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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PATRICK HAMMOND III, Plaintiffs, v. SALLY JEWELL, Secretary of the U.S. Department of the Interior; INTERIOR BOARD OF INDIAN APPEALS, U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR; AMY DUTSCHKE, Regional Director, Pacific Regional Office, Bureau of Indian Affairs; TROY BURDICK, Superintendent, Central California Agency, Bureau of Indian Affairs, Defendants.	Case No. 1:15-cv-00391-SKO **FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

This lawsuit concerns the tribal leadership dispute of the Picayune Rancheria of Chukchansi Indians. The Plaintiff here, Patrick Hammond, claims the other members of the Tribal Council removed him from the Council for improper reasons. Plaintiff claims that the Bureau of Indian Affairs ("BIA") should have taken action to reverse his removal, and by not acting, denied him due process rights. Plaintiff further claims that when the BIA Regional Director named which Tribal Council the BIA would work with for the limited purposes of federal contracting – that the BIA should have revisited his removal, and put him back on the Tribal Council.

The fundamental flaw with Plaintiff's position is that the BIA does not have a role in deciding who is on Tribal Council – the Tribal membership decides who is elected to those positions. And if a tribal council determines pursuant to tribal law that a person should be removed from tribal council, there is no federal action or role for the BIA to play. Accordingly, the BIA is not the cause of Plaintiff being removed from Tribal Council and BIA cannot put him back on Tribal Council. Plaintiff's remedy was to pursue appeals within the Tribe. Plaintiff does not meet the traceability and redressability prongs of Article III standing, and the Court should dismiss Plaintiff's Complaint.

Similarly, this Court does not have jurisdiction over Plaintiff's grievance about his removal from Tribal Council. Intra-tribal disputes – such as whether removal from tribal council was appropriate – should be resolved in tribal forums and not in federal courts. Plaintiff should have pursued a remedy with the Tribal court, particularly where the Tribal governing documents provide no role for BIA concerning Tribal appeals.

Additionally, Plaintiff's due process claims should be dismissed. Remaining on the Tribal Council is not an interest that is protected by the U.S. Constitution. Even if it were, Plaintiff received due process by raising the issue of his removal from Tribal Council before the Interior Board of Indian Appeals ("IBIA" or "the Board") in the administrative appeals brought by other factions within the Tribe over the BIA's decision concerning contracting with the Tribe. Likewise, Plaintiff's claims that BIA violated the Indian Civil Rights Act do not state a claim because that statute only applies to Indian tribes. Finally, Plaintiff's generic claims that BIA violated the Administrative

Procedure Act ("APA") should be dismissed because Plaintiff does not state which statute (other than the due process clause and Indian Civil Rights Act) he claims the BIA violated. Accordingly, Plaintiff does not provide the statutory guidepost against which to measure either IBIA or BIA's conduct, and thus, there is no waiver of sovereign immunity under the Administrative Procedure Act. The Court should dismiss Plaintiff's Complaint.

ARGUMENT

I. Plaintiff does not have standing because the Court must determine an issue of tribal law to find for Plaintiff.

In our opening brief, we argued that Plaintiff has not met either the traceable or redressability prongs of Article III Standing, and thus, Plaintiff's Complaint must be dismissed. Def.'s Op. Brief at 6-8. Specifically, we argued that Plaintiff cannot trace his alleged injuries to the federal government. Plaintiff's grievance concerns his removal from the Tribal Council by the other members on the council. In fact, Plaintiff's Complaint spells out the nature of this action being about the Tribal Council's actions, and not BIA's. The allegations brought against Plaintiff by the Tribal Council concerned violations of the tribal Ethics Ordinance. Pl.'s Compl. ¶¶ 11, 14. Plaintiff's Complaint states that his removal from Council was "in conflict with the Tribal governing documents" and that the removal "violat[ed] tribal law." Id. at ¶ 35. In sum, the federal government did not remove Plaintiff from Tribal Council – the other members of the Tribal Council did. Accordingly, the federal government is not the cause of Plaintiff's grievance – and Plaintiff does not have standing to pursue a claim against the federal government.

In response, Plaintiff argues that the federal government has "approved of Plaintiff's exclusion from the Tribal Council" and has "terminated Plaintiff's participation in the tribe's relationship with the BIA." Pl.'s Resp. at 8. Plaintiff is still a member of the Tribe and neither BIA's nor the IBIA's decisions prohibit Plaintiff from full participation in the processes provided by tribal

law for interaction with BIA. Plaintiff can vote in tribal council elections and can seek re-election to the Tribal Council.

Likewise, neither BIA nor IBIA "approved" Plaintiff's removal from tribal council. As explained in our opening brief, the Regional Director's decision was limited to the issue of whether to approve the submission of Self-Determination Act contracts. Def.'s Op. Br. at 2-4. Since December, 2011 (after Mr. Hammond's removal from Tribal Council), the leadership of the Tribe has been embroiled in dispute. Pl.'s Compl. at 16, 19-25; see also ECF No. 16-1 (Bureau of Indian Affairs, February 11, 2014 Decision ("BIA Decision")) at 3. At that time, the Tribe had fractured into two factions (the Reid Faction and the Lewis Faction), each vying for control of the Tribal Council. BIA Decision at 3. The situation deteriorated to the point where each tribal election, including the one held on December 2011, was considered invalid by one faction or another. BIA Decision at 3-4. Eventually, an additional faction emerged, the Ayala and later the Ayala/McDonald Faction. BIA Decision at 4.

The BIA Decision reflects that Tribal relations were further strained and the situation further muddled on February 21, 2013, when the Ayala Faction removed the entire Tribal Council, with the exception of Ayala, and replaced them with a new Tribal Council. BIA Decision at 5. After that action there were a series of purported suspensions and removals by all of the factions with questionable legal effect. BIA Decision at 5. The separate tribal factions again held elections on December 7, 2013, and these elections were based on separate election ordinances prepared by the respective factions.

All three factions submitted Indian Self–Determination and Education Assistance Act ("Self-Determination Act") contracts to the BIA. Before BIA can award a contract, BIA needs to determine if the entity submitting the contract represented the tribe. Each faction was claiming to be the rightful

Tribal governing body for purposes of contracting and working with BIA on a government-to-government basis. Yet, as the BIA Regional Director observed the situation had deteriorated to the point that the BIA Superintendent decided to return the contracts to all three factions because "it has not been possible to ascertain which factions[']actions are consistent with Tribal law." BIA Decision at 7. The Bureau of Indian Affairs properly recognized that it could not determine tribal leadership since it "is quintessentially an intra-tribal matter" to be decided "through an appropriate tribal forum." BIA Decision at 7 (citing Hamilton v. Acting Sacramento Area Dir., BIA, 29 IBIA 122, 123 (1996)).

The three factions then appealed the Superintendent's decision to the Regional Director through the administrative appeals process within the Department of the Interior. After reviewing the Superintendent's decision, the Regional Director decided that "for the purpose of contracting under the [Self-Determination Act] and preventing any further hiatus of the government-to-government relationship with the Picayune Rancheria of Chukchansi Indians" the BIA would conduct business, on an interim basis, with the last uncontested Tribal Council, elected December 2010. BIA Decision at 6; Pl.'s Compl. at ¶ 25. The Regional Director listed that last uncontested Tribal Council as being Dora Jones, Chance Alberta, Jennifer Stanly, Nancy Ayala, Morris Reid, Reggie Lewis and Nokomis Hernandez. Id. at ¶ 26, 30. In a footnote, the Regional Director's decision refers to the Tribal Council's replacement of Patrick Hammond by Nokomis Hernandez. Id.

The Regional Director's Decision was appealed to the Interior Board of Indian Appeals by two tribal factions, a tribal citizens group and Patrick Hammond. Pl.'s Compl. at ¶ 28. Following the violence between the factions at the Casino (and its closure), the appellants and the BIA asked the Board to expedite consideration of the Regional Director's Decision and to place the decision into immediate effect. The Board determined that public exigencies required that the decision be made effective immediately. See ECF No. 16-3 (IBIA Public Exigency Decision) at 5. Specifically, the

Board found that making the BIA Decision effective immediately was in the public interest, citing evidence that tribal services and the casino were both shut down, as well as evidence that the majorities on two prior tribal councils were now cooperating. Id.

Because the BIA's Decision was made immediately effective, the Board did not address the merits of either the Regional Director's Decision or any of the various appellants' arguments. Id. at footnote 11 (stating that because the Decision is being placed into immediate effect, it is unnecessary to address the merits of the arguments concerning the composition of the tribal council). Likewise, the Board did not reach the merits of Mr. Hammond's appeal and instead, stated in footnote 5 that "Hammond, who was elected to the Council in 2010, appeals from the Regional Director's acceptance of his subsequent removal from the Council and replacement with Nokomis Hernandez."

Importantly, at the time of the Regional Director's decision, Plaintiff was not on any of the three factions who had submitted contracts to BIA. BIA Decision at 2 (listing the elected members of the Reid, Lewis and Ayala Factions Tribal Councils). Given the issues with the election results, the Regional Director decided to return to the tribal council, elected in 2010. While Mr. Hammond was on that Tribal Council (as elected), he was subsequently removed from the Council by the other Tribal Council members in April 2011. There is no mechanism in the Tribe's Constitution for review by BIA of the Tribal Council decision, hearings or findings concerning removal of another Council member. Moreover, Plaintiff has not stated that he sought to contest his removal within the Tribe, nor has he stated how the Tribal Council's proceedings were incorrect. Thus, the inquiry undertaken by the Regional Director in reviewing the Self-Determination Act contracts did not include reviewing Mr. Hammond's removal from the Tribal Council. In sum, there can be no question that the Tribal Council (and not the BIA as Plaintiff alleges) was responsible for his removal from Tribal Council.

Plaintiff also claims that he has standing because his removal from tribal council violated federal law and not just tribal law. Pl.'s Resp. at 7. Plaintiff claims that the federal law being violated includes his Constitutional "due process rights[,] violation of the Indian Civil Rights Act and violation of the Administrative Procedure Act." Id. As discussed on our opening motion, as a matter of law, Plaintiff has not set forth a claim upon which relief can be granted. Def.'s Op. Br. at 9-14 In the standing context, Plaintiff does not – and cannot – rebut the remedy sought in his Complaint – an order directing that Plaintiff is a member of the Tribal Council and that his removal was void – requires the Court to determine whether his removal was proper as a matter of tribal law. Whether the Tribal Council properly followed the Tribal Constitution in his removal, provided Plaintiff his due process rights, or whether Plaintiff violated the Tribal Ethics Ordinance – are all matters of tribal law. And having to determine tribal law questions, particularly in the context of tribal leadership disputes, defeats standing. See Picayune Rancheria of Chukchansi Indians v. Henriquez, 2013 WL 6903750 at * 3-4 (D. Ariz. 2013) (finding that the Picayune faction who brought that case did not have standing because in order to grant the requested relief, the court would have to decide the intra-tribal dispute). The Court should dismiss Plaintiff's Complaint.

II. There is no constitutionally protected interest in remaining on Tribal Council thus, the due process guarantee does not apply.

In our opening motion, we argued Plaintiff cannot set forth a protected interest in being on Tribal Council; thus, there is nothing for the Government to deprive, and Plaintiff's First Count cannot set forth a claim upon which relief can be granted. Def.'s Op. Br. at 9-12. Mr. Hammond also received full opportunity to be heard and participated in the appeal before the Board, which is all the Due Process Clause requires. Id. This Court should dismiss Plaintiff's count one.

In response, Plaintiff argues that "[t]his particular situation calls in question the liberty interest of Plaintiff." Pl.'s Resp. at 8. Plaintiff claims that "had and has [an] expectation that he may retain his position as a member of the Tribal Council." Id. at 9. While the Tribe's Constitution provides that an elected Tribal Council member "shall hold office until their successors are duly elected (ECF No. 16-1 at Article VII (c))," it also provides a process by which a Tribal Council member may be removed by the other members of the Council. See Id. at Article X, Section 1. ("The Tribal Council may, by a majority vote, remove any member of the Tribal Council for neglect of duty or gross misconduct."). The Tribe's Constitution does not provide for BIA to review removal actions by the Tribal Council. Id. The tribal membership elected Patrick Hammond in December 2008 and 2010. Pl.'s Compl. at ¶¶ 10, 12. In January 2011, the Tribal Council placed Plaintiff under a temporary suspension from the Tribal Council for violations of the Tribe's Ethics Ordinance. Id. at ¶ 13. In April 2011, the Tribal Council held a hearing, found Mr. Hammond in violation of the Tribe's Ethics Ordinance, and removed him from the Tribal Council in June 2011. Id. at ¶ 14. Mr. Hammond was replaced on the Tribal Council by Nokomis Hernandez. Id. at ¶ 26. Again, Mr. Hammond does not say in his Complaint that he sought redress within the Tribe for his removal. Under these circumstances, Plaintiff does not have a protected interest that he could remain on Tribal Council indefinitely.

Plaintiff further claims that the "Federal Defendants have made a decision that took that position away from Plaintiff and have thus imposed a stigma upon him." Pl.'s Resp. at 9. Again, the federal government did not remove Plaintiff from the Tribal Council – the other members of the Tribal Council did. In fact, the Board did not decide the "legitimacy" or the merits of the composition of the 2010 Council as set forth in the Regional Director's decision. ECF No. 16-3 at 5 ("In making the Decision effective immediately, the Board emphasizes that it makes no determination

about whether, once the 2010 Council is recognized by BIA on an interim basis, an [Indian Self-Determination Act] proposal from that Council will meet the applicable requirements in order for the Tribe to resume contracting programs and services from BIA.").

III. Plaintiff's Complaint does not set forth statutes by which to measure the BIA's or the IBIA's actions

We argued in our opening motion that the generic cause of action alleged under the APA in Counts three and four, which either cannot be brought against the federal government or fail to state a claim. Def.'s Op. Br. at 12-14. Plaintiff's main argument in support of a violation of the APA appears to be that the IBIA decision did not review Plaintiff's removal from Council. Pl.'s Resp. at 6, 9, 10-11. Yet, Plaintiff does not provide a "relevant statute" that the federal government has violated. The APA does not provide for a free-standing claim that an agency has acted arbitrarily or capriciously, but instead requires the plaintiff to identify the source of law it seeks to invoke. See Or. Natural Res. Council v. Thomas, 92 F.3d 792, 798 & n.11 (9th Cir. 1996); see also Singh v. Moyer, 867 F.2d 1035, 1038 (7th Cir. 1989) ("In determining whether a 'meaningful standard' for review is available, this court considers four areas: the statutory language, the statutory structure, the legislative history, and the nature of the agency action") (citation omitted)). Plaintiff here provides no statute by which to measure the IBIA's decision. See 5 U.S.C. § 702 (Plaintiff must show it is "adversely affected or aggrieved by agency action *within the meaning of a relevant* statute."). "[T]here is no right to sue for a violation of the APA in the absence of a 'relevant statute' whose violation 'forms the basis for [the] complaint.'" Preferred Risk Mut. Ins. Co. v. United States, 86 F.3d 789, 792 (8th Cir. 1996) (citation omitted). "[P]laintiff must identify a substantive statute or regulation that the agency action had transgressed *and* establish that the statute or regulation applies to the United States." Id.

Plaintiff claims that the source of law against which to determine if the federal government's actions are arbitrary and capricious is the due process clause of the Constitution and the Indian Civil Rights Act. As discussed above and in our opening motion, neither of these provide a legal standard the federal government violated here. The due process clause does not apply because Plaintiff does not have a protected interest in remaining on Tribal Council. Even if he does, then he has received meaningful process through his participation in the appeals by the factions. The Indian Civil Rights Act only applies to Indian tribes (Def.'s Op. Br. at 11-12), and Plaintiff has not rebutted this argument in his response.

Plaintiff appears to be arguing that the Board had to decide his appeal. Yet, as discussed in our opening motion, the Board's regulations cited in Plaintiff's Complaint (43 C.F.R. § 4.318), which Plaintiff cites for the proposition that Interior has the authority to "correct a manifest injustice or error where appropriate," and "failed . . . to exercise that authority on behalf of plaintiff." Pl.'s Compl. at ¶ 36. The regulation cited provides the scope of review for appeals before the Board:

> An appeal will be limited to those issues that were before the administrative law judge or Indian probate judge upon the petition for rehearing, reopening, or regarding tribal purchase of interests, or before the BIA official on review. However, except as specifically limited in this part or in title 25 of the Code of Federal Regulations, the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

43 C.F.R. § 4.318. Presumably, Plaintiff believes that the Board should have ruled whether his removal was proper and that by only deciding that public exigency required the Decision be effective, that the Board acted arbitrary and capriciously. The issue of Hammond's removal was not before the Regional Director at the time of decision because the issue presented to the Regional Director was which faction's Self-Determination Act contract should be accepted – not the issue of whether Mr. Hammond's removal was proper. Under the regulation, the appeal before the Board was properly

"limited" to the narrow issue of the contracts. Similarly, in determining whether to make the Regional Director's Decision effective immediately, the Board was looking at whether the factors for public exigency had been met, consistent with the regulation at 25 C.F.R. § 2.6. Accordingly, the Board did not decide the merits of the appeals.

The regulation (43 C.F.R. § 4.318) also leaves the discretion to exercise the Secretary's authority to correct a manifest injustice "where appropriate" with the Board. The Board was clearly aware of Mr. Hammond's appeal (as they referred to it in the footnote) and, in its discretion, the Judges did not address the merits of anyone's pending claims. This regulation does not require the Board to address all claims when issuing decisions, and Plaintiff has not identified a source of law that does. Plaintiff has not stated an APA claim upon which relief can be granted and both APA claims (counts three and four) should be dismissed.

RESPECTFULLY SUBMITTED,

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