The Honorable Richard A. Jones

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RUDY ST. GERMAIN, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants.

CASE NO. C13-945RAJ

REPLY RE: DEFENDANTS' MOTION TO DISMISS, ETC.

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INTRODUCTION

The motion before the Court seeks the dismissal of plaintiffs' claim based on 25 U.S.C. § 476(d) which alleges that defendants violated 25 U.S.C. § 476(c)(2) by failing to conduct a pre-election legal review of a constitutional amendment proposed by the Nooksack Tribal Government.[1] Defendants contend that plaintiffs lack standing to raise this claim under Article III of the United States Constitution, and that they lack statutory standing as recently defined by the United States Supreme Court in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, ___ U.S. ____, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014).[2] Defendants also seek dismissal of plaintiffs' claim under the 5th and 15th Amendments to the United States Constitution.[3] Lastly, defendants seek dismissal of plaintiffs' claim that defendants they have committed a common law breach of trust owed to defendants based on the actions alleged.[4] In general, plaintiffs argue in their opposition that none of their claims should be dismissed. Our reply to their specific opposition arguments follows.[5]

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1 Plaintiffs assert in their opposition that "[h]ere, plaintiffs have alleged that Defendants have not conducted the legal review required by 25 U.S.C. § 476(c)(2)(B) *and § 476(d)(1)*. Dkt. # 41, p. 2, *ll.* 19-20 (emphasis added). Plaintiffs also assert that "Plaintiffs have also alleged that Defendants violated numerous written policies, guidelines, and directives, by failing to at all conduct the legal review required by 25 U.S.C. § 476(c)(2)(B) *and § 476(d)(1)*, and have therefore violated the APA." *Id.* at p. 2, *ll.* 20-23. 25 U.S.C. § 476(d)(1) is solely concerned with the *post*-election responsibilities of the Secretary if a proposed constitution or constitutional amendment is ratified in a Secretarial election. The operative complaint was filed on June 17, 2013, *before* the completion of the Nooksack election on June 21, 2014. Dkt. # 3. The purpose of plaintiffs' application for a temporary restraining order, filed the very same day as the operative complaint, was to stop the election *before* its completion. *See generally*, Dkt. # 4. Thus, at the time the operative complaint was filed, the result of the election was not yet known, and none of the Secretary's post-election actions, including approval of the amendment, had yet occurred. Consequently, not only is the operative complaint devoid of any allegation that any of the Secretary's actions violated 25 U.S.C. § 476(d)(1), that statutory subsection is not even cited in the operative complaint. Rule 15(d), F.R.Civ.P., requires that leave must be sought in order to file a supplemental complaint in order to "[set] out any transaction, occurrence of event that happened after the date of the pleading to be supplemented." Plaintiff has never sought leave from this Court to file a supplemental complaint to bring before it in this lawsuit the alleged post-election violations of law by the Secretary which occurred after the date of the filing of the operative complaint. This motion to dismiss is directed only to the claims actually alleged by plaintiffs in their presently operative complaint.

2 With respect to dismissal on constitutional grounds, all three procedural devices recited in the motion, 12(c), 12(h)(3), and 56, Fed.R.Civ.P., are appropriate. Statutory standing on the other hand, does not go to subject matter jurisdiction, but instead concerns whether a plaintiff has a viable claim under the particular statute said to be violated. *Lexmark, supra,* 134 S.Ct. at 1387 *n.* 3, so Rule 12(h)(3) is not applicable.

3 Dismissal of this claim is sought pursuant to Rule 12(c). Plaintiffs have failed to sufficiently allege a plausible violation of their constitutional rights by defendants, *see Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

4 Dismissal of this claim is sought pursuant to Rules 12(c) and 56, F.R.Civ.P., because the actions alleged do not constitute a violation of any trust duty owed to defendants.

5 Since only questions of law are raised by the motion, a detailed response to plaintiffs' statement of facts is unnecessary. However, two inaccuracies should be pointed out. First, regarding the pre-election review required by 25 U.S.C. § 476(c)(2)(B), plaintiffs' opposition asserts unconditionally that "Defendant Akin [authorized Defendant

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ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING

As set forth in our motion to dismiss, plaintiffs lack standing to sue for a violation of 25 U.S.C. § 476(c)(2). Standing is the "irreducible constitutional minimum" necessary to make a justiciable "case" or "controversy" under Article III, § 2. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It contains three requirements: injury in fact to the plaintiff, causation of that injury by the defendant's complained-of conduct, and a likelihood that the requested relief will redress that injury. *Ibid*. Insofar as plaintiffs are claiming that defendants violated the requirement in 25 U.S.C. § 476(c)(2) that the Secretary conduct pre-election review of a proposed amendment, and advise *the proposing tribe*, of any preliminary finding by the Secretary that the amendment may be contrary to applicable laws (as defined), they fail to meet any of the three standing requirements.

a. Injury

Plaintiffs' opposition asserts in conclusory terms that they have been injured by the Secretary's *presumed* failure to conduct a pre-election review of the proposed constitutional amendment, but they fail to say precisely how.[6] In other words, neither in their complaint nor in their opposition memorandum have plaintiffs shown that they have suffered or will suffer a "concrete and particularized legal harm" that is necessary for Article III standing. Instead, plaintiffs' argument consists primarily of a lengthy discussion of *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999), from which they ask the Court to draw the conclusion that individual tribal members have as much of an "*interest* in the lawful administrative process under 25 U.S.C. § 476," as the

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Superintendent Joseph 'to call and conduct the secretarial election'] without having conducted the legal review required by federal law." Dkt. 41, p. 4, *ll.* 6-9. While asserted by plaintiffs as a *fact*, this is no more than an unproven allegation. Plaintiffs' point citations refer back to this Court's order denying plaintiffs' TRO application, dkt. # 25 and their amended complaint, dkt. # 3. Obviously, neither constitutes evidence. Also, notwithstanding plaintiffs' assertion that they were deprived of their voting rights, dkt. # 41, p. 5, *ll.* 19-23, both cast ballots in the election. Declaration of Johnston, ¶ 6.

6 *See, e.g.*, dkt. 41, p. 10, *ll.* 8-9, wherein plaintiffs assert that they "are members of the Nooksack Indian Tribe and spokespersons for 306 Nooksacks who have been injured by Defendants' failure to conduct the required legal review." Notably, plaintiffs do not identify precisely how *they* have suffered any concrete or particularized legal harm. Nor do they indicate how the other 304 Nooksacks, as to which they claim to be the "spokespersons," have suffered any concrete or particularized injury either in regards to the Secretary's presumed failure to conduct pre-election legal review. In any event, plaintiffs cannot base their standing in this lawsuit on the alleged rights of third parties not before the Court. *See e.g., Hong Kong Supermarket v, Kizer*, 830 F.2d 1078, 1081 (9th Cir. 1987); *and see Hollingsworth v. Perry*, ___ U.S. ___, 133 S.Ct. 2652, 2663 (2013).

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Tribe *qua* Tribe. Dkt. #41, p. 9, *l.* 22 – p. 10, *l.* 1. Plaintiffs' argument, however, is marred by at least two crucial errors. First, *Thomas* is *not* a standing case. Not only does the *Thomas* case involve a distinguishable type of claim under 25 U.S.C. § 476, but the question of standing was neither discussed nor apparently raised as an issue in the case. Instead, the issue on appeal in *Thomas* concerned the correctness of the District Court's holding that a Tribe was an "indispensable party" to a lawsuit filed by individual Tribal members concerning a constitutional amendment which was disapproved by the Secretary (after being initially approved) outside the 45-day statutory review period set forth in 25 U.S.C. § 476(d)(1). Thus, at least in regards to a question as to the standing of individual tribal members to complain about a presumed absence of pre-election review under 25 U.S.C. § 476(c)(2), the case is not precedent, even in the Seventh Circuit. *See United States v. Los Angeles Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952) (A prior decision is not a binding precedent on a point not raised in briefs or arguments nor discussed in the Court's opinion); *and see Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 136 F.3d 1360, 1363 (9th Cir. 1998) (Supreme Court case which did not directly consider whether a school district had standing in a particular case did not constitute binding authority with respect to standing).

The second crucial error in plaintiffs' argument is that it conflates the concepts of "injury" and "interest." There is little doubt that plaintiffs are "interested" in the Secretarial election and that they are particularly interested in finding a legal mechanism to overturn it. Otherwise, presumably, they would not have gone to the trouble and expense of filing a lawsuit. But "interest" and "injury" are not the same thing, and the casebooks are rife with standing cases in which a plaintiff, though highly interested in a particular dispute, nevertheless lacked a sufficient concrete and particularized injury to meet the requirements of Article III standing. As the Supreme Court noted in *Hollingsworth v. Perry*, ___ U.S. ____, 133 S.Ct. 2652 (2013):

> For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also have "standing," which requires, among other things, that it have suffered a concrete and particularized injury.

Id. at 2659. Plaintiffs fit in this category of persons who may be keenly interested but who, nevertheless, have suffered no injury as a result of the Secretary's alleged breach of a duty owed

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only to the Tribe *qua* Tribe.[7]

b. Traceability

Because plaintiffs cannot establish that they have suffered any concrete and particularized injury as a result of the Secretary's presumed failure to advise the Tribe prior to the election of any *found* legal inconsistency between the proposed amendment and applicable laws, they are also unable to meet the traceability element.

c. Redressibility

Not only have plaintiffs failed to meet the other elements of standing, they have also failed to show how they meet the redressibility requirement for their claim. "In the particular context of injunctive and declaratory relief, a plaintiff must show that he has suffered or is threatened with a concrete and particularized legal harm coupled with a sufficient likelihood that he will again be wronged in a similar way." *Canatella v. State of California*, 304 F.3d 843, 852 (9th Cir. 2002). This is because, as held in *United States v. Oregon State Medical Society*, 343 U.S. 326, (1952), "[t]he sole function of an injunction is to forestall future violations," not to punish for past wrongs. *Id*. at 333; *and see, Loya v. Immigration and Naturalization Service*, 583 F.2d 1110, 1114 (9th Cir. 1978). Here, not only have plaintiffs been unable to show that they have suffered any concrete or particularized legal injury, they have made no showing that there is any likelihood that they will be harmed again in a similar way. Thus, an injunction simply cannot help them.

Similarly, declaratory relief provides plaintiffs no redress for the injuries they say they have suffered. Specifically, declaratory relief could not, as plaintiffs assert, "send the Defendants back to the drawing board to conduct the requisite legal review." *See*, dkt. # 41, p. 11, *ll.* 19-20. By definition, declaratory relief simply determines and declares legal rights and relations. Unlike an

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7 On a related point, plaintiffs insist that their former status as individual tribal councilmembers results in a different calculus, even asserting that they are "tribal officials acting on behalf of their government." Dkt. 41, p. 10, ll. 12-15. This assertion is distinctly at odds with their allegations in the operative complaint. Plaintiffs' complaint asserts, unequivocally, that "[p]laintiffs bring this suit in their individual capacities." Dkt. # 3, ¶ 9. In any event, it is the Tribe *qua* Tribe to which the duty is owed under 25 U.S.C. § 476(c)(2)(B), and the Tribe is not here before the Court asserting that its rights have been violated. The duty is not owed to, and corresponding injury suffered by, individual councilmembers. Id. at ¶ 39. Individual members of a legislative body not specifically authorized by that legislative body to serve as its legal representatives cannot rely upon the injury suffered by the legislative body in order to satisfy standing requirements. *See Hollingsworth v. Perry*, *supra*, 133 S. Ct. at 2664-2667. Nowhere in the operative complaint do plaintiffs allege that such authority has been conferred upon them by the Nooksack Tribal Council, and it is obvious from the facts alleged that they lack such authority.

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injunction, however, a declaratory judgment does not carry any coercive force. *Municipal Authority of the Town Of Bloomsburg v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 496 F.Supp. 686, 689 (M.D. Pa. 1980). Hence, a declaratory judgment also fails to provide redress for their professed injury.

II. PLAINTIFFS LACK STATUTORY STANDING

Not only does plaintiffs' opposition completely ignore the teachings of *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, ___ U.S. ____, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014), they fail to even mention the case in their memorandum. Instead, in an argument that begs the crucial question, plaintiffs contend that "[u]ndoubtedly, 25 U.S.C. § 476(d)(2) provides a private right of action to enforce the statutory scheme found within 25 U.S.C. § 476 *for all members who believe the statute has not been complied with*." Dkt. # 41, p. 12, *ll*. 18-24 (citing *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999)) (emphasis added, internal quotation omitted).[8] While the *Thomas* court certainly recognized that 25 U.S.C. § 476(d)(2) creates a private right of action, nowhere was the Court called upon to decide, nor did it decide, *who* possesses the private right of action or who has standing to assert a claim like the one asserted by plaintiffs here. Indeed, that is the crucial question for purposes of statutory standing. Plaintiffs cannot simply assume that they have that right without demonstrating it under the applicable law.

First, plaintiffs must overcome the barrier of sovereign immunity. While plaintiffs ask the Court to imply that they have a right to sue defendants under 25 U.S.C. §476(d), the Court does not have that luxury under the law. "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1463 (10th Cir.1989) (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)) (alterations omitted). Such consent "cannot be implied but must be unequivocally expressed." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quotation omitted). It is the terms of the United States' consent that define this court's jurisdiction to entertain any suit. *Id*. Nowhere

8 It should be recalled that statutory standing is a necessary element of standing, but not sufficient by itself. The requirements of Article III standing must also be met. *See Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014); *and see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (refusing "[t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts")

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in the statute is a private right of action expressly extended to individual tribal members to sue the United States for the alleged violation of a statutory right expressly conferred only upon the Tribe *qua* Tribe. Under the law, that right cannot be created by implication. Thus, plaintiffs are barred by the doctrine of sovereign immunity from filing suit against the Government under 25 U.S.C. § 476(d). *Allen v. United States*, 871 F.Supp.2d 982, 992-994 (N.D. Cal. 2012) (". . . plaintiffs cannot satisfy the IRA's definition of "tribe" and cannot therefore invoke its provisions as the basis for waiving the government's sovereign immunity.")

Even without the barrier of sovereign immunity, however, all of the *Lexmark* factors go against them. As noted in our prior memorandum, individual tribal members are not within the "zone of interests" protected by the statute. The purpose of the relevant section of the IRA, as amended, is to protect the interests of tribes *qua* tribes in self-governance by strictly limiting the authority of the Secretary to delay or disapprove proposed tribal constitutions and amendments thereto. The statute was not intended to afford individual tribal members, such as plaintiffs, a mechanism to thwart tribal self-government when its workings are not to their liking. Indeed, construing the statute to provide such a mechanism is contrary to its very purpose. Also, plaintiffs are unable to identify an injury, much less establish a proximate cause relationship between injury and legal violation. Consequently, they do not even attempt to establish such a relationship in their opposition memorandum.

III. PLAINTIFFS' IRA CLAIM IS MOOT

As noted in our prior memorandum, there is no longer any live controversy between the parties. After the operative complaint was filed, the proposed Nooksack Constitutional Amendment was submitted to registered Nooksack voters, ratified by them in a Secretarial election, and approved by the Secretary thereafter. The Secretary's approval of the amendment evidences her conclusion that the statute is not contrary to applicable laws. This approval effectively supersedes any presumed failure by the Secretary to conduct a pre-election legal review of the proposed amendment before submitting it to the electorate. Indeed, if the conclusions drawn from the Secretary's pre-election legal review were consistent with her post-election views then, under the statute, she was under no obligation to notify the Tribe of anything. On the other hand, if her pre-election views

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preliminarily found an inconsistency between the proposed amendment and applicable laws, the Tribe was not injured by any failure to provide pre-election notification of that preliminary finding in a situation such as this where the Secretary has ultimately determined, post-election, that no inconsistency exists.

No response to this argument is found anywhere in plaintiffs' opposition memorandum.

IV. THE AMENDMENT IS NOT INCONSISTENT WITH APPLICABLE LAWS

Lastly, at bottom, plaintiffs seek a *de novo* legal determination that the proposed Nooksack constitutional amendment violated applicable laws as defined in the IRA. Specifically, plaintiffs contend that 25 U.S.C. § 1302(a)(8) is an applicable law and that the proposed amendment deprives them and others of equal protection of the law or due process under that statute. As set forth in our original memorandum, the amendment as proposed, and as enacted, violates no applicable laws. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978).

No response to this argument is found anywhere in plaintiffs' opposition memorandum.

V. THE ALLEGATIONS IN THE OPERATIVE COMPLAINT FAIL TO STATE A CLAIM AGAINST DEFENDANTS UNDER EITHER THE 5TH OR 15TH AMENDMENTS TO THE UNITED STATES CONSTITUTION

An allegation that federal actors have committed a constitutional violation, particularly one that alleges intentional race-based discrimination against a certain class of voters, should neither be made lightly nor be based on vague, superficial, and artfully plead allegations of fact. And, indeed, the applicable pleading standards, as set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), require more of plaintiffs then is found in the operative complaint. In *Twombly*, *supra*, the Court recognized that the pleading standard in Rule 8, F.R.Civ.P. does not require "detailed factual allegations," but it demands more than an unadorned, "the-defendant-unlawfully-harmed-me accusation." *Id.*, at 555. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id*., at 557. Elaborating on *Twombly*, the Court said in *Iqbal:*

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The

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> plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id at 687. The Court drew from the *Twombly* decision, two underlying working principles: (1) The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.*, at 678-679. (2) Second, only a complaint which states a plausible claim for relief survives a motion to dismiss. *Id*. at 679. Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. *Ibid*. Moreover, where "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Ibid*. (quoting Rule 8(a)(2), F.R.Civ.P.).

Applying those principles to the case at bar, it is apparent that plaintiffs' operative complaint does not state a plausible claim for relief under the U.S. Constitution (or even a mere possibility of misconduct). As plaintiffs acknowledge in their memorandum, their task is to prove purposeful, intentional discrimination against them by federal actors. Dkt. #41, p. 13, *ll.* 7-14; *see Reno v. Bossier Parish School Board*, 520 U.S. 471, 481-482 (1997). *Iqbal* addresses the level of pleading that such a claim demands:

> [P]urposeful discrimination requires more than intent as volition or intent as awareness of consequences. It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, [the action's] adverse effects upon an identifiable group.

Iqbal, 556 U.S. at 676–77 (internal quotation marks and citation omitted; brackets in original); and see *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979) (noting that "discriminatory purpose" implies not just that the decisionmaker possessed "intent as awareness of consequences" but that he "selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group") (internal quotation marks omitted).

With these standards in mind, the Court is given the task under *Iqbal* of exercising its judicial experience and common sense to evaluate plaintiffs' allegations in order to determine whether they show more than a "possibility of misconduct" but instead show a "plausible claim for relief."

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Plaintiffs' operative complaint does not meet this standard. Nowhere in plaintiffs' complaint are any factual allegations made that make out a plausible claim of relief for purposeful discrimination against them or anyone else. Rather, plaintiffs commence their defense to the motion by mischaracterizing defendants' argument. Defendants have *never* argued, as plaintiffs represent, that "the fact that *the federal Secretarial Election Board* engaged in 'race-based discrimination of election information' and otherwise acted with discriminatory intent cannot be 'imputed to the federal government'" Dkt. 41, p. 13, *l.* 18 – p. 14, *l.* 1 (emphasis added). What defendants *actually* argued is that actions taken by *Chairman Kelly in his individual capacity or in his capacity as Chairman of the Nooksack Tribe* are not imputable to the federal government. Dkt. # 37, p. 22, *ll*. 3-15.

In order to survive a motion to dismiss *on their own theory*, it was incumbent upon plaintiffs to plead and prove that Chairman Kelly engaged in acts of purposeful discrimination against an identifiable group and to allege facts which show that those actions are imputable to the Election Board as a whole.[9] Assuming for purposes of argument that Chairman Kelly's distribution of certain campaign literature constituted an act of purposeful discrimination against an identifiable group, plaintiffs allege no facts which demonstrate that those actions were taken by Chairman Kelly in his capacity as a member of the Election Board, or any other facts which plausibly demonstrate that his actions were those of the Election Board. Plaintiffs attempt to mask this defect through artful pleading. However, the necessary linkage is simply missing. According to plaintiffs' operative complaint:

> The Secretarial election is a federal election, and Defendant Joseph is Chair of the Election Board. The Election Board also includes the Enrollment Officer who initiated race-based disenrollment proceedings and the Tribal Chairman who is engaging in discriminatory election practices. By conducting an election involving discriminatory election practices, such as Chairman Kelly's provision of election information only to non-Filipino voters, the Defendants are violating the Plaintiffs' equal protection and voting rights.

Dkt. # 3, ¶ 92. Parsing these allegations, and ignoring allegations that amount to legal conclusions, plaintiffs' claim that defendants have engaged in race-based voter discrimination is based only on

9 The Secretary's election regulations call for the assemblage of an election board, which is to include at least two members of the proposing tribe, to carry out certain ministerial duties associated with the election including ensuring that each person offering to vote is on the official list of registered voters, keeping the ballot boxes locked at all times, counting regularly cast ballots, and certifying election results. Declaration of Johnston, ¶ 1.

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the following three factual allegations:

1. The Nooksack Enrollment Officer, who (allegedly) "initiated race-based [tribal] disenrollment proceedings" is a member of the Election Board.

2. The Tribal Chairman, who (allegedly) is "engaging in discriminatory election practices," is a member of the Election Board.

3. Among the (allegedly) discriminatory election practices engaged in by the Tribal Chairman Kelly was the "provision of election information only to non-Filipino voters."[10]

None of these allegations make out a plausible claim that defendants engaged in purposeful race-based discrimination against any individual or any group of individuals. Assuming for purposes of argument that a Tribal Enrollment Officer who initiates race-based tribal disenrollment proceedings may be branded as a "racist" (which is the gist of plaintiffs' allegation), that mere fact, divorced from any allegation of an overt act of purposeful discrimination taken by him in his capacity as a member of the Election Board, does not sufficiently plead any act of purposeful discrimination by defendants. The same, of course, is true of Chairman Kelly, who plaintiffs' complaint also implies is a racist. Thus, neither allegation #1 nor #2 are sufficient alone or together to state a plausible claim of purposeful race-based voter discrimination by defendants. Perhaps recognizing this deficiency, plaintiffs artfully elaborate on Chairman Kelly's alleged "discriminatory election practices" in factual allegation #3, averring that Chairman Kelly was guilty of providing election information "to only non-Filipino voters." Assuming this arguably constitutes an act of purposeful discrimination, nowhere is there any allegation that Chairman Kelly undertook this alleged discriminatory practice in his capacity *as a member of the Election Board*, nor is there any allegation that the Board *qua* Board engaged in or ratified any action taken by Chairman Kelly. Rather, reading the complaint as a whole, *see Barker v. Gottlieb*, ___ F.Supp.2d ___, 2014 WL 2215920, *5 (D. Hawaii, 2014), it is apparent that this particular "discriminatory election practice," at least as alleged by plaintiffs, was taken by Chairman Kelly only in his official capacity as Chairman of the Nooksack Tribe:

> On April 29, 2013, Chairman Kelly wrote to members of the Nooksack Tribe, urging them to register to vote in the Secretarial election. Chairman Kelly, however, only sent the letter to members of the Nooksack Tribe who are not of Filipino descent and not targeted for disenrollment. *The letter was sent from Chairman Kelly purportedly in his official capacity, yet was sent without approval from the Tribal Council.* Both the letter's recipients and its

10 Plaintiffs' operative complaint alleges other "discriminatory election practices," but does not identify them in factual allegations. Accordingly, under *Twombly* and *Iqbal*, this conclusory allegation is ignored for purposes of assessing the claim's plausibility.

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> content betrayed the racial animus toward Filipino-Nooksacks that underlies the proposed amendment and the Secretarial election. Chairman Kelly's letter explained that the Secretarial election is designed to prevent "losing control of the cultural identity of the Nooksack Tribe" by targeting "large groups or families that have much weaker ties to Nooksack than the rest of us." Chairman Kelly's letter also obfuscated the potential impact of the Secretarial election, stating that "[a]nyone enrolled before the upcoming constitutional election will not be affected regardless of whether the amendment to the constitution passes or not." Indeed, taken in tandem with Defendants' disenrollment strategy, this statement was a flat-out lie.

Dkt. # 3, ¶ 52 (emphasis added). In summary, the linkage necessary for plaintiff to state a plausible claim for purposeful race-based voter discrimination by the Election Board is not present in plaintiffs' operative complaint. It is simply not sufficient for plaintiffs to allege that two members of the Board have engaged in "racist" activities in their non-Board capacities. Rather, in order to make out a plausible claim of purposeful race-based discrimination, it was necessary for plaintiffs to include factual allegations of actions taken by the Board *qua* Board, that if proven demonstrate purposeful racial discrimination.

Apparently recognizing the deficiency in their pleading, plaintiffs offer supplemental "facts" in a belated effort to bolster their constitutional claim, although not specifically alleged by them in support of that claim in the operative complaint. Plaintiffs claim that the Election Board "set[ ] only 10 days for voters in Canada, who are primarily made up of members of the Nooksack 306, to register." Dkt. # 41, p. 15, *ll*. 13-14. As the operative complaint appears to tacitly acknowledge, however, the 10 day registration period was precisely the same for all tribal members, not just those in Canada. Dkt. # 3, ¶¶ 51, 58. Plaintiffs also argue in conclusory terms, and without any elaboration, that the Election Board "prevent[ed] many members of the Nooksack 306 from requesting absentee ballots . . ." Dkt. # 41, p. 15, ll. 14-15. The corresponding allegation in the complaint appears to be that the Secretary acted arbitrarily and capriciously by requiring that a request for an absentee ballot be made by a date that was eight days sooner than the latest date permissible under the Secretary's regulations. Dkt. # 3, ¶ 97. Nothing in this allegation reflects that the deadline was applied differently among registered voters or that it otherwise constituted purposeful discrimination against any identifiable group. The same is true of plaintiffs' third assertion regarding the Secretary's presumed failure to conduct a pre-election review of the proposed amendment. Dkt. # 41, p. 15, *ll*. 15-16.

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Even if plaintiffs' *had* included these allegations in support of their constitutional claims, they still would not suffice to allege a plausible claim of purposeful discrimination against plaintiffs or anyone else. Such a claim requires that the defendant have acted "'because of,' not merely 'in spite of' [the actions] adverse effects upon an identifiable group." *Iqbal, supra*, 556 U.S. 676-677 (some internal quotation marks omitted) (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)). Plaintiffs' operative complaint is devoid of any allegation of fact which makes out a plausible claim of purposeful racial discrimination by any federal defendant against plaintiffs or anyone else in regards to the Nooksack election. Accordingly, the claim should be denied.[11]

VI. PLAINTIFFS HAVE NOT PLEAD A VIABLE BREACH OF TRUST CLAIM

As noted in our original memorandum, an action for breach of trust must involve a trust "resource" which is "pervasively regulated" by the federal government. *Gros Ventre Tribe v. United States*, 469 F.3d 801, 813 (9th Cir. 2006) (citing *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974 (9th Cir. 2006)). Plaintiffs now seek to counter this argument by equating a tribal government to a trust resource. This argument has no supporting authority and is contrary to the decided cases in the Circuit. As the Court stated in *Gros Ventre*:

> Although 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. at 810 (some citations omitted). Plaintiffs have identified no specific duty that has been placed upon the federal government whereby the Nooksack Tribal Government can be viewed as a trust resource which is pervasively regulated and from which enforceable fiduciary responsibilities arise above and beyond those which exist because of applicable statutes, regulations, treaties or other agreements. Accordingly, this claim should also be dismissed.

11 Plaintiffs' suggest that "[t]o the extent that there is any question that Plaintiffs have stated a cause of action, discovery is required pursuant to Fed. R. Civ. Proc. 56(d) and federal common law. Dkt. 41, p. 3, *ll*. 6-8. The Supreme Court has stated, however, that plaintiffs must satisfy the pleading requirements of Rule 8 before the discovery stage, not after it. *See Iqbal*, 556 U.S. at 678–79 (explaining that Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions").

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CONCLUSION

For the foregoing reasons, and for those reasons stated in their original memorandum, defendants respectfully requests that their motion be granted and that plaintiffs' first, second and fourth causes of action be dismissed.

DATED this 21st day of November, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on November 21, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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I further certify that on November 21, 2014, I mailed by United States Postal Service the foregoing document to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

-0-

Dated this 21st day of November 2014.

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