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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

WINNEMUCCA INDIAN COLONY, THOMAS R. WASSON, CHAIRMAN, Plaintiffs v. UNITED STATES OF AMERICA ex rel. THE DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, WESTERN NEVADA AGENCY, SUPERINTENDENT, and, THE EMPLOYEES, CONTRACTOR AND AGENTS OF THE WESTERN NEVADA AGENCY OF THE BUREAU OF INDIAN AFFAIRS, Defendants.	Case No. 3:11-CV-00622-RCJ-VPC **DEFENDANTS' MOTION TO DISMISS**

COME NOW Defendants the United States of America, Department of the Interior, Bureau of Indian Affairs, Western Nevada Agency, Superintendent, and the employees, contractor and agents of the Western Nevada Agency of the Bureau of Indian Affairs (collectively "BIA") and hereby move to dismiss this action. Dismissal is warranted on numerous grounds, including

failure to state a claim for relief, res judicata, lack of subject matter jurisdiction, sovereign immunity, failure to exhaust administrative remedies, failure to perfect service of process and lack of personal jurisdiction. This motion is brought pursuant to Federal Rules of Civil Procedure 12(b)(1), (2), (5) and (6).

ARGUMENT

A. The complaint does not assert any causes of action and thus it fails to state a claim for relief.

Plaintiffs' complaint asserts two "claims for relief" against the BIA: "Temporary Restraining Order and Preliminary Injunction" and "Declaratory Judgment." (#1 at pp. 6-7). No other "claims for relief" are alleged. Those purported "claims for relief," however, are not claims at all; they are simply remedies. *See Chiste v. Hotels.com L.P.*, 756 F.Supp.2d 382, 407 (S.D.N.Y. 2010) ("Declaratory judgments and injunctions are remedies, not causes of action."); *Lima v. American Home Mortgage Servicing, Inc.,* 2010 WL 144810 at 2 (N.D.Cal.) ("an injunction is a remedy, not a cause of action"); *Downingtown Industrial & Agricultural School*, 172 B.R. 813, 823 (E.D.Pa. 1994) ("a declaratory judgment is a procedural device and not a cause of action"). Because the complaint seeks remedies but asserts no causes of action, it fails to state a claim for relief and should be dismissed.

B. This action is barred because Winnemucca Indian Colony co-representative William Bills did not authorize the filing of the complaint or the relief it seeks.

On September 16, 2001, this Court ruled that "[u]ntil some tribal court says otherwise or [William] Bills appears and is heard to object (making the Council's vote 1-1), Wasson represents the will of the [Winnemucca Indian] Council under the Minnesota Panel's ruling." (#19 p. 13, lines 3-5). On September 19, 2011, William Bills informed the BIA that he "objects to the BIA relying upon Mr. Wasson speaking on behalf of the [Winnemucca Indian] Colony." (#23). Bills further advised that "[t]he will of Mr Wasson is not the will of the Council or Mr. Bills." (#23).

Plaintiffs' complaint seeks to take action on behalf of the Winnemucca Indian Colony. ("Colony") (#1). Specifically, the complaint seeks to prevent unwanted persons from entering

Colony property and interfering with Colony activities on that property. (#1). The complaint also seeks a judgment that would require the BIA to recognize Wasson and his faction as the Colony's government. (#1). As noted, however, Wasson does not speak for — or represent — the will of the Colony. Thus, he is not authorized to seek the removal of unwanted persons from Colony lands or recognition of himself and his faction as the Colony's government. On the contrary, Bills, as co-representative of the Colony, must approve such actions before Wasson may proceed. Bills has not given the requisite approval, however. (#23). In fact, Bills has advised that he objects to any action by Wasson that is purportedly taken on behalf of the Colony. (#23). Accordingly, because Bills did not authorize the filing of the complaint or the relief it seeks, this action should be dismissed in its entirety.

C. The doctrine of res judicata bars the "claim for relief" that this Court should order the BIA to "recognize" a tribal government.

Three elements determine whether the doctrine of res judicata applies to bar a claim. There must exist an identity of claims, a final judgment on the merits and privity between the parties. *Rowland v. Baca*, 2011 WL 841275 at 1 (N.D.Cal.). Here, Plaintiffs have asserted as a "claim for relief" that this Court should order the BIA to recognize certain tribal members as the governing body of the Colony. (#1 ¶ 44). But Plaintiff Thomas R. Wasson ("Wasson") asserted that same "claim for relief" in *Magiera et al. v. Norton et al.*, 3:01-cv-00467-LRH-VPC: "Because of th[e] continuing refusal by the BIA to recognize the government, the Winnemucca Indian Colony filed the Complaint in this matter to require the BIA to recognize the Council." (*Magiera et al. v. Norton et al.*, 3:01-cv-00467-LRH-VPC; Ex. E at 5). The first element of res judicata is thus met because that "claim for relief" — asserted in both cases — is identical. The second element of res judicata is also met because the Court dismissed the complaint in *Magiera* and then issued a final judgment that was appealed to the Ninth Circuit Court of Appeals. (*Magiera et al. v. Norton et al.*, 3:01-cv-00467-LRH-VPC; Exs. F-G). Lastly, there is privity between the parties because in *Magiera*, Wasson asserted his claim against the federal government, as is the case here. (*Magiera et al. v. Norton et al.*, 3:01-cv-00467-LRH-

VPC; Exs. E-G). Because the "claim for relief" that this Court should order the BIA to recognize a tribal government is barred by the doctrine of res judicata, that "claim for relief" should be dismissed from this action.

D. Plaintiffs have failed to plead a valid basis for subject matter jurisdiction.

Federal courts are courts of limited jurisdiction and, until proven otherwise, a federal court is presumed to lack jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377 (1944); *Whitman v. Dept. of Transportation*, 382 F.3d 938, 943, n. 6 (9th Cir. 2004). Because a federal court is presumed to lack jurisdiction, a plaintiff bears the burden to establish the existence of jurisdiction. *Kokkonen*, 511 U.S. at 377; *Hollomon v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983).

Plaintiffs' complaint asserts that this Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1296, 1331 and 1346. (#1, ¶ 1). But none of those provisions provides a proper basis for subject matter jurisdiction for the claims alleged. The first statute cited by Plaintiffs, 28 U.S.C. § 1296, gives the United States Court of Appeals for the Federal Circuit — not this Court — jurisdiction over certain matters, which the statute identifies. Because the statute does not apply to this Court, however, Plaintiffs' reliance on the statute is misplaced.

Plaintiffs' reliance on 28 U.S.C. § 1331 is equally unavailing. That provision gives the district courts jurisdiction over civil actions that arise under the Constitution, laws or treaties of the United States. But Plaintiffs' complaint does not allege any such violation. On the contrary, as noted, the complaint simply seeks declaratory and injunctive relief. (#1 ¶¶ 6-7). Accordingly, 28 U.S.C. § 1331 does not provide a basis for subject matter jurisdiction over this action.

The third provision on which Plaintiffs rely, 28 U.S.C. § 1346, provides subject matter jurisdiction for tax-refund claims, contract claims and claims for money damages under the Federal Tort Claims Act ("FTCA"). 28 U.S.C. 1346(a)(1)(2) and (b)(1). But Plaintiffs' complaint does not assert such claims and Plaintiffs have not requested money damages. Moreover, as a

prerequisite to filling suit under the FTCA, a litigant is required to file an administrative claim with the appropriate federal agency — in this case the BIA. *Hollomon*, 708 F.2d at 1402. But Plaintiffs did not file an administrative claim in this matter and this Court thus lacks jurisdiction to consider an FTCA cause of action.

In sum, Plaintiffs have failed to establish that this Court has subject matter jurisdiction over the claims alleged. Accordingly, this case should be dismissed in its entirety. *See Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir. 2002) ("The party asserting federal jurisdiction has the burden of establishing it.") (citation omitted).

E. Plaintiffs' claims are barred by the doctrine of sovereign immunity.

The United States is immune from suit except as it consents to be sued. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). No action can lie against the United States unless Congress has authorized the action and consented to the lawsuit. *McGuire v. U.S.*, 550 F.3d 903, 910 (9th Cir. 2008). The terms of the United States' consent to be sued define the Court's jurisdiction to hear a case. *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941). Because the United States' consent to be sued is a prerequisite to jurisdiction, a plaintiff is required to identify a statute that specifically authorizes suit against the United States. *See Powelson v. U.S.*, 150 F.3d 1103, 1104 (9th Cir. 1998) ("[i]n an action against the United States, *in addition* to statutory authority granting subject matter jurisdiction, there must be a waiver of sovereign immunity") (emphasis in original). The doctrine of sovereign immunity applies equally to suits brought by tribal plaintiffs. *United States v. Mottaz*, 476 U.S. 834, 851 (1986). A suit against a United States officer alleging statutory or constitutional violations qualifies as a suit against the sovereign if relief will require affirmative action by the sovereign. *Johnson v. Matthews,* 539 F.2d 1111, 1124-25 (8th Cir. 1976).

As noted, Plaintiffs' complaint asserts jurisdiction pursuant to 28 U.S.C. §§ 1296, 1331 and 1346. (#1, ¶ 1). But none of those provisions provides a waiver of sovereign immunity for the claims alleged. Again, 28 U.S.C. § 1296 gives the United States Court of Appeals for the Federal Circuit — not this Court — jurisdiction over certain matters. Because the statute does not apply

to this Court, and, in any event, the provision fails to address the issue of sovereign immunity, Plaintiffs' reliance on that statute is unfounded.

Plaintiffs reliance on 28 U.S.C. § 1331 is likewise misplaced. As noted, the provision gives the district courts jurisdiction over civil actions that arise under the Constitution, laws or treaties of the United States. But the provision does not waive the government's immunity from suit. *See Hollomon v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983) ("Section 1331 does not waive the government's sovereign immunity from suit."); *Rosebud Sioux Tribe v. United States*, 714 F.Supp. 1546, 1552 (D. S.D. 1989) (28 U.S.C. § 1331 "sets forth the general federal question jurisdiction of federal courts, but is not a general waiver of sovereign immunity allowing suits against the government").

The third provision on which Plaintiffs rely, 28 U.S.C. § 1346, provides a waiver of sovereign immunity for tax-refund claims, contract claims and FTCA claims. Again, Plaintiffs' complaint does not assert such claims and, in any event, Plaintiffs did not file an administrative claim before filing suit. Under the circumstances, there has been no waiver of sovereign immunity.

In sum, Plaintiffs have failed to cite any authority that demonstrates the United States' waiver of sovereign immunity for the claims alleged in the complaint. Accordingly, the case should be dismissed in its entirety. *See Duval Ranching Co. v. Glickman*, 965 F.Supp. 1427, 1444 (D.Nev. 1997) ("The absence of the United States' consent to be sued is a 'fundamental jurisdictional defect' which negates our subject matter jurisdiction.") (citations omitted)

F. The tribal leadership question is currently the subject of litigation in administrative proceedings. This Court lacks jurisdiction to proceed until a final agency decision issues.

The claim that the BIA should "recognize" a Colony government is currently the subject of ongoing proceedings in Plaintiffs' administrative case before the BIA. (Bowker Dec. ¶¶ 9-10; Ex. B-D). On December 8, 2009, the BIA's Regional Director issued a decision that he would not "recognize" the Colony's purported governing body. (Bowker Dec. ¶ 9; Ex. B; TRO Motion Ex.

5). On December 17, 2010, the Interior Board of Indian Appeals ("IBIA") vacated the Regional Director's decision because he did sufficiently explain the basis for his ruling. (Bowker Dec. ¶ 9; TRO Motion Ex. 5). The IBIA then remanded the case with instructions for the Regional Director to give Plaintiffs an opportunity to submit supplemental briefing and evidence related to an alleged trespass and the tribal leadership issue. (Bowker Dec. ¶ 9; TRO Motion Ex. 5). The IBIA also ordered the Regional Director to give other interested parties an opportunity to respond. (Bowker Dec. ¶ 9; TRO Motion Ex. 5).

On July 21, 2011, in accordance with the IBIA's remand order, the BIA requested supplemental briefing and evidence addressing several questions, including the following:

> 1. Identification of the names of the individuals and in what capacity they request action by the BIA.
>
> 2. The current basis for your claim relating to the trespass allegation and to the tribal leadership issue.
>
> * * * * *
>
> 9. The specific statute(s), regulation(s), or cases upon which you premise your allegation that BIA is required to "recognize" Appellants as the Tribal Council for the Winnemucca Indian Colony.

(Bowker Dec. ¶ 10; Ex. C).

On August 30, 2011, Plaintiffs submitted supplemental briefing to the BIA. (Bowker Dec. ¶ 10; Ex. D). Plaintiffs' briefing makes the very same tribal leadership claims that they have asserted before this Court. (Bowker Dec. ¶ 10; Ex. D). Plaintiffs' briefing includes the following statement:

> 1. Identification of the names of the individuals and in what capacity they request action by the BIA.
>
> *The names of the individuals who request action by the BIA for recognition of the government of the Winnemucca Indian Colony are*: Thomas R. Wasson, Chairman of the Winnemucca Indian Colony[,] Misty Morning Dawn Rojo, Vice Chairman, Katherine Hasbruck, Secretary, Eric Magiera, Treasurer, and Judy Rojo, Councilman of the Council of the Winnemucca Indian Colony. These persons make these requests in their official capacity as the Council of the Colony and in their individual capacity as members of the Colony.
>
> * * * * *

(Bowker Dec. ¶ 10; Ex. D) (emphasis added). Plaintiffs' briefing also includes arguments addressing BIA questions 2 and 9. (Bowker Dec. ¶ 10; Ex. D). Specifically, Plaintiffs argue that the BIA should be required to "recognize" a tribal government. (Bowker Dec. ¶ 10; Ex. D) Plaintiffs also accuse the BIA of unreasonably delaying that recognition. (Bowker Dec. ¶ 10; Ex. D). In support of their arguments, Plaintiffs discuss and attach a multitude of authorities and exhibits. ((Bowker Dec. ¶ 10; Ex. D).

Interested parties, including those who claim to be the rightful Colony leader, will now have an opportunity to respond to Plaintiffs' arguments. (Bowker Dec. ¶ 10; Ex. D). Once briefing in the administrative case is complete, the BIA will issue its ruling. (Bowker Dec. ¶ 10). Plaintiffs will have the right to seek IBIA review once that final agency decision issues. (Bowker Dec. ¶ 10).

The fact that an administrative proceeding is currently underway involving the very claims at issue in this litigation deprives this Court of jurisdiction to proceed. Administrative remedies must be exhausted — and a final agency decision issued — before judicial review is appropriate. *See Joint Board of Control v. United States*, 862 F.2d 195, 199 (9th Cir. 1988) ("the federal courts may not assert jurisdiction to review agency action until the administrative appeals are complete"); *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 919 (9th Cir. 1995) (allowing judicial review for "final" agency decisions). Accordingly, this Court should dismiss this action for failure to exhaust administrative remedies and lack of a final agency decision.[1]

G. This Court lacks jurisdiction to direct the BIA to "recognize" the Colony's governing body.

As noted, Plaintiffs' complaint asks this Court to order the BIA to "recognize" certain persons as the Colony's governing body. (#1 ¶ 44). But three judges in this district — Judges Edward Reed, Brian Sandoval and Larry Hicks — have concluded that this Court lacks

[1] The regulations for IBIA review of BIA decisions are found at 25 C.F.R. § 2.3(a) (2011) and 43 C.F.R. § 4.331 (2011).

jurisdiction to issue such orders. *See U.S. Bancorp v. Ike*, 171 F. Supp. 2d 1122, 1125 (D.Nev. 2001) ("We agree with the Ike Group that we have no jurisdiction to determine which group is the governing body of the Te-Moak. Deciding a question involving a tribal election dispute is solely a matter of tribal law, and we do not have jurisdiction to address this question."); *Bank of America v. Bills*, 3:00-cv-450-BES-VPC (#225) ("Federal Courts do not have jurisdiction to determine tribal governments or to decide issues solely involving intra-tribal politics. * * * This Court decided in its March 6, 2008 Order that the decision by the Minnesota Panel was controlling in this matter. As such, the Court enforced a trial court decision under principles of comity. The Court did not decide a government for the Winnemucca Indian Colony."); *Magiera v. Norton*, CV-N-01-467-LRH-VPC (#63) (dismissing claims related to tribal leadership dispute because "in the absence of a determination by the BIA, the issues facing the Winnemucca Tribe, which are questions of Tribal law, are not questions properly resolved by a federal court").

A majority of courts agrees with Judges Reed, Sandoval and Hicks that courts are precluded from deciding tribal leadership disputes: *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 712-13 (2nd Cir. 1998) (holding that court lacked jurisdiction to determine which member of tribe was proper tribal representative, as question involved purely tribal law); *Sac and Fox Tribe of the Mississippi in Iowa*, 258 F. Supp. 2d 938, 943 (N. D. Iowa 2003) ("[D]espite plaintiffs' efforts to characterize this action as one based on federal question jurisdiction, the Court finds that the Tribe's leadership dispute raises intra-tribal issues. This Court is without jurisdiction to resolve intra-tribal disputes."); *Wheeler v. U.S. Dept. of Interior*, 811 F.2d 549, 551 (10th Cir. 1987) ("when a tribal forum exists for resolving a tribal election dispute, the Department [of the Interior] must respect the Tribe's right to self-determination and, thus, has no authority to interfere."); *Ordinance 59 Ass'n v. Babbitt,* 970 F.Supp. 914, 927 (D.Wyo. 1997) ("unless expressly waived or affected by Congressional enactment, [Indian tribes] have sovereign immunity over intra-tribal disputes such as those involving tribal government and membership"); *Attorney's Process and Investigation Services, Inc. v. Sac and Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 943 (8th

Cir. 1020) ("It is plain, then, that whether Walker was properly removed from office and whether he had general authority to act on behalf of the Tribe in a governmental capacity are pure questions of tribal law, beyond the purview of the federal agencies and the federal courts.").[2]

Moreover, the Colony's Constitution has reserved solely to itself the determination of council membership. *See* Article III (describing council composition, eligibility and length of term requirements); Article IV (describing election requirements); Article V (describing how to fill council vacancies and how to remove and recall council members); and Article VI (describing council powers).[3] In addition, Article VII, entitled "Powers of the People," specifically reserves to Colony members the authority to alter council action:

> Section 1. The power of the colony lies with its members. Any actions taken by the council pursuant to constitutional delegation shall be subject to revocation or change at the will of a majority of the colony members through the adoption of appropriate amendments.
>
> Section 2. The will of the members of the colony shall be imposed through referendum, initiative, and recall, the procedures to be used in accomplishing this shall be specified in an ordinance which shall be enacted by the council within one (1) year following the effective date of this document.

(Ex. A). The Colony's Constitution thus confirms that tribal leadership disputes are — and must be — resolved through tribal mechanisms and procedures. Accordingly, the claim that this Court should order the BIA to "recognize" a tribal government is subject to dismissal.

H. Plaintiffs have not perfected service of process.

A federal court must obtain personal jurisdiction over a defendant before it can issue a binding judgment against that defendant. Without proper service of process, the court has no

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[2] *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983) reached a different result. There, the BIA was required to recognize a tribal government on an interim basis until a tribal election dispute could be resolved. *Id.* at 339. The case appears to be an anomaly, however, and inconsistent with the majority rule. For that reason, this Court should decline to follow the non-binding Eighth Circuit decision. *Goodface* is also inapposite because a final agency decision had issued in that case, thereby providing jurisdiction under the APA. Here, as noted, no final agency decision has issued.

[3] The Colony's Constitution is attached hereto as Exhibit A.

jurisdiction to render a judgment. *Moskovits v. DEA*, 774 F.Supp. 649 (D. D.C. 1991). Actual notice by the defendant is not sufficient and does not substitute for compliance with service requirements. *DeFazio v. Delta Air Lines*, 849 F.Supp. 98 (D.Mass. 1994).

Service upon the United States is effected by (1) delivery of the summons and complaint to the United States Attorney or designated official in the United States Attorney's Office or by mailing a copy of the summons and complaint by certified/registered mail to the United States Attorney's Office and (2) mailing a copy of the summons and complaint by certified/registered mail to the Attorney General in Washington, D.C. Fed. R. Civ. P. 4(i)(1). Service on a federal official of official capacity claims is effected by (1) service on the United States as described above and (2) mailing a copy of the summons and complaint by certified/registered mail to the official. Fed. R. Civ. P. 4(i)(2). Service on a federal official of individual capacity claims also requires service on the United States. Fed. R. Civ. P. 4(i)(3).

These unambiguous and easy-to-follow rules regarding service of process have been in place for decades. Nonetheless, Plaintiffs did not comply with these rules; they filed their complaint with the Court but they did not serve the United States by delivering the summons and complaint to the agency and the Attorney General. Nor did they serve any individual Defendants. Under the circumstances, the action should be dismissed. *See A.W. Reynolds v. United States*, 782 F.2d 837, 838 (9th Cir. 1986) (upholding dismissal of complaint without prejudice where plaintiff failed to serve the United States Attorney's Office).

CONCLUSION

For the reasons argued above, this Court should dismiss this action in its entirety.

Dated this 31st day of October 2011.

Respectfully submitted,

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United States Attorney

/s/ Holly A. Vance
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Assistant United States Attorney

CERTIFICATE OF SERVICE

WINNEMUCCA INDIAN COLONY, THOMAS R. WASSON, CHAIRMAN, Plaintiffs v. UNITED STATES OF AMERICA ex rel. THE DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, WESTERN NEVADA AGENCY, SUPERINTENDENT, and, THE EMPLOYEES, CONTRACTOR AND AGENTS OF THE WESTERN NEVADA AGENCY OF THE BUREAU OF INDIAN AFFAIRS, Defendants.	Case No. 3:11-CV-00622-RCJ-VPC

It is hereby certified that service of the foregoing **"DEFENDANTS' MOTION TO DISMISS,"** was made through the Court's electronic filing and notice system or, as appropriate, by sending a copy of same by first class mail, addressed to the following addressee, on this 31st day of October, 2011.

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