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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TIFFANY L. (HAYES) AGUAYO, et al.,

Plaintiffs,

vs.

KEN SALAZAR, Secretary of the Department of Interior - United State of America, LARRY ECHO HAWK, Assistant Secretary of the Department of Interior - Indian Affairs - United States of America, AMY DUTSCHKE, Regional Director, Department of Interior - Indian Affairs, Pacific Regional Office, and ROBERT EBEN, Superintendent of the Department of Interior - Indian Affairs, Southern California Agency, in their official capacity; and DOE Defendants 1 through 10, inclusive.

Defendants.

No. 12-CV-0551WQH (KSC)

REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS

[NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT]

CONTENTS

I. INTRODUCTION

The Federal Defendants hereby file this reply brief in further support of their Motion to Dismiss. In their Memorandum in Opposition to Defendants' Motion to Dismiss ("Pls.' Opp'n") (ECF No. 45), Plaintiffs have still failed to identify a final agency action or unlawful inaction under the Administrative Procedure Act ("APA") that would permit review by this Court. As Plaintiffs have failed to appeal or are currently appealing the very actions and inactions for which they seek this Court's review, it is clear that Plaintiffs' administrative remedies have not been exhausted. However, even if this Court were to find that Plaintiffs have identified an administratively exhausted final agency action or inaction, their claim pertaining to the Bureau of Indian Affairs' ("BIA") approval of the Band's 1997 Constitution is barred by the statute of limitations: the Constitution was approved by BIA in 2000 and the limitations period ended in 2006. Therefore, the United States has not waived sovereign immunity under the APA and no jurisdiction lies for this suit. Further, in the absence of this waiver of sovereign immunity and an APA claim that is within the jurisdiction of this Court, the Band is an indispensible party that cannot be joined. For these reasons the Court should dismiss Plaintiffs' First Amended Complaint ("FAC") (ECF No. 37).

II. ARGUMENT

A. Plaintiffs Still Fail to Establish a Valid Waiver of the United States' Sovereign Immunity or Grant of Subject Matter Jurisdiction.

Plaintiffs have not met their "burden of pointing to . . . an unequivocal waiver of [sovereign] immunity." Prescott v. United States, 973 F.2d 696, 701 (9th Cir. 1992) (citation and marks omitted). Nor have they shown a grant of subject matter jurisdiction. The only potential waiver of sovereign immunity and grant of subject matter jurisdiction here must necessarily come from the APA.[1] But the actions Plaintiffs complain of are not reviewable under

[1] Plaintiffs assert that Defendants have violated the Constitution, and federal law including the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302. Pls' Opp'n at 16. But these claims—that an agency has violated the law—are properly brought under the APA, and Plaintiffs have not demonstrated any other law that provides an independent waiver of sovereign immunity or grant of jurisdiction. See Lynch v. United States, 292 U.S. 571, 582 (1934) (the Constitution does not

this statute. Where action has not been expressly made reviewable by another statute, the APA allows review of only certain circumscribed types of actions: final agency actions. 5 U.S.C. § 704. Here the actions Plaintiffs seek to challenge are not final—most obviously because they are not administratively exhausted—and in any case are not "agency actions" as that term is defined. Further, the Department's approval of the 1997 Constitution, even if the claim regarding that action had been exhausted, occurred in 2000 and is thus outside the applicable limitations period. For these reasons, Plaintiffs' Complaint fails to bring a claim under the APA, and therefore there is no waiver of sovereign immunity, no grant of subject matter jurisdiction, and no means for this suit to proceed.

1. BIA's Non-binding Interpretation of the Band's Ordinance has not been Administratively Exhausted and is not Final Agency Action Reviewable under the APA.

a) Interpretation of the Band's ordinance, including in a non-binding recommendation letter, is not final agency action.

Plaintiffs argue in their reply that the BIA's interpretation of the Band's membership ordinance, including in a June 7, 2012 letter, represents final agency action. Pls.' Opp'n at 5; FAC ¶¶ 25-26; 29; 33. Plaintiffs attempt to characterize the June 7, 2012 letter as a "decision." E.g., Pls.' Opp'n at 5. It is not. Like the earlier letters, it is merely an advisory recommendation. Indeed, the letter directly states:

> Requests for Regional Director review of the Band's disenrollment decisions are based on Section 8, Appeals of Eligibility Decision, of the Band's Enrollment Ordinance dated July 22, 2009. Because the Band's Enrollment Ordinance does not invoke any provision of federal law that would provide the Bureau of Indian Affairs with the authority to decide enrollment appeals, **there is no required federal action to take with regard to these requests, and we cannot render any decision regarding the Executive Committee's actions**.

Exhibit 10, Mot. to Dismiss (emphasis added). This letter, along with BIA's other letters and "interpretations," are not agency actions. See Mot. to Dismiss at 13-15. They are not

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independently waive sovereign immunity); Robbins v. U.S. Bureau of Land Mgmt., 438 F.3d 1074, 1085 (10th Cir. 2006) (plaintiffs can bring due process claim under the APA); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 69-72 (1978) (ICRA does not provide a cause of action other than a writ of habeas corpus).

statements of future effect designed to implement, interpret, or prescribe law or policy ("rule"). Nor do they represent BIA's final disposition in a matter ("order"); and they are certainly not a "license," "sanction," or type of "relief." See 5 U.S.C. § 551. Therefore, these actions are not the type of action that the Court can review under section 706.

Plaintiffs' only argument—new in their Response—is that BIA officials have failed to act on Plaintiffs' May 25, 2012 request that BIA rescind approval of the Constitution and that this is a failure to provide "relief". Pls.' Opp'n at 8. However a BIA official's inaction is not "final" until administrative remedies with respect to that inaction have been exhausted. Order Denying TRO (ECF. No. 23). Here there has not been any exhaustion of remedies regarding this request for action.[2] Even if Plaintiffs had exhausted their administrative remedies with respect to that inaction (they have not, see infra §1(b)), however, Plaintiffs' argument based on an ostensible failure to act should be rejected because they have not identified a legally required action BIA had to take. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004).

Even if the June 7 letter or other actions "interpreting" the ordinance did constitute "actions" as defined by the APA, they would not be "final" for purposes of the APA, and therefore would still be outside this Court's jurisdiction. 5 U.S.C. § 704; Ukiah Valley Med. Ctr. v. FTC, 911 F.2d 261, 264 n.1 (9th Cir. 1990). An agency action is only final if it (1) represents the consummation of the agency's decision making process; and (2) determines rights or obligations or creates legal consequences. Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citations omitted). Where either condition is not met, there is no final agency action that is subject to judicial review. Id.

Here, the identified "actions" did not represent a culmination of BIA's decision making process, determine rights or obligations, or create legal consequences. Both the 2011 letters and the June 7, 2012 letter were not "culmination[s]", but rather simply referenced the Band's ordinance and earlier BIA action regarding the Band's Constitution. And although Plaintiffs

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[2] As Defendants established in Defendants' opposition to Plaintiffs' previous TRO, Resp. to Mot. for TRO at 8-10 (ECF No. 13), BIA regulations establish a specific process for appealing inaction. See 25 C.F.R. § 2.8 (describing appeal process). Plaintiffs have not established that they have invoked this process with regard to their claim that BIA failed to act on their request that BIA rescind approval of the Band's Constitution.

argue that "BIA's action of enforcing a void ordinance is final, nonappealable agency action . . . because it creates immediate concrete injuries that denies the plaintiffs' 'relief,'" Pls.' Opp'n at 9, a mere recommendation by the BIA has no effect on whether the person will be an enrolled member or not. The ultimate "relief" that Plaintiffs seek is re-enrollment within the Band, but BIA's role with regard to enrollment decisions is advisory and the Band does not have any legal requirement to follow the recommendation. Order Denying TRO at 12-13. For this fundamental reason, no obligations were created by BIA's recommendation letters, and no legal consequences flowed or even could have flowed from them. Thus they are not final and not reviewable under the APA.

b) In any event, finality requires administrative exhaustion which has not occurred in this case.

Lastly, and most clearly, even if the purported "actions" did represent the culmination of the agency's decisionmaking process, they are not final because they have not been administratively exhausted. BIA regulations provide that "[n]o 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. . . ." 25 C.F.R. § 2.6(a).

On July 2, 2012, Plaintiffs appealed a series of alleged inactions and decisions taken by BIA that are largely coterminous with the actions and inactions complained of in this suit. As the appeal process has at best just begun, it is clear that Plaintiffs' claims are not yet administratively exhausted and the APA prevents this Court from reviewing these claims. See White Mountain Apache Tribe v. Hodel, 840 F.2d 675, 677 (9th Cir. 1988).

Plaintiffs argue that appeal is somehow exhausted because the June 7, 2012 letter "does not contain a statement that may be appealed and it does not identify the person or agency to whom it may be appealed as required by 25 C.F.R. 2.7(c)" Pls.' Opp'n at 3, 5. But just because a letter does not contain a statement that it may be appealed does not render it a final decision for BIA purposes, and certainly does not automatically make it "final" for purposes of the APA and therefore amenable to review in federal court. See Nulankeyutmonen Nkihtaqmikon v. Impson, 573 F. Supp. 2d 311, 322 (D. Me. 2008) aff'd sub nom., 585 F.3d 495 (1st Cir. 2009) ("[§ 2.7]

does not eliminate the obligation to exhaust administrative remedies. . . . The BIA's regulations could easily have provided that its failure to give notice of the decision in accordance with the regulation would allow the interested party to proceed directly to district court. It says no such thing.").

Plaintiffs alternatively argue that exhaustion would be futile. Pls.' Opp'n at 4. But BIA has not yet even responded to Plaintiffs' July 2, 2012 challenges to BIA action and inaction, and certainly BIA's response has not yet been appealed to the IBIA.[3] See 25 C.F.R. § 2.8(a) (process for appealing inaction); 25 C.F.R. §2.4(e) (providing for appeal to IBIA). Further, Plaintiffs have appealed the BIA's recommendations regarding the disenrollment actions to the IBIA, and the IBIA referred that appeal to the Assistant Secretary pursuant to 43 C.F.R.§ 4.330(b)(1). Aguayo v. Acting Pacific Regional Director, 55 IBIA 192 (July 18, 2012). (A true and correct copy of this decision is attached for the Court's convenience as Exhibit A). The administrative appeals process established under the regulations has not yet run its course. Because recourse within the agency is still available, Plaintiffs have not exhausted the administrative process and cannot carry their burden of showing that further administrative exhaustion would be futile. See generally Exhaustion of the Administrative Process, 33 Charles A. Wright and Charles H. Koch, Jr., Fed. Prac. and Proc. Judicial Review § 8398 (1st ed.) (Citing cases, and noting "[t]he presumption in favor of exhaustion must be emphasized however and hence courts are very skeptical of exception claims and such claims only rarely succeed. The burden rests with the party claiming an exception."). Therefore, Plaintiffs have failed to show a waiver of sovereign immunity or grant of subject matter jurisdiction under the APA

2. BIA's Approval of the Constitution Took Place Outside the APA's Statute of Limitations Period and Therefore is Not Reviewable Under the APA.

Furthermore, the Court must also dismiss Plaintiffs' second cause of action because, even if

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[3] If the BIA had failed to act upon an inaction claim filed under 25 C.F.R. § 2.8 relating to an issue other than disenrollment, the IBIA could consider such a claim despite its relationship to the disenrollment issues. The IBIA has held that where there is a standard against which BIA's exercise of discretion may be reviewed, the Board has jurisdiction to consider an appeal and a referral of the appeal to the Assistant Secretary is not required. See Alturas v. Pacific Regional Director, 54 IBIA 138 (November 9, 2011).

BIA's action in approving the Band's Constitution was final, it would still be barred by the APA's six year statute of limitations. Plaintiffs filed their initial complaint on March 5, 2012, but admit that the BIA approved the "Revised Constitution in or about July 2000 . . . ." FAC ¶ 50 (p. 9 lines 23-24). Therefore, from Plaintiffs' FAC, it is clear that the BIA's approval of the Constitution occurred well outside the six year statute of limitations period and APA review is barred.

Claims based on the APA "shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). A statute of limitations "constitutes a condition on the waiver of sovereign immunity," Block v. North Dakota, 461 U.S. 273, 287 (1983), and claims not filed against the United States within the applicable limitations period are barred. Hells Canyon Pres. Council v. U.S. Forest Serv., 593 F.3d 923, 930 (9th Cir. 2010). "A cause of action accrues when a plaintiff knew or should have known of the wrong and was able to commence an action based upon that wrong." Wild Fish Conservancy v. Salazar, 688 F. Supp. 2d 1225, 1233 (E.D. Wash. 2010) (citing Shiny Rock Mining Corp. v. United States, 906 F.2d 1362, 1364-65 (9th Cir. 1990)) (emphasis added).

Plaintiffs have not challenged the evidence presented in the Motion to Dismiss (Mot. to Dismiss at 10-13) that they knew or should have known that the Constitution had replaced the Articles, and therefore if they suspected a violation of law in connection with this change, they had sufficient knowledge of the applicable facts to pursue their claim during the limitations period. See, e.g., Shiny Rock Mining Corp., 906 F.2d at 1364 (statute of limitations period began once the plaintiff had constructive notice of wrong).

Plaintiffs' Opposition Brief has three nonresponsive arguments on the issue of when their claims relating to the BIA's approval of the Band's Constitution accrued. First, they argue that the Constitution is void. Pls.' Opp'n at 9-10. But this goes to the merits of their argument, and is not relevant to whether they brought their suit in the applicable time period. Next, Plaintiffs argue that the Band's authority to enact the ordinance came from the Constitution, and challenges can be brought outside the limitations period if they "contest[] the substance of an agency decision as exceeding constitutional or statutory authority. . . ." Pls.' Opp'n at 11. But the authority they cite for this proposition predates the Supreme Court and Ninth Circuit

precedent regarding the jurisdictional nature of the Statue of Limitations. See Mot. to Dismiss at 10-13. Indeed, Plaintiffs entirely fail to respond to the arguments in Defendants' Motion to Dismiss that the jurisdictional nature of the statute of limitations precludes the application of this type of tolling. See id. Finally Plaintiffs argue that by asking the BIA to rescind its approval of the 1997 Constitution, they have somehow tolled the limitations period. Pls.' Opp'n at 11-12. They provide no support for this proposition. That BIA, in an exercise of discretion, could conceivably rescind its approval of the Constitution does not in any way mean that the limitations period is tolled. Such a rule would allow plaintiffs to defeat the operation of 28 U.S.C. § 2401(a) in all instances simply by requesting the United States take action. That is not the law. Therefore with respect to their claim seeking review of the BIA's approval of the Band's Constitution, Plaintiffs have failed to show a cause of action brought within the limitations period, and this claim must be dismissed.

B. Plaintiffs Fail to Establish Subject Matter Jurisdiction or State a Claim Based Upon BIA's Alleged Violation of a Fiduciary Duty.

Plaintiffs' Complaint also fails to allege a specific duty that the United States has violated that could give rise to a cause of action for violation of fiduciary duty. While the government does have a general trust relationship towards tribes, this relationship "alone. . . does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations." Gros Ventre Tribe v. United States, 469 F.3d 801, 810 (9th Cir. 2006) (citations omitted). Plaintiffs seek to distinguish recent Supreme Court precedent on this issue, but the law is clear: "[a]lthough the Tribes may disagree with the current state of Ninth Circuit caselaw, as it now stands, 'unless there is a specific duty that has been placed on the government with respect to Indians, [the government's general trust obligation] is discharged by [the government's] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.'" Id. (citing Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 574 (9th Cir.1998)) (alterations in original); Los Coyotes Band of Cahuilla & Cupeno Indians v. Salazar, No. 10CV1448 AJB (NLS), 2011 WL 5118733, at *8 (S.D. Cal. Oct. 28, 2011) ("Without a specific duty, there can be no violation of the trust doctrine.")

Nor does Plaintiffs' opposition brief cure the defects in their complaint. Instead of citing

a specific statutory duty, Plaintiffs cite an excerpt from the BIA's website; a handbook on Indian law; 25 U.S.C. § 2; and the Indian Civil Rights Act ("ICRA"). Pls.' Opp'n at 14-16. None of these authorities (if a website qualifies as such) are sufficiently specific to state a claim or demonstrate subject matter jurisdiction for a claim based on breach of fiduciary duty.[4] 25 U.S.C. § 2 does no more than establish the general power of the Department to "manage" Indian Affairs. And ICRA is directed at tribal governments, not the United States. See 25 U.S.C. § 1302 ("No Indian tribe in exercising powers of self-government shall . . . .") (emphasis added); Alto v. Salazar, 11CV2276-IEG (BLM), 2012 WL 2152054, at *5 (S.D. Cal. June 13, 2012) ("Plaintiffs do not persuasively show the Court can compel the Defendants to act under . . . ICRA."). Therefore Plaintiffs have failed to establish that this Court has jurisdiction to hear review a claim for breach of a specific fiduciary duty, or to state a claim on the basis of such a breach.

C. Plaintiffs Fail to Show Subject Matter Jurisdiction or State a Claim Based Upon the Due Process Clause.

Similarly, Plaintiffs have still failed to show that BIA's actions deprived them of a protected property right, or, that if its actions had caused a deprivation, that appeal to the IBIA would not provide sufficient process.

Plaintiffs concede that procedural due process "imposes constraints on governmental decisions." Pls.' Opp'n at 18. The government "decisions" Plaintiffs take issue with here are "interpreting a void ordinance and void Constitution, and [BIA's] inaction." Id. But, as discussed above, interpreting an ordinance in a non-binding recommendation letter is not a final agency action subject to judicial review under the APA, and any inaction has not yet been appealed within the agency and is therefore not reviewable.[5]

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[4] Discovery, which Plaintiffs request in order to discover authority upon which to base a fiduciary duty, is inappropriate for the conceded reasons elaborated in Defendants' Motion to Dismiss. See Mot. to Dismiss at 22-23.

[5] To the extent Plaintiffs argue that APA section 702 provides an independent waiver of sovereign immunity—not limited by other sections of the APA—for Constitutional claims, Defendants argue this is inconsistent with applicable precedent. See Gallo Cattle Co. v. U.S. Dept. of Agric., 159 F.3d 1194, 1198 (9th Cir. 1998) ("[T]he APA's waiver of sovereign immunity contains several limitations. Of relevance here is § 704, which provides that only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review.") (citing 5 U.S.C. § 704).

Even if these actions were amenable to review, though, the fundamental point remains that the BIA's review of an ordinance in a nonbinding recommendation letter did not take away Plaintiffs' property. Rather, it is the Band's action in disenrolling them that would ultimately do this. Moreover, if some other BIA action—such as the approval of the 1997 Constitution—could be construed as depriving Plaintiffs of a property interest, such a deprivation is subject to appeal within the agency and this process is sufficient to satisfy the requirements of the due process clause. See Chuchua v. Pac. Reg'l Dir., Bureau of Indian Affairs, 42 IBIA 1, at *6-7 (Nov. 1, 2005).

D. In the Absence of a Valid APA Claim within the Jurisdiction of this Court, this Lawsuit Cannot Proceed Without the Band.

Because the Tribe has an undeniable interest in the validity of its Constitution and membership ordinance, if Plaintiffs cannot establish the prerequisites to assert a claim under the APA, then the Tribe is an indispensable party as defined by Federal Rule of Civil Procedure 19, and therefore this lawsuit cannot proceed.

First, to the extent Plaintiffs deny that the Band lacks an interest in this lawsuit or that the suit "does not implicate the band," Pls.' Opp'n at 20, their argument is clearly incorrect. Plaintiff argues that "The Band does not have a legally protected interest that would be prejudiced because on February 16, 2012, . . . the Band publicly admitted that it was governed by Articles of Association." Id. But whether the fundamental governing documents of the Band are the Articles or its Constitution is certainly within the broad definition of "interest." See Mot. to Dismiss at 19-20. Moreover, were this court to find a violation of the APA in the BIA's approval or interpretation of the Band's Constitution or membership ordinance, the Band's interest in self government and its right to determine its own membership could be implicated—and these are clearly "interests" for Rule 19 purposes. See Mot. to Dismiss at 18-20.

Second, Plaintiffs speculative arguments premised on the alleged overlap between the Federal Defendants' arguments and those Plaintiffs assume the Band would make are unavailing. Pls.' Opp'n at 21. The United States' interest is only in demonstrating the

reasonableness of its actions in this case; this is not identical to the interest the Band has in this suit, as demonstrated in part by the fact that the BIA has advised the Band not to proceed with the disenrollments. Exhibit 10, Defs.' Mot. to Dismiss. See Shermoen v. United States, 982 F.2d 1312, 1318 (9th Cir.1992) (United States cannot adequately represent interest of nonparty Tribes where "competing interests and divergent concerns of the tribes" might conflict with United States' position). Therefore, as this suit implicates and could prejudice the Band's interest in self government and in defining its membership, and because the Band cannot be joined without its consent, this suit must be dismissed.

Though dismissing this suit may deny Plaintiffs a federal forum, the Ninth Circuit has recognized "'that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity.'" Kecoli v. Babbitt, 101 F.3d 1304, 1311 (9th Cir. 1996) (quoting Confederated Tribes v. Lujan, 928 F.2d 1496, 1500 (9th Cir. 1991)). This is because if the necessary party is immune from suit, there may be "'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" Kecoli, 101 F.3d at 1311 (quoting Confederated Tribes, 928 F.2d at 1499). In Kecoli, Confederated Tribes, Quileute Indian Tribe v. Babbitt, 18 F.3d 1456, 1460 (9th Cir. 1994), and Shermoen, 982 F.2d at 1317, although the court determined that the plaintiff would be without an alternative forum, the absent Indian tribe was nonetheless deemed indispensable. So, too, here the Band is indispensable in the absence of a valid and properly exhausted APA claim within the jurisdiction of this Court. Plaintiffs' argument that they would not have an adequate remedy if their case were dismissed is immaterial. In fact, as discussed above, Plaintiffs have an alternative forum that is actually prescribed under the regulations: appeal to the agency. For these reasons and those articulated in the Defendants' Motion to Dismiss, it is clear that the Band has an interest in this suit, and that it cannot be joined without its consent. Therefore this suit must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(7).

III. CONCLUSION

For the foregoing reasons, the Court should not order discovery, and should dismiss Plaintiffs' First Amended Complaint with prejudice.

Respectfully submitted, August 20, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served by Electronic Case Filing, which will send a notice of electronic filing to all counsel of record in the above captioned action.

Respectfully submitted August 20, 2012,

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