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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NICOLAS VILLA, JR., and the HISTORIC IONE BAND OF MIWOK INDIANS TRIBE,

Plaintiffs,

v.

SALLY JEWELL, in her capacity as the Secretary of the DEPARTMENT of the INTERIOR, the DEPARTMENT of the INTERIOR, the BUREAU of INDIAN AFFAIRS, AMY DUTCHSKE, in her capacity as the Pacific Regional Director of the BUREAU OF INDIAN AFFAIRS, and JOHN DOE and MARY ROE, unknown BUREAU OF INDIANS AFFAIRS employees in their official capacities,

Defendants.

CASE NO. 2:16-CV-00503-KJM-KJN

REPLY SUPPORTING FEDERAL DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

Federal Rule of Civil Procedure 12(b)(1) & (7)

DATE: September 9, 2016
TIME: 10:00 a.m.
COURTROOM: 3, 15th floor
JUDGE: Hon. Kimberly J. Mueller

I. INTRODUCTION

As Federal Defendants pointed out in their motion to dismiss, Plaintiffs' Second Amended Complaint identifies no cause of action over which this Court can exercise jurisdiction. Plaintiffs' Opposition similarly fails to do so, instead pointing to general statutes establishing general federal question jurisdiction and mandamus jurisdiction. But neither of those statutes independently create federal jurisdiction, and neither waives sovereign immunity. For this reason, the Court need not consider any of the other issues in the motion. Plaintiffs' complaint does not include any cause of action invoking this Court's jurisdiction and must be dismissed. That dismissal should be with prejudice, because Plaintiffs have demonstrated (through two amendments and the Opposition) that they cannot identify a cause of action invoking this Court's jurisdiction. Leave to amend would be futile.

Though the Court need not reach them, a host of other reasons also require dismissal. First, the Ione Band of Miwok Indians of California (the "Ione Band") is a required party that cannot be joined due to their sovereign immunity from suit. Plaintiffs seek to divert federal funding from the Ione Band to Plaintiff Villa's group. This unquestionably implicates the Ione Band's interests, making it a required party in any lawsuit seeking such relief. But because the Ione Band cannot be joined, this suit must be dismissed under Federal Rule of Civil Procedure 19. Second, tribal sovereign immunity bars Plaintiffs' challenges to the Ione Band's membership criteria regardless of what form those challenges take. Third, Plaintiffs cannot seek federal recognition as an Indian tribe before this Court because they have not exhausted the Department of the Interior Bureau of Indian Affairs ("BIA") administrative process for seeking such recognition. And finally, Plaintiffs' claims all stem from the BIA's approval of the Ione Band's election and membership decisions in 1996. The six-year statute of limitations applicable to any claims challenging the 1996 decisions therefore bars this lawsuit.

Accordingly, the Court should dismiss Plaintiffs' complaint without leave to amend.

II. ANALYSIS

A. Plaintiffs' Opposition again fails to identify any cause of action over which this Court could exercise jurisdiction.

Plaintiffs respond to Federal Defendants' observation that the Second Amended Complaint identifies no cause of action within the Court's jurisdiction by invoking two general statutes, neither of

which creates jurisdiction or waives sovereign immunity. *See* Dkt. 19 at 13 ("This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1361").[1] The federal question statute 28 U.S.C. § 1331 gives the district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The statute thus "confers jurisdiction only where a federal question is otherwise at issue; it does not create federal jurisdiction." *Ellis v. Cassidy*, 625 F.2d 227, 229 (9th Cir. 1980), *abrogated on other grounds by Kay v. Ehrler*, 499 U.S. 432 (1991). And the statute only can confer jurisdiction over a claim against the United States when some other statute provides a sovereign immunity waiver. *High Country Citizens All. v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006).

Similarly, the mandamus statute 28 U.S.C. § 1361 gives the district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." But the mandamus statute "does not provide an independent ground for jurisdiction." *Starbuck v. City and Cty of San Francisco*, 556 F.2d 450, 459, n.18 (9th Cir. 1977); *see also White v. Adm'r of Gen. Servs. Admin. of U. S.*, 343 F.2d 444, 447 (9th Cir. 1965) (section 1361 does not create new liabilities or new causes of action against the United States Government or its officials). And the mandamus statute also does not waive Federal Defendants' sovereign immunity. *See Hou Hawaiians v. Cayetano*, 183 F.3d 945, 947 (9th Cir. 1999). Plaintiffs thus fail to meet their burden of establishing this Court's jurisdiction, including by identifying a sovereign immunity waiver.

Plaintiffs' failure to identify a viable cause of action is fatal to their lawsuit. Because it includes no cause of action invoking this Court's jurisdiction, Plaintiffs' complaint must be dismissed. And because Plaintiffs have demonstrated through two amendments and their Opposition that they cannot identify such a cause of action, that dismissal should be without leave to amend. The Court need not

[1] The parties agree that 28 U.S.C. § 1346(b), the jurisdictional statute for the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq., (the "FTCA"), confers no jurisdiction here. Dkt. 16-1 at 6 n.5; Dkt. 19 at 12-13. The parties also agree that 25 U.S.C. § 476 (f), (g), and (h) (portions of the Indian Reorganization Act) confer no jurisdiction here. *See* Dkt. 16-1 at 6 ("alleged violations of the Indian Reorganization Act (the "IRA"), 25 U.S.C. §§ 461–79, do not create any private right of action (let alone authorize any such action against the United States) and so cannot invoke this Court's jurisdiction"); Dkt. 19 at 13 ("Plaintiffs have not pled 25 U.S.C. § 476 (f), (g), and (h) as a private cause of action."); *id.* ("Plaintiffs argue the Court's jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1361.").

consider any of the other issues in this motion.[2]

B. Plaintiffs' complaint and Opposition demonstrate that the federal recognition they seek conflicts with the Ione Band's existing federal recognition.

Even if Plaintiffs had identified a viable claim and corresponding sovereign immunity waiver, that claim would have to be dismissed for failure to join the required but unavailable party around whom their complaints revolve – the Ione Band that Plaintiffs insist on calling "the Mock Tribe." Most of Plaintiffs' complaint consists of attacks on the Ione Band's legitimacy. *See* Dkt. 14 at 12 ("The BIA Creates a 'Mock' Tribe and Expands the Historic Ione Band of Miwok Indians Tribal Rolls to Include Persons who are Not Eligible to be Tribal Members") to 26 ("The BIA's 1996 'transfer' of the Historic Ione Band of Miwok Indians Tribe's federal recognition of the Mock Tribe is a violation of 25 U.S.C. ¶ 476 (g)."). And Plaintiffs' Opposition makes clear that their central complaint is that the Ione Band "usurped" the Villa group's federal recognition. *See* Dkt. 19 at 19 ("What is disturbing to the Historic Ione Band of Miwok Indians is the BIA's unilateral decision, which was strenuously objected to by the Tribe's lawful government, to create a new tribe [that] usurped the Tribe's federal recognition."). Moreover, Plaintiffs' complaint explicitly asks the Court to divert the Ione Band's federal and state funding to Plaintiffs for Villa's benefit. Dkt. 14 at 27 ("Amongst other illegal acts, Dutchske in concert with Doe and Roe, has directed federal and State of California benefits that belong to the Historic Ione Band of Miwok Indians Tribe and Villa to the Mock Tribe"); *id.* ("The Court should order Secretary Jewell, the DOI and BIA to take those actions necessary to ensure that the Mock Trobe [sic] does not receive the federal benefits and State of California funding that rightfully belongs to the Historic Ione Band of Miwok Indians Tribe for the benefit of Villa.").

Plaintiffs' complaint and Opposition thus demonstrate that Plaintiffs seek to substitute Plaintiff Villa's Historic Band group for the Ione Band on the list of federally recognized Indian tribes and to divert federal resources from the Ione Band to Plaintiffs. This threat to the Ione Band's federal

[2] In support of their Opposition, Plaintiffs submit lengthy materials in support of factual assertions within the Opposition and their complaint. *See* Dkt. 20-1. Federal Defendants object to these materials as irrelevant to this motion because they do not bear on any issue related to the Court's jurisdiction. In addition, these materials include an *unsigned* Al Logan Slagle declaration (dated 1997) filed in 2014 in a previous case. *See* Dkt. 20-1 at 44. Federal Defendants object to this document (Dkt. 20-1 at 2-46) as irrelevant and lacking adequate foundation and evidence establishing authenticity. Federal Rule of Evidence 402, 901.

recognition and funding means that Plaintiffs' lawsuit could not equitably proceed in the Ione Band's absence. *See, e.g.*, *Round Valley Nation v. California*, No. C 00-3329 SC, 2000 WL 1810211, at *2-4 (N.D. Cal. Dec. 8, 2000) (federally recognized tribe was indispensable party in attempt by a tribal faction to obtain judicial declaration of federal recognition and obtain tribal assets). And though it is a required party, the Ione Band cannot be involuntarily joined because it enjoys sovereign immunity from suit. *United States v. Oregon*, 657 F.2d 1009, 1012–13 (9th Cir. 1981). Plaintiffs' suit therefore must be dismissed for failure to join the Ione Band as a party. *See Timbisha Shoshone Tribe v. Bureau of Indian Affairs*, No. CIV S-03-404 WBS/GGH, 2003 WL 25897083, at *6 (E.D. Cal. Apr. 10, 2003) (finding a tribe and its BIA-recognized governing council to be indispensable parties in a dispute between tribal factions over governance issues and dismissing case because sovereign immunity prevented joinder); *see also Round Valley Nation*, 2000 WL 1810211, at *3-4 (holding that tribal sovereign immunity barred indispensable tribe's joinder and so required dismissal).

Though the lack of an alternate remedy for Plaintiff would not change this result, see *Round Valley Nation*, 2000 WL 1810211, at *4, Plaintiffs do have an alternate remedy here. As explained below, Plaintiffs can submit a petition to BIA under 25 C.F.R. § 83.2 seeking federal recognition.

C. Plaintiffs contest the Ione Band's 1996 membership requirements, and tribal sovereign immunity bars such challenges.

Plaintiffs' complaint and Opposition repeatedly attack the Ione Band's membership criteria. *See, e.g.,* Dkt. 14 at 12 ("The BIA Creates a 'Mock' Tribe and Expands the Historic Ione Band of Miwok Indians Tribal Rolls to Include Persons who are Not Eligible to be Tribal Members"); *id.* at 22 ("The vast majority of the Mock Tribe's membership is not made up of genuine, authentic Historic Ione Band of Miwok Indians Tribal members."). Because tribal sovereign immunity divests this Court of jurisdiction over tribal membership disputes, including suits seeking to force a tribe to enforce or change its membership criteria, any otherwise viable claims Plaintiffs brought to carry out such attacks would have to be dismissed. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978); *Lewis v. Norton*, 424 F.3d 959, 961, 963 (9th Cir. 2005).

D. Plaintiffs cannot seek federal recognition in this Court because they have not exhausted administrative remedies by filing a petition with the BIA.

Federal Defendants' Motion to Dismiss explained that, even if Plaintiffs had identified a viable

cause of action through which they could pursue federal recognition, they would first have to exhaust administrative remedies through the BIA's administrative process under 25 C.F.R. § 83.2. Like the dissenting tribal faction in the *James* case, Plaintiffs argue that they do not have to file an administrative petition seeking federal recognition because they are already recognized. *See James v. U. S. Dep't. of Health and Human Servs.*, 824 F.2d 1132, 1136-37 (D.C. Cir. 1987) (dissenting faction "did not file a petition for federal acknowledgment, but rather sought, in the court below, a declaration ordering the Department of the Interior to add the [dissenting faction] to the list of federally recognized tribes. The district court dismissed the claim based on [the faction's] failure to exhaust administrative remedies."); Dkt. 19 at 17 (arguing that Plaintiffs "need not submit to a 're-recognition process'" because "the Department has repeatedly expressed and identified the Historic Ione Band of Miwok Indians as a federally recognized tribe for over 100 years."); Dkt. 14 at 26 (requesting that the Court "re-affirm by an order that the Historic Ione Band of Miwok Indians Tribe is a federally recognized American Indian Tribe").

Also like the dissenting faction in the *James* case, Plaintiffs are wrong. The Ione Band is federally recognized and Plaintiff Villa's dissenting faction is not. *See No Casino in Plymouth v. Jewell*, 2:12-cv-01748-TLN-CMK (E.D. Cal.) Dkt. 78-1 at 2-3 (Declaration of Kevin Bearquiver, Deputy Regional Director for Trust Services for the United States Department of the Interior's Bureau of Indian Affairs - Pacific Regional Office, attesting that the Ione Band is federally recognized and describing the longtime factional dispute involving Plaintiff Villa);[3] *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 81 Fed. Reg. 5,019, 5,021 (Jan. 29, 2016) (identifying the Ione Band of Miwok Indians of California as federally recognized and not identifying Plaintiff Villa's "Historic Band" entity as such). As in the *James* case, if Plaintiff Villa's faction has evidence to support its claim that it was previously recognized, then it must present that evidence to the Department of the Interior's BIA for determination. *See James*, 824 F.2d at 1137 ("[T]he determination whether these documents adequately support the conclusion that the Gay Heads were federally recognized in the middle of the nineteenth century, or whether other factors support federal recognition,

[3] The court may take judicial notice of court records in another case. *United States v. Howard*, 381 F.3d 873, 876 n.1 (9th Cir. 2004).

should be made in the first instance by the Department of the Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and regulations."); *id.* at 1138 ("[R]equiring exhaustion allows the Department of the Interior the opportunity to apply its developed expertise in the area of tribal recognition.").

Plaintiffs imply that administrative exhaustion should be excused here because "it would be futile for the Tribe to seek an administrative determination from the BIA that it is a tribe separate and distinct from the Mock Tribe." Dkt. 19 at 18. But Plaintiffs offer no support for this assertion, and their insistence that Plaintiff Villa's group maintains a longstanding, separate tribal identity from the Ione Band suggests otherwise. *See id.* at 19 ("In truth and in fact, the Tribe and the Mock Tribe are undisputedly separate and distinct from one another in that their members do not share the same Indian blood, genealogy, ancestry, traits or characteristics associated with tribal attributes, such as custom, language or any other tribal tradition"). As in the *James* case, Plaintiffs have not demonstrated that resort to administrative remedies is futile, and adverse action certain, because there has been no indication from BIA that it lacks jurisdiction over any recognition application from Plaintiff Villa's group or that it has expressed a strong position on the issue together with an unwillingness to reconsider. *See James*, 824 F.2d at 1139. Thus, as in *James*, Plaintiffs must exhaust administrative channels concerning tribal recognition prior to seeking any judicial review. *Id.*

E. Plaintiffs' complaints stem from the 1996 election, and so the six-year statute of limitations bars their claims.

Plaintiffs' Opposition repeatedly emphasizes that their dispute with BIA began in 1996. *See* Dkt. 19 at 2 ("In 1996, the BIA inexplicably and illegally created what has been referred to in this litigation as the 'BIA Created Tribe' or 'Mock Tribe.' The BIA sanctioned requirements to become a Mock Tribe member are entirely different than the requirements for membership set out in the Historic Ione Band of Miwok Indians' Constitution and Ordinances."); *id.* ("Since 1996, when the Mock Tribe was created, the BIA has illegally refused to acknowledge the Historic Ione Band of Miwok Indians' federal recognition."); *id.* ("For the last 20 years, the Tribe has begged and pleaded with the BIA to acknowledge it as a federally recognized tribe as it had for 100 years, until 1996."). The applicable statute of limitations required that any claim concerning alleged wrongdoing by BIA in connection with

the 1996 election be brought within six years. 28 U.S.C. § 2401(a); *see also Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir. 1990) (six-year statute of limitations in 28 U.S.C. § 2401(a) is a term of the United States' sovereign immunity waiver and so failure to comply with it deprives the court of jurisdiction). Because this lawsuit was filed long after that statute of limitations deadline, it is time barred.[4]

III. CONCLUSION

For the foregoing reasons, the Court should dismiss the Second Amended Complaint for lack of jurisdiction without leave to amend.

Dated: September 2, 2016

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By: /s/ VICTORIA L. BOESCH
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[4] Plaintiff Villa long ago sued BIA regarding the Ione Band's 1996 election and membership enrollment decisions. *See Burris v. Sacramento Area Director, Bureau of Indian Affairs*, 33 I.B.I.A. 66 (1998). Though he lost that fight, Villa continues to try to challenge the 1996 election and the Ione Band's associated decisions about tribal membership and leadership in other forums. *See, e.g.*, *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1178-81 (E.D. Cal. 2015) (rejecting Villa's attempt to raise identical claims in suit opposing land into trust acquisition for Ione Band); *see also No Casino in Plymouth v. Jewell*, 2:12-cv-01748-TLN-CMK (E.D. Cal.) Dkt. 86 (Declaration of Ione Band Chairperson Yvonne Miller discussing Ione Band member Villa and his ongoing disputes with tribal leadership).