F.3d 1322, 1327 (9th Cir.1982); *see also Hutchinson v. United States*, 677 F.2d 1322, 1327 (9th Cir. 1982) (stating that a suit against an official of the United States in his official capacity is effectively a suit against the United States).

C. Plaintiffs' Claims Are Untimely

On the question of the statute of limitations, plaintiffs contend that their claims are not barred by the statute of limitations because they are "pattern and practice" claims that are subject to the continuing violation doctrine. This contention fails for a variety of reasons. First, a pattern and practice claim is a method by which the government or a plaintiff class can demonstrate employment discrimination against a protected group, s*ee, e.g., Int'l Broth. of Teamsters v. United States*, 431 U.S. 324 (1977), and plaintiffs' action is not an employment discrimination action. Second, the Supreme Court did not hold in *Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), that so long as one act in a pattern and practice claim falls within the statutory filing period that all discriminatory and retaliatory acts that are plausibly related to that act may also be considered timely for purposes of liability. Instead, the Supreme Court simply stated that "[w]e have no occasion here to consider the timely filing question with respect to 'pattern-or-practice' claims brought by private litigants as none are at issue here." *Id*. at 115 n.9. Third, even if plaintiffs' action were subject to the continuing

violation doctrine, they fail to articulate any specific continuing violations that occurred within the six-year statute of limitations under 28 U.S.C. § 2401(a). Plaintiffs only state cryptically: "Only actions like the instant action will expose (through discovery) the ongoing and continuing violations." Plaintiffs' Opposition at 8.[1]

Plaintiffs also ask the Court to apply the doctrine of equitable tolling. *See* Plaintiffs' Opposition at 10. Even assuming that the doctrine of equitable tolling applies, *see Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990); *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997), plaintiffs have failed to demonstrate that they pursued their rights diligently and that some "extraordinary circumstance" stood in the way of filing a timely action. *See Pace v. DiGuglielmo*, 554 U.S. 408, 418 (2005).[2] Plaintiffs cannot plausibly claim that the fact that the *Watt* case was litigated in the United States District Court for the Northern District of California as opposed to the United States District Court for the Eastern District of California was an "extraordinary circumstance" that stood in the way of filing a timely action. Plaintiffs' Opposition at 10. Moreover, the fact that plaintiffs or their counsel did not understand the *Watt* stipulation or that the transfer of Association-owned parcels to the United States in 1984 pursuant to the *Watt* stipulation was allegedly a "violation of the statute and Articles of Association," is of no consequence because a claim accrues when a plaintiff knows the necessary facts underlying his claim, not when he becomes aware of the legal implications of those facts. *See United States v. Kubrick*, 444 U.S. 111, 122 (1979) (interpreting 28 U.S.C. § 2401(b)).

Finally, plaintiffs contend that their "allegation that the Secretary failed to provide services for

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[1]Plaintiffs vaguely refer to a 100-year course of conduct consisting of "lack of schools, jobs, access to ownership to land, and access to the same public facilities as the 'white man' (or separate but equal schools which were declared unconstitutional in Brown v. Board but continued to be operated by the United States on the Indian reservations)," Plaintiffs' Opposition at 8, but they offer no details about what these alleged violations consisted of or when they occurred. *Garcia v. Brockway*, 526 F.3d 456, 462 (9th Cir. 2008) ("A continuing violation is occasioned by continual unlawful acts, not by continual ill effects.").

[2]Plaintiffs' reliance on the equitable tolling test set forth in *Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 984 (9th Cir. 1997) (citing *Donoghue v. County of Orange*, 848 F.2d 926, 931 (9th Cir. 1987)), is curious because that doctrine applies to save a claim when a plaintiff has reasonably pursued a concurrent federal remedy, which is not the case in this action. *See Donoghue*, 848 F.2d at 930.

the last six years is sufficient to overcome a motion to dismiss based on the statute of limitations defense." Plaintiffs' Opposition at 11. This contention is unpersuasive because the Second Amended Complaint alleges that plaintiffs have expended great sums of their owns funds since 1983 (the date of the *Watt* stipulation) "to gain access to services, benefits and programs which the Secretary failed to provide them." Second Amended Complaint ¶ 37. Therefore, by their own admission, it appears that plaintiffs were aware of the Secretary's alleged failure to provide unspecified services and benefits for 28 years. *Id.* In addition, plaintiffs allege absolutely no factual details whatsoever regarding what "services" they are referring to, whether and when they applied or inquired about such services, what the criteria were for receipt of such services, and specifically when the Secretary failed to provide such services,

D. Plaintiffs Fail To State A Claim Upon Which Relief Can Be Granted

1. First Cause of Action

On the subject of whether their First Cause of Action states a claim upon which relief can be granted, plaintiffs state:

> Defendant's description and analysis of what the allegations are in the SAC are very different than what Plaintiffs believe they actually alleged. . . . Plaintiffs did not specify any time period; the allegations are that the Secretary failed to fulfil his obligations at all times from 1916 to the present and continues to fail to fulfil his obligations under the law to this day."

Plaintiffs' Opposition at 4 (emphasis added).

Plaintiffs' allegation that the Secretary failed to fulfill "his obligations" for approximately 95 years does not satisfy the pleading standard under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Iqbal*, 129 S. Ct. at1949 (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* In this case, the Second Amended Complaint is devoid of plausible factual content that is sufficient to state a claim – it does not identify what services or benefits the Secretary allegedly

failed to provide to the plaintiffs; what the standards or criteria were for receipt of benefits; whether plaintiffs applied for or inquired about such services or benefits; which agency allegedly provided the services; which of the many named plaintiffs were denied what services or benefits at which times over the 95-year period that the plaintiffs refer to in their Opposition; and what specific legal duty the Secretary failed to comply with.

The existence of a trust relationship between the United States and Indian Nations does not alone translate into a cause of action. *See Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 921-22 (9th Cir. 2008). To create an actionable fiduciary duty of the federal government, a statute must create binding legal obligations on a federal agency. *Id.* at 922-24. Plaintiffs have failed to point to an applicable statute that creates any binding obligations on the Secretary with regard to any of the unspecified benefits and services the plaintiffs refer to in their Second Amended Complaint. Although plaintiffs cite 25 U.S.C. § 13, that statute (known as the Snyder Act) simply authorizes the United States to provide "for the benefit, care, and assistance of the Indians throughout the United States for the relief of distress and conservation of health." 25 U.S.C. § 13. "But it imposes no specific legal duty." *Quechan Tribe of the Fort Yuma Indian Reservation v. United States*, 2011 WL 1211574, at *2 (D. Ariz. March 31, 2011). "Moreover, the Ninth Circuit has concluded that the Snyder Act consists of only broad language and does not impose any specific statutory duty." *Id.* (citing *McNabb v. Bowen*, 829 F.2d 787, 792 (9th Cir. 1987)). Moreover, although plaintiffs cite the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* ("ICWA"), the purpose of the ICWA was to rectify state agency and state court actions that result in the removal of Indian children from their Indian communities and heritage. *Doe v. Mann*, 415 F.3d 1038, 1047 (9th Cir. 2005). "'At the heart of the ICWA' lies a jurisdictional scheme aimed at ensuring that tribes have a role in adjudicating and participating in child custody proceedings involving Indian children domiciled both on and off the reservation." *Id*. at 1049. This case obviously does not involve a child custody proceeding and, accordingly, the ICWA has no application whatsoever.

Moreover, as argued in the motion to dismiss, the first portion of the First Cause of Action – namely, plaintiffs' claim that the Secretary failed to comply with his obligations under the California Rancheria Act to provide essential services such as irrigation, sanitation facilities, and road

improvements to Table Mountain Rancheria residents before the Rancheria was terminated in 1959 – is barred by the doctrine of claim preclusion because this exact issued was raised and resolved in *Table Mountain Rancheria Ass'n v. Watt*, No. C-80-4595-MHP (N.D. Cal.), and plaintiffs have not provided a plausible reason why their interests on this issue were not "adequately represented by someone with the same interests who was a party to the suit." *Taylor v. Sturgill*, 533 U.S. 880, 894 (2008). "Representative suits with preclusive effect on nonparties include properly conducted class actions [.] *Id.* (internal citations omitted); *see also Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276-80 (9th Cir. 1991) (finding nonparties bound in privity because their interests were represented by the class certified in the case despite the fact that they were not actually members of the class); *Jackson v. Hayakawa*, 605 F.2d 1121, 1126 (9th Cir. 1979) (finding nonparties in privity because the earlier case was "treated by the court as a class action" even though it was never certified as such); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1084 n.18 (9th Cir. 2003) (collecting these and other cases). Contrary to plaintiffs' suggestion, the fact that the Secretary argued in a Reply to plaintiffs' Opposition to the Secretary's Motion to Dismiss the First Amended Complaint (Docket No. 29 at page 6) that the express terms of the *Watt* stipulation only required the Secretary to distribute a list of available programs, services and benefits to the certified class (and not the plaintiffs, who were not members of the certified class) does not estop the Secretary from now arguing that plaintiffs' interests were adequately represented in *Watt* on the issue of whether the Secretary complied with his obligations under the California Rancheria Act..

2. Second Cause of Action

On the subject of whether their Second Cause of Action (which plaintiffs now refer to as their "Takings Claim") states a claim upon which relief can be granted, plaintiffs have not meaningfully responded to the Secretary's arguments that were made in the Secretary's Motion to Dismiss. First, there is no support in either the California Rancheria Act or the Table Mountain Rancheria Association's Articles of Association for plaintiffs' assertion that the parcels of land that were distributed to the Table Mountain Rancheria Association in 1959 were to be held and managed for anyone other than those individuals who had received individual parcels under the distribution plan.

Second, plaintiffs do not dispute that they have failed to pursue their remedies under the Tucker Act. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (stating that "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act."). Finally, to the extent plaintiffs' Second Amended Complaint might be read as asking the Court to set aside the 1984 transfer of these parcels to the United States under the Quiet Title Act, this request must be rejected because the United States has not waived its sovereign immunity in suits where, as here, the case involves a challenge to the United States' title to land held in trust for an Indian tribe. *See* 28 U.S.C. § 2409a; *State of Alaska v. Babbitt*, 38 F.3d 1068, 1072-73 (9th Cir. 1994); *Wildman v. United States*, 827 F.2d 1306, 1308-09 (9th Cir. 1987).

III. CONCLUSION

For the reasons set forth above, the Secretary respectfully asks this Court to dismiss plaintiffs' action with prejudice for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

Dated: July 25, 2011

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