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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CINDY ALEGRE, an individual, et al., Plaintiffs, v. RYAN ZINKE, Secretary of the Department of Interior, in his official capacity, et al. Defendants.	Case No.: 16-cv-02442-AJB-KSC MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT DATE: August 10, 2017 TIME: 2:00 p.m. CTRM: 3B JUDGE: Hon. Anthony J. Battaglia

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I. INTRODUCTION

On September 28, 2016, a Complaint was filed in which 94 plaintiffs brought three causes of action alleging five federal employees in their official capacity ("Defendants") failed to appropriately review their enrollment applications to the San Pasqual Band of Mission Indians (the "Tribe" or the "Band"). (ECF No. 1.) Defendants moved to dismiss the complaint, arguing that the Court lacked subject matter jurisdiction because there was no final agency action regarding Plaintiffs' applications. (ECF No. 9.)

Rather than opposing the motion, a First Amended Complaint ("FAC") was filed by 133 plaintiffs ("Plaintiffs") who bring 14 causes of action against Defendants. The Court should dismiss the FAC for lack of subject matter jurisdiction and/or failure to state a cognizable claim, as explained below. Specifically:

- Plaintiffs' first and second causes of action should be dismissed with prejudice for lack of prudential standing. See infra § IV.B.1.
- Plaintiffs' first, third, and fourth causes of action should be dismissed with prejudice for lack of subject matter jurisdiction because there has been no final agency action. See infra § IV.B.2.
- Plaintiffs' second and eighth causes of action should be dismissed for failure to allege a cognizable claim. See infra § IV.B.3.
- Plaintiffs' first and second causes of action should be dismissed with prejudice because the Court lacks subject matter jurisdiction to declare individuals members of the Band. See infra § IV.B.4.
- Plaintiffs' first, second, third, fourth, and fifth causes of action should be dismissed with prejudice to the extent they request anything beyond remand to the BIA for failure to join a necessary party pursuant to Rule 19. See infra § IV.B.5.
- Plaintiffs' sixth, seventh, and thirteenth causes of action should be dismissed with prejudice because the Court lacks subject matter jurisdiction and the United States has not waived sovereign immunity over claims for money damages based on Fifth Amendment's Due Process or Equal Protection Clauses. See infra § IV.C.1.

- Plaintiffs' eighth, ninth, and tenth causes of action should be dismissed with prejudice because the Court lacks subject matter jurisdiction and the United States has not waived sovereign immunity over claims for money damages based on the Administrative Procedures Act. See infra § IV.C.2.
- Plaintiffs' eleventh cause of action should be dismissed with prejudice because the Court lacks subject matter jurisdiction and the United States has not waived sovereign immunity over claims for money damages based on alleged breaches of fiduciary duties arising from trust responsibilities over Indians. See infra § IV.C.3.
- Plaintiffs' fourteenth cause of action should be dismissed with prejudice because the Court lacks subject matter jurisdiction and the United States has not waived sovereign immunity over claims for money damages based on allegations of fraud and misrepresentation. See infra § IV.C.4.
- Plaintiffs' fourth, fifth, and twelfth causes of action should be dismissed for failure to allege a cognizable claim because the statute of limitations has run. See infra § IV.D.
- Any remaining causes of action should be dismiss pursuant to Federal Rule of Civil Procedure 8. See infra § IV.E.

II. PLAINTIFFS' ALLEGATIONS[1]

A. Alleged Facts Related To Plaintiffs' Enrollment Applications With Tribe

In their FAC, Plaintiffs allege that on September 22, 2005, the Band's Enrollment Committee sent a letter to the Bureau of Indian Affairs ("BIA"), Southern California Agency ("SCA"), Superintendent (the "Superintendent") requesting him to increase the blood degree for Modesta (Martinez) Contreras from 3/4 to 4/4 degree blood of the Band.[2]

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[1] By stating facts alleged by Plaintiffs, Defendants do not mean to indicate that they agree that the alleged facts are accurate.

[2] There is no disagreement that Modesta Contreras' mother, Guadalupe (Alto) Martinez was 4/4 blood of the Band. The determination whether Modesta Contreras is 3/4 or 4/4 blood of the Band is based on whether her father, Jose Juan Martinez, is 1/2 (i.e. 2/4) or 4/4 blood of the Band.

(ECF No. 13, ¶ 11; ECF No. 13-11.) Previously, on September 12, 2005, the Band's Tribal Counsel[3] sent a letter to the Superintendent stating they supported Plaintiffs' applications for enrollment in the Band, and were sending the applications for BIA's approval pursuant to the Band's Constitution. (ECF No. 13, ¶ 10; ECF No. 13-10.) The basis of Plaintiffs' enrollment applications were that they were great-grandchildren of Modesta Contreras; therefore if Modesta Contreras was 4/4 blood of the Band, her great-grandchildren would each be at least 1/8 blood of the Band. (ECF No. 13, 13-1, 13-2, ¶¶ 70-203; ECF No. 13-3, ¶ 291; ECF No. 13-74.)

Forwarding Plaintiffs' applications to BIA was necessary because 25 C.F.R. Part 48 (which is no longer operative as federal regulations)[4] has been incorporated into the Band's Constitution, and therefore is Tribal law. (ECF No. 13, ¶ 24.) Pursuant to that tribal law, as codified at former 25 C.F.R. § 48.7, "the [enrollment] applications whether approved or disapproved shall be filed with the Director[5] within thirty (30) days from receipt by the [Enrollment] Committee."

In a memorandum dated December 8, 2005, the Superintendent told the Bureau of Indian Affair's Pacific Region Regional Director (the "Director") that it concluded that "The preponderance of evidence does not sufficiently demonstrate that Modesta (Martinez) Contreras is fullblood." (ECF No. 13, ¶ 5; 13-7 at 2-3.) In a letter dated January 31, 2006, the Director stated that it agreed with the Superintendent "that the evidence does not substantiate the blood degree change for Modesta (Martinez) Contreras, [and] therefore [the

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[3] ECF 13-10 states the letter is from the Band's Tribal Counsel, but Plaintiffs allege it was from the Band's Business Committee. (ECF 13, ¶ 10.)

[4] "The [Band's] Constitution . . . expressly incorporates federal regulations, adopted in 1960 [that were] formerly codified at 25 C.F.R. §§ 48.1–48.15 . . ., which addressed tribal enrollment criteria, the process for completing an initial membership roll, the procedures for keeping the membership roll current, and the purposes for which the roll was to be used. [These] Regulations have since been removed from the Code of Federal Regulations, but the reference to them remains in the Tribe's Constitution." Alto v. Black, 738 F.3d 1111, 1116 (9th Cir. 2013). Therefore, any reference to former 25 C.F.R. Part 48 regulations in this motion will to the Band's Tribal law only.

[5] "'Director' means the Area Director, Sacramento Area Office" of the BIA. (ECF No. 13-13 at 2, § 48.1(c)).

Director] recommend[ed] disapproval." (ECF No. 13-12 at 2-3.) In a letter dated April 7, 2006, the United States Department of the Interior, Office of the Secretary, told the Band's chairman that it concurred with the Director and the Superintendent "that there is insufficient evidence to warrant an increase from 3/4 to 4/4 degree San Pasqual Indian blood for Modesta (Martinez) Contreras." (ECF No. 13-6 at 2-3.)

B. Alleged Facts Related To History of Tribe

Plaintiffs also allege facts related to the history of the tribe, including Defendants: (1) amended, in or about 1960, the federal regulation (25 C.F.R. § 48.5(f)) governing the enrollment of persons in the San Pasqual Band of Mission Indians in order to benefit "a White man" named Frank Trask, and his descendants; (2) failed to inform Plaintiffs regarding the amendments; and, as a result, (3) allowed Frank Trask's descendants "who have no San Pasqual blood" to secure "full control of the tribe and the enrollment process" to the Plaintiffs' detriment. (ECF No.13-4, ¶¶ 383-385 (alleging Defendants allowed Frank Trask and his family "to squat . . . with impunity" on Indian lands); ¶¶ 399-400 (alleging that Plaintiffs have been denied "their rightful inheritance" as a result of the "full control" enjoyed by the Trask descendants over the enrollment process); ¶¶ 525-526, 533 (alleging that their losses include "rights to land, an income, school, education, tribal voting rights," as well as "an unconstitutional diminution of [their] land"); ¶¶ 406-411, 415, 418 (alleging that the Trask descendants' "full control" was afforded pursuant to amendments to the enrollment regulations that were never disclosed).

C. Relief Sought By Plaintiffs

In their first five causes of action, Plaintiffs request "a declaration by the Court that the acts of Defendants, and each of them, were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." (ECF No. 13-4 at p. 46-47.[6]) Additionally, the first two claims request the Court declare certain individuals are members of the Band,

[6] Page number citations are to the blue CM/ECF-generated page numbers located at the top of each page.

the third claim requests the Court declare Plaintiffs are members of the Band, and the fourth and fifth claims request the Court declare Plaintiffs have been denied equal protection and due process of the law. (Id.)

Plaintiffs' sixth through fourteenth causes of action seek "[d]amages in an amount to be proven at trial." (ECF No. 13-4 at p. 47-48.)

III. FACTS FROM MOORE AND DUTSCHKE DECLARATIONS

On April 21, 2006, the former Superintendent sent a letter to the Band's Enrollment Committee providing them a copy of the April 7, 2006, blood degree decision for Modesta Contreras. See Ex. 1 (Moore Decl.) at 2 (¶ 5) (citing ECF # 1-20 at 65-67). In that same letter, the Superintendent explained he was returning the original enrollment applications of Modesta Contreras' descendants[7] for the Band's review, without any decision from any BIA office on the enrollment applications, because the determination not to increase Modesta Contreras' blood degree could affect the Band's analysis of the applications. See Ex. 1 at 2-3 (¶ 5) (citing ECF # 1-20 at 65-67). This was consistent with the procedures set forth in the provisions of 25 CFR §§ 48.4 and 48.7. See Ex 2 (Dutschke Decl.) at 3 (¶ 4).[8] No BIA office made any decision regarding the enrollment applications before returning them to the Band. See id.

In a letter to the Superintendent dated May 3, 2006, the Enrollment Committee Chairman acknowledged receipt of the April 7, 2006, letter. See Ex 1 at 3 (¶ 6); id. at 20-21.) The letter stated that in light of a research report prepared by Enrollment Committee member, Dr. Robert Phelps, and the information in the BIA's April 7, 2006, decision, the Enrollment Committee concurred that Modesta Contreras' blood degree should remain 3/4. See Ex. 1 at 20.) The letter also stated that once the Enrollment Committee completed its review of the enrollment applications that were affected by the BIA's denial of a blood

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[7] There were a total of 179 enrollment applications. (ECF # 9-2, ¶ 1.)

[8] The Superintendent (formerly the Filed Representative) initially receives enrollment applications pursuant to 25 C.F.R. § 48.4. (ECF No. 13-13 at 3.) The Superintendent then "refer[s] duly filed applications for enrollment to the [Band's] Enrollment Committee," pursuant to 25 C.F.R. § 48.7. (Id. at 4.)

degree increase for Ms. Contreras, it would prepare and mail to each applicant a letter regarding the BIA's decision and the concurrence of the Enrollment Committee. See Ex. 1 at 21.)

In a letter to the Superintendent dated July 28, 2006, the Band's Enrollment Committee provided a list of individuals whose applications had been reviewed by the Committee and were determined ineligible for enrollment because they did not possess sufficient blood degree. See Ex. 1 at 3 (¶ 7); id. at 23-26.) The Band advised that notices were sent to the applicants via certified mail with copies of regulations at 25 C.F.R. Part 62 concerning enrollment appeals. See Ex. 1 at 3 (¶ 7); id. at 23.) The BIA did not receive any request for a determination of eligibility consistent with 25 CFR §§ 48.7 and 48.8 and Article III of the Band's Constitution. Ex 2 at 3 (¶ 6).

IV. DISCUSSION

A. Relevant Legal Standards

1. Motion to Dismiss for Lack of Subject Matter Jurisdiction

A motion to dismiss for lack of subject matter jurisdiction may be brought by a defendant pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. "A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). By contrast, in a factual attack, the challenger may rely on evidence extrinsic to the complaint. See Safe Air for Everyone, 373 F.3d at 1039; see also Tritz v. U.S. Postal Service, 721 F.3d 1133, 1141 n.6 (9th Cir. 2013) (court may properly consider declaration submitted with motion to dismiss for lack of subject matter jurisdiction in factual attack). The Ninth Circuit has explained:

> In resolving a factual attack on jurisdiction, the district court may review: evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. The court need not presume the truthfulness of the plaintiff's allegations. "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction."

Safe Air for Everyone, 373 F.3d at 1039 (internal citations omitted and emphasis added).

The United States may bring a motion to dismiss for lack of subject matter jurisdiction for various reasons, including: lack of waiver of sovereign immunity, see Harger v. Dep't of Labor, 569 F.3d 898, 903 (9th Cir. 2009) or plaintiffs' lack of standing, see V. Real Estate Grp., Inc. v. U.S. Citizenship & Immigration Servs., 85 F. Supp. 3d 1200, 1205 (D. Nev. 2015).

2. Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted

A motion to dismiss for failure to state a claim upon which relief can be granted may be brought by a defendant pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. "Dismissal is proper when the complaint does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory." Chubb Custom Ins. Co. v. Space Systems/Loral, Inc., 710 F.3d 946, 956 (9th Cir. 2013). "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.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. The plausibility standard requires more than the sheer possibility or conceivability that a defendant has acted unlawfully, rather, factual allegations must be enough to raise a right to relief above the speculative level. See id. at 678–79, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("'[E]ntitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."). "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." Iqbal, 556 U.S. at 678.

A motion to dismiss may be made and granted to dismiss either the whole complaint or part of the complaint. See Tatum v. Board of Supe'rs for University of Louisiana System,

9 F. Supp. 3d 652, 655 (E.D. La. 2014); Miceli v. Ansell, Inc., 23 F. Supp. 2d 929, 931 (N.D. Ind. 1998); Brocksopp Engineering, Inc. v. Bach-Simpson Ltd., 136 F.R.D. 485, 486 (E.D. Wis. 1991).

Although allegations of fact are normally taken as true and construed in the light most favorable to the nonmoving party, the Court need not accept as true allegations that are merely conclusory, unwarranted deductions of fact, unreasonable inferences that are contradicted by matters properly subject to judicial notice or by exhibit referred to or incorporated by reference into the complaint, or that are legal conclusions that cannot reasonably be drawn from the facts alleged. See Iqbal, 556 U.S. at 678-79; Gonzalez v. Planned Parenthood of Los Angeles, 759 F.3d 1112, 1115 (9th Cir. 2014); Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1145 n.4 (9th Cir. 2012); Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004). Furthermore, although leave to amend should be given freely, Doe v. United States, 58 F.3d 494, 497 (9th Cir.1995), a district court may dismiss without leave where a plaintiff's proposed amendments would fail to cure the pleading deficiencies and amendment would be futile. See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990) (per curiam).

3. A District Court Lacks Subject Matter Jurisdiction Over Federal Defendants Unless Sovereign Immunity Has Been Waived and There Is Statutory Authority Vesting the Court with Subject Matter Jurisdiction

To confer subject matter jurisdiction in an action against the United States, its agencies, or its employees acting in their official capacity, there must be both a waiver of sovereign immunity, and a statutory authority vesting a district court with subject matter jurisdiction. See Alvarado v. Table Mountain Rancheria, 509 F.3d 1008, 1016 (9th Cir. 2007); see also Arford v. United States, 934 F.2d 229, 231 (9th Cir. 1991) ("In an action against the United States," a plaintiff must establish both "statutory authority granting subject matter jurisdiction" and "a waiver of sovereign immunity."). The United States is immune from suit unless it consents to waive its sovereign immunity. See Lehman v. Nakshian, 453 U.S. 156, 160 (1981). "The doctrine of sovereign immunity applies to federal agencies and to federal employees acting within their official capacities." Hodge v.

Dalton, 107 F.3d 705, 707 (9th Cir. 1997). The consent of the United States to be sued through a waiver of sovereign immunity is a prerequisite for jurisdiction over any such defendants.[9] See United States v. Mitchell, 463 U.S. 206, 212 (1983). "A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. Mitchell, 445 U.S. 535, 538 (1980). The plaintiff bears the burden of demonstrating an unequivocal waiver of sovereign immunity. See Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir. 1983). Unless a plaintiff can point to such a waiver, the court lacks jurisdiction to hear the action and the claim must be dismissed for lack of subject matter jurisdiction. See Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982); see also Robinson v. Salazar, 885 F. Supp. 2d 1002, 1015 (E.D. Cal. 2012) (A "court presumes lack of jurisdiction until the plaintiff proves otherwise.").

Furthermore, "[t]o confer subject matter jurisdiction in an action against a sovereign, in addition to a waiver of sovereign immunity, there must be statutory authority vesting a district court with subject matter jurisdiction." Alvarado v. Table Mountain Rancheria, 509 F.3d 1008, 1016 (9th Cir. 2007). Therefore, to establish subject matter jurisdiction over their claims, a plaintiff "cannot rest on the assertion that principles of immunity do not apply. Rather, [the plaintiff] must establish some form of statutory authorization for their claims." Id.

B. The Court Should Dismiss Plaintiffs' First Five Causes of Action Seeking Declaratory Relief and Plaintiffs' Eighth Cause of Action

1. Plaintiffs Lack Prudential Standing to Bring Their First or Second Causes of Action

In order to be entitled to have a court decide the merits of a dispute, a plaintiff must meet both constitutional and prudential standing requirements.[10] See Warth v. Seldin, 422

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[9] When sovereign immunity is waived, the terms of such waiver define a court's jurisdiction to entertain the suit. See United States v. Sherwood, 312 U.S. 584, 586 (1941).

[10] Constitutional standing requires a plaintiff to demonstrate there is a 'case or controversy' between himself and the defendant within the meaning of Art. III. In addition to this minimum constitutional mandate, a plaintiff must also demonstrate prudential standing, including showing the asserted harm is not a 'generalized grievance,' and that he is asserting his own legal rights and interests. Prudential standing prevents courts from

U.S. 490, 498 (1975). In order to have prudential standing to bring a claim, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982). This is true "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement." Warth v. Seldin, 422 U.S. 490, 499 (1975).

In the first cause of action, Plaintiffs seek "declaratory relief in the form of a determination [order] that Jose Juan Martinez is a full blood San Pasqual Indian." (ECF No. 13-3, ¶ 353.) Jose Juan Martinez is not a plaintiff in this case. Indeed, according to the FAC, he died in 1929. (Id. ¶ 352). Therefore, Plaintiffs lack prudential standing to seek the Court to declare that Jose Juan Martinez is a full blood member of the Band. Therefore, the Court should dismiss Plaintiffs' first cause of action with prejudice.

In the second cause of action, Plaintiffs seek "declaratory relief in the form of a determination that Jose Juan and Modesta (Contreras) Martinez are full blood San Pasqual Indians." (Id. ¶ 374.) Modesta (Contreras) Martinez, like Jose Juan Martinez, is not a plaintiff in this case. Therefore, Plaintiffs lack prudential standing to seek the Court to declare that Modesta (Contreras) Martinez is a full blood member of the Band. Accordingly, the Court should dismiss Plaintiffs' second cause of action with prejudice.

2. The Court Lacks Subject Matter Jurisdiction Over Plaintiffs' First, Third, and Fourth Causes of Action Because There Has Been No Final Agency Action

a) Federal Courts Only Have Subject Matter Jurisdiction Over Tribal Enrollment Disputes When They May Appropriately Review BIA's Actions Pursuant to the Administrative Procedure Act

Federal courts normally lack jurisdiction regarding the adjudication of tribal disputes,

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deciding abstract questions when other governmental institutions may be more competent to address the questions. See Warth, 422 U.S. at 498–500. Motions to dismiss based on lack of constitutional standing are decided pursuant to Fed. R. Civ. P. 12(b)(1), while those based on prudential standing are decided pursuant to Fed. R. Civ. P. 12(b)(6). See Johnson v. Myers, No. CV-11-00092 JF PSG, 2011 WL 4533198, at *4 (N.D. Cal. Sept. 30, 2011) (unpublished).

especially controversies pertaining to tribal membership, because Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government, including matters of membership, and are unconstrained by constitutional provisions limiting federal or state authority, including the Fifth Amendment); Alto v. Black, 738 F.3d 1111, 1115 (9th Cir. 2013) ("In view of the importance of tribal membership decisions and as part of the federal policy favoring tribal self-government, matters of tribal enrollment are generally beyond federal judicial scrutiny.").

A federal court may sometimes indirectly review a tribal enrollment decision under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., if the BIA takes a final agency action in reviewing a tribe's membership determination, when tribal law explicitly permits such review by the BIA.[11] See Alto, 738 F.3d at 1123; see also Miranda v. Jewell, No. EDCV 14-00312-VAP (DTBx), 2015WL 226024, at *6-*7 (C.D. Cal. Jan. 15, 2015). "The APA's waiver of sovereign immunity contains several limitations," including "§ 704, which provides that only '[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review.'" Gallo Cattle Co. v. U.S. Dep't of Agric., 159 F.3d 1194, 1198 (9th Cir. 1998) (emphasis added); see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990) ("When . . . review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'"); Alto, 738 F3d at 1124 (only reviewing BIA's disenrollment order because that was final agency action).

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[11] Such review is strictly limited to adverse enrollment actions when the tribal governing document provides an appeal right to the BIA regarding the specific action taken. See 25 C.F.R. § 62.2; Cahto Tribe of Laytonville Rancheria v. Dutschke, 715 F.3d 1225, 1228 (9th Cir. 2013) (since tribal governing document only provided BIA right to review rejected applications for enrollment, no APA review of disenrollment decision).

An agency action will be considered final if it (1) "mark[s] the consummation of the agency's decisionmaking process," and (2) is "one by which rights or obligations have been determined or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (internal quotations marks and citations omitted). The first prong of the test is satisfied if the agency "has rendered its last word on the matter." Or. Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 984 (9th Cir.2006). It is not satisfied if the agency's action is "merely tentative or interlocutory in nature." Bennett, 520 U.S. at 178. The second prong requires that the agency's decision directly change the plaintiff's rights and obligations, rather than leaving the plaintiff's status unchanged until a later action is taken, because agency action that does not immediately impose an obligation, deny a right, or fix some legal relationship is not judicially reviewable due to lack of finality.[12] See Fairbanks N. Star Borough v. U.S. Army Corps of Engineers, 543 F.3d 586, 593–97 (9th Cir. 2008). "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." Franklin v. Massachusetts, 505 U.S. 788, 797 (1992).

b) The Court Lacks Subject Matter Jurisdiction Because the APA Does Not Waive Sovereign Immunity Since There Has Been No Final Agency Action

Plaintiffs' first and third causes of action seek a declaration by the Court that the acts of Defendants in concluding Jose Juan Martinez was not a full blood member of the Band, and concluding Plaintiffs were not members of the Band, were arbitrary and capricious, constituted an abuse of discretion, and were otherwise not in accordance with law. Plaintiffs fourth cause of action seeks a similar declaration based on Defendants' alleged failure to rule on their enrollment applications using the same standards as were used to determine the enrollment status of two individuals who became members of the Band in or around June 7, 1965. In other words, Plaintiffs are asking the Court to hold unlawful and set aside

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[12] Therefore, "[n]ot every agency 'decision . . . [that] has immediate financial impact,' or even 'profound [economic] consequences' in the real world, is final agency action. Fairbanks N. Star Borough, 543 F.3d at 596.

agency action pursuant to the APA, 5 U.S.C. § 706. Cf. Alto, 738 F.3d at 1117 (concluding plaintiffs' claims for declaratory and injunctive relief "may therefore be fairly characterized as claims for judicial review of agency action under the APA," even though "only [one] claim is explicitly denominated as an APA claim" since the claims "all involve challenges to the propriety of the BIA's decision"). As indicated in the preceding section, the APA would only waive sovereign immunity over such actions if an agency had taken a final agency action regarding Jose Juan Martinez' blood degree and Plaintiffs' enrollment applications. Since no such final agency action was taken, the Court should dismiss Plaintiffs' first, third, and fourth causes of action.

Although BIA was asked by the Band to render a decision regarding a change in the blood degree of Modesta (Martinez) Contreras, BIA was never asked to change the blood degree for Jose Juan Martinez (Modesta Contreras' father), nor did BIA ever render final agency action regarding any change of Jose Juan Martinez' blood degree. See Ex 2 at 2 (¶ 3). Therefore, this Court lacks subject matter jurisdiction over Plaintiffs' first cause of action and must dismiss it with prejudice because there has been no final agency action regarding any request to change the blood degree of Jose Juan Martinez.

Plaintiffs' third cause of action alleges the Court should "grant declaratory relief in the form of a determination that . . . all of the Plaintiffs have at least 1/8" blood of the Band. (ECF No. 13-3, ¶ 380.) Plaintiffs' fourth cause of action alleges that Plaintiffs "are entitled to be enrolled and to be federally recognized members of the [Band]." (ECF No. 13-4, ¶ 404. There has been no waiver of sovereign immunity for such claims because the BIA never took a final agency action determining Plaintiffs did not have at least 1/8 blood of the Band, or that they should not be members of the Band. Rather, at the same time the BIA told the Band that the petition to increase the blood degree for Ms. Contreras from 3/4 to 4/4 degree San Pasqual Blood was denied, the BIA returned Plaintiffs' enrollment applications of Contreras' decedents consistent with Article III of the Tribal Constitution

and 25 CFR §§ 48.4 and 48.7, and given the decision regarding Ms. Contreras.[13] See Ex. 2 at 3 (¶ 4). Subsequently, the Band determined that it agreed with the BIA that Modesta Contreras' blood degree should not be increased. See Ex. 1 at 20. The Band then determined that a list of individuals who applied to enroll in the Band based on being her great-grandchildren were ineligible for membership. See Ex 1 at 3 (¶ 7); id. at 23-26; Ex 2 at 3 (¶ 5). The Band told the BIA that it informed all such individuals by certified mail, with copies of 25 C.F.R. Part 62 regarding enrollment appeals. See Ex 1 at 3 (¶ 7); id. at 23-26; Ex 2 at 3 (¶ 5). Critically, following BIA's referral of the 176 enrollment applications to the Band on April 21, 2006, BIA did not receive any request from the Band to approve or disapprove the enrollment applications, or any request for a determination of eligibility consistent with 25 CFR §§ 48.7 and 48.8 and Article III of the Band's Constitution. See Ex. 2 at 2 (¶ 6). Indeed, BIA never received the enrollment applications back, so it would have been impossible to conduct such a review. (Id.)

Therefore, BIA never took any final action regarding whether or not Plaintiffs had at least 1/8 blood of the Band or whether they should be members of the Band. Rather, the last action taken by BIA was when they sent Plaintiffs' enrollment applications to the Band, consistent with 25 CFR §§ 48.7 and 48.8, so the Band could analyze them in light of the BIA's decision regarding Ms. Contreras' blood degree. This action did not constitute "final agency action" because it did not: (1) mark the consummation of the agency's decisionmaking process, or (2) determine the applicants' rights or obligations or constitute a decision from which legal consequences flowed. For one, the return of the applications to the Band is not necessarily the BIA's last word on the matter. Instead, if the applications were returned to BIA pursuant to 25 C.F.R. §§ 48.7 and 48.8, BIA would speak again on

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[13] Besides being authorized by 25 CFR §§ 48.4 and 48.7, this was a very reasonable action. Those applicants who were great-grandchildren of Ms. Contreras without any other relatives with blood degree of the Band would not qualify as members based on the BIA's decision Ms. Contreras' blood degree was 3/4, meaning such great-grandchildren would only have 3/32 blood of the Band, which is less than 1/8. Others might still qualify if they had other relatives with blood of the Band. BIA could not conduct any such analysis without input from the applicants and the Band.

the matter. Second, the actions BIA did take in sending the applications to the Band was interlocutory in nature.

Third, none of BIA's decisions thus far directly changes Plaintiffs' rights and obligations. Rather BIA's actions have left Plaintiffs' statuses unchanged. Fourth, since none of BIA's actions thus far have immediately imposed an obligation, denied a right, or fixed some legal relationship of or to Plaintiffs, their claims are not judicially reviewable due to lack of finality. For any or all of these reasons, the Court lacks subject matter jurisdiction over Plaintiffs' claims because they are not challenging final agency action.

Plaintiffs receive no aid in overcoming the Court's lack of subject matter jurisdiction from 5 U.S.C. § 551(13), which defines "agency action" as including a "failure to act," nor from 5 U.S.C. § 706(1), which allows a court to "compel agency action unlawfully withheld or unreasonably delayed." A "claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004). Here, BIA did not fail to act at all. Rather, in 2006, it acted by sending all 176 enrollment applications back to the Band in accordance with 25 CFR Part 48, for reassessment of the applications in light of BIA's decision not to increase the blood degree of Ms. Contreras. While this was not a 'final agency action' pursuant to the APA, it was also not a failure to act. Rather, BIA took an action that was interlocutory in nature in sending the enrollment applications back to the Band's Enrollment Committee, consistent with Article III of the Band's Constitution and 25 CFR §§ 48.4 and 48.7. See Ex. 2 at 2 (¶ 4). In substance, this action was similar to an Appellate Court that sends a case back to a District Court for reassessment in the first instance based on changed circumstances. Up to this point, however, BIA has never been placed in a position where it could take a final action regarding Plaintiffs' enrollment applications. Therefore, this Court lacks subject matter jurisdiction over Plaintiffs' third cause of action and must dismiss it with prejudice.

3. Plaintiffs Have Failed To Allege a Cognizable Claim in Their Second and Eighth Causes of Action That Defendants Violated the APA by Failing to Provide Notice Regarding the Modesta Contreras Decision

Plaintiffs' second cause of action seeks declaratory relief based on their allegations that Defendants violated the APA when they failed to give Plaintiffs notice, in accordance with 25 C.F.R. part 48, regarding their determination that Modesta Contreras' blood degree should not be increased from 3/4 to 4/4, thereby preventing them from being able to appeal the matter. Plaintiffs' eighth cause of action alleges that Defendants violated the APA when they "failed to personally notice each Plaintiff of their decision regarding their ancestor Modesta (Martinez) Contreras." (ECF No. 13-4, ¶ 469.) Plaintiffs allege such failure violated 25 C.F.R. § 48.9, which states that "if the Director determines that an applicant is not eligible for enrollment in accordance with the provisions of § 48.5, he shall notify the applicant in writing of his determination and reasons therefore." (ECF No. 13, ¶ 14.)

Plaintiffs have failed to allege a cognizable legal theory and therefore their claims should be dismissed. 25 C.F.R. § 48.9 was clearly not applicable to the Band's request to increase Modesta Contreras' blood degree. As Plaintiffs allege, and as indicated by exhibit 8 to their FAC, Section 48.9 states procedures to be followed if the Director determines an applicant for enrollment in the Band is not eligible for enrollment in the Band. (ECF No. 13, ¶ 14, ECF 13-13 at 4.) Modesta Contreras was not an applicant for enrollment into the Band.[14] Rather, in September 2005, the Band requested that the BIA increase the blood degree of Modesta Contreras – who was already a member of the Band as Roll # 49 – from 3/4 to 4/4. (ECF No. 13, ¶ 11, ECF No. 13-11). Such a request did not involve § 48.9, or any of the other sections of former 25 C.F.R. part 48 regarding individuals applying to enroll in the Band.[15] Rather, the request for the Director to increase the degree of blood on the

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[14] Plaintiffs frequently confuse the issue by conflating their allegations regarding Modesta Contreras with the allegations regarding their personal applications to enroll with the Band. As explained above, those are two separate processes.

[15] Former 25 C.F.R., Part 48 includes the following sections pertinent to enrolling in the Band:

48.4 – procedures for applicants to apply to enroll in the Band;

Band's roll was made pursuant to former 25 C.F.R. § 48.14(c). Other than indicating that correcting the blood degree of Band members on the roll should be made by the Director, 25 C.F.R. Part 48 does not state any procedural requirements regarding requests to change a member's blood degree. Therefore, Plaintiffs' claim that Defendants violated the APA by failing to personally notice each Plaintiff of their decision regarding Modesta Contreras pursuant to 25 C.F.R. § 48.9 fails to make out a cognizable claim or allege facts to support a cognizable legal theory. According, the Court should dismiss Plaintiffs' second and eighth causes of action for failure to plead a cognizable claim. Since the failure is based on the law of the Tribe, as clearly indicated in Plaintiffs' exhibits, leave to amend would be futile and the dismissal should be with prejudice.

4. The Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Request in Their First, Second, And Third Causes of Action to Declare Certain Individuals Are Members of the Band

As discussed above, Indian tribes are separate sovereigns whose decisions regarding their own tribal membership is typically beyond the jurisdiction of federal courts, with the narrow exception that federal courts may review, pursuant to the APA, a final agency action of the BIA reviewing a tribe's membership determination, when tribal law explicitly permits such review by the BIA. Even if Plaintiffs' requests could appropriately be reviewed by this Court, the only appropriate remedy in such case would be a remand to the BIA for further action consistent with the Court's conclusions. See Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional

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48.5 – Qualifications to enroll in the Band;

48.7 – Procedures for Band to Review applications for enrollment and send to BIA;

48.8 – Procedure for BIA Director to make determination regarding eligibility of applicants for enrollment

48.9 - Procedures for appeals when Director determines applicant not eligible for enrollment.

investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry."); Asarco, Inc. v. U.S. Envtl. Prot. Agency, 616 F.2d 1153, 1160 (9th Cir. 1980) ("If the court determines that the agency's course of inquiry was insufficient or inadequate, it should remand the matter to the agency for further consideration and not compensate for the agency's dereliction by undertaking its own inquiry into the merits.").

In their first three causes of action, Plaintiffs ask the Court to do much more than remand the case to the BIA, but to actually declare that certain individuals are members of the Band. Neither the APA, nor any other source, has waived sovereign immunity so as to allow such a remedy. Therefore, the Court should dismiss with prejudice Plaintiffs' first three claims for lack of subject matter jurisdiction to the extent they request such a remedy.[16]

5. The Court Should Dismiss Plaintiffs' First Five Causes of Action Because a Necessary Party, the Band, Cannot Be Joined

Even if it was within the Court' jurisdiction to grant the relief requested in the first three causes of action – to have certain individuals declared members of the Band (as opposed to simply remanding to the BIA) – the Court would still have to dismiss the claims pursuant to Fed. R. Civ. P. 12(b)(7), for failure to join a party under Rule 19. This is because Plaintiffs' inability to join the Band Rule 19, would significantly prejudice to the Band if the Court were to grant such relief. The Court should also dismiss Plaintiffs' fourth cause of action because of Plaintiffs' inability to join the Band since the relief that Plaintiffs request – a declaration that it violates the Equal Protection Clause for the Government, when acting in accordance with Art. III of the Band's Constitution and former 25 C.F.R. part 48, to assess whether an applicant demonstrated at least 1/8 blood of the Band – would

[16] In addition to the jurisdictional issue, Plaintiffs' request for certain individuals to be declared members of the Band, rather than for the Court to remand the issue to BIA, should be dismissed for failure to allege a cognizable claim since, as explained above, Plaintiffs are entitled, at most, to a remand to the BIA. Cf. Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 974 (9th Cir. 2010) (12(b)(6) is appropriate vehicle to challenge inappropriate prayer for relief).

seriously prejudice the Band. Moreover, the Court should dismiss Plaintiffs' fifth cause of action, requesting a declaration that it is a violation of the Due Process Clause for the Band's Constitution to contain 25 C.F.R. § 48.5(f), for failure to join the Band since such relief would also significantly prejudice the Band. "In ruling on a dismissal for lack of joinder of an indispensable party, a court may go outside the pleadings and look to extrinsic evidence." In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig., 826 F. Supp. 2d 1180, 1196 (C.D. Cal. 2011) (quoting Davis Cos. v. Emerald Casino, Inc., 268 F.3d 477, 480 (7th Cir. 2001)).

Federal Rule of Civil Procedure 19(a) defines parties required to be joined to a lawsuit when feasible. See E.E.O.C. v. Peabody W. Coal Co., 610 F.3d 1070, 1078 (9th Cir. 2010). A party must be joined if feasible when (1) a "court cannot accord complete relief" in that party's absence; or (2) the party "claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party]'s absence may . . . impair or impede the [party]'s ability to protect the interest," or "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1). If a party required to be joined if feasible cannot be joined, then the court must determine whether "in equity and good conscience" the action should proceed among the existing parties or be dismissed. See id. at 19(b).

Rule 19 thus poses "three successive inquiries." Peabody, 610 F.3d at 1078. "First, the court must determine whether a nonparty should be joined under Rule 19(a)." Id. If a nonparty (or "absentee") meets the requirements of Rule 19(a), "the second stage is for the court to determine whether it is feasible to order that the absentee be joined." Id. "Finally, if joinder is not feasible, the court must determine at the third stage whether the case can proceed without the absentee" or whether the action must be dismissed. Id.

a) The Band Is a Party That Must Be Joined If Feasible

The Band is a party that must be joined if feasible regarding Plaintiffs' first three causes of action pursuant to Fed. R. Civ. P. 19(a)(1)(A) because the Court cannot provide

the complete relief requested in Plaintiffs' first three causes of action in its absence. In or about July 2006, the Band's Enrollment Committee determined the Plaintiffs were ineligible for enrollment because they did not possess sufficient blood degree. (ECF # 9-2 at 3 (¶ 7); id. at 23-26.) Even if the Court declared that Plaintiffs should be members of the Band, in order for Plaintiffs to actually become members of the Band, Defendants would need the Band to submit to BIA the applications that were returned to the Band with a request to BIA for approval of Band enrollment determinations in order for BIA to make a final decision concerning the applications consistent with 25 CFR §§ 48.7 and 48.8 and Article III of the Band's Constitution, or BIA would need to receive new applications for review and processing consistent with the procedures set forth at 25 CFR Part 48 and Article III of the Band's Constitution. See Ex. 2 at 3-4 (¶ 7). Otherwise, Defendants have no authority to make Plaintiffs members of the Band otherwise. See id. Since the relief requested by Plaintiffs cannot be provided in the Band's absence, they are a party that must be joined if feasible. See Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1498 (9th Cir. 1991) ("Judgment against the federal officials would not be binding on the Quinault Nation, which could continue to assert sovereign powers and management responsibilities over the reservation.")

Even if the Court could provide the complete requested relief for Plaintiffs' first three causes of action, the Band would still be a party that must be joined if feasible pursuant to Fed. R. Civ. P. 19(a)(1)(B)(i). Courts have construed the "interest" requirement of 19(a)(1)(B) fairly broadly to cover any "significantly protectable" or "legally protectable" interest in the subject of the litigation. See Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990). Nonparty tribes have a sufficient interest under Rule 19(a)(1)(B) where the outcome may interfere in their internal governance or affect their status as sovereign entities. See Shermoen v. United States, 982 F.2d 1312 (9th Cir. 1992) (nonparty Hoopa Valley and Yurok Tribes found to have an interest in suit by individual tribal members and another Tribe challenging the constitutionality of the Hoopa-Yurok Settlement Act of 1988); Confederated Tribes of Chehalis v. Lujan, 928 F.2d 1496) (9th Cir. 1991) (absent

Quinault Nation had a sufficient interest in suit challenging refusal by United States to recognize tribes other than the Quinault Nation on the Quinault Indian Reservation).

Here, Plaintiffs first three causes of action seek a declaration by the Court that certain individuals that the Band concluded had insufficient blood degree to be members of the Band are in fact members of the Band. "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978). Therefore, the Band clearly has a sufficient interest relating to the subject of Plaintiffs' first three causes of action, and a ruling by the Court in the Band's absence would impair or impede the Band's ability to protect that interest. See Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1024 (9th Cir. 2002) (sufficient interest when ruling in tribe's absence would impair the tribe's sovereign power); Confederated Tribes, 928 F.2d at 1499 (sufficient interest when suit would affect tribe's governing authority). Similarly, a declaration by the Court that it would violate equal protection for the Government to assess whether an applicant to the Band demonstrated at least 1/8 blood of the Band while complying with 25 C.F.R. part 48, would also significantly interfere with the Band's right to define its own membership. Even more obviously, a declaration that 25 C.F.R. § 48.5(f), which is no longer an active federal regulation and exists only as Constitutional law of the Band, was passed in 1960 in violation of the due process clause, would significantly interfere with the Band's internal governance and affect their status as sovereign entities. Therefore, the Tribe is a party that must be joined if feasible to Plaintiffs' first five causes of action pursuant to Fed. R. Civ. P. 19(a)(1)(B)(i).

Furthermore, any relief granted to the Plaintiffs on their first five causes of action in this case would surely be opposed by the Band. There is nothing to stop the Band, if it remains a non-party, from continuing to fail to recognize Plaintiffs as members, or any of the other requests made by Plaintiffs in their first three causes of action. Similarly, the Band could fail to recognize individuals who the Government determined should be members using a standard other than requiring at least 1/8 blood of the Band, and continue to

recognize 25 C.F.R. § 48.5(f) as Tribal law. Thus, Defendants would be subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. See Davis v. United States, 199 F. Supp. 2d 1164, 1177 (W.D. Okla. 2002) ("The Court also finds compelling the very real possibility that defendants would incur a substantial risk of inconsistent legal obligations if the BIA officials were subsequently sued by the Seminole Nation for actions taken in violation of tribal law as a result of plaintiffs' success in this cause of action."). Therefore, the Tribe is a party that must be joined if feasible regarding Plaintiffs' first five causes of action pursuant to Fed. R. Civ. P. 19(a)(1)(B)(ii).

b) Joinder of the Band is Not Feasible

Joinder of the Band is not feasible because the Band possesses sovereign immunity and therefore cannot be sued without its consent. See Pit River Home & Agr. Co-op. Ass'n v. United States, 30 F.3d 1088, 1100 (9th Cir. 1994) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."); Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1499 (9th Cir. 1991) ("Indian tribes, however, are sovereign entities and are therefore immune from nonconsensual actions in state or federal court."). The Band has not clearly waived its sovereign immunity allowing it to be joined to this suit. Therefore, The Court must go on to determine whether Plaintiffs' first five causes of action should be dismissed.

c) Equity and Good Conscience Dictate Plaintiffs' First Five Causes of Action Should Be Dismissed

Since the Band is a party required to be joined if feasible, but joinder is not feasible, the Court must determine whether in equity and good conscience this case should proceed without the Band as a party. The factors to be considered are:

> (1) The extent to which a judgment rendered in the person's absence might prejudice the person or the existing parties;
>
> (2) The extent to which any prejudice could be lessened or avoided by:
>
> (A) Protective provisions in the judgment;
>
> (B) Shaping the relief, or
>
> (C) Other measures;
>
> (3) Whether a judgment rendered in the person's absence would be adequate; [and]
>
> (4) Whether the plaintiff would have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

Clearly the scope of the relief that Plaintiffs call for in their first three causes of action – a declaration they and others are members of the Band – would severely prejudice the Band. See Davis v. United States, 192 F.3d 951, 959 (10th Cir. 1999) ("Unless the Band is a party to the lawsuit, it has no ability to protect its claimed interest in determining eligibility requirements."). Importantly, such relief is outside of Defendants' authority (i.e., it is not something the BIA through its maintenance of tribal rolls can control). See Ex. 2 at 3-4 (¶ 7). However, *were* Defendants to take such an action then it would completely undermine the Band's authority to control its own membership. A declaration that it would violate equal protection for the Government to comply with Art. III of the Band's constitution, and 25 C.F.R. part 48, using a standard other than requiring at least 1/8 blood of the Band would also prejudice the Band. Also, a declaration that a portion of the Band's Constitution, former 25 C.F.R. § 48.5(f), is invalid would interfere in the Band's internal governance and affect their status as a sovereign entity. Thus the first factor weighs in favor of dismissal of Plaintiffs' first five causes of action.

As for the second factor, it is clear that there is no way to shape relief in this case to avoid impairing the Band's interest. No matter how the remedy is shaped, it would interfere with the Band's sovereign right to define their own laws and their own membership. See Davis, 199 F. Supp.2d at 1177 ("there are no protective provisions which could be included

in the judgment which would prevent trampling on the . . . Tribe's sovereign right to make its own laws and be ruled by them."). As discussed above, the Band will suffer prejudice if Plaintiffs are successful in obtaining a declaratory order that over one hundred individuals are now members of the Band, or that it violated equal protection for the Government to comply with the Band's Constitution and 25 C.F.R. part 48, using a standard other than requiring at least 1/8 blood of the Band, or that 25 C.F.R. § 48.5(f) was passed in violation of due process. Any such orders would be a direct attack on the Band's right to determine its own laws and membership which would have significant effects on the authority and sovereignty of the Band. Such prejudice weighs overwhelmingly in favor of a dismissal. See Confederated Tribes of Chehalis, 928 F.2d at 1498-99.

Furthermore, a declaratory order granting Plaintiffs' first five causes of action would be inadequate under the third consideration of Rule 19(b). There can be no adequate remedy for the parties who are now present. The Band is not a party here and therefore cannot be bound by a judgment from this court that alters the Band's membership choices. See Davis v. United States, 343 F.3d 1282, 1293 (10th Cir. 2003) (explaining that "the concern underlying th[e] [third Rule 19(b)] factor is . . . 'that of the courts and the public in complete, consistent, and efficient settlement of controversies,' that is, the 'public stake in settling disputes by wholes whenever possible."). The Band could simply choose to ignore a declaratory order regarding the membership status of Plaintiffs, the constitutionality of requiring 1/8 blood of the Band for membership, or the constitutionality of 25 C.F.R. § 48.5(f). See Confederated Tribes of Chehalis, 928 F.2d at 1498-99. Therefore, the third factor weighs in favor of dismissal.

Because the Band enjoys sovereign immunity, the Plaintiffs have no alternative forum where the declaratory relief they seek against Defendants in their first five causes of action can be brought. The lack of an alternative forum, however, does not prevent this Court from dismissing those causes of action because of the inability to join the Band. Rather, it is a common consequence of the Band's sovereign immunity, and an Indian tribe's interest in maintaining its sovereign immunity outweighs a plaintiff's interest in litigating

his claims. See Am. Greyhound, 305 F.3d at 1025; Pit River, 30 F.3d at 1102-03 ("Although the [plaintiff] does not have an alternative forum in which it may seek . . . declaratory relief against the government, we dismiss the [plaintiff's] claims with prejudice, since the [tribe] is an indispensable party under Rule 19(b)."

Without the Band's participation as a full party to this litigation, its interests will certainly suffer. Since the Band is a party that must be joined if feasible, and since the Band cannot be joined because of its sovereign immunity, and since the factors in Fed. R. Civ. P. 19(b) weighing favor of dismissal, the Court should dismiss Plaintiffs' first five causes of action to the extent they seek relief other than the typical APA relief of remand to the BIA.

C. The Court Should Dismiss Plaintiffs' Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Thirteenth, And Fourteenth Causes of Action Since There Has Neither Been A Waiver Of Sovereign Immunity, Nor A Grant of Statutory Authority Vesting A Federal Court With Subject Matter, Over A Claim For Money Damages Against the United States Over Such Causes of Action

1. No Subject Matter Jurisdiction or Waiver of Sovereign Immunity for Sixth, Seventh, and Thirteenth Causes of Action for Money Damages Based on Fifth Amendment's Due Process or Equal Protection Clauses

Plaintiffs' sixth cause of action seeks money damages for Defendants' alleged violations of their due process rights by allegedly failing to comply with the procedures of 25 C.F.R. part 48 with regard to Plaintiffs' enrollment applications and the Band's request to increase Modesta Contreras' blood degree. Plaintiffs' seventh cause of action seeks money damages for Defendants' alleged violations of their equal protection rights by allegedly treating Plaintiffs differently than their 22 cousins or the Trask family. Plaintiffs' thirteenth cause of action seeks money damages for Defendants' alleged violations of their due process and equal protection clause rights by allegedly failing to approve their enrollment applications, and allowing alleged non-Band members to live on land set aside for the Band.

First, the Court must dismiss these claims for lack of jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1),[17] because, only the Court of Federal Claims could hear such claims. Section 1491(a)(1) provides:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Little Tucker Act, 28 U.S.C. § 1346(a)(2), does provide a United States District Court concurrent jurisdiction to entertain any such monetary claims not exceeding $10,000. Cf. Stone v. United States, 683 F.2d 449, 452 (D.C. Cir. 1982) (permitting claim otherwise limited to Court of Federal Claims when plaintiff agreed to waive any recovery in excess of $10,000). Here, however, Plaintiffs have not agreed to such a waiver. Therefore, at best, Plaintiffs sixth, seventh, and thirteenth causes of action may only be heard in the Court of Federal Claims, and this Court should dismiss the claim before it for lack of subject matter jurisdiction. Cf. Dettling v. United States, 948 F. Supp. 2d 1116, 1129–30 (D. Haw. 2013) (dismissing claim for lack of subject matter jurisdiction pursuant to Tucker Act).

If that were the only defect with Plaintiffs' claims, the Court could determine "if it is within the interest of justice" to transfer the claim to the Court of Federal Claims. Also, Plaintiffs could potentially save the claim by agreeing to waive any recovery in excess of $10,000. Here, however, it would not be in the interest of justice to transfer the case, and it would not matter if Plaintiffs agreed to waive damages greater than $10,000, because the United States has not waived sovereign immunity for Plaintiffs' claims, nor vested any court with subject matter jurisdiction over such claims.

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[17] A "companion statute, the Indian Tucker Act, [28 U. S. C. §1505] confers a like waiver for Indian tribal claims that 'otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe." United States v. White Mountain Apache Tribe, 537 U.S. 465, 472. "Neither Act, however, creates a substantive right enforceable against the Government by a claim for money damages." Id. The two statutes "are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)." United States v. Navajo Nation, 556 U.S. 287, 290 (2009).

The Tucker Act does not create any substantive right enforceable against the United States for money damages, rather, a substantive right must be found in some other source of law. See United States v. Mitchell, 463 U.S. 206, 216 (1983). Therefore, "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" Id. at 216-17. Furthermore, although Congress has waived sovereign immunity for some constitutional claims through the Tucker Act, such waiver only applies when a substantive right to money damages is otherwise provided. See Crocker v. United States, 125 F.3d 1475, 1476 (Fed. Cir. 1997).

The Fifth Amendment Due Process Clause does not provide for money damages against the Government. See id.; LeBlanc v. United States, 50 F.3d 1025, 1028 (Fed. Cir. 1995); Inupiat Community of Arctic Slope v. United States, 680 F.2d 122, 132 (Ct. Cl. 1982.). Similarly, the Fifth Amendment's Equal Protection Clause does not provide for money damages against the Government. Mullenberg v. United States, 857 F.2d 770, 773 (Fed. Cir. 1988); Carruth v. United States, 627 F.2d 1068, 1081 (Ct. Cl. 1980). Therefore, there is neither a waiver of sovereign immunity, nor statutory authority vesting a federal court with subject matter jurisdiction, over Plaintiffs' sixth, seventh, or thirteenth causes of action. Accordingly, the Court must dismiss Plaintiffs' sixth, seventh, and thirteenth causes of action for lack of subject matter jurisdiction with prejudice.

2. No Subject Matter Jurisdiction or Waiver of Sovereign Immunity for Eighth, Ninth, and Tenth Causes of Action for Money Damages Based On Administrative Procedures Act

Plaintiffs' eighth cause of action seeks monetary damages for Defendants' alleged violations of the APA in association with their allegations regarding Plaintiffs' enrollment applications, the Band's request to increase Modesta Contreras' blood degree, and the 1960 amendment of § 48.5(f). Plaintiffs' ninth cause and tenth causes of action similarly seek monetary damages for Defendants' alleged "intentional" and "negligent" violations of the

APA associated with the same allegations.[18] As described above, the only appropriate remedy for any such APA violations would be a remand to the BIA for further action consistent with the Court's conclusions.[19] Indeed, section 702 of the APA, specifically states it only provides consent to suit against the Government in actions "seeking relief other than money damages." 5 U.S.C. § 702; see also Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 645 (9th Cir. 1998) ("the APA's waiver of sovereign immunity . . . contains several limitations [including,] by its own terms, § 702 does not apply to claims for 'money damages.'"). Therefore, this Court lacks subject matter jurisdiction over Plaintiffs' eighth, ninth, and tenth causes of action since there is neither a waiver of sovereign immunity, nor statutory authority vesting a federal court with subject matter jurisdiction, over such claims. Cf. Dettling v. United States, 983 F. Supp. 2d 1184, 1205 (D. Haw. 2013) (dismissing APA claim seeking money damages for lack of subject matter jurisdiction). Accordingly, the Court should dismiss these claims with prejudice.

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[18] Plaintiffs would fare no better if they attempted to replead their ninth and tenth claims pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671 et seq. Under the FTCA, the United States may only be liable to the same extent as a private party in accordance with the law of the state where the act or omission occurred. See 28 U.S.C. § 2674; United States v. Olson, 546 U.S. 43, 46–47 (2005); Autery v. United States, 424 F.3d 944, 956 (9th Cir. 2005). Violations of federal statutes or regulations (such as the APA) may not form the basis of a claim under the FTCA. See Chen v. United States, 854 F.2d 622, 626 (2d Cir. 1988) ("The FTCA's law of the place requirement is not satisfied by direct violations of the Federal Constitution, or of federal statutes or regulations standing alone. The alleged federal violations also must constitute violations of duties analogous to those imposed under local law. Consequently, as to certain governmental functions, the United States cannot be held liable, for no private analog exists.") (internal citations and quotation marks omitted); Xue Lu v. Powell, 621 F.3d 944, 951 (9th Cir. 2010) ("The plaintiffs' claim under 8 C.F.R. § 208.9 was properly dismissed; it was not a claim for which California law would provide a remedy against a private party."); Love v. United States, 60 F.3d 642, 644 (9th Cir. 1995) ("The breach of a duty created by federal law is not, by itself, actionable under the FTCA."); Gelley v. Astra Pharm. Prod., Inc., 610 F.2d 558, 562 (8th Cir. 1979) ([F]ederally imposed obligations, whether general or specific, are irrelevant to our inquiry under the FTCA, unless state law imposes a similar obligation upon private persons."). Despite the volume of their allegations, Plaintiffs have failed to allege or identify any state law ground imposing a duty on the various BIA and DOI officials that would give rise to FTCA liability. Because their claims have no basis in state tort law, Plaintiffs cannot recover money damages against the United States under the FTCA.

[19] Plaintiffs do not seek such relief in association with their eighth causes of action. Regardless, such claims would be redundant to other claims that should be dismissed for the reasons articulated in this motion.

3. No Subject Matter Jurisdiction or Waiver of Sovereign Immunity for Eleventh Cause of Action for Money Damages Based on Alleged Breaches of Fiduciary Duties Arising From Trust Responsibilities Over Indians

Plaintiffs' eleventh cause of action seeks monetary damages for Defendants' alleged breaches of their fiduciary duties to the Band and Plaintiffs regarding various allegations of historical events covering the last 160 years, including how the Government granted the Tribe land, who it allowed on the land, who it placed on the rolls as members of the Band, the promulgation of 25 C.F.R. § 48.5(f), and regarding Plaintiffs' enrollment applications and the Band's request to increase Modesta Contreras' blood degree. As previously explained, pursuant to the Tucker Act (or Indian Tucker Act), at best, this cause of action would only be able to be heard in the Court of Federal Claims, and this Court would have to dismiss the claim for lack of subject matter jurisdiction.

Similarly to Plaintiffs' sixth, seventh, and thirteenth claims, however, there is not subject matter jurisdiction in any federal court over Plaintiffs' eleventh claim. In order for a trust relationship to give rise to a Tucker Act (or Indian Tucker Act) claim, there must be "specific rights-creating or duty-imposing statutory or regulatory prescriptions," without which even the "undisputed existence of a general trust relationship" between the government and a plaintiff "is insufficient to support jurisdiction." United States v. Navajo Nation, 537 U.S. 488, 506 (2003) ("Navajo I").

In order for the Tucker Act (or the Indian Tucker Act) to waive sovereign immunity, a plaintiff:

> [M]ust assert a claim arising out of other sources of law specified in the Act, such as a statute or contract. And not any claim arising out of these sources of law will do. "The claim must be one for money damages against the United States . . . and the claimant must demonstrate that the source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal Government for damages sustained.

Hopi Tribe v. United States, 782 F.3d 662, 666-67 (Fed. Cir. 2015) (internal citations omitted). Therefore, if a plaintiff fails to "identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's 'control'

over [Indian assets] nor common-law trust principles matter." United States v. Navajo Nation, 556 U.S. 287, 302 (2009) ("Navajo II"); see also United States v. Jicarilla Apache Nation, 564 U.S. 162, 177, 131 S. Ct. 2313, 2325, 180 L. Ed. 2d 187 (2011) ("The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."). Plaintiffs' failure to identify such a statute or regulation means that the Tucker Act does not waive sovereign immunity over Plaintiffs' eleventh claim. Therefore, this Court lacks subject matter jurisdiction over Plaintiffs' eleventh cause of action since there is neither a waiver of sovereign immunity, nor statutory authority vesting a federal court with subject matter jurisdiction, over such a claim. Accordingly, the Court should dismiss this claim with prejudice.

4. No Subject Matter Jurisdiction or Waiver of Sovereign Immunity for Fourteenth Causes of Action for Money Damages Based On Alleged Fraud and Misrepresentation

Plaintiffs' fourteenth cause of action seeks monetary damages for Defendants' alleged fraud and misrepresentation regarding the passage of former 25 C.F.R. § 48.5(f), the placement of certain Band members on the roll, the determination that Modesta Contreras should not have her blood degree increased form 3/4 to 4/4, and the handling of Plaintiffs' enrollment applications. "The [Federal Tort Claims Act ("FTCA")] is the exclusive remedy for tortious conduct by the United States, and it only allows claims against the United States." F.D.I.C. v. Craft, 157 F.3d 697, 706 (9th Cir. 1998). Therefore, none of the individual defendants named in their official capacity may be sued for torts in their official capacity; any such claim could only be brought against the United States. See Borntrager v. Stevas, 772 F.2d 419, 421 (8th Cir. 1985)

[T]he FTCA's waiver of immunity is limited, however, by a number of statutory exceptions found at 28 U.S.C. § 2680. See Nurse v. United States, 226 F.3d 996, 1000 (9th Cir. 2000). "If appellant's causes of action fall within one or more of these exceptions, then the federal courts lack subject matter jurisdiction to hear her claims." Id. One of those exceptions is that the FTCA's waiver of sovereign immunity does not apply to "[a]ny claim arising out of . . . misrepresentation [or] deceit." 28 U.S.C. § 2680(h). Sheehan v.

United States, 896 F.2d 1168 1169 (9th Cir. 1990). "[S]ince Congress employed both the terms 'misrepresentation' and 'deceit' in s[ection] 2680(h), it clearly meant to exclude claims arising out of negligent, as well as deliberate, misrepresentation" United States v. Neustadt, 366 U.S. 696, 702 (1961).

"The misrepresentation exception is broadly construed." Frigard v. United States, 862 F.2d 201, 202 (9th Cir. 1988). Therefore, "claims against the United States for fraud or misrepresentation by a federal officer are absolutely barred by 28 U.S.C. [§] 2680(h)." Owyhee Grazing Ass'n, Inc. v. Field, 637 F.2d 694, 697 (9th Cir. 1981). Indeed, the misrepresentation exception shields Government employees from tort liability for failure to communicate information or for communicating false information, regardless of whether the failure to communicate is done negligently or intentionally. See Lawrence v. United States, 340 F.3d 952, 958 (9th Cir. 2003). Simply put, "Congress has determined that citizens should not be able to hold their government liable for misrepresentations." Mullens v. United States, 785 F. Supp. 216, 222 (D. Me. 1992); see also Rich Products Corp. v. United States, 804 F. Supp. 1270, 1273 (E.D. Cal. 1992) ("[I]f the alleged misrepresentation is essential to the claim then the action is barred even though there is some other allied negligence by the government . . . .").

Since the FTCA specifically excludes Plaintiffs' fourteenth cause of action for fraud and misrepresentation, the claim must be dismissed with prejudice since there is no waiver of sovereign immunity or statutory authority vesting the court with subject matter jurisdiction over such a claim.

D. The Court Should Dismiss Plaintiffs' Fourth, Fifth, and Twelfth Causes of Action Because Of the Running of the Statute Of Limitations

The general statute of limitations applicable to civil actions against the United States provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action accrues." 28 U.S.C. § 2401(a); see also Hells Canyon Pres. Council v. U.S. Forest Serv., 593 F.3d 923, 930 (9th Cir. 2010) ("APA claims are subject to a six-year statute of limitations.). A suit "against a federal

official based on that person's official actions" is a suit "against the United States" for purposes of the six-year limitations period. Mason v. Judges of U.S. Court of Appeals for District of Columbia, 952 F.2d 423, 425 (D.C. Cir. 1991).

In their fourth cause of action, Plaintiffs seek declaratory relief based on Defendants' alleged violation of the Equal Protection Clause when, in or about 1965, they interpreted 25 C.F.R. § 48.5 to allow certain individuals to become members of the Band without having actual blood of the Band. (ECF No. 13-3 – 13-4, ¶ 394-397.) Plaintiffs' fifth cause of action seeks declaratory relief based on Defendants' alleged violation of the Due Process Clause when, in or about 1959-1960, they improperly passed 25 C.F.R. § 48.5(f), and when in or about 1965, they determined certain individuals were entitled to membership in the Band. (ECF No. 13-4, ¶ 407-424.) In their twelfth cause of action. Plaintiffs' allege diminution of Indian land based on their allegations that in 1910, Defendants allowed an individual without blood of the Band to obtain land meant for the Band, which allowed him and his family to liver there for the last 107 years. (ECF No. 13-4, ¶ 525-528.)

All three of these claims necessarily accrued more than six years before Plaintiffs filed this suit. Indeed, at the very latest, these three claims accrued in the mid-sixties when the BIA allegedly allowed individuals without sufficient blood of the Band to be members of the Band and live on land set aside for such members. As this accrual date was more than 50 years ago, Plaintiffs' fourth, fifth, and twelfth claims are time barred by 28 U.S.C. § 2401(a).

E. The Court Should Dismiss Any Remaining Causes of Action Pursuant To Federal Rule of Civil Procedure 8

Even if any of the causes of action of the FAC remain after the Court rules on the various bases for dismissal argued above, the Court should dismiss the entire remaining FAC pursuant to Fed. R. Civ. P. 8 and 41(b). Fed. R. Civ. P. 8(a)(2) states that "[a] pleading which sets forth a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief." Therefore, "[t]o comply with Rule 8 [a] plaintiff must plead a short and plain statement of the elements of his or her claim." Bautista

v. Los Angeles Cty., 216 F.3d 837, 840 (9th Cir. 2000). "Each allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). "The propriety of dismissal for failure to comply with Rule 8 does not depend on whether the complaint is wholly without merit. . . . McHenry v. Renne, 84 F.3d 1172, 1177, 1179 (9th Cir. 1996). Rather, the requirement a complaint "be 'simple, concise, and direct,' applies to good claims as well as bad, and is a basis for dismissal independent of Rule 12(b)(6)." Id.

Therefore, a complaint may be dismissed pursuant to Rule 8 if it is argumentative, prolix, replete with redundancy, largely irrelevant, verbose, confusing, and/or largely conclusory. See Cal. Coal. for Families & Children v. San Diego Cnty. Bar Assn., 657 Fed. Appx. 675, 677-78 (9th Cir. 2016) (unpublished) (citing McHenry, 84 F.3d at 1177, 1180, and Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 674 (9th Cir. 1981)). When a complaint is "prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, [it] fails to perform the essential functions of a complaint." McHenry, 84 F.3d at 1180. Furthermore, "[p]rolix, confusing complaints such as the ones plaintiffs filed in this case impose unfair burdens on litigants and judges." Id. at 1179.

In Cal. Coal. For Families & Children, the Ninth Circuit affirmed the dismissal of a first amended complaint that was "voluminous at 251 pages and 1397 attached pages of exhibits" where the complaint was "complicated, lengthy, and meandering." 657 Fed. Appx. at 678. Here, the FAC is 249 pages long, and contains 866 pages of exhibits. It is replete with redundant allegations. For instance, Plaintiffs allege defendant Dutschke determined Modesta (Martinez) Contreras had only 3/4 blood degree of the Band, rather than full (4/4) blood, in paragraphs 14, 42, 303, 358, and 439. The FAC is also argumentative and prolix. Two prime examples are paragraphs 22 and 288. Neither the Court, nor Defendants, should have to struggle through the complicated, lengthy, and meandering FAC to ascertain Plaintiffs' claims. Rather, Plaintiffs should follow the requirements of Rule 8 and provide a short and plain statement of the elements of their claims with simple, concise, and direct allegations. Therefore, to the extent any of

Plaintiffs' claims survive the other bases for dismissal, the Court should dismiss the remainder of the FAC pursuant to Fed. R. Civ. P. 8 and 41(b).

V. CONCLUSION

For the reasons stated above, the Court should grant Defendants' motion to dismiss Plaintiffs' First Amended Complaint with prejudice.

DATED: June 12, 2017

Respectfully submitted,

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s/ *George Manahan*
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Assistant United States Attorney
Attorneys for United States

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CINDY ALEGRE, an individual, et al., Plaintiffs, v. RYAN ZINKE, Secretary of the Department of Interior, in his official capacity, et al. Defendants.	Case No.: 16-cv-2442-AJB-KSC CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of:

MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

along with all associated documents (memorandum of points and authorities, exhibits, etc.) on the following party(ies) by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

Alexandra Riona McIntosh
Law Office of Alexandra McIntosh
2214 Faraday Avenue
Carlsbad, CA 92008
Email: alexandra_mcintosh@yahoo.com

I declare under penalty of perjury that the foregoing is true and correct.

DATED: June 12, 2017

s/ George Manahan
George V. Manahan
Assistant U.S. Attorney
Email: george.manahan@usdoj.gov
Attorney for Defendant