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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CINDY ALEGRE, an individual, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

Case No.: 17-cv-0938-AJB-KSC

REPLY IN SUPPORT OF MOTION TO:
1) DISMISS PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION AND THE COMPLAINT SEEKING A PERMANENT INJUNCTION FOR LACK OF SUBJECT MATTER JURISDICTION; OR
2) ALTERNATIVELY DENY PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION

DATE: August 10, 2017
TIME: 2:00 p.m.
CTRM: 4A
JUDGE: Hon. Anthony J. Battaglia

I. DISCUSSION

A. The Court Should Dismiss Plaintiffs' Requests for Preliminary and Permanent Injunctive Relief Due to Lack of Subject Matter Jurisdiction

1. Relevant Legal Standards for Motion to Dismiss by United States for Lack of Subject Matter Jurisdiction

Plaintiffs correctly state that since Defendants' motion to dismiss Plaintiffs' request for a preliminary and permanent injunction is based on the Court's lack of subject matter jurisdiction, the Court may consider affidavits and other evidence in ruling on that motion. (ECF No. 23 at 8.) Plaintiffs appear to contradict themselves and the law, however, when they cite Ashcroft v. Iqbal and Tellabs, Inc., v. Makor Issues & Rights, Ltd. for the proposition that the Court must accept the allegations in the Complaint as true for purposes of the instant motion to dismiss. As Plaintiffs themselves point out, Tellabs, 551 U.S. 308, 322 (2007), discussed the standards for a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, not a Rule 12(b)(1) motion. See also Weber v. Allergan, Inc., 621 F. App'x 401, 402 (9th Cir. 2015) (explaining Iqbal and its companion case, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), interpreted Rule 12(b)(6)).

But, as more fully explained in Defendants' initial motion, in a factual attack pursuant to Fed. R. Civ. P. 12(b)(1), "the court need not presume the truthfulness of the plaintiff's allegations." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). "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." Id.; see also U.S. ex rel. Meyer v. Horizon Health Corp., 565 F.3d 1195, 1200 n.2 (9th Cir. 2009) (in "a factual, as opposed to facial, motion to dismiss for lack of subject-matter jurisdiction" court "'need not presume the truthfulness of the plaintiffs' allegations' and may 'look beyond the complaint . . . without having to convert the motion into one for summary judgment.'").

Here, Defendants present evidence, that, among other things, supports their arguments that the Court lacks subject matter jurisdiction because of lack of final agency

action, and because Plaintiffs' injunction request is not ripe. Plaintiffs have failed to present evidence refuting Defendants' evidence, and therefore have failed to satisfy their burden of establishing subject matter jurisdiction. Therefore, the Court must grant Defendants' motion to dismiss.

2. The Court Lacks Subject Matter Jurisdiction Because There Has Been No Final Agency Action and Therefore No Waiver of Sovereign Immunity Pursuant to the APA

Defendants have demonstrated that no action, let alone final agency action, has been taken by the BIA approving any changes to the Band's Constitution regarding enrollment procedures. As previously argued, such final agency action is required in order for the APA to waive Defendants' sovereign immunity.[1] In the absence of any such waiver, the Court lacks subject matter jurisdiction over Defendants regarding Plaintiffs' injunction request.

Plaintiffs argue that the last sentence of 5 U.S.C. § 705, which allows courts to "issue all necessary and appropriate process to . . . preserve status or rights pending conclusion of the review proceedings," supports their request for injunctive relief. 5 U.S.C. § 705 is section 10(d) of the Administrative Procedures Act. See In re GTE Serv. Corp., 762 F.2d 1024, 1026 (D.C. Cir. 1985). The Attorney General's Manual on the Administrative Procedure Act (1947), available at https://ia600406.us.archive.org/30/items/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947.pdf, states at page 106:

> Section 10(d) confers no power upon a court in advance of the submission to it of final agency action for review on the merits. See Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375, 383 (1938). This is the only logical conclusion to be drawn from the employment of the phrase "reviewing court," rather than "any court." Any other construction would twist section 10(d) into a general grant of power to the Federal courts to review all kinds of questions presented by preliminary and intermediate agency action.

(emphasis added). "The Supreme Court has accorded deference to the interpretations of

[1] Plaintiffs' opposition verifies that they seek to overcome sovereign immunity through the APA. (ECF No. 23 at 11-13.)

APA provisions contained in the Attorney General's Manual, both because it was issued contemporaneously with the passage of the APA and because of the significant role played by the Justice Department in drafting the APA." Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1013 n.7 (9th Cir. 1987). Therefore, section 10(d) of the APA, 5 U.S.C. § 705, does not support Plaintiffs' injunction request unless they can point to a final agency action which would waive sovereign immunity.

Plaintiffs argue that various actions BIA took, including denying the Band's request to increase Modesta Contreras' blood degree from 3/4 to 4/4, its alleged failure to adjudicate Plaintiffs' enrollment applications appropriately, and failure to give Plaintiffs notice of these actions, are sufficient 'final agency action' to permit the Court to consider their injunction request. None of the cases cited by Plaintiffs support their argument that such actions can suffice as the required final agency action to waive sovereign immunity over their injunction request. Rather, the relevant cases cited by Plaintiffs demonstrate that BIA would have to take a final agency action approving a change to the Band's Constitution before this Court would have subject matter jurisdiction over Plaintiffs' injunction request.

Plaintiffs' citation of Murray v. Kunzig, 462 F.2d 871 (D.C. Cir. 1972) to support their argument that a court may enjoin a federal agency before the agency takes a final action regarding the subject matter of the injunction request actually belies their argument. In Murray, the D.C. Court of Appeals considered whether the district court had authority to enjoin an agency from firing an employee before the agency had finished deciding an appeal challenging the discharge. Id. at 877. The decision of the D.C. Court of Appeals stating the district court had such authority was reversed by the Supreme Court in Sampson v. Murray, 415 U.S. 61 (1974). In so reversing, the Supreme Court explained the lower courts erred in granting the plaintiff injunctive relief regarding his discharge because "the authority of the District Court to review agency action . . . does not come into play until it may be authoritatively said that the administrative decision to discharge an employee does in fact fail to conform to applicable regulations. Until administrative action has become final, no court is in a position to say that such action did or did not conform to applicable regulations."

Sampson v. Murray, 415 U.S. 61, 74 (1974) (emphasis added). Therefore, Sampson corroborates that the Court lacks subject matter jurisdiction over Plaintiffs' injunction requests before a final agency action is taken by BIA regarding a requested change to the Band's Constitution.

The Supreme Court's 1974 decision in Sampson calls into question the older Ninth Circuit decisions cited by Plaintiffs, including the 1965 decision, Schwartz v. Covington, 341 F.2d 537, 538-39 (9th Cir. 1965), staying the plaintiff's discharge from the Army while the discharge was being reviewed by the Army Board for Correction of Military Records. Regardless, the stay was only issued after a board of officers recommended an undesirable discharge be issued and the plaintiff was ordered processed for discharge.[2] Id. at 538. Similarly, (including the effect of Sampson on the decision), in Smith v. Resor, 406 F.2d 141, 145 (2d Cir. 1969), the Second Circuit allowed a stay of an order calling an Army Reservist up to active duty while the plaintiff appealed the decision administratively only after the plaintiff was "actually ordered to report for a period of one year, six months, and fourteen days active duty." Here, there has been no action taken by the BIA with regard to approving any change to the Band's Constitution that is similar to a federal agency ordering a soldier to be discharged or ordering a soldier to report for active duty. As Plaintiffs admit, "the tribal council has not yet petitioned the Defendants for a change in their Constitution and enrollment procedures and criteria." (Pls' Opp. 11.) Even under these pre-Sampson decisions, speculation that they might, and that Defendants might approve such a petition, is insufficient to waive sovereign immunity pursuant to the APA.

The other cases cited by Plaintiffs do not involve a proposed injunction against the United States (although some were requested by federal agencies or involved actions being

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[2] Furthermore, courts have concluded that the Schwartz court's decision was based on the fact the plaintiff in that case was being discharged for alleged homosexual acts, which constituted substantial stigma at the time of that case, and therefore the precedential value of Schwartz should be confined to those particular facts. See Davis v. City of Memphis Fire Dep't, No. 11-3076-STA-CGC, 2013 WL 12043552, at *5 (W.D. Tenn. Jan. 4, 2013) (unpublished); Neal v. Brown, 451 F. Supp. 1335, 1337 (S.D. Cal. 1978).

reviewed by federal agencies). Therefore, subject matter jurisdiction for those courts was not dependent on a final action of a federal agency under the APA. See W. India Fruit & S.S. Co. v. Seatrain Lines, 170 F.2d 775, 774-75 (2d Cir. 1948) (involving request to enjoin a common carrier from reducing its rates); Isbrandtsen Co v. U.S., 81 F. Supp. 544, 546-47 (S.D.N.Y. 1948) (involving request to enjoin steamship carriers from instituting exclusive patronage provisions requiring customers to use only their ships);[3] F.T.C. v. Dean Foods Co., 384 U.S. 597, 602 (1966) (involving request to enjoin two distributors of packaged milk from merging); Arrow Transp. Co. v. S. Ry. Co., 372 U.S. 658 (1963) (involving request to enjoin railroads from reduced rates on grain shipments). Unlike such private parties, Defendants enjoy sovereign immunity, which divests the Court of jurisdiction unless the United States has waived such immunity. As previously pointed out, there has been no final agency action by BIA regarding any change to the Band's Constitution. Therefore, Plaintiffs' requests for preliminary and permanent injunctive relief must be dismissed for lack of subject matter jurisdiction since the United States has not waived its sovereign immunity over such claims though the APA or any other statute.

3. The Court Lacks Subject Matter Jurisdiction Because Plaintiffs' Requests for Preliminary and Permanent Injunctive Relief Are Not Constitutionally or Prudentially Ripe

Defendants argue that the Court lacks subject matter jurisdiction because Plaintiffs' injunction requests are neither constitutionally nor prudentially ripe. In response, Plaintiffs cite one case, Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972), which they argue supports their argument that their claim is ripe because they filed a detailed factual record.

But the Socialist Labor Party court's dismissal of the appeal was not based on lack of ripeness, but on the appellants' failure to demonstrate standing.[4] See Fairley v. Patterson,

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[3] The steamship carrier had already received approval to require exclusive patronage by the United States Maritime Commission, but that agency was not enjoined from doing anything. Regardless, the Commission's approval was a final agency action.

[4] Although, as demonstrated above, Socialist Labor Party's holding is based on standing, it does make one statement which is relevant to both standing and ripeness: "Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present."

493 F.2d 598, 604 (5th Cir. 1974) (citing Socialist Labor Party as support to conclude plaintiffs lacked standing). Standing (like ripeness) derives from the constitutional requirement of courts deciding "cases" and "controversies," and requires a litigant demonstrate a concrete and particularized injury that is fairly traceable to the challenged conduct, and that is likely to be redressed by a favorable judicial decision. See Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013); cf. Socialist Labor Party, 406 U.S. at 589 (dismissing suit because "[n]othing in the record shows that appellants have suffered any injury thus far"). In order to ensure that a federal court's Article III power is properly invoked, courts have developed several doctrines, including standing and ripeness, which impose different requirements on the substance of a plaintiff's claim. See Lee v. State of Or., 107 F.3d 1382, 1387 (9th Cir. 1997), as amended (Mar. 21, 1997), as amended (Apr. 16, 1997). Therefore, Socialist Labor Party's discussion of standing does not contradict any of Defendants' arguments demonstrating that Plaintiffs' injunction request is not ripe for decision. Accordingly, the Court should grant Defendants' motion to dismiss for lack of constitutional and prudential ripeness.

B. Even If the Court Believes It Has Subject Matter Jurisdiction, It Should Deny Plaintiffs' Request Since Plaintiffs Cannot Satisfy the Equitable Requirements of Preliminary Injunctive Relief

1. The Winter Factors Demonstrate No Preliminary Injunction Is Warranted Here

Defendants' initial brief details how each of the Winter factors preclude a preliminary injunction here. Plaintiffs' brief reinforces the conclusion since Plaintiffs cannot meet their burden of demonstrating a likelihood of success on the merits, a likelihood of irreparable harm, that the balance of equities tips in their favor, or that an injunction is in the public interest. See Winter v. NRDC, 555 U.S. 7, 20 (2008). Therefore, the Court should deny Plaintiffs' request for a preliminary injunction.

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406 U.S. at 588. Far from supporting Plaintiffs' opposition, this statement supports Defendants' request that the court dismiss Plaintiffs' unripe claim, even if it otherwise concludes that it would have jurisdiction to hear the case.

a) Likelihood of Success

Defendants' initial brief establishes that to succeed on the merits, Plaintiffs must identify a final agency action and prove that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Plaintiffs fail to meet that "heavy burden." See Med Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, (1983)). Plaintiffs identify three agency actions they allege make their injunction petition ripe for Court review. (ECF No. 23 at 13; but see supra § II.A.3). But even if those actions were sufficient to overcome ripeness concerns, Plaintiffs never attempt to articulate *why* they believe those actions were arbitrary and capricious under the law. Instead, Plaintiffs merely make the conclusory statement that there "is a great likelihood of Plaintiffs' being successful on the merits of their cases." (ECF No. 23 at 20). As such, Plaintiffs have failed to meet their heavy burden of demonstrating an agency action that was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Furthermore, the identified agency actions all address steps the BIA took in 2006 surrounding a blood determination and enrollment applications. Even if Plaintiffs' claims were valid, they could not justify an injunction in 2017 to freeze the tribal and administrative process for enrollment.

Because Plaintiffs have not identified an arbitrary and capricious final agency action, they have no chance of success on the merits.

b) Irreparable Harm

As explained in Defendants' initial brief, a party seeking a preliminary injunction must show an "immediate threatened injury." See Boardman v. Pacific Seafood Group, 822 F.3d 1011, 1022 (9th Cir. 2016) (quoting Caribbean Marine Servs. Co., Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir.1988)). Plaintiffs' brief confirms that no such injury exists.

Plaintiffs concede that any harm would come only after the Tribe's "proposed" enrollment ordinance is approved by BIA and takes effect. (ECF No. 23 at 20). While they allege a proposed ordinance exists, Plaintiffs provide no such ordinance it to the Court. Nor

have they disputed the series of steps laid out in Defendants' initial brief that would have to occur before any harm materializes. If those steps occur and BIA approves the amendment to the tribal constitution, Plaintiffs may have a ripe APA claim (so long as they can satisfy standing and other requirements). Until then, the alleged injury is entirely "speculative" and cannot be the basis for an injunction. See Boardman, 822 F.3d at 1022.

Plaintiffs suggest that other tribes have similarly changed their enrollment practices to exclude BIA oversight. They allege that in those other situations, once the agency approved the new ordinance, dis-enrolled members "no longer had recourse in the court system." (ECF No. 23 at 21). This is simply not true. The dis-enrolled members there had the opportunity to challenge the United States' approval of the operative tribal constitution, just as Plaintiffs here would upon a final agency action. In fact, the dis-enrolled members in the Pala Band case relied on by Plaintiffs *did* bring a federal court challenge to the approval of the constitution and the dis-enrollment decision. Their claims were heard, and the court ruled against them. See Aguayo v. Jewell, 827 F.3d 1213 (9th Cir. 2016).

The harm Plaintiffs allege could come only after a series of steps by the Tribe and the United States. Such speculative harm cannot provide the basis for a preliminary injunction.

c) Balance of Equities and the Public Interest

Plaintiffs argue that the public interest factor should consider only "San Pasqual Indians, enrolled and not yet enrolled." (ECF No. 23 at 23). This misunderstands the nature of equitable relief, which must always account for the interest of the public as a whole. See, e.g., Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). In considering an injunction, a court must also consider the effect on specific parties not before it. See CTIA-The Wireless Association v. City of Berkeley, California, 854 F.3d 1105, 1124 (9th Cir. 2017). Plaintiffs simply ignore the interests of the public and the Tribe noted in Defendants' initial brief. These factors confirm that no relief is appropriate until any enrollment ordinance goes

through the Tribal and administrative process and is ripe for judicial review.

2. The "Serious Questions" Test Does Not Alter the Analysis That a Preliminary Injunction Is Not Warranted

As noted in Defendants' initial brief, the Ninth Circuit continues to use an alternative "sliding scale" test where a plaintiff seeking a preliminary injunction can meet his burden by showing "serious questions on the merits" (which is less than a likelihood of success) combined with a showing that the "balance of hardships tips sharply in the plaintiff's favor" (which is greater than the showing required under the Winter test), as long as the plaintiff also demonstrates a likelihood of irreparable injury and that the injunction is in the public interest. See Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-35 (9th Cir. 2011). Under either the Winter test or the "serious questions" test, a plaintiff must "make a showing on all four prongs." Id. at 1135. Therefore, Plaintiffs' argument that there are tests that allow a court to issue a preliminary injunction without considering all four prongs is wrong. Indeed, both Romero-Barcelo and Amoco Production Co. v. Gambell, 480 U. S. 531 (1987), which Plaintiffs contend support alternative standards, are cited in Winter as supporting the traditional four-factor test. See Winter, 555 U.S. at 20.

Furthermore, Plaintiffs cannot meet their burden under any of the four prongs of the sliding scale test for the same reasons discussed above and in Defendants' initial motion. Therefore, the Court should deny Plaintiffs' preliminary injunction request.

3. There Is No 'Rebuttable Presumption' in Favor of Injunctive Relief

Plaintiffs argue that they need not satisfy the four prongs of the Winter test or the "serious questions" test because there is a rebuttable presumption in favor of injunctive relief for "substantial procedural violations of statutes." (ECF No. 23 at 16, 24). This claim is incorrect, and appears to rest on circuit case law that has been repudiated.

Plaintiffs cite the Supreme Court's Romero-Barcelo opinion for this proposition, yet nothing in that decision describes a presumption in favor of injunctive relief. Instead, it confirms courts' authority *not* to grant injunctive relief following a statutory violation. 456 U.S. at 320. Plaintiffs' argument in favor of a presumption resembles lines of circuit law

that (1) in cases under the Endangered Species Act, irreparable harm can be presumed; and (2) in cases under the National Environmental Policy Act, an injunction is the presumptive remedy. See Cottonwood Envtl. Law Center v. U.S. Forest Service, 789 F.3d 1075, 1088-89 (9th Cir. 2015) (describing previous cases). However, the Ninth Circuit has held that neither line of case law remains viable in light of recent Supreme Court decisions. Id. at 1092. And neither purports to apply to this type of case. Therefore, the Court should reject Plaintiffs' request for a presumption in favor of issuing a preliminary injunction, and deny Plaintiffs' request for the reasons articulated by Defendants.

II. CONCLUSION

For the reasons stated above, the Court should grant Defendants' 12(b)(1) motion to dismiss Plaintiffs' motion for a preliminary injunction, and Plaintiffs' Complaint seeking a permanent injunction, for lack of subject matter jurisdiction and/or lack of ripeness. For the same reasons, the Court should rescind the TRO. Alternatively, the Court should deny Plaintiffs' request for a preliminary injunction and rescind the TRO.

DATED: August 1, 2017

Respectfully submitted,

ALANA W. ROBINSON
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s/ *George V. Manahan*
George V. Manahan
Assistant United States Attorney
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CINDY ALEGRE, an individual, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al. Defendants.	Case No.: 17-cv-0938-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:

REPLY IN SUPPORT OF MOTION TO: 1) DISMISS PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION AND THE COMPLAINT SEEKING A PERMANENT INJUNCTION FOR LACK OF SUBJECT MATTER JURISDICTION; OR 2) ALTERNATIVELY DENY PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION

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
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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: August 1, 2017

s/ George Manahan
George V. Manahan
Assistant U.S. Attorney
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Attorney for Defendant