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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a federally-recognized Indian tribal government and as *parens patriae* on behalf of the enrolled members of the Confederated Tribes and Bands of the Yakama Nation, Plaintiffs, vs. ERIC H. HOLDER, JR., Attorney General of the United States; et al., Defendants.	NO. CV-11-3028-RMP FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiffs (hereinafter "Tribes" or "Yakama Nation") have filed this action against numerous parties whom they believe were involved in the execution of a criminal search and seizure warrant at a business located on the Yakama Indian Reservation on February 16, 2011. The Tribes do not challenge the validity of the search warrant at issue. Rather, they contend that the Federal Defendants' (United States) execution of this warrant, without giving prior notice to or consulting with the Tribes, violated the Treaty of 1855 between the United States and the Yakama Nation, the United States' fiduciary duties, Executive Order No. 13175, and various federal regulations, policies and directives. The Tribes seek several forms of relief, including a declaratory judgment, an injunction, and a writ of mandamus.

The Second Amended Complaint (Complaint) can and should be dismissed on several grounds. First, it fails to identify a valid and applicable waiver of the United States' sovereign immunity. Further, the Treaty, regulations, and policy guidance documents cited in the Complaint do not create a private cause of action. For these reasons, the Complaint lacks subject matter jurisdiction and should be dismissed under Rule 12(b)(1). Alternatively, even if sovereign immunity is waived as to any of the claims, the Complaint fails to identify any specific treaty provision or fiduciary obligation that requires the United States to notify and consult with the Tribes prior to entering onto the reservation to execute a validly obtained federal search warrant on reservation lands. Thus, the Complaint also fails to state a claim upon which relief can be granted and should be dismissed under Rule 12(b)(6).

FACTUAL SUMMARY

Presented below are facts that are material to the legal jurisdictional issues raised in the instant motion to dismiss, along with general background facts offered to provide context. It should be noted that the United States accept the allegations in Plaintiffs' Complaint as true only for the purposes of this motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). This background discussion does not concede that any of the Plaintiffs' allegations are in fact true or correct, nor does it introduce facts from outside the pleadings, as the present motion brings only a facial challenge to subject matter jurisdiction.

I. Treaty with the Yakama, 1855

In 1855, the governor and superintendent of Indian affairs for the Territory of Washington, on behalf of the United States, entered into a Treaty with the chiefs of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah and Se-ap-cat, who for purposes of the treaty are considered as one nation, the

Yakama. See Ex. 1. The Treaty addresses numerous topics, including the ceding of land from the Yakama to the United States along with compensation for the cession, the setting aside of lands for the Yakama reservation, the building of roads, schools and hospitals on the reservation, and the Tribes' usufructuary fishing rights. Id.

At issue in this case is Article II of the Treaty, which sets forth the boundaries of the Yakama reservation and states:

> [N]or shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent.

The Treaty does not contain a provision requiring the United States to give advance notice to, or consult with, the Yakama Nation tribal government prior to entering onto the Reservation for law enforcement purposes.

II. The Execution of the Search Warrant on February 16, 2011.

On February 16, 2011, as part of a criminal investigation, the FBI executed a search warrant on King Mountain Tobacco, a cigarette manufacturing business owned and operated by a Yakama tribal member and located on the Yakama Reservation at 2000 Fort Simcoe Road. Second Amended Compl. ECF No. 41, ¶¶ 2, 66; King Mountain Tobacco Co., et. al., v. Alcohol and Tobacco Tax and Trade Bureau, et. al., CV-11-3038-RMP, ECF No. 1, ¶¶ 2.2, 2.5. The FBI obtained the search warrant from a Federal Magistrate Judge for the Eastern District of Washington pursuant to Federal Rule of Criminal Procedure 41(c). See Ex. 2.

The purpose of the search was to seek evidence of a crime, contraband, fruits of crime, or other items illegally possessed, and to search for property designed for use, intended for use, or used in committing a crime. Id. The search warrant and accompanying 89-page affidavit states that the investigation seeks information regarding possible violations of several federal statutes, including interstate transportation of stolen property, violations of the Contraband Cigarette

Trafficking Act, mail and wire fraud, and money laundering. See 18 U.S.C. §§ 1956, 1341-1343 & 2342-2343. The subjects of the investigation are individuals and corporations, including King Mountain Tobacco, believed to be involved in a nationwide network dealing in the distribution and sale of contraband cigarettes. Ex. 2.

The FBI notified the Yakama Nation Public Safety Commissioner just prior to carrying out the search warrant. ECF No. 41, ¶ 72. It did not, however, consult with the tribal government or obtain its permission prior to executing the search warrant. Id. ¶¶ 72-77.

STANDARD OF REVIEW

A cause of action lacking in subject matter jurisdiction must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1). "It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978). The burden of establishing jurisdiction rests on Plaintiffs. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). "When a defendant challenges jurisdiction *facially*, all material allegations in the complaint are assumed true, and the question for the court is whether the lack of federal jurisdiction appears from the face of the pleading itself." Del Puerto Water Dist. v. U.S. Bureau of Reclamation, 271 F.Supp.2d 1224, 1231 (E.D. Cal.,2003) (emphasis in original) (citing Thornhill Publishing Co. v. General Telephone Electronics, 594 F.2d 730, 733 (9th Cir.1979). The doctrine of sovereign immunity is one of those limitations on the power of a federal court to hear a claim for relief against the United States. See Tucson Airport Auth. v. General Dynamics Corp., 136 F.3d 641, 644 (9th Cir. 1998).

A motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) may be based on either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.1990); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). While a plaintiff's material factual allegations are assumed to be true, district courts may not assume the truth of legal conclusions merely because they are cast in the form of factual allegations. W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

ARGUMENT

For all of its length, Plaintiffs' Complaint is at its heart simple and straightforward. It uses multiple legal theories to raise what is in essence a single claim: Plaintiffs argue that the United States is legally required, pursuant to treaty and trust obligations, to notify and consult with the Yakama Nation Tribal Government prior to entering onto reservation lands in furtherance of valid law enforcement activities.

In analyzing this argument, it may be helpful to first establish and put aside the issues that are not in dispute in this case. It is undisputed that the Treaty gives the Yakama Nation a general right to exclude non-Indians from their reservation land. See 12 Stat. 951, Art. II (Ex 1); U.S. Department of Labor v. Occupational Safety and Health Commission, Warm Springs Forest Products ("Warm Springs"), 935 F.2d 182, 185 (9th Cir. 1991). This right is consistent with the Ninth Circuit's acknowledgment that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands" independent of a treaty. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1117 (9th Cir. 1985) (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982)). But it is also clear that this general right is not absolute, because tribal sovereignty is "dependent on, and

subordinate to," the federal government. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980). As recognized by the Supreme Court, tribal sovereignty exists only "at the sufferance of Congress." United States v. Wheeler, 435 U.S. 313, 323 (1978).

Importantly, the limits of a tribe's right to exclude others from its reservation lands have already been well defined. It is settled law that tribes do not possess a right to prevent the United States from enforcing generally applicable federal laws (including federal criminal statutes) hat apply with equal force on Indian reservations. See FPC v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960) ("a general statute in terms applying to all persons includes Indians and their property interests"); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214 n.16 (1987) ("Federal law enforcement officers have the capability to respond to violations of [federal law] on Indian reservations"); Solis v. Matheson, 563 F.3d 425, 437 (9th Cir. 2009) (holding a general right of exclusion in an Indian treaty was not sufficient to bar the application of Fair Labor Standards Act to the tribe); Confederated Tribes of Warm Springs v. Kurtz, 691 F.2d 878, 882 (9th Cir. 1982) (holding a general right of exclusion in an Indian treaty was not sufficient to bar the application of federal tax laws to the tribe); United States v. Farris, 624 F.2d 890, 894 (9th Cir. 1980) (holding a general right of exclusion in an Indian treaty was not sufficient to bar the application of the Organized Crime Control Act to the tribe).

When federal officials are empowered to enforce generally applicable federal laws on Indian reservations, they are likewise empowered and authorized to enter tribal lands to do so. See Warm Springs, 935 F.2d at 186. In Warm Springs, the right of exclusion provision in the treaty at issue was very similar to the Yakama Treaty, in that it read: "nor shall any white person be permitted to reside upon the [reservation] without the concurrent permission of the agent and

superintendent." 935 F.2d at 184 (citing the Treaty with the Tribes of Middle Oregon ("Oregon Treaty") art. 1, June 25, 1855, 12 Stat. 963). Directly at issue to this case, the Ninth Circuit specifically held that the tribe's explicit right of exclusion included in the treaty is no broader than the inherent sovereign right possessed by all tribes to exclude non-members from their reservations. Warm Springs, 935 F.2d at 185. Thus, the Court accepted the full possible breadth of the tribe's right as a sovereign to exclude; the only issue was whether this right was sufficient to bar the application of federal law, as well as the entry onto the reservation for enforcement of federal law. Id.

The Ninth Circuit unambiguously resolved this issue by holding that a tribe's broad, general right as a sovereign to exclude non-members did not prevent the Occupational Safety and Health Administration from entering tribal land without permission when the entry was authorized by the Occupational Safety and Health Act (OSH Act). Warm Springs, 935 F.2d at 187. The Court reasoned that if a federal law applies to Indians, it implicitly follows that the federal government has the authority to enter reservation property in order to enforce the law. Id. at 186 (citing cases) (emphasis added). If it was otherwise — if the general right of exclusion barred application of the OSH Act to reservations — "the enforcement of nearly all generally applicable federal laws would be nullified." Id. at 187.

It does not appear that Plaintiffs challenge or dispute any of the legal principles just set forth. The Tribes do not argue that the United States lacked the authority to enter the reservation to execute the search warrant. Nor do the Tribes argue that the United States was required to obtain their permission before entering. Instead, the Tribes take a different and apparently novel approach: They argue that the United States is required to notify and consult with the Tribes prior to entering the reservation, even though the Tribes have no right to prevent the entry.

The Tribes' position has no legal support and must be rejected. First, as discussed below, Plaintiffs have set forth no applicable waiver of sovereign immunity for their claims against the United States. Even if the Court were to find a waiver, no authority exists in the Treaty, statute, regulation or in judicial precedent to support Plaintiffs' position and the Complaint fails to state any viable claim for relief. Simply put, the United States is under no duty to notify and consult with the Tribal Government prior to executing a valid search warrant on reservation lands. As such, the complaint should be dismissed under Rule 12(b)(1) or 12(b)(6).

I. The Court Lacks Subject Matter Jurisdiction.

As in any suit, the Court should first address the threshold matter of whether subject matter jurisdiction exists over Plaintiffs' claims. Because the present action is against the United States and its agencies, Plaintiffs must plead an applicable waiver of sovereign immunity and raise congressionally authorized causes of action. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Mitchell ("Mitchell I"), 445 U.S. 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). In determining when such consent is present, the Supreme Court has long held that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" Mitchell I, 445 U.S. at 538 (quoting United States v. King, 395 U.S. 1, 4 (1969)). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." FDIC v. Meyer, 510 U.S. 471, 475 (1994). "[S]overeign immunity bars both equitable and legal claims." Western Shoshone Nat'l Council v. United States, 408 F. Supp. 2d 1040, 1047 (D. Nev. 2005) (citing Assiniboine & Sioux

Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of Mont., 792 F.2d 782, 792 (9th Cir. 1986)).

Here, Plaintiffs plead jurisdiction pursuant to 28 U.S.C. § 1331 (providing jurisdiction for claims arising under federal law) and § 1362 (jurisdiction for suits brought by an Indian tribes or bands); 28 U.S.C. § 1361 (mandamus actions); 28 U.S.C. § 2201 and § 2202 (the Declaratory Judgment Act); federal common law; and 5 U.S.C. § 702 (the Administrative Procedure Act or "APA"), and the Yakama Treaty. ECF No. 41, ¶¶ 11-12. With the exception of the APA, none of the statutes cited by Plaintiffs waive the United States' sovereign immunity. And while the APA waives sovereign immunity in some instances, it does not presently provide Plaintiffs with a cause of action because the Complaint does not point to a reviewable agency action, nor does it specify how Plaintiffs have been aggrieved by agency action within the meaning of a relevant statute.

Plaintiffs also attempt to bring claims based on Department of Justice Office of Tribal Justice regulations, Executive Order No. 13175, and the other internal guidance documents. ECF No. 41, ¶¶ 131-159. These documents do not waive the United States' sovereign immunity, nor do they provide any private right of action on which Plaintiffs could bring a claim.

At least one court has addressed many of the same jurisdictional claims brought by Plaintiffs. See Western Shoshone Nat'l Council v. United States, 408 F. Supp. 2d 1040, 1047 (D. Nev. 2005). There, the plaintiff Indian tribe also alleged that subject matter jurisdiction existed under 28 U.S.C. §§ 1331, 1353, 1362, 2201, and 2202, as well as the APA and the tribe's treaty with the United States. Id. The court granted the United States' motion to dismiss the action, for the simple reason that none of the cited authorities provided the court with jurisdiction. Id. at 1055. The Western Shoshone court's analysis applies equally to this case and should lead to the same result. For the reasons discussed below,

the Court should dismiss this action against the Federal Defendants for lack of subject matter jurisdiction.

A. Plaintiffs Have Not Plead a Waiver of Sovereign Immunity.

"A statute may create subject matter jurisdiction yet not waive sovereign immunity." Powelson v. U.S., By and Through Secretary of Treasury, 150 F.3d 1103, 1105 (9th Cir. 1998). The Tribes cite several statutes that create subject matter jurisdiction, but fail to cite any statute that waives the United States' sovereign immunity in this case.

Plaintiffs first allege jurisdiction under 28 U.S.C. §§ 1331 and 1362. ECF No. 41, ¶¶ 11-12. While these statutes give United States district courts jurisdiction over cases involving federal questions, they do not in themselves waive the United States' sovereign immunity. See United States v. Park Place Assocs., Ltd., 563 F.3d 907, 924 (9th Cir. 2009); Muscogee (Creek) Nation v. Okla. Tax Comm'n, 611 F.3d 1222, 1228 n.2 (10th Cir. 2010) (Section 1331 does not waive sovereign immunity and "will only confer subject matter jurisdiction where some other statute provides such a waiver."); Assiniboine & Sioux Tribes of Fort Peck Indian Reservation, 792 F.2d at 792 (Section 1362 does not constitute a waiver of sovereign immunity).

Similarly, it is well settled that the mandamus statute, 28 U.S.C. § 1361, does not by itself waive sovereign immunity. See Smith v. Grimm, 534 F.2d 1346, 1352 (9th Cir. 1976). Rather, mandamus actions are limited to their traditional scope and are "proper only to command an official to perform an act which is a positive command and so plainly prescribed as to be free from doubt. The claim must be clear and certain and the duty of the officer ministerial." Id. (citations omitted). Here, Plaintiffs cannot allege that Federal Defendants failed to take any actions that are so plainly prescribed as to be free of doubt. As discussed below, Plaintiffs instead base their claims on a treaty that does not contain a right to

notice and consultation, as well as an Executive Order and various internal regulations and policy guidelines that do not create ministerial duties or private rights of action.

Likewise, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, does not waive sovereign immunity or confer an independent jurisdictional basis. Smith, 534 F.2d at 1349 n.5 (citation omitted). The statute "neither provides nor denies a jurisdictional basis for actions under federal law, but merely defines the scope of available declaratory relief." Progressive Consumers Fed. Credit Union v. United States, 79 F.3d 1228, 1230 (1st Cir. 1996) (internal citation and quotation omitted).

In short, Plaintiffs cite numerous statutes that provide for jurisdiction and relief once a viable suit is brought forth. But the Complaint fails to set forth a viable statutory waiver of the United States' sovereign immunity. Without this essential piece, Plaintiffs cannot properly invoke jurisdiction and their Complaint must be dismissed.

B. The APA Does Not Provide a Waiver of Sovereign Immunity Here.

At several points in their Complaint, the Tribes claim jurisdiction exists under the APA. It first states that the APA applies "in that the Nation seeks relief for other than money damages against agencies of the United States and its officers in their official capacity." ECF No. 41, ¶ 12(d). Additionally, claims of APA violations are the bases, in whole or in part, of the Tribes' first cause of action (alleging a treaty violation), fourth cause of action (alleging violations of various regulations and directives), and the fifth cause of action. ECF No. 41, ¶¶ 119, 159, 161-166. The fifth cause of action is explicitly brought solely under the APA and alleges that "Federal agency action taken without fully complying with a tribal consultation policy adopted by the agency is subject to judicial review under the APA." Id. ¶ 162. Plaintiffs then cite to Section 702 of the APA, alleging that

the Federal Defendants' actions were illegal, arbitrary and capricious, abuses of discretion, and were agency actions for purposes of the APA. Id. ¶ 166. These are all incorrect conclusions of law, and insufficient bases for this Court to exercise jurisdiction.

"[T]he APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." Califano v. Sanders, 430 U.S. 99, 107 (1977). While Section 702 of the APA contains a limited waiver of sovereign immunity for certain actions against the federal government, "the party seeking review under § 702 must show that he has 'suffer[ed] legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action '*within the meaning of a relevant statute*.'" Lujan v. National Wildlife Federation, 497 U.S. 871, 883 (1990)(emphasis added). The Supreme Court has also unanimously held that the APA does not authorize federal courts to "enter general orders compelling compliance with broad statutory mandates." Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 66 (2004). Under the APA, a federal court can only remedy a "failure to act" that amounts to withholding an action that is both "discrete" and "legally required." Id. at 63. Moreover, the APA also precludes judicial review of agency action committed to the agency's discretion by law. 5 U.S.C. § 701(a)(1); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

It is a plaintiff's burden to focus the case sufficiently for judicial review under the APA. See Colo. Farm Bureau Fed'n v. U. S. Forest Serv., 220 F.3d 1171, 1173 (10th Cir. 2000) ("Plaintiffs have the burden of identifying specific federal conduct and explaining how it is 'final agency action' within the meaning of section 551(13)") (citing Lujan, 497 U.S. at 882). If a plaintiff fails to identify a final agency action challengeable under the APA, the action should be dismissed for lack of subject matter jurisdiction. See ONRC Action v. Bureau of Land

Mgmt., 150 F.3d 1132, 1140 (9th Cir. 1998) (holding that plaintiff had no statutory standing because it failed to identify a final agency action for purposes of the APA).

Here, the Tribes have not identified any final agency actions in violation of specified laws nor a cognizable legal wrong in any of their causes of action where they invoke the APA. Instead, the Tribes point to the Treaty, an executive order, a regulation and various internal government policies and directives. As discussed below, these documents are not "relevant statutes" as required under the APA, do not set forth mandatory, non-discretionary duties, and in some cases explicitly state that they cannot serve as the basis for a legal action. The Tribes have thus failed to establish this Court's jurisdiction under the APA.

C. The Treaty Does Not Require Notice and Consultation.

The primary reason Plaintiffs are unable to point to a valid waiver of sovereign immunity is that the document at the heart of their case—the Yakama Treaty of 1855—does not support their position. While the canon of construction favors resolving textual ambiguities in treaties in favor of Indians, this does not come into play unless and until a court finds *express language* within the four corners of the treaty which would be "reasonably construed" to support the claimed treaty right. See, e.g., Ramsey v. United States, 302 F.3d 1074, 1078-9 (9th Cir. 2002) (rejecting Yakama member's argument that he was exempt from federal vehicle and fuel taxes because Treaty contained no such "express exemptive language" and citing Confederated Tribes of Warm Springs Reservation v. Kurtz, 691 F.2d 878, 881 (9th Cir. 1982) (noting that the intent to exempt must be definitely express before the court can construe the statute or treaty to create an exemption), and United States v. Anderson, 625 F.2d 910, 913 (9th Cir. 1980) (noting that the canon of construction reading statutes and treaties in favor of the Indians does not come into play absent express exemptive

language)). Following this rule, courts have held that a treaty trumps federal law only where there is an expressly stated provision in the treaty. See, e.g., U.S. v. Smiskin, 487 F.3d. 1260, 1267 (9th Cir. 2007) (decision based on expressed "right to travel . . . upon all public highways").

In contrast to Smiskin, nowhere in the Yakama Treaty is there a provision stating or even suggesting that federal law enforcement officers are required to give notification of entry and to consult with the Tribe before entering the boundaries of the reservation to enforce or investigate violations of federal law. Being unable to point to any express language of the Treaty itself, Plaintiffs instead attempt to stretch the meaning of the words used in the Treaty and rely heavily on selected excerpts from the minutes of the Treaty negotiations. But looking to the treaty minutes to interpret the treaty language is not proper where there is no ambiguity in the treaty's text. While ambiguities in the text of a treaty must be construed in favor of Indians, "[c]ourts are not free to create ambiguities in order to serve the interests of Indians." Confederated Tribes of Warm Springs Reservation, 691 F.2d at 881. In other words, there is no textual support for the position advocated by the Tribes, and such a right cannot be created where none exists.

The language of the Treaty does not provide Plaintiffs the necessary "relevant statute" under the APA and Plaintiffs' Treaty claim should be dismissed for lack of jurisdiction. Likewise, the Treaty claim fails under Rule 12(b)(6).

D. Executive Order No. 13175 Is Not Judicially Reviewable.

Throughout its Complaint, the Tribes also allege that the United States failed to comply with Executive Order No. 13175, which calls for consultation and coordination with Indian tribes in some instances, and offers this as the legal basis for several of their claims for relief. But this Executive Order expressly disclaims

judicial review and therefore, under established case law cannot provide subject matter jurisdiction.

As a general rule, private parties may not enforce compliance with orders issued by the Executive Branch. Chai v. Carroll, 48 F.3d 1331, 1339 (4th Cir. 1995); Zhang v. Slattery, 55 F.3d 732, 747-48 (2d Cir. 1995). Executive orders, such as the one at issue here, are generally viewed "as a managerial tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action." Indep. Meat Packers Ass'n v. Butz, 526 F.2d 228, 236 (8th Cir. 1975); see also In re Surface Mining Regulation Litig., 627 F.2d 1346, 1357 (D.C. Cir. 1980). Courts have long rejected attempts to enforce executive orders implementing executive branch policies through private lawsuits. Facchiano Constr. Co. v. U.S. Dep't of Labor, 987 F.2d 206, 210 (3d Cir. 1993); Farkas v. Tex. Instrument, Inc., 375 F.2d 629, 632-33 (5th Cir. 1967); Farmer v. Phila. Elec. Co., 329 F.2d 3, 9-10 (3d Cir. 1964). Courts have recognized an exception to this general rule, only where the following criteria are met: (1) the executive order is based upon statutory authority, (2) there is a legal standard or "law to apply" by which the agency's action may be judged, and (3) the executive order does not expressly disclaim the creation of a private right of action. See City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1166 (9th Cir. 1997).

The exception allowing for judicial review plainly does not apply to Executive Order 13175. The last paragraph of the order expressly disclaims the creation of a private right of action: "This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person." Ex. 3. § 10. In

short, the language of the Executive Order definitively resolves that the Order is not judicially reviewable.

Additionally, while the Court need not reach this issue, Plaintiffs have also failed to demonstrate how this Executive Order meets the first and second requirements that it be based upon statutory authority and supply a legal standard by which the agency's actions may be judged. Nor could Plaintiffs do so, as it is clear from the face of the order that it is not based upon any statutory authority, and imposes no legal standard by which the Court could conduct meaningful judicial review.

The Tribes are thus incorrect in their repeated assertion that this Executive Order provides grounds for relief. The document explicitly prohibits any type of judicial review based upon it. Those causes of action based upon Executive Order No. 13175 are not based upon a valid waiver of sovereign immunity and must therefore be dismissed for lack of subject matter jurisdiction.

E. Regulations and Internal Guidance Memoranda do Not Waive Sovereign Immunity or Provide a Private Right of Action.

The Tribes next cite 25 U.S.C. §§ 2801-2815 (the Tribal Law and Order Act), 28 C.F.R. § 0.134 (the regulation defining the Office of Tribal Justice ("OTJ") as a component of the Department of Justice), and various internal policy memoranda, arguing that these documents give them a private right of action to sue for a lack of notice and consultation prior to the execution of a criminal search warrant. ECF No. 41, ¶¶ 145-159.

But just as with the Executive Order discussed above, none of these documents contain a waiver of sovereign immunity, nor provide for a cause of action. First, federal regulations do not waive sovereign immunity unless a waiver of sovereign immunity is unequivocally expressed in the statutory text; waiver will not be implied. Lane v. Pena, 518 U.S. 187, 192 (1996); Heller v. United

States, 776 F.2d 92, 98 n.7 (3d Cir. 1985)("Government regulations alone, without the express intent of Congress, cannot waive sovereign immunity."). Second, even where a statute does call for government consultation, this does not create a private right of action to sue for a lack of consultation. See Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988) (holding that the consultation requirement of the American Indian Religious Freedom Act, a statute created for the benefit of Indian tribes, does not create a private right of action); see also San Carlos Apache Tribe v. United States, 417 F.3d 1092, 1099 (9th Cir. 2005) (holding that the National Historic Preservation Act's consultation provision does not create a private right of action).

The regulations and directives cited by the Tribes plainly do not waive sovereign immunity or create a private right of action. The Tribal Law and Order Act and its implementing regulations simply establish the Office of Tribal Justice as a component of the Department of Justice and set forth the parameters of its organization, mission and function. Neither contains any language creating a right of action against the federal government or otherwise waiving immunity. See 25 U.S.C. §§ 2801-2815; 28 C.F.R. § 0.134.

Similarly, the Attorney General's Guidelines for Domestic FBI Operations guides the FBI in investigating crimes and contains a provision providing that the FBI "may disseminate information" to "tribal agencies if related to their responsibilities." See Ex. 4, Section VI. B. 1.b. But the guidelines further provide that they are:

> solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter, civil or criminal, nor do they place any limitation on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

Ex. 4, Section I. D. 2.

The Attorney General's June 1, 1995 Memorandum on Indian Sovereignty provides that the executive branch shall "consult, to the greatest extent practicable and permitted by law, with Indian tribal governments before taking actions that affect federally recognized Indian tribes." See Ex. 5, Section I. A. 2. The Memorandum provides that "the Department will consult with tribal leaders in its decisions that relate to or affect the sovereignty, rights, resources or lands of Indian tribes," but then clarifies that "[e]ach component will conduct such consultation in light of its mission." Id., Section III. B. The Memorandum further provides that "[t]he trust responsibility, in both senses [the general trust responsibility and the specific, enforceable, legal trust duties], will guide the Department in . . . enforcement, . . . when appropriate to the circumstances." Id. Section III. D. Finally, the memorandum provides that the policy "is not intended to create any right enforceable in any cause of action by any party against the United States, its agencies, officers, or any person." Id., Section V.

The Memorandum of Understanding between the BIA and the FBI likewise contains the provision that the document is for internal guidance only and does not create procedural or substantive rights enforceable at law. Ex. 6. Further, the President's Memorandum of November 5, 2009, the January 10, 2010, Ogden memo, and the January 27, 2010, DOJ Plan to Develop a Tribal Consultation and Coordination Policy, all cited by Plaintiffs, are simply plans of action for the implementation of Executive Order No. 13175.

Plaintiffs fare no better with the Department of Treasury's Internal Revenue Manual (IRM). The IRM provisions do not create or confer any procedural or substantive rights, privileges, or benefits on any person. They are not intended to have the force of law. Fargo v. Commissioner, 447 F.3d 706, 713 (9th Cir. 2006); Crystal v. United States, 172 F.3d 1141, 1148 (9th Cir. 1999).

Thus, not only do the Tribes not cite to regulations and directives containing express language creating a private right of action, they actually cite to regulations and directives that expressly prohibit these actions. The Tribes' fourth cause of action and any other claims based on the regulations and directives cited by Plaintiffs are without any legal support and must be dismissed under Rule 12(b)(1).

F. The United States Does Not Have a Trust Duty to Consult With the Tribes Before Executing a Search Warrant.

Similarly, the Tribes are unable to raise a viable claim that the lack of notice and consultation violated a trust obligation. "[A]lthough the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency' s compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 574 (9th Cir. 1998).

This straightforward rule controls on this issue. As discussed above, the Tribes are unable to point to a specific statutory duty or treaty provision requiring the FBI task force officers to notify and consult with the Tribe before executing a search warrant. The United States, therefore, has discharged its general trust responsibility by complying with general statutes and regulations regarding the procurement and execution of search warrants, and is under no other specific enforceable duty.

G. Plaintiffs Do Not Have Standing to Sue the Federal Government under the Doctrine of *Parens Patriae*.

Lastly, Plaintiffs have not established standing for any claims they purport to bring under the doctrine of *parens patriae*. Under this doctrine, a state or local government may bring a legal action to protect its quasi-sovereign interests, such

as the interest in the health and well-being of its citizenry or the interest in preventing discrimination against its citizenry. Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez, 458 U.S. 592, 600-01 (1982). Importantly, a state does not have standing to sue the federal government to protect such interests because, with respect to the relationship between citizens and the federal government, the United States, and not the state, is presumed to represent the interests of citizens as *parens patriae*. Id. at 610 n.16 (citations omitted). This principle also applies to bar local government entities such as counties from bringing *parens patriae* actions against the federal government. See, e.g., Mount Evans Co. v. Madigan, 14 F.3d 1444, 1453 n.3 (10th Cir. 1994).

Likewise, this doctrine applies here to bar the Tribes from bringing a *parens patriae* action against the United States. Because the United States is presumed to represent the interests of citizens as *parens patriae,* and the Tribes are a sovereign entity analogous to a state, it is similarly unable to bring a *parens patriae* suit against the United States. See, e.g., Northern Paiute Nation v. U.S., 10 Cl.Ct. 401, 406 (Cl. Ct.,1986) ("Since the Tribe, in relation to the Federal Government, is lower in the hierarchy of governments, somewhat akin to a state, it would seem reasonable to conclude that the Tribe cannot litigate as a *parens patriae* against the Federal Government on behalf of its members.").

II. Alternatively, the Complaint Fails to State a Claim Upon Which Relief can be Granted.

For the same reasons that this Court lacks subject matter jurisdiction to consider Plaintiffs' claims, the Complaint can also be dismissed for its failure to set forth any viable claims for relief. As discussed above, neither the Treaty nor any other statute, regulation or directive cited by Plaintiffs, requires that the United States notify and consult with the Yakama Tribal Government prior to

executing a valid search warrant on reservation lands. As such, the Complaint may also be dismissed under Rule 12(b)(6).

CONCLUSION

For the reasons set forth above, the United States respectfully requests the Court dismiss Plaintiffs' Second Amended Complaint.

DATED this 22nd day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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