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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TIMBISHA SHOSHONE TRIBE, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	Case No. 2:11-cv-00995-MCE-DAD **FEDERAL DEFENDANTS' REPLY TO OPPOSITION TO MOTION TO DISMISS SECOND AMENDED COMPLAINT** Date: February 7, 2013 Time: 2:00 p.m. Ctrm: 7 (14th floor) Hon. Morrison C. England, Jr.

INTRODUCTION

Plaintiffs are asking this Court to declare legally invalid an administrative order that ceased being effective a year and a half ago (EHD I). They are also asking this Court to declare legally invalid an administrative decision (EHD II) that recognized the results of the tribal election held almost two years ago, an election that Plaintiffs lost and unsuccessfully appealed to the tribal Election Board. Though Plaintiffs may say that they are not asking the Court to order

[1] Federal Defendants are the Department of the Interior ("Department" or "DOI"), the Bureau of Indian Affairs ("BIA"), and the three Departmental officials: Donald Laverdure, Amy Dutschke, and Troy Burdick.

the Federal Defendants to cease recognizing any particular faction, the practical effect of declaring the two decisions invalid, especially EHD II, will be exactly that. Plaintiffs have tried twice to amend their complaint to cure the many jurisdictional and other problems that the Court and the Federal Defendants have identified. They have failed to do so. This case should be dismissed with prejudice.

ARGUMENT

I. Federal Defendants' Temporary Recognition Of The 2010 Gholson Council And The Subsequent Recognition Of The Elected 2011 Tribal Council Are Nonjusticiable.

Two years ago, the Department of the Interior's Assistant Secretary-Indian Affairs ("AS-IA"), then Larry Echo Hawk, faced a difficult question. The Timbisha Shoshone Tribe had been wracked for years by internal feuding over control of the Tribe, with two primary factions, the Kennedy Faction (led by plaintiff Joe Kennedy) and the Gholson Faction (led by defendant George Gholson) running competing elections for competing Tribal Councils. Whenever the BIA stated that it was recognizing one Faction as the government of the Tribe, another Faction would immediately file an administrative appeal. These appeals ultimately reached the Department's last level of appeal for Indian issues, the AS-IA. He realized that regardless of how he decided the last remaining issue in the administrative appeals – namely, whether the General Council validly ratified the 2007 Kennedy Tribal Council election – the two-year term of that Council had expired well over a year before, and each Faction had held several elections since that time. Thus, as the AS-IA explained in his March 1, 2011 Order ("EHD I"), "[t]he final decision on this appeal [to affirm the BIA Regional Director] leaves the long-standing break in government-to-government relations unresolved." Declaration of James Porter in Support of Defendants' Motion to Dismiss First Amended Complaint, ECF No. 48 Ex. 1 at 10.

Because the Department has a duty to recognize a tribal government if possible and because the resolution of the administrative appeal did not – and could not – decide who to recognize in 2011, the AS-IA had to answer the difficult and fundamentally political question of whom to recognize for government-to-government purposes when two factions are fighting for control over a sovereign entity. He therefore went on to resolve this second question by

temporarily recognizing one faction – the faction that had not been excluding Tribal members from its elections – for purposes of holding an election to choose its leadership. This election, which both factions participated in, resulted in a Tribal Council that the AS-IA recognized as the governing body of the Tribe on July 29, 2011 ("EHD II"). ECF No. 48, Ex.2.

Federal Defendants argued in their Memorandum of Points and Authorities in Support of Motion to Dismiss ("Opening Memo" at ECF No. 61) that these two decisions – EHD I, to the extent that it temporarily recognized the 2010 Gholson Council for purposes of holding a special election, and EHD II recognizing the 2011 Tribal Council that was elected by the Tribe – are actions that are subject to the political question doctrine, and as such are nonjusticiable, and that this Court therefore lacks jurisdiction over them. Opening Memo at 8-10. In its Opposition to Motion to Dismiss Second Amended Complaint ("Opposition" at ECF No. 72), the Kennedy Faction says that it is "incorrect that DOI decisions recognizing tribal governments are not justiciable" (Opposition at 3) but then fails to cite a single case that considers the justiciability of such recognition decisions and holds that they are in fact justiciable. In fact, some of the cases that they cite come to a different conclusion. *See, e.g., In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763-64 (8th Cir. 2003), citing with approval *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983), which held that a district court oversteps the boundaries of its jurisdiction to get involved in the merits of an election dispute and order BIA to recognize a particular group; *Tarbell v. Dep't of the Interior*, 307 F. Supp. 2d 409, 429 (N.D.N.Y. 2004) ("the question of who the federal government should recognize for purposes of its dealings with a tribe as duly authorized leaders is properly within the province of the BIA. . . . It is also a matter which this court is not empowered to decide."). Indeed, there is a persistent theme through the cases that Plaintiffs identify pertaining to tribal government recognition decisions: while federal courts may have jurisdiction to order *that* the BIA recognize some government to end a hiatus in recognition, they disclaim jurisdiction to order *whom* the BIA should recognize. Because EHD I and II did not create or perpetuate a hiatus in recognition, but instead ended it by recognizing first the 2010 Gholson Council and then the 2011 Elected Council, they fall into the second category of recognition decisions, which are not justiciable.

The Kennedy Faction attempts to distinguish *Sac & Fox Tribe of the Mississippi in Iowa v. Bureau of Indian Affairs*, 439 F.3d 832 (8th Cir. 2006), on the ground that "the non-recognized faction sought an order *requiring* BIA to recognize them as the legitimate government" and thus that a decision had to be made on a matter of tribal law (Opposition at 6-7), but this attempt fails. The Kennedy Faction, which is the "non-recognized faction" here, is asking this Court to issue an order declaring legally invalid the AS-IA's recognition of the 2011 Tribal Council as the legitimate tribal government, which is the mirror image of what the *Sac & Fox Tribe* plaintiffs were seeking. Second Amended Complaint ("SAC" at ECF No. 59) at 48:5-6 (requests an order that "[d]eclares that the Echo Hawk decisions violated the APA [Administrative Procedure Act] because they were made in a manner that was arbitrary, capricious, and otherwise not in accordance with law.") In a desperate bid to salvage the justiciability of their complaint, Plaintiffs go on to say that they are not requesting "that the Court stay the effectiveness of the Echo Hawk Decisions pending the outcome of further judicial or administrative proceedings, that the Court enjoin DOI to recognize or cease to recognize any particular tribal faction for the purposes of government-to-government relations, or that the Court make any order that would have the effect of creating a hiatus in federal government recognition of a tribal government" (SAC at 48:11-15), but the practical effect of an order declaring EHD I and II legally invalid would be to accomplish all of those things. Accordingly, as the Court already pointed out in its Order of May 16 (ECF No. 38) at 12-13, the reasoning of *Sac & Fox Tribe* is applicable here and this case should be dismissed as well.

Federal Defendants also noted that well-established case law bars Plaintiffs' attempt to invalidate the Echo Hawk Decisions based on allegations that the recognized officials are not proper members of the Tribe and that the Gholson Faction allowed nonmembers to vote. Opening Memo at 10-11. Even though the SAC is rife with such allegations (SAC ¶¶ 1, 2, 26, 32, 72-74, 82, 86, 109, 131, 143-154), Plaintiffs now disown seeking review of tribal membership decisions, enrollment, or disenrollment decisions, instead claiming that they are only attacking DOI's allegedly ultra vires decisions on tribal membership. Opposition at 7-8. But as the Federal Defendants explained, the EHD I did not add or subtract any members to the

Tribe's roll – it only stated that members should not be barred from participating in an election if they had not been disenrolled in compliance with Tribal law and the Indian Civil Rights Act. Opening Memo at 3, 13. Far from being "ultra vires," it is well-established that the Department has this authority. *Torres v. Acting Muskogee Area Dir.*, 34 IBIA 173, 181 (1999), and cases cited therein. As for EHD II, if Plaintiffs believe that the now-recognized 2011 Elected Council included non-members or was elected by ineligible voters, the place to have brought such claims is in an appeal to the Tribe's Election Committee or any other appropriate body under Tribal law, not a federal court.

II. Plaintiffs Fail To Meet Their Burden Of Establishing Federal Question Jurisdiction Over The Second, Third, and Fifth Claims.

Although the APA may provide a waiver of sovereign immunity allowing the government to be sued, it does not provide a basis for subject matter jurisdiction, as Federal Defendants explained in their Opening Memo at 11. Nor is it enough to simply cite 28 U.S.C. § 1331 as a basis for jurisdiction if the complaint does not establish "'either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Proctor v. Vishay Intertechnology, Inc.*, 584 F.3d 1208, 1219 (9th Cir. 2009) (*quoting Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 690 (2006). For example, in *Alto v. Salazar*, No. 11cv2276-IEG(BLM), 2012 WL 2152054 (S.D. Cal. June 13, 2012), a case Plaintiffs discuss in their Opposition at 5, it was not enough to cite the APA and 28 U.S.C. § 1331 to establish subject matter jurisdiction – there had to be a violation of a separate federal regulation as well. *Id*. at *3-*4.

Defendants argued that the Second, Third, and Fifth Causes of Action each fail to present a federal question under section 1331. Opening Memo at 11-15. In response, Plaintiffs fail to identify what exactly the federal question is for any of these three causes of action. Although they mention 25 C.F.R. Parts 2 and 83, as well as the Timbisha Shoshone Homeland Act, they do not argue that any of these provisions created the causes of action in the Second, Third, and Fifth Claims, nor do they offer any explanation of how their right to relief turns on any of these regulatory or statutory provisions in the context of those claims. Opposition at 9.

Instead, they cite various cases for the propositions that the Department and BIA must defer to tribal forums and tribal-law applying bodies and that they cannot make membership decisions. Opposition at 9-12. Thus, for example, they assert that "[w]here an intra-tribal dispute of this nature has been resolved in a valid tribal forum, the results are binding on BIA." Opposition at 10, quoting *Bucktooth v. Acting E. Area Dir.*, 29 IBIA 144, 149 (1996) (citing *Wheeler v. U.S. Dep't of the Interior*, 811 F.2d 549 (10th Cir. 1987)). Defendants agree with the legal principle set forth in *Bucktooth*. However, neither the Court nor the Defendants are obligated to defer to invalid tribal forums or tribal law-applying bodies.[2] The question of whether a tribal forum or law-applying is valid is determined by tribal law, not federal, and that is insufficient to establish jurisdiction under section 1331. *See Boe v. Fort Belknap Indian Cmty.*, 642 F.2d 276, 279 (9th Cir. 1981) (violations of tribal law insufficient for jurisdiction under section 1331 even if adopted pursuant to the federal law). For these reasons, as well as all the reasons given in the Opening Memo at 11-15, the Court lacks jurisdiction over the Second, Third, and Fifth Claims.[3]

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[2]The Kennedy Faction's Second and Third Claims in particular are based on the assertion that the Federal Defendants must blindly defer to its decisions, but the cases do not support this. Indeed, *Wheeler*, a case prominently cited by the Kennedy Faction, acknowledges that the Department may need to take a more active role in Tribal matters when it needs to determine which tribal government to recognize. *Wheeler*, 811 F.2d at 552; *see also LaRoque v. Aberdeen Area Dir.*, 29 IBIA 201, 203 (1996) ("Although the Board has repeatedly stated that intratribal disputes should be resolved in tribal forums, it has also recognized that the government-to-government relationship between the Federal government and the tribes may require BIA to make a decision concerning tribal leadership, and that, in making such a decision, BIA has authority to interpret tribal governing documents.").

[3]The Kennedy Faction relies heavily on a decision by the AS-IA in an unrelated matter concerning the California Valley Miwok Tribe. Opposition at 11-12. The Kennedy Faction failed to attach this document to its papers, and it is not relevant here in any event. That situation involved a tribe of five people and BIA's concerns about approximately 250 "potential citizens" of the tribe; this case involves a situation in which one Faction of the Tribe purported to disenroll 74 actual members of the Tribe, including the leader of the opposing faction. As the AS-IA explained in EHD I, if those individuals are removed from the Tribal roll through a valid Tribal process, the department will accept that disenrollment. ECF No. 48, Ex. 1 at 10.

Plaintiffs acknowledge that "[i]n response to a 12(b)(1) motion, the plaintiff has the burden of demonstrating that the Court has jurisdiction over its action pursuant to federal law," but then cite *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708 (9th Cir. 2011) for the assertion that there is a presumption of judicial review under the APA that Federal Defendants must overcome. Opposition at 2-3. *Pinnacle Armor* involved a motion to dismiss for failure to state a claim based on 5 U.S.C. § 701(a)(2), a section of the APA that exempts from review "agency action [that] is committed to agency discretion by law," but as Federal Defendants' Opening Memo points out, the Second Amended Complaint has an even more basic problem than the failure to state a claim, and that is lack of subject matter jurisdiction on multiple grounds. Opening Memo at 8-15. Because Plaintiffs have failed to meet their burden of establishing jurisdiction, no presumption of APA review comes into play.

III. The Fourth Claim For Relief Alleging A Manufactured Hiatus In Federal Recognition Of A Tribal Government Should Be Dismissed.

Plaintiffs do not dispute that the two documents that they assert improperly created a hiatus in recognition of a tribal government are not final agency action, and hence may not be challenged under the APA. See Opening Memo at 14-15. Nor do they deny that EHD I and EHD II, rather than creating a hiatus, effectively ended any hiatus in 2011, and that therefore no claim regarding the creation of an improper hiatus can be alleged with regard to either EHD I and II. *See, e.g.*, SAC ¶ 113. The hiatus in recognition of a tribal government – whether proper or improper – is over and has been over for almost two years, and the fact that Plaintiffs do not like how it was ended does not make it – as the substantive violation alleged in the Fourth Claim – a live controversy. The "brooding presence" about which Plaintiffs complain in their Opposition at 13-14 is not the Federal Defendants' failure to recognize anyone as the tribal government, but the failure to recognize Plaintiffs as the tribal government.

Plaintiffs also assert that "[e]ven if the Court were to remand EHD I alone, EHD II would necessarily fall," and that the controversy over EHD I is thus still alive. Opposition at 14. This is incorrect. As the AS-IA explained, it was the April 29 election, not EHD I, that "constituted the resolution of an internal tribal dispute in a valid tribal forum," forming the basis for

recognition of the 2011 Tribal Council in EHD II. ECF No. 48, Ex. 2 at 3. Thus, if the Court remanded EHD I for the Department to reconsider its temporary recognition of the 2010 Gholson Council (a recognition that ended a year and a half ago), the Department's decision in EHD II to recognize the outcome of the Tribe's election almost two years ago (which Plaintiffs appealed to the appropriate tribal body and lost) would still stand.

For all these reasons, the Fourth Claim should be dismissed.

IV. The Remaining Part Of The Fourth Claim Concerning The So-Called "Rollback Rule" Should Be Dismissed As Well.

In the SAC, Plaintiffs have requested this Court issue an order that "[d]eclares that the Rollback Rule violates the APA as an administrative rule established in violation of the APA and enjoins DOI from further reliance on the Rollback Rule unless and until it promulgates the rule pursuant to the APA." SAC at 48:16-18. The specific violation that Plaintiffs allege is that DOI should have provided notice that it was promulgating a rule and an opportunity for comment on the proposed rule. SAC ¶¶ 161, 166. However, as Federal Defendants explained in the Opening Memo, there are multiple problems with such a claim. Opening Memo at 15-16. For example, the six year statute of limitations passed long ago. Plaintiffs cite *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991), in an effort to avoid this bar to their claim, but *Wind River* actually proves the Federal Defendants' point – challenges asserting procedural violations such as the alleged failure to engage in notice and comment rulemaking must be brought within six years of the rulemaking. *Id.* at 714 ("If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision.") Accordingly, their challenge to the Rollback Rule comes much too late.

In response to this array of problems, Plaintiffs appear to retreat from their request that the Rollback Rule be declared invalid, instead claiming that they are attacking only EHD I and II. Opposition at 12. However, this retreat cannot save the Fourth Claim for Relief, since as the Federal Defendants pointed out, neither EHD I or II relies on the Rollback Rule. Opening Memo at 16. To the contrary, rather than going back to recognize the last undisputed tribal council

(which was led by Plaintiff Kennedy), the EHD I opted to temporarily recognize the recently elected 2010 Gholson Council. ECF No. 48 Ex. 1 at 10. Similarly, EHD II did not revert to recognizing the last undisputed tribal council, instead recognizing the new 2011 Elected Council. ECF No. 48 Ex. 2 at 1-3. Plaintiffs assert that "EHD depends upon the binding nature of the Rollback Rule for its key finding that it could disregard the disenrollment decision" (Opposition at 12, citing to EHD I at 10 (Ex. 48, Ex. 1 at 10), but review of the cited page shows that this is false – the EHD does not cite to the Rollback Rule either by name or as a principle in support of its decision to recognize the 2010 Gholson Council. *Id.*[4]

V. The First Claim For Relief Fails To State A Claim Under Departmental Regulations Or The Due Process Clause.

As is clear from the Plaintiffs' Opposition, their First Claim for Relief relies entirely on their theory that the BIA's appeal regulations at 25 C.F.R. Part 2 – and more specifically the provision at 25 C.F.R. § 2.21(b) that allows the AS-IA to decide an administrative appeal based on information outside the administrative record provided that the interested parties are given notice and an opportunity to comment on that information – apply to Echo Hawk's decision to recognize temporarily the 2010 Gholson Council for the limited purpose of holding a tribal election, and his decision made five months later to recognize the winners of that tribal election as the tribal government. Opposition at 14-15. They do not allege or identify any other violation of the BIA appeal regulations, let alone a separate liberty or property interest protected under the Due Process Clause, as the Federal Defendants pointed out in their Opening Memo at 17. Because the Part 2 regulations do not apply to these two decisions, the First Claim fails as a matter of law.

Although this Court has previously observed that EHD I had two parts – a decision on the Kennedy Faction's administrative appeal, and a decision to recognize temporarily the 2010

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[4]Plaintiffs cite several other decisions that they allege rely on the Rollback Rule (Opposition at 12), but none of these decisions are being challenged in the SAC, which explicitly challenges only the Echo Hawk Decisions (SAC ¶ 4), nor could they be, as they were not final agency action and Plaintiffs do not claim otherwise. See, e.g., Opening Memo at 14-15 (pointing out the non-final nature of some of the cited decisions).

Gholson Council for the limited purpose of holding a Tribal election (ECF No. 38 at 7), Plaintiffs try to cram these two decisions together with EHD II into "a single decision" and hence argue that they all subject to the Part 2 regulations. Opposition at 15. That EHD I and EHD II are not a single decision is obvious – the latter occurred five months later and recognized a somewhat different set of individuals as the tribal government for an unlimited amount of time and an unlimited purpose, unlike EHD I. That EHD II was not part of an administrative appeals process is equally obvious on its face, as it did not affirm or deny a lower BIA official's decision, nor did it otherwise respond to the invocation of the 25 C.F.R. Part 2 procedures asking for a decision on whether or not to recognize the election winners as the tribal government. (The Part 2 procedures do not allow for direct appeals to the AS-IA in any event.) As a result, it could not have violated any Part 2 requirements. Finally, as explained in more detail in the Opening Memo at 17-18, EHD I was not one decision, but two, and the second decision – the temporary recognition decision – was not the resolution of a Part 2 administrative appeal, unlike the first one. Accordingly, the First Claim for Relief fails to state a cause of action.

VI. Plaintiffs Fail To Offer Any Substantial Response To Federal Defendants' Arguments For Dismissing The Sixth Claim For Relief.

In their Opening Memo, Federal Defendants pointed out that Plaintiffs' Sixth Claim for Relief is deficient for three reasons: (1) it improperly bases a due process claim on allegations that Plaintiffs' First Amendment speech and petition rights were violated; (2) it fails to allege that the two challenged final Echo Hawk decisions had any chilling effect on Plaintiffs' exercise of their First Amendment rights; and (3) the factual allegations in the SAC itself, as well as the judicial docket in the D.C. district court case that features prominently in their claim for retaliation (*Timbisha Shoshone Tribe v. Salazar*, Case No. 1:10-cv-000968 (D.D.C.), *on appeal* No. 11-5049 (D.C. Cir.); see SAC ¶¶ 123, 184-191), contradict their claim that the two Echo Hawk decisions violated the APA by retaliating against them for exercise of their First Amendment rights. Opening Memo at 18-20.

Plaintiffs offer no response of any kind to the first two deficiencies, and do not dispute that, as explained in the Opening Memo and as a matter of law, their own factual allegations and

the facts in the D.C. case docket, contradict their claim.[5] Opposition at 15. Instead, they assert the Sixth Claim "states a claim that the EHD was based on animus toward Plaintiffs arising out of more than three decades of conflict, not just a single case" and that the Federal Defendants "focuse[d] solely" on the D.C. case. Opposition at 15. This is false. At Opening Memo at 20, n.5, Federal Defendants pointed out how the Plaintiffs' own factual allegations in the SAC undermined their claims of longstanding animus as well. For example, in contrast to the Opposition's assertion of animus arising out of more than three decades of conflict, the SAC alleges categorically that up to March 1, 2011, "DOI had previously recognized and worked with the Kennedy Faction for three decades" (SAC ¶ 185). Even though Federal Defendants discussed these inconsistencies in their Opening Memo, Plaintiffs make no attempt in their Opposition to explain them away. This Court need not accept as true contradictory claims, and should dismiss the Sixth Claim for Relief for all the reasons stated here and in the Opening Memo. *See, e.g., Jackson v. Marion County*, 66 F.3d 151, 153 (7th Cir. 1995) ("a plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts"); *Amore ex rel. Estates of Amore v. Accor*, 529 F. Supp. 2d 85, 94 (D.D.C. 2008) (court need not accept as true self-contradictory factual allegations).

CONCLUSION

For the foregoing reasons and those provided in the Federal Defendants' Opening Memo, the Court should dismiss this case in its entirety.

DATED: January 31, 2013

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[5]The Kennedy Faction does not dispute that as the Federal Defendants stated in their Opening Memo at 19, this Court may take judicial notice of the D.C. case docket.