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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DONALD ALLEN, BARBARA CRABTREE, LYNN CRABTREE, VENUS HOAGLEN, DANIEL JACKSON, GWEN JACKSON-LOSS, JESSICA JACKSON, MARTHA KNIGHT, LUCILLE SILVA, MICHAEL TOOLEY, and CLARENCE WRIGHT, Plaintiffs, v. UNITED STATES OF AMERICA, and KENNETH SALAZAR, as Secretary of the United States Department of the Interior, Defendants.	Civil No. CV 11-5069-WHA District Judge William H. Alsup DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS Hearing Date: April 26, 2012 Hearing Time: 2:00 pm Courtroom: 8, 19th Floor Judge: William H. Alsup

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

RELIEF REQUESTED

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants request from the Court an order granting their motion to dismiss Plaintiffs' claims for lack of jurisdiction on the basis that there is no waiver of the government's sovereign immunity and further, as to Plaintiffs' First and Fifth Claims, Plaintiffs' fail to state a claim for which relief may be granted.

STATEMENT OF ISSUES TO BE DECIDED

Whether Plaintiffs fail to allege a waiver of Defendants' sovereign immunity pursuant to the Administrative Procedure Act, 5 U.S.C. § 702 *et seq*, based upon their failure to exhaust administrative remedies.

Whether this Court should dismiss Plaintiffs' Complaint's First and Fifth Claims, for a Fifth Amendment violation and breach of trust, because Plaintiffs fail to provide an explicit waiver of sovereign immunity and fail to state a claim upon which relief may be granted.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Defendants, the United States of America and Kenneth Salazar, as Secretary of the Department of the Interior, (collectively, "Defendants"), hereby move to dismiss this action filed by Plaintiffs, certain individuals claiming membership in the proposed Ukiah Valley Pomo Indian Tribe ("Ukiah Valley").[1] Plaintiffs object to a decision by the Director ("RD") of the Pacific Regional Office ("PRO") of the Bureau of Indian Affairs ("BIA"), but failed to comply with the regulatory requirement to appeal that decision to the Interior Board of Indian Appeal ("IBIA"). Therefore, they have failed to exhaust administrative remedies, and this Court should dismiss their claims for lack of jurisdiction.

Plaintiffs bring suit asserting, *inter alia*, that Defendants: (1) unreasonably delayed calling and conducting a Secretarial election under the Indian Reorganization Act ("IRA"), 25 U.S.C. §

[1] Defendants, in referring to the Ukiah Valley Pomo Indian Tribe in this brief, are not acknowledging that this entity is a federally-recognized tribe or that the individuals seeking to organize the entity as a tribe are eligible to do so.

476;(2) misinterpreted 25 C.F.R. § 81.1(w) and 25 U.S.C. § 476 as requiring Ukiah Valley to be a federally-recognized tribe in order to be eligible for an election; and (3) denied services and benefits to Plaintiffs by preventing them and other individuals from organizing a tribal government. Plaintiffs further plead various jurisdictional statutes, including 28 U.S.C. § 1331 (federal question cases), 28 U.S.C. § 1337 (jurisdiction of any civil action arising under acts of Congress regulating commerce or protecting trade), and 28 U.S.C. § 1361 (mandamus). Finally, Plaintiffs also plead the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq*.

Plaintiffs, some or all of whom are former members of the Pomo Nation, seek to reorganize a new tribal government. Plaintiffs' claims stem from the RD's denial of a petition to call and conduct a Secretarial election pursuant to 25 U.S.C. § 476 of the Indian Reorganization Act ("IRA") for the purpose of organizing a tribe. Plaintiffs are some of the petitioners for this proposed tribe. On August 5, 2010, the Acting RD sent a letter to Plaintiffs' counsel stating that he was without authority to call and/or conduct a Secretarial election as requested. The Ukiah Valley petitioners were further informed of their appeal rights and provided information on how to appeal the decision to the IBIA, including relevant time limitations, addresses of parties, and the form of appeal. Plaintiffs did not pursue their administrative remedies. Instead, on September 8, 2010, their counsel submitted a letter to the RD requesting that he reconsider his decision. The RD did so and denied the reconsideration request on October 22, 2010. Again, the RD fully informed Plaintiffs of their appeal rights before the IBIA. Plaintiffs did not file an appeal. Plaintiffs now attempt to side-step the mandatory administrative process by filing suit in this Court. They cannot do so. Plaintiffs failed to exhaust administrative remedies with the Department of the Interior. Thus, Plaintiffs five claims[2] should be dismissed for lack of subject matter jurisdiction under the APA. Furthermore, this Court should dismiss the First and Fifth Claims, for a Fifth Amendment violation and breach of

[2] First Claim, "Violation of the Fifth Amendment," ¶¶ 30-34; Second Claim, "Violation of 25 C.F.R. § 81.1(w)(2)," ¶¶ 35-40; Third Claims, "Violations of the IRA," ¶¶ 41-44; Fourth Claim, "Violation of Administrative Procedure Act," ¶¶ 45-49; and Fifth Claim, "Breach of Trust," ¶¶ 50-53.

trust, because Plaintiffs fail to provide an explicit waiver of sovereign immunity and fail to state a claim upon which relief may be granted.

I. STATUTORY BACKGROUND

A. The Indian Reorganization Act

Congress passed the Indian Reorganization Act ("IRA") in 1934. Under the IRA, any Indian tribe can organize and adopt a constitution, which constitution would then become effective when ratified by a majority of the tribe in an election called and conducted by the Secretary. The two sections of the IRA that relate to reorganization and adoption of a tribal constitution through a Secretarial election are 25 U.S.C. §§ 476 and 479. Congress, however, limited eligibility for those benefits to persons who met the statutory definition of "tribe" and "Indians" incorporated within section 19. Under section 19, "the term 'tribe' . . . shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indian residing on one reservation." 25 U.S.C. § 479. "Indian" is defined as:

> all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Id. The statute is interpreted in Interior's regulations, which define "Indian" as "(1) [a]ll persons who are members of those tribes listed or eligible to be listed in the Federal Register pursuant to 25 C.F.R. 83.6(b) . . .; and (2) any person not a member of one of the listed or eligible to be listed tribes who possesses at least one-half degree of Indian blood." 25 C.F.R. § 81.1(i). "Tribe" is defined, in part, as "any group of Indians whose members each have at least one-half degree of Indian blood for whom a reservation is established and who each reside on that reservation. Such tribes may consist of any consolidation of one or more tribes or parts of tribes." 25 C.F.R. § 81.1(w)(2).

"[T]he IRA left many of the terms and procedures for Secretarial elections undefined." Cohen, *Handbook of Federal Indian Law*, § 4.06[2][b] (2005 ed.). Indeed, under section 16 (25 U.S.C. § 476(a)(10) as enacted, Congress delegated to the Secretary the authority to promulgate

rules and regulations governing Secretarial elections. *See* Pub. L. No. 73-383, § 16, 48 Stat. 984, 987 (1934) (the reorganization is effective when ratified at a "special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribed.").

The Secretary has delegated some of his responsibilities under the IRA to BIA Regional Directors. *See* 25 U.S.C. § 1a (authorizing delegations of authority). Decisions made by BIA Regional Directors are subject to administrative appeal. *See id*.; 25 C.F.R. §§ 2.1-.21 (setting forth appeal procedures); 43 C.F.R. §§ 4.200-.340 (additional procedures made relevant under 25 C.F.R. § 2.4(e)). The regulations governing the BIA require exhaustion of administrative appeals within the BIA before a decision can be considered "final" for purposes of judicial review. *See* 25 C.F.R. §§ 2.4(e) (IBIA decides appeals from decision made by area director), 2.6 (finality of decisions) 2.8 (appeal from inaction of official); *see also White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988). Specifically, 25 C.F.R. § 2.6 - Finality of decisions provides:

> (a) No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704, unless when an appeal is filed, the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately.
>
> (b) Decisions made by officials of the Bureau of Indian Affairs shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed.
>
> (c) Decisions made by the Assistant Secretary-Indian Affairs shall be final for the Department and effective immediately unless the Assistant Secretary-Indian Affairs provides otherwise in the decision.

Thus, under Departmental regulations, if a decision made by a Regional Director is subject to an administrative appeal, the decision cannot constitute a final agency action for purposes of the APA. 25 C.F.R. § 2.6.

II. FACTUAL BACKGROUND

Plaintiffs are 11 individuals who, along with others, seek to organize as the Ukiah Valley Pomo Indian Tribe. Compl., ¶ 1 and Ex. A. Plaintiffs assert that they qualify for reorganization under the IRA because they are half-blood Indians residing on the Pinoleville Reservation.

Currently, the Pinoleville Pomo Nation (formerly the Pinoleville Rancheria, Pomo Indians of California) occupies the bulk of the reservation. A.R. Allen-2012-000015; 505;528;530;752.[3] The Pinoleville Rancheria was one of 41 rancherias named in the Act of August 18, 1958 (72 Stat. 619) ("Rancheria Act"). Pursuant to the Rancheria Act, Congress authorized the termination of federal trust status of rancheria lands and the termination of special benefits provided to Indians by virtue of their status as Indians occupying those lands. The Secretary of the Interior then approved a distribution plan for the assets of the Pinoleville Rancheria and the individuals listed in the plan were entitled to share in the distribution of the property comprising the rancheria. The status of the Pinoleville Rancheria as a federally-recognized Indian Tribe was restored as a result of the Stipulation for Entry of Judgment approved and entered in *Tillie Hardwick v. United States*, Case No. C 79-1710 SW (N.D. Cal.) on December 22, 1983. It appears that the restored tribe reorganized in 1985 by voting to approve a Constitution that included criteria for membership in the Tribe, although the Secretary never gave final approval to that Constitution. 22 IBIA 176, 1992. Petitioners, and plaintiffs in this case, qualified for membership under the 1985 Constitution. A.R. Allen-2012-000015; 530. After the Pinoleville Rancheria regained its federal recognition, there was a sharp division within the tribe over who was properly a member. After a Special Tribal Election was held on June 21, 2003, the RD recognized the Tribal Council elected on that date. 39 IBIA 234. In 2005, the Rancheria ratified a new constitution, renaming itself the Pinoleville Pomo Nation. A.R. Allen-2012-000045. The 2005 Constitution set out different membership criteria. A.R. Allen-2012-000045; 330; 622. As a consequence, many erstwhile members of the tribe, including some of the Plaintiffs and Ukiah Valley petitioners, were disenrolled from the Rancheria. *Id*.

On May 28, 2009, some of the individuals seeking to organize as Ukiah Valley and their counsel, Lester Marston, met with then-Director of the Pacific Regional Office, BIA Dale Morris and presented: (1) a petition requesting that the Secretary of the Interior call and conduct an election

[3] Citations to the Administrative Record, filed on March 15, 2012 (Dkt. No.25), are "A.R." and the bates number.

under the authority of the IRA for the proposed Ukiah Valley tribe pursuant to 25 U.S.C. § 476 ("Petition"); (2) a proposed tribal membership list; (3) a copy of a proposed Constitution; and (4) a letter dated May 27, 2009, addressed to Regional Director Morris from Mr. Marston reiterating the request that the Secretary call and conduct an election. *See* Compl., ¶ 17. At the meeting, Mr. Morris received the documents and agreed to determine if the petitioners were eligible to hold an election to organize a tribal government. Mr. Marston sent a follow-up letter on June 9, 2009, describing the meeting. *See* Compl., ¶¶ 19-20 and Ex. D.

On November 4, 2009, Mr. Morris sent correspondence to Jerry Gidner, then BIA Director, requesting further instruction in evaluating the materials and request by petitioners to organize the Ukiah Valley as a tribe. *See* Compl., ¶ 21 and Ex. E. Mr. Morris requested further instruction because:

> We understand that the Regional Directors have been delegated the authority to authorize a Secretarial election for those tribes that are federally recognized. However, it is not clear as to what authority the Regional Director has, if any, to authorize a Secretarial election for which the Tribe has requested if the Tribe has not been federally recognized. Furthermore, there are no established regulations that address a process for which the Tribe has requested.

Id. In addition to corresponding with the Regional Director, Plaintiffs' counsel also had telephone conversations and e-mail exchanges with George Skibine, Principal Deputy Assistant Secretary-Indian Affairs, and Margaret Treadway, Counselor to the Principal Deputy Assistant Secretary, regarding Ukiah Valley's request. In one email to Mr. Skibine, Mr. Marston discusses Mr. Morris's November 4 memorandum, noting that, "Mr. Morris is correct there are no regulations per se governing this issue . . ." A.R. Allen-2012-000402; 133.

On May 13, 2010, Acting Regional Director Risling sent a letter to Mr. Marston requesting further information to assist in making a decision on the election request. *See* Compl., ¶ 23 and Ex. F. Specifically, Mr. Risling informed Mr. Marston that, "in order for the Director, Bureau of Indian Affairs, to make an appropriate assessment and determination regarding your request, the following information is requested . . . ." *Id*. Mr. Risling then listed six separate requests concerning the membership, lineal descendant, dependence, distributee, and blood status of the individuals. Mr.

Risling advised that in his office's review of the submitted materials, they determined that 14 of the 43 listed individuals were distributees, dependent members, or lineal decendants of a distributee or dependent member of the Pinoleville Pomo Nation and that 20 were one-half Pomo/Indian bloods. *Id*. As to the other 23 individuals, Mr. Risling requested that they complete enclosed Certificate of Degree of Indian or Alaska Native Blood forms and submit additional documentation so that his office could determine their blood quantum. *Id*.

On July 13, 2010, Mr. Marston replied to Director Risling's request stating that the letter was not responsive to the petitioners' request and demanded that Risling call and conduct an election for the petitioners. Compl., ¶ 24 and Ex. G. Mr. Marston stated that if an election was not authorized on or before July 30, 2010, the petitioners would file suit against the Secretary of the Interior seeking an order directing the Secretary to call and conduct an election. *Id*. After describing the parties' May 28, 2009, meeting, Mr. Marston describes further contacts with BIA officials, including a telephone call and emails with Mr. Skibine and Ms. Treadway. Compl., Ex. G.

On August 5, 2010, Mr. Risling sent a letter to Mr. Marston denying the petitioner's request for the Secretary to call and conduct an election. *See* Compl., ¶ 25 and Ex. H. Mr. Risling stated:

> The latest listing of federally recognized tribes published in the Federal Register dated April 4, 2009, does not list the Ukiah Valley Pomo Indians as an Indian entity recognized and eligible to receive services from the United States Bureau of Indian Affairs (Bureau). The federally recognized tribes listed have been acknowledged by the Assistant Secretary-Indian Affairs. Please be advised that in order for the Bureau to initiate a Federal action, such as calling and conducting a Secretarial election pursuant to the IRA, a tribe must be listed in the Federal Register as a federally recognized tribe.
>
> It is our understanding that the authority for acknowledging that a tribe may organize under the IRA resides within the Assistant Secretary-Indian Affairs, The Assistant Secretary-Indian Affairs or his authorized representative must first acknowledge the Tribe as eligible to organize under the IRA and then authorize a Secretarial election allowing the members of the Tribe and opportunity to ratify their proposed Constitution. Until that determination is made by the Assistant Secretary-Indian Affairs, I am without the authority to call and/or conduct a Secretarial election, as you have requested.[4]

[4] Defendants note that the issue presented to the Court in this Motion to Dismiss is not whether the RD was correct on the law regarding his authority to call the election. The issue is whether absent an administrative appeal of the RD's decision there was a final agency action subject to judicial review.

Id. Mr. Risling explained to the petitioners their appeal rights should they disagree with the decision:

> This decision may be appealed to the Interior Board of Indian Appeal, 8-1 North Quincy Street, Arlington, Virginia 22203, in accordance with regulations in 43 C.F.R. § 4.310 4.340. Your Notice of Appeal to the Board must be signed by you and must be mailed within 30 days of the date you receive this decision. . . . If no Notice of Appeal is filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a Notice of Appeal.

Compl., Ex. H.

After the Acting Regional Director issued his decision, the Ukiah Valley petitioners did not file a Notice of Appeal of the decision. Instead, on September 8, 2010, their counsel submitted a request for reconsideration to the Regional Director. *See* Compl., ¶ 26; A.R. Allen-2012-000185; 268; 299. In addition to sending a request for reconsideration to the Regional Director, on September 17, 2010, Plaintiffs' counsel sent a copy of his September 8 letter to Mr. Skibine by e-mail. *See* A.R. Allen-2012-000210. In this email, Mr. Marston requested that Mr. Skibine advise the Regional Director to call the election. *Id*. Mr. Skibine informed Mr. Marston that he would look into the matter. *See* A.R. Allen-20120-000217.

Plaintiffs' counsel was aware of the Ukiah Valley petitioners' appeal rights. In a September 23, 2010, email to Ms. Treadway, cc'ing Mr. Skibine, Mr. Marston stated:

> If the BIA won't call [Ukiah Valley's] election then please have George pull the request and deny it directly so that I can go directly to federal court and have the decision immediately reviewed. Otherwise as you and I both know, if the Acting Regional Director denies the request at his level, it will be at least 2 years before the IBIA makes a decision on the appeal that I will file.

See A.R. Allen-2012-000213. On October 7, 2010, Mr. Skibine informed Mr. Marston that the Regional Director would reconsider the decision and issue a new decision within 45 days. *See* A.R. Allen-2012-000217.

On October 22, 2010, the Regional Director issued his response to the Ukiah Valley petitioners' request for a reconsideration of his August 5, 2010, decision denying the petitioners' request for a Secretarial election. Mr. Risling stated:

> Please be advised that our position on this matter remains the same. Until the Assistant Secretary-Indian Affairs has determined that the Ukiah Valley Pomo Indians are entitled to organize under the provisions of 25 U.S.C.§ 476, as a half blood community, I am without the authority to call and conduct a Secretarial election pursuant to 25 C.F.R. § 81. Therefore, your request for my reconsideration is denied.

See A.R. I 12; Allen-2012-000219; 265. Mr. Risling provided notice of the petitioners' appeal rights, stating that:

> This decision may be appealed to the Interior Board of Indian Appeal, 801 North Quincy Street, Arlington, Virginia 22203, in accordance with regulations in 43 CFR § 4.310 4.340. Your Notice of appeal to the Board must be signed by you and must be mailed within 30 days of the date you receive this decision. It should clearly identify the decision being appealed. . . . If you file a Notice of Appeal, the Board of Indian Appeals will notify you of further appeal procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a Notice of Appeal.

Id. The petitioners did not file a notice of appeal concerning the Regional Director's October 22 decision. For several weeks after the issuance of the October 22 letter, Plaintiffs' counsel continued to communicate with the Assistant Secretary's office, but no further reconsideration was issued by any Interior Official. *See* Declaration of James W. Porter, Attorney Advisor in the Division of Indian Affairs, Office of the Solicitor, Department of the Interior ("Porter Dec."), ¶ 4.d.; A.R. Allen-2012-000221-223.

III. STANDARDS OF REVIEW FOR A MOTION TO DISMISS

A. Subject Matter Jurisdiction

Pursuant to Fed. R. Civ. P. 12(b)(1), a complaint, or any claims therein, may be dismissed for lack of subject matter jurisdiction. "A motion to dismiss for lack of subject matter jurisdiction may either attack the allegations of the complaint or may . . . attack[] the existence of subject matter jurisdiction in fact." *Thornhill Publ'g Co. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). When considering a motion that challenges the existence of jurisdiction in fact, no presumption of truthfulness attaches to the plaintiff's allegations. *Id*. Jurisdiction is a threshold issue, which should be addressed prior to any consideration of the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998). A party invoking federal jurisdiction, once challenged, has

the burden of proving its existence. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). In resolving a motion to dismiss for lack of subject matter jurisdiction, the Court is not limited to allegations in the complaint, but may consider materials outside the pleadings. *Assoc. of American Medical Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000).

B. Failure to State a Claim

A motion to dismiss pursuant to Fed R. Civ. P. 12(b)(6) is a challenge to the sufficiency of the pleadings set forth in the complaint. A Fed.R.Civ.P. 12(b)(6) dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1990). In considering a motion to dismiss for failure to state a claim, the court generally accepts as true the factual allegations of the complaint in question, construes the pleading in the light most favorable to the party opposing the motion, and resolves all doubts in the pleader's favor. *Lazy Y. Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir.2008); *Jenkins v. McKeithen*, 395 U.S. 411, 421, *reh'g denied*, 396 U.S. 869 (1969).

IV. ARGUMENT

Plaintiffs' claims must be dismissed for lack of jurisdiction. Although Plaintiffs allege that this is a case seeking to compel Defendants "to take action unlawfully withheld or unreasonably delayed pursuant to the APA" (Compl., ¶ 3), their allegation assumes that the RD had a legal duty to conduct a Secretarial election. What is really at issue in this case is the validity of the Regional Director's August 5, 2010, decision denying Ukiah Valley's request for an election, which was confirmed on October 22, 2010.[5] Plaintiffs' referral to various jurisdictional statutes, such as 28 U.S.C. § 1331, do not alter the fact that this is an action seeking review of an agency decision that

[5] Although Plaintiffs' allege in their Complaint that after receipt of Plaintiffs' September 8, 2010, request for reconsideration, "the defendants have taken no action on the Indians' request for reconsideration," the Regional Director issued a letter on October 22, 2010, confirming his previous denial. A.R. Allen-2012-000219; 265. Furthermore, there is no legal duty either for the RD to issue a reconsideration nor for the Assistant Secretary to take action in response to counsel's e-mails. The RD denied the petition; the only mechanism by which petitioners could have *obligated* the Department to "take action on their request" was for petitioners to appeal the RD's decision to the IBIA.

was not a final agency action. The jurisdictional statutes cited by Plaintiffs only serve as potential basis for federal jurisdiction. They do not constitute waivers of federal sovereign immunity, which is required for the Court to exercise federal jurisdiction over the United States and its agencies. The APA is the sole waiver of sovereign immunity applicable to this complaint, and Defendants have not waived their sovereign immunity by reason of Plaintiffs' failure to exhaust administrative remedies.

A. Reliance on General Jurisdictional Provisions Contained in 28 U.S.C. §§ 1331, 1337, 1361 Is Insufficient Because the Provisions Do Not Constitute Waivers of Sovereign Immunity

"It is elementary that the United States, as sovereign, is immune from suit except 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*, 445 U.S. 535, 538 (1980) (citing *United States v. Sherwood*, 312 U.S. 548, 586 (1941) (internal quotations, alterations, and omissions removed)). In *United States v. Idaho*, the Supreme Court reaffirmed its frequent pronouncements that waivers of sovereign immunity must be "unequivocally expressed in the statutory text . . . strictly construed in favor of the United States . . . not enlarged beyond what the language of the statute requires." 508 U.S. 1, 6-7 (1993) (internal quotations and citations omitted); *see also* Tobar v. United States, 639 F.3d 1191, 1195 (9th Cir.2011).

The burden is on the plaintiff to find and prove an explicit waiver of sovereign immunity. *Dunn & Black P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir.2007); *see also McNutt v. General Motors Acceptance Corp. Of Indiana*, 298 U.S. 178, 188-89 (1936) (holding that because the plaintiff is the party seeking relief, that "it follows that he must carry throughout the litigation the burden of showing that he is properly in court."). This bar is jurisdictional–unless a statutory waiver exists, the district court lacks jurisdiction to entertain a suit against the United States or its agencies. *Sherwood*, 312 U.S. at 586.

Plaintiffs cite 28 U.S.C. § 1331, the general federal question statute, as a basis for federal jurisdiction. However, it is well settled that while that section affords a grant of jurisdiction to the

district courts for matters raising federal questions, it does not, itself, constitute a waiver of federal sovereign immunity. The United States and its agencies must consent to be sued, and section 1331 is not a general waiver of sovereign immunity. *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007) (Section 1331 does not provide a waiver of sovereign immunity, it "merely provides that the district court shall have original jurisdiction in all civil actions arising under the Constitution, laws or treaties of the United States" and "cannot by itself be construed as constituting a waiver of the government's defense of sovereign immunity.") (quoting *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458-59 (9th Cir.1985). Plaintiffs cannot rely on section 1331 as a jurisdictional basis unless another statute provides an applicable waiver of sovereign immunity.

Likewise, section 1337 is a jurisdictional statute and does not waive sovereign immunity. *See, e.g., Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir.1985); *Lonsdale v. United States*, 919 F.2d 1440, 1443-44 (10th Cir.1990); *Hagemeier v. Block*, 806 F.2d 197, 203 (8th Cir. 1986) ("Section 1337 is merely a jurisdictional statute and does not waive sovereign immunity). The same is true for 28 U.S.C. § 1361. No waiver of sovereign immunity applies to Plaintiffs' reliance on section 1361, the Mandamus Statute. The Mandamus Statute itself does not waive sovereign immunity. *See Hou Hawaiians v. Cayetano*, 183 F.3d 945, 947 (9th Cir.1999); *Smith v. Grimm*, 534 F.2d 1346, 1352 n. 9 (9th Cir.), *cert. denied*, 429 U.S. 980 (1976).

The waiver of federal sovereign immunity for such suits stems only from the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see, e.g., Lonsdale v. United States*, 919 F.2d 1440, 1444 (10th Cir. 1990). Thus, for this action to proceed, Plaintiffs must meet the jurisdictional requirements of the APA.

B. Plaintiffs' Failure to Exhaust Administrative Remedies Precludes Judicial Review of the Regional Director's Decision Denying Ukiah Valley's Request for a Secretarial Election

Plaintiffs claim jurisdiction under the APA, which contains a limited waiver of sovereign immunity. 5 U.S.C. § 702; *Assinboine and Sioux Tribes of Fort Peck Reservation v. Board of Oil and Gas Conserv. of the State of Montana*, 792 F.2d 782, 793 (9th Cir. 1986). Sovereign immunity

under the APA is waived only to the extent that the agency action of which a plaintiff complains is "final," as required under 5 U.S.C. § 704. *See Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998). An agency action is "final" if it "mark[s] the consummation of the agency's decision making process . . . it must not be of a merely tentative or interlocutory nature." *W. Radio Servs. Co., Inc. v. Glickman*, 123 F.3d 1189, 1196 (9th Cir. 1997) (internal quotations and citation omitted) (alteration in the original). The regulations governing the BIA require exhaustion of administrative appeals within the BIA before a decision can be considered "final." *See* 25 C.F.R. §§ 2.4(e), 2.6(a), 2.8; *see also White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988).

The Ninth Circuit holds that the requirement to exhaust administrative remedies is jurisdictional in nature. *Joint Bd. of Control v. United States*, 862 F.2d 195, 199 (9th Cir. 1988) (quoting *White Mountain Apache Tribe*, 840 F.2d at 677). The requirement permits the development of a factual record, application of agency expertise, and possible resolution of the dispute without resort to federal court. *Joint Bd. of Control*, 862 F.2d at 199 (citing B. Mezines, J. Stein and J. Gruff, 5 Administrative law § 49.01, pg. 49–3 (1988)); *White Mountain Apache Tribe*, 840 F.2d at 677. In addition, exhaustion insures that a court will have the benefit of the agency's experience in exercising administrative discretion, as well as a factual record to review. *Id.*

Under the doctrine of exhaustion of administrative remedies, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *McKart v. United States*, 395 U.S. 185, 193 (1969) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). "Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed." *Peters v. Union Pac. R. Co.*, 80 F.3d 257, 262 (8th Cir. 1996) (citing *Reiter v. Cooper*, 507 U.S. 258, 269 (1993)). A party must exhaust administrative remedies when a statute or agency rule dictates that exhaustion is required. *See White Mountain Apache Tribe*, 840 F.2d at 677; *also Gilmore v. Salazar*,

248 F. Supp. 2d 1299, 1306 (N.D. Okla. 2010) ("If exhaustion of administrative remedies is required by statute or agency rule, a federal court may not assert jurisdiction over a case until the party seeking judicial review has exhausted his administrative remedies."). Under Department of the Interior regulations, if an agency decision is subject to appeal within the agency it is not a final agency action and a party must appeal the decision to higher authority within the agency. A departmental entity vested by regulations with authority to render a final agency action must do so before judicial review is available. *See* 25 C.F.R. § 2.6(a); *see also Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1055 (10th Cir.1993) (administrative exhaustion completed under § 2.6(a) when party appeals to highest authority within agency).

In this case, in his August 5, 2010, decision denying Ukiah Valley's request for a Secretarial election pursuant to 25 U.S.C. § 476, the Regional Director informed the Ukiah Valley petitioners of their appeal rights:

> This decision may be appealed to the Interior Board of Indian Appeal, 801 North Quincy Street, Arlington, Virginia 22203, in accordance with regulations in 43 C.F.R. § 4.310 4.340. Your Notice of Appeal to the Board must be signed by you and must be mailed within 30 days of the date you receive this decision. . . . If no Notice of Appeal is filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a Notice of Appeal.

Compl., Ex. H. The regulations the Regional Director cites are the provisions Interior promulgated relating to appeals to the IBIA generally (43 C.F.R. §§ 4.310 through 4.318) and appeals to the IBIA from actions or decisions of the BIA (43 C.F.R. §§ 4.201 and 4.330 through 4.340). 43 C.F.R. § 4.310(a) specifically provides:

> No decision of an administrative law judge, Indian probate judge, or BIA official that at the time of its rendition is subject to appeal to the [IBIA], will be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. § 704, unless it had been made effective pending a decision on appeal by order of the [IBIA].

Id.

As provided, after the Regional Director denied Ukiah Valley's election request, the relief available to the Ukiah Valley petitioners was to appeal that decision to the IBIA. The petitioners did not do so. Instead, Plaintiffs' counsel requested that the Regional Director reconsider that decision.

Compl., ¶ 26. Although Plaintiffs' counsel contacted the Assistant Secretary-Indian Affairs' office and corresponding with Mr. Skibine and Ms. Treadway, such contact does not constitute an appeal of the Regional Director's decision. Rather, the Regional Director listed the specific steps Ukiah Valley needed to take to submit an appeal to the IBIA.

On October 22, 2010, the Regional Director issued his decision on Ukiah Valley's request for reconsideration, denying that request and advising the Ukiah Valley petitioners that his position remained the same. A.R. Allen-2012-000219; 265. The Regional Director again provided the Ukiah Valley petitioners with notice of their appeal rights:

> This decision may be appealed to the Interior Board of Indian Appeal, 801 North Quincy Street, Arlington, Virginia 22203, in accordance with regulations in 43 CFR § 4.310 4.340. Your Notice of appeal to the Board must be signed by you and must be mailed within 30 days of the date you receive this decision. It should clearly identify the decision being appealed. . . . If you file a Notice of Appeal, the Board of Indian Appeals will notify you of further appeal procedures. If no appeal is timely filed, this decision will become final[6] for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a Notice of Appeal.

Id. The petitioners did not file a notice of appeal with the IBIA. Instead, on October 14, 2011, Plaintiffs, a subgroup of the individuals petitioning the BIA to call an election for Ukiah Valley, filed the instant lawsuit. *See* Compl. (Dkt. No. 1). Plaintiffs cannot maintain this lawsuit. It was incumbent upon Ukiah Valley, and Plaintiffs as potential members, to exhaust their administrative remedies in order to obtain a final decision that is judicially actionable. Because Plaintiffs, on behalf of Ukiah Valley, did not exercise their administrative rights, the Court cannot permit them to circumvent proper processes and continue to pursue a claim in the federal court; to do so would encourage claimants to litigate and disregard the administrative process. *See Begay v. Public Serv. Co. of N.M.*, 710 F. Supp. 2d 1161, 1205 (D. N.M. 2010).

Because Plaintiffs' administrative remedy is a prerequisite for final agency action, there is no right to judicial review. Further, because they have not exhausted their administrative remedies, *i.e.*,

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[6] The RD's use of the word "final" here cannot make his decision a "final agency action" for purposes of APA jurisdiction. 25 C.F.R. § 2.6 clarifies that a Regional Director's decision goes into *effect* after the appeals period has run, but it never becomes *final* agency action except in circumstances not applicable here.

there has been no final agency action, Congress has not waived sovereign immunity under the APA. A prerequisite to the waiver of sovereign immunity under the APA is that there be final administrative action. *See* 5 U.S.C. § 704. Here, Plaintiffs had an adequate and statutorily prescribed administrative review process available to them, and they did not avail themselves of that process. Therefore, this Court does not have subject matter jurisdiction to hear Plaintiffs' complaint.

C. Plaintiffs Fail to State a Claim for Which Relief May Be Granted on Their Claims for Breach of Trust and Violation of the Fifth Amendment

Plaintiffs' claims at issue in this case all arise from Defendants' denial of Ukiah Valley's request for a Secretarial election. Defendants assert that all claims must be dismissed on the basis that subject matter does not exist. To the extent, however, that Plaintiffs' claims based upon an alleged breach of trust and violation of the Fifth Amendment are separate and apart from their challenge to BIA's decision, Plaintiffs fail to state a claim upon which relief may be granted and the Court must dismiss these counts as well.

1. Plaintiffs Fail to State a Claim for Breach of Trust

Plaintiff's Fifth Claim, "Breach of Trust," is premised on the notion that Defendants owe a fiduciary duty to Plaintiffs based upon the IRA and regulations promulgated thereunder. *See* Compl. at ¶¶ 51-53. The claim founded upon the IRA should be dismissed because the IRA does not impose upon the federal government specific fiduciary duties. Although there exists a "general trust relationship between the United States and the Indian people," *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*"), the United States "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2325 (2011). The relationship alone does not suffice to impose an actionable fiduciary duty on the United States. *Ashley v. U.S. Dept. of Interior*, 408 F.3d 997, 1002 (8th Cir. 2005) (citing *United States v. Navajo Nation*, 537 U.S. 488, 506 (1980) (*Navajo II*"); *United States v. Mitchell*, 445 U.S. 535, 541-43 (1980) ("*Mitchell I*"). "[T]o determine whether such a duty exists, [the court] must look to 'specific rights-creating or duty-imposing statutory or

regulatory prescription.'" *Navajo II*, 537 U.S. at 506. "For a duty to exist, there must be something akin to elaborate provisions . . . [that] give the Federal government full responsibility to manage Indian resources for the benefit of the Indians." *Ashley*, 408 F.3d at 1002 (internal quotations and citations omitted).

The Supreme Court has distinguished between a general trust responsibility that the United States owes to all federally recognized Indian tribes and those specific duties that arise when the United States manages Indian property pursuant to the standard prescribed specifically in federal statutes and regulations. *Mitchell II*, 463 U.S. at 209, 217-18, 220-25; *Mitchell I*, 445 U.S. at 541-43, 545-46; *Inter Tribal Council v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (noting that elements of a trust require "a trust corpus."). This rule is the central principle affirmed by the Supreme Court in its decisions in *Navajo II* and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003). Those two cases stand for the general proposition applicable to this case that the only cognizable breach of trust claim is one founded upon a definite and express fiduciary duty imposed on the federal government by administrative regulation or Act of Congress (*i.e.*, a "textual basis," *Navajo II*, 537 U.S. at 1094), which provides law to apply. Breach of trust claims should focus on the enforcement of fiduciary duties in circumstances when the governmental trustee actually controls trust assets pursuant to sensible standards announced in positive law.

In the absence of a specific duty that has been placed on the government with respect to a tribe and its trust property, the United States' general trust responsibility is discharged by compliance with generally applicable regulations and statutes. *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 479 (9th Cir. 2000) (Tribe's claim that BLM approval of gold mine violated trust obligations was refuted by compliance with NEPA) (*citing Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 574 (9th Cir. 1998)). When a tribe asserts the applicability of more demanding fiduciary duty, "the analysis must train on specific-rights creating or duty-imposing statutory or regulatory prescriptions." *Navajo II*, 537 U.S. at 506. Enforceable fiduciary obligations falling within this category are also characterized by the basic elements of a common law trust - a

trustee (the United States), a beneficiary (Indian tribe or allottees), and a trust corpus (the regulated Indian property, lands, or funds) over which the government exercises elaborate control. *White Mountain Apache Tribe*, 537 U.S. 465 (J. Ginsburg concurring).

Here, Plaintiffs claim that the federal government has "a fiduciary duty in the nature of a continuing trust obligation to assist the Indians in organizing a tribal government and to conduct a government-to-government relationship with the tribal government that the Indians form." Compl. at ¶ 51. As a basis for the alleged breach of trust, Plaintiffs look to the Defendants' alleged "failure . . . to recognize the Indians as being eligible to organize a tribal government pursuant to the IRA, and to conduct a special IRA election for the benefit of the Indians . . . ." Compl. at ¶ 52. Plaintiffs' claims for breach of trust must be dismissed pursuant to 12(b)(6) for two reasons: (1) the IRA cannot be construed as a "specific rights-creating or duty-imposing statutory or regulatory prescription[]," *Ashley*, 408 F.3d at 1002; and (2) no tribal trust assets are at issue.

Plaintiffs look to the IRA as their basis for breach of trust, Compl., ¶¶ 51-53, yet the IRA's statutory scheme does not impose upon the Defendants specific fiduciary duties above and beyond the government's general statutory and regulatory obligations. But just as in *Ashley*, the IRA falls short of anything "akin to elaborate provisions . . . [that] give the Federal government full responsibility to manage Indian resources of the benefit of the Indians." *Ashley*, 408 F.3d at 1002 (internal quotations omitted); *see also Redding Rancheria v. Salazar*, Case No. 11-1493, Dkt. No. 27, *31-31 (N.D. Cal. Feb. 16, 2012) (finding government's decision that certain parcels a tribe held in fee were not eligible for gaming was not a breach of fiduciary duty because the statute at issue, the IGRA, is a regulatory scheme that does not create a fiduciary duty, and because the government never acquired the land in trust, there was no fiduciary duty for the Secretary to breach).

Should this Court decide that the IRA is "akin to elaborate provisions," Plaintiffs fail to allege that these allegations "give the Federal government full responsibility to manage *Indian resources* for the benefit of the *Indians*." *Ashley*, 408 F.3d at 1002 (emphasis added); *see also Redding Rancheria*, Case No. 11-1493, Dkt. No. 27, *31 (citing *Lac Courte Oreilles Band of Lake*

Superior Chippewa Indians of Wisconsin v. United States, 259 F. Supp. 2d 783, 790 (W.D. Wis. 2003)). Plaintiffs fail to identify any tribal assets (also referred to as a trust corpus) that the government exercises control over. To the contrary, Plaintiffs allege that as a result of Defendants' failure to conduct an IRA election, they are unable to enter into contracts with the government to, for example, provide housing and health care to their members. Compl. at ¶ 33.

2. Plaintiffs Fail to State a Claim for Violation of the Fifth Amendment

In Plaintiffs' First Claim, they allege a violation of the Fifth Amendment without specifically stating exactly how Defendants have violated the Fifth Amendment.[7] Plaintiffs seem to attempt to assert a violation by ways of what appears to be an Equal Protection Claim. Plaintiffs contend that Defendants have "unreasonably discriminated" against Plaintiffs by "failing to recognize that Indians are an 'Indian tribe' within the meaning of 25 U.S.C. § 476 and 25 C.F.R. § 81.1(w)(2), unreasonably delaying the review of the Indians' Constitution, and failing to call and conduct an IRA election for the Indians. . . ." Compl. at ¶ 32. Far from articulating any plausible claim of a Fifth Amendment violation, it appears that Plaintiffs' First Claim merely echoes Plaintiffs' Second, Third, and Fourth Claims, but is now thinly veiled as a Constitutional violation in an attempt to create a cause of action apart from Plaintiffs' APA claims. Accordingly, the First Claim should be dismissed.

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[7] Insofar as Plaintiffs allege a deprivation of a protected property interest under the Due Process Clause of the Fifth Amendment, Plaintiffs fail to state a claim because any BIA benefits, such as housing and health, in relation to unrecognized tribes are not property interests. *Cf. Miami Nation of Indians of Indiana v. Babbitt*, 887 F. Supp. 1158, 1174 (N.D. Ind. 1995) (finding that "the Supreme Court has never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement"), *aff'd*, 255 F.3d 342 (7th Cir.), *cert. denied*, 534 U.S. 1129 (2002). Only federally recognized tribes are eligible to apply for and potentially receive certain programs, services, and benefits. For due process purposes, a plaintiff has a property interest in disputed property when he or she has a "legitimate claim of entitlement" to it. *Barnes v. City of Omaha*, 574 F.3d 1003, 1006 (8th Cir. 2009) (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972)). Here, governmental benefits and services are not entitlements; they are contingent on Plaintiffs' eligibility. Plaintiffs are not federally recognized; thus, they not entitled to governmental benefits. Moreover, any claim of a taking would not be, if Plaintiffs had a property right, reviewable under the APA because that would be a Tucker Act remedy. With a Tucker Act remedy available, there can be no claim of constitutional deprivation. The remedy provides the just compensation. *See In re National Sec. Agency Telecommunications Records Litigation*, 669 F.3d 928 (9th Cir. 2011); *see also Littlewolf v. Lujan*, 877 F.2d 1058 (D.C. Cir. 1989).

Notwithstanding Plaintiffs' failure to complete the administrative appeals process, Plaintiffs contend Defendants "have acted arbitrarily and unreasonably discriminated against the Indians in direct violation of the Fifth Amendment to the United States' Constitution." Compl. at ¶ 32. Assuming, *arguendo*, Plaintiffs bring a claim against Defendants pursuant to the Equal Protection Clause, to succeed on a claim based on unlawful racial discrimination, a plaintiff must demonstrate the government's action had a "racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 238-42 (1976). However, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact," *Britton v. Rogers*, 631 F.2d 572, 577 (8th Cir. 1980); instead, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id*. (Citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977)).

Far from providing factual allegation sufficient to state a plausible claim for relief under the Fifth Amendment, Plaintiffs merely restate the factual underpinnings for their claim that Defendants are required to hold and conduct an IRA election. Plaintiffs eschew the requisite demonstration that Defendants have acted in a discriminatory manner or acted with discriminatory intent as is required, and instead chose to describe the alleged consequences that will arise as a result of Defendants' actions. This notable absence of relevant allegations compels dismissal.

WHEREFORE, Defendants respectfully request that this Court dismiss Plaintiffs' Complaint with prejudice, that judgment be entered for Defendants, and that Defendants be allowed such further relief as the Court may allow.

March 22, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

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