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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 REPLY BRIEF 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

A. The Court Should Dismiss Plaintiffs' First Five and Eighth Causes of Action

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

Plaintiffs' first and second claims should be dismissed because Plaintiffs lack standing. Plaintiffs argue that they have third-party standing pursuant to Powers v. Ohio, 499 U.S. 400 (1991) (holding criminal defendant has third-party standing to assert equal protection rights of jurors excluded on account of their race). (Pls' Opp. 27-30.) When a plaintiff seeks to vindicate the rights of a third party not before the court, the plaintiff must suffer a concrete injury, which must be particularized in the sense that it "affect[s] the plaintiff in a personal and individual way." Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 & n.1 (1992). Plaintiffs argue that since they have alleged that Defendants' actions have kept them from being enrolled members of the Band, "they are able to assert the rights and interest of . . . their ancestors." (Pls' Opp. 30.) But even if Plaintiffs' allegations sufficiently allege a particularized injury with regard to their first-party claim (i.e. the third cause of action), and even if the blood degree status of their ancestors may be evidence in that claim, that does not mean that Plaintiffs' allegations regarding the blood status of their ancestors causes them a concrete injury which affects them in a personal and individualized way. See Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 23, 25-27 (D.D.C. 2010) (parent does not suffer sufficiently personal and individual concrete injury when adult child killed by government). Rather, a plaintiff lacks third-party standing to "pursue claims belonging to his ancestors whether or not the wrongs done to the ancestors have injured the plaintiff indirectly." Tatum ex rel. Blacks v. United States, 630 F. App'x 638, 638 (7th Cir. 2016) (unpublished); see also Langley v. United States, 1995 WL 714378, at *2 (N.D. Cal. Nov. 30, 1995) (unpublished). Therefore, the Court should dismiss Plaintiffs' first and second claims for lack of standing.

2. The Court Lacks Subject Matter Jurisdiction Over Plaintiffs' First, Third, and Fourth Causes of Action Because of Lack of Final Agency Action

Plaintiffs' first, third, and fourth causes of action should be dismissed for lack of subject matter jurisdiction since there has been no final agency action, and therefore no

waiver of sovereign immunity.[1] With regard to the first cause of action,[2] Plaintiffs have not attempted to state a final agency action regarding Jose Juan Martinez's blood degree. Rather, Plaintiffs argue Defendants' alleged failure to adjudicate Plaintiffs' enrollment applications constituted final agency action. (Pls' Opp. 12-15.) While this is wrong (see infra), Jose Juan Martinez is not a plaintiff, and Plaintiffs have not alleged that Defendants were ever asked to change his blood degree. Therefore, the first claim should be dismissed with prejudice for lack of subject matter jurisdiction.

Plaintiffs' third and fourth claims also must be dismissed for lack of subject matter jurisdiction since Defendants have not taken a final agency action. The claims seek a declaration that Plaintiffs should be members of the Band. BIA never took a final agency action, however, determining whether Plaintiffs should be members of the Band.

Plaintiffs' first argument in opposition, that BIA did take a final agency action allowing review of their enrollment applications claims because BIA wrote in 2015 "[t]his April 7, 2006 decision is final for the Department," (Pls' Opp. 24), conflates Plaintiffs' enrollment applications with the Band's request to increase Modesta Contreras' blood degree. The referenced April 7, 2006, letter from the Department of the Interior to the Band's Chairman stated, "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.) While this letter might show final agency action regarding the BIA's denial of the

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[1] To confer subject matter jurisdiction against the United States, its agencies, or its employees in their official capacity, there must be both a waiver of sovereign immunity and statutory authority vesting a district court with subject matter jurisdiction. (Balser v. Dep't of Justice, 327 F.3d 903, 907 (9th Cir. 2003)). Therefore, Plaintiffs' arguments that certain statutes vest the Court with jurisdiction (Pls' Opp. 18-22) do not address Defendants' arguments that there is a lack of subject matter jurisdiction because there is no waiver of sovereign immunity. See Powelson v. U.S., By & Through Sec'y of Treasury, 150 F.3d 1103, 1105 (9th Cir. 1998) ("A statute may create subject matter jurisdiction yet not waive sovereign immunity."). "Suits against the government are barred for lack of subject matter jurisdiction unless the government expressly and unequivocally waives its sovereign immunity." Mills v. United States, 742 F.3d 400, 404 (9th Cir. 2014).

[2] Plaintiffs argue that their first cause of action seeks either declaratory or mandamus relief. (Pls' Opp. 12-15.) The FAC does not mention a request for a writ of mandamus. Regardless, in this context, a claim seeking mandamus is analyzed pursuant to the APA. See Indep. Min. Co. v. Babbitt, 105 F.3d 502, 507 & n.6 (9th Cir. 1997).

request to increase Modesta Contreras' blood degree, it does not open the door for the Court to review Plaintiffs' claims regarding their own applications. Rather, the APA's waiver of sovereign immunity for review of final agency actions only allows review of circumscribed, discrete actions taken by an agency. See Norton v. S. Utah Wilderness All. ("SUWA"), 542 U.S. 55, 62 (2004) (sections 702, 704, and 706(1) of APA limit review to "circumscribed, discrete agency actions"); Sierra Club v. Peterson, 228 F.3d 559, 567-68 & n.12 (5th Cir. 2000) ("[T]he necessary institutional limitations on courts which Lujan identified limit our review of agency action to only specific and final agency actions."). Unlike the action denying the request to increase Modesta Contreras' blood degree, Defendants never took a circumscribed, discrete action approving or denying Plaintiffs' enrollment applications. Therefore, Plaintiffs' third and fourth causes of action should be dismissed with prejudice for lack of subject matter jurisdiction.

Plaintiffs also argue that Defendants' failure to act on their enrollment applications provides an exception to the 'final agency action' requirement, permitting the Court to "compel agency action unlawfully withheld or unreasonably delayed" pursuant to 5 U.S.C. § 706(1). "[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." SUWA, 542 U.S. at 64. "Courts have permitted jurisdiction under the limited exception to the finality doctrine only when there has been a genuine failure to act," "refus[ing] to allow plaintiffs to evade the finality requirement with complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'" Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922, 926 (9th Cir. 1999).

Plaintiffs' argument appears to be that BIA failed to take a required action because the Southern California Agency Superintendent ("Superintendent") failed to send their enrollment applications to the Pacific Region Regional Director ("Director"), pursuant to former 25 C.F.R. § 48.7, causing the Director (and the Deputy Assistant Secretary) not to perform the review of the applications required by § 48.8, or to provide the notices discussed at §§ 48.9-.10. Plaintiffs' argument is wrong for at least three reasons.

First, Plaintiffs' enrollment application request had not reached the point in the process where the Superintendent would provide those applications to the Director. Rather, pursuant to former 25 C.F.R. §§ 48.4 and 48.7, when the Superintendent first received those applications for enrollment to the Band, he was required to determine whether those applications were "duly filed," and then refer such applications to the Band's Enrollment Committee—which was what was done here.[3] See Dutschke Decl. (ECF No. 20-3) ¶¶ 2, 4.) Subsequently, BIA never received the enrollment applications back for a determination of eligibility. (Id. ¶ 6.) Therefore, BIA never failed to take an action it was required to take.

Second, the Band's General Council purportedly voted to adopt Resolution SP041005-01, seeking to approve the enrollment of Plaintiffs into the Band on April 10, 2005. (ECF No. 13 ¶ 40; ECF No. 13-9 at 6-9). By letter dated May 6, 2005, the Superintendent wrote a letter to the Band stating he was unable to validate the enrollment actions addressed by Resolution SP041005-01. (Ex. 1, Risling Declaration ¶ 3; id. Ex. 2 at 1.) By letter dated September 1, 2005, the Director informed the Band that he affirmed the Superintendent's decision refusing to validate Resolution SP041005-01. (Id. ¶ 5; id. Ex 3 at 1, 8.) Although the Band was informed that it had the ability to appeal the Director's decision to the Interior Board of Indian Appeal ("IBIA"), no such appeal was received by IBIA, making the Director's decision final for the Department of the Interior.[4] Since BIA determined the Band's purported approval of Plaintiffs' enrollment applications was not valid, even if the Superintendent would not have otherwise been allowed to return Plaintiffs' enrollment applications to the Band pursuant to former 25 C.F.R. §§ 48.4 and 48.7, he would have been justified in returning those applications for further analysis by the Band.

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[3] This procedure of the Superintendent referring duly filed applications to the Band's Enrollment Committee pursuant to former §§ 48.4 and 48.7 can occur before the Committee makes a determination on the applications. The fact the Band's Tribal Council provided the applications to the Superintendent indicating their support does not alter, however, the fact the Superintendent was required to determine the applications were duly filed and return them to the Band's Enrollment Committee under the Band's Constitution.

[4] Since the administrative appeal processes was not completed, the decision not to affirm Resolution SP041005-01 is not reviewable. See White Mountain Apache Tribe v. Hodel, 840 F.2d 675, 677 (9th Cir.1988).

Third, the Superintendent appropriately returned Plaintiffs' applications due to the BIA's decision denying the Band's request to increase Modesta Contreras' blood degree from 3/4 to 4/4. The Band's initial purported decision approving Plaintiffs' applications was affected by BIA's decision not to increase Modesta Contreras' blood degree. (ECF No. 20-2 at 2-3 (¶ 5). If Modesta Contreras' blood degree had been changed to 4/4, any great-grandchild of hers would have the requisite 1/8 blood of the Band regardless if they had no other ancestors with blood of the Band. Since Modesta Contreras' blood degree remained only 3/4, however, any of her great-grandchildren without any other ancestor with blood of the Band would only be 3/32 blood of the Band, which is less than the required 1/8.

It was therefore appropriate for BIA to return the applications to the Band so that they could determine in the first instance what the consequences of Modesta Contreras' remaining 3/4 blood of the Band would have on Plaintiffs' applications. BIA's handling of enrollment requests from the Band are based on its approval of the Band's Constitution, which incorporates as tribal law former 25 C.F.R. Part 48 as enrollment procedures. Appeals from BIA enrollment decisions are addressed at 25 CFR Part 62, but there is no specific federal statute or active regulation that instructs BIA how they must handle enrollment applications received from the Band. Therefore, BIA was well within its authority to 'remand' to the Band to determine in the first instance the effect on Plaintiffs' enrollment applications of the BIA's decision denying the Band's request to increase Modesta Contreras' blood degree. Such authority to remand to an inferior decision-maker based on changed factual circumstances is generally available to any superior tribunal. See, e.g. Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 165-67 (1996) (discussing power to vacate and remand a case in light of changed circumstances so that the lower court can respond in the first instance to those changed circumstances); Nat'l Labor Relations Bd. v. Fed. Motor Truck Co., 325 U.S. 838, 838 (1945) (vacating and remanding to the Court of Appeals for further consideration of changed factual circumstances).

Since BIA appropriately returned Plaintiffs' applications to the Band for any of these three reasons, and never received any further request from the Band to approve or

disapprove those applications, BIA was never in a position to make a final determination of Plaintiffs' eligibility for enrollment in the Band. (ECF No. 20-3 ¶ 6; ECF No. 20-2 ¶ 8.) BIA neither took a final agency action, nor failed to take a discrete action it was required to take. Rather, BIA took an action that was interlocutory in nature in sending the enrollment applications back to the Band's Enrollment Committee. Therefore, there has been no waiver of sovereign immunity pursuant to the APA over Plaintiffs' third and fourth causes of action since there was no final agency action. Thus, the Court should dismiss with prejudice Plaintiffs' first, third, and fourth causes of action for lack of subject matter jurisdiction.

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 fail to allege a cognizable claim in their second and eighth causes of action, which allege Defendants failed to provide notice to Plaintiffs of the determination that Modesta Contreras' blood degree should not be increased from 3/4 to 4/4. The request to increase Modesta Contreras' blood degree did not involve those sections of the Band's Constitution stating the process for enrolling in the Band (§§ 48.4 – 48.10). Rather, the request to increase the degree of blood on the Band's roll was made pursuant to former 25 C.F.R. § 48.14(c), which allows the Band's roll to be kept current by correcting members' degree of blood of the Band. (ECF No. 13-13 at 5.) Furthermore, since the request to increase Modesta Contreras' blood degree came from the Band, not from Plaintiffs (ECF No. 13-11), it was appropriate for the response to that request to be sent back to the Band. (ECF No. 13-6 (sending decision to Band's Chairman); ECF No. 1-20 at 65-67 (sending decision to Band's Enrollment Committee).

In response, Plaintiffs merely summarily repeat their allegation that notice was required pursuant to former 25 C.F.R. §§ 48.9 – .10. (Pls' Opp. at 10.) Therefore, the Court should grant Defendants' motion to dismiss Plaintiffs' second and eighth causes of action.

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

The Court lacks subject matter jurisdiction over Plaintiffs' first three causes of action

seeking a declaration by the Court that certain individuals are members of the Band. As previously explained, even if the Court denies Defendants' various arguments that the claims should be dismissed, the only appropriate remedy pursuant to the APA would be a remand to the agency for further consideration, not for the Court to make its own inquiry into the merits. Plaintiffs argue that the Court has jurisdiction to hear their claims, but they do not specifically address Defendants' argument that the Court lacks subject matter jurisdiction to provide the requested relief. Therefore, the Court should dismiss with prejudice Plaintiffs' first three claims for lack of subject matter jurisdiction to the extent they request the Court declare specific individuals are members of the Band (or, as previously argued, dismiss for failure to state a cognizable claim).

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

Plaintiffs' first five causes of action should be dismissed pursuant to Fed. R. Civ. P. 12(b)(7), for failure to join the Band under Rule 19. With regard to the first three causes of action, Defendants argue that Plaintiffs' request to have the Court declare certain individuals are members of the Band triggers the necessity for the Band to be joined. Plaintiffs' fourth and fifth causes of action, however, must be dismissed for failure to join the Band because, regardless of the requested remedy, litigation of those claims would significantly interfere with the Band's right to define its own membership and internal governance, affecting their status as sovereign entities.

In response, Plaintiffs' rely solely on Alto v. Black, 738 F.3d 1111 (9th Cir. 2013), arguing that case supports a conclusion that the case can proceed because complete relief can be provided in the Band's absence and Defendants can adequately represent the Band's interests. (Pl's Opp. 30-33.) In Alto (which involved the same Band as the one at issue in this suit), the Ninth Circuit considered whether the district court could issue a preliminary injunction enjoining the enforcement of a BIA order upholding the Band's decision to disenroll certain individuals in the Band's absence. See id. at 1115. Here, Plaintiffs seek relief far beyond the Alto plaintiffs: the court's determination that they are members of the

Band and that the Band's Constitution defining membership should be changed and/or reinterpreted. Indeed, Alto supports Defendants' argument that Plaintiffs' first five causes of action should be dismissed pursuant to Fed. R. Civ. P. 12(b)(7).

Pursuant to Fed. R. Civ. P. 19(a)(1), a party must be joined if feasible when (A) a "court cannot accord complete relief" in that party's absence; or (B) 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 . . . (i) impair or impede the [party]'s ability to protect the interest," or "(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."

The Alto Court concluded that the Band was not a required party since complete relief could be provided because the plaintiffs were only seeking the court review the agency action upholding the Band's decision to disenroll certain individuals, and did not challenge the Band's prior actions with regard to the membership issue. See id. at 1127. Here, however, Plaintiffs' first three causes of action request the Court declare that Modesta Contreras and her father, Jose Juan Martinez, are full blood members of the Band, and that Plaintiffs are members of the Band that should be added to the rolls. (ECF No. 13.4 at 46-47.) The Band's Enrollment Committee (subsequent to their initial request for review by BIA) determined that Modesta Contreras's blood degree should not be increased from 3/4 (because her father was not full blood), and Plaintiffs (or at least the majority of them) were ineligible for enrollment because they did not possess sufficient blood degree. (ECF No. 20-2 at 3 (¶ 6, 7); id. at 20-26.) Thus, Plaintiffs' requested relief goes beyond reviewing the agency's action, but rather directly challenges the Band's actions. Therefore, the relief requested by Plaintiffs cannot be provided in the Band's absence, and the Band is a party that must be joined if feasible pursuant to Rule 19(a)(1)(A). See Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1498 (9th Cir. 1991).

Even if the Court could provide the complete requested relief for Plaintiffs' first three claims, the Band would still be a party that must be joined if feasible pursuant to Fed. R. Civ. P. 19(a)(1)(B)(i). The Alto Court concluded the Band's absence would not impair their

ability to protect their interests pursuant to Rule 19(a)(1)(B) since the United States could adequately represent the Band's interests. The Alto Court explained this was because the United States was only defending the order requested by the Band removing the Altos from the Band's membership, and because the court's review was limited to the administrative record before the BIA, so the Band could not offer new evidence that would materially affect the outcome. See Alto, 738 F.3d at 1127-28. Here, however, the Band's Enrollment Committee embarked on its own independent review, and in light of research done by Dr. Robert Phillips, reached the conclusion that Modesta Contreras' blood degree should not be increased, and that Plaintiffs did not possess sufficient blood degree to qualify for enrollment. (ECF No. 20-2 at 3(¶ 6, 7); id. at 20, 23-26.) Also, Plaintiffs admit that they are seeking to present additional evidence to the Court that they did not previously present in support of their claims seeking declaratory relief. (Pls' Opp. 13.)[5] Therefore, the United States cannot represent the Band's interest to the same degree as the Court concluded in Alto, since the Band has evidence to support their conclusions that was not provided to the Government, and Plaintiffs are seeking to present evidence that was not before the Band.

Furthermore, regardless of the requested relief, the Band is a party that must be joined if feasible pursuant to Fed. R. Civ. P. 19(a)(1)(B)(i) as to Plaintiffs' fourth and fifth causes of action. Plaintiffs' fourth cause of action seeks the Court declare a violation of Equal Protection on the grounds that Defendants evaluated Plaintiffs' enrollment eligibility based on whether they possessed 1/8 blood of the Band rather than 1/8 blood from any Indian tribe (as Plaintiffs claim was the standard used for others). This goes directly to the definition of who should be a member of the Band. Such a claim is nothing like the United States defending an order affirming the Band's disenrollment of individuals. Rather, it goes to the heart of who can be a member of the Band under the Band's Constitution. The Band would need to be heard on this issue to protect its interests.

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[5] Explaining the need for numerous exhibits with Plaintiffs' filings.

Similarly, Plaintiffs' fifth cause of action seeking 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 Band 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, Defendants argue that in the absence of the Band, they face a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. Alto has little to say regarding this argument. Therefore, Plaintiffs have not opposed the argument, and have waived their right to do so. Accordingly, the Court should conclude the Band 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).

Plaintiffs do not argue against Defendants' contention that joinder of the Band is not feasible, or that equity and good conscience dictate Plaintiffs' first five causes of action should be dismissed based on the inability to join the Band. Therefore, these points are also conceded. Accordingly, the Court should dismiss with prejudice Plaintiffs' first five causes of action pursuant to Fed. R. Civ. P. 12(b)(7) for failure to join the Band under Rule 19.

B. The Court Should Dismiss Plaintiffs' Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Thirteenth, And Fourteenth Causes of Action Since There Has Not Been a Waiver of Sovereign Immunity Over a Claim for Money Damages Against the United States Over Such Causes of Action

1. No 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, seventh, and thirteenth causes of action for money damages based on the Fifth Amendment's Due Process or Equal Protection Clauses must be dismissed for lack of subject matter jurisdiction for multiple reasons. First, under the Tucker Act (or the Indian Tucker Act), only the Court of Federal Claims could hear such claims. Plaintiffs do not mention the Tucker Act in the opposition brief. Therefore, the Court should grant Defendants' motion on this basis.

Second, as previously explained, Plaintiffs could only rely on the Tucker Act as a waiver of sovereign immunity for a claim seeking money damages against federal employees in their official capacity for violations of the Constitution, a federal statute, or a regulation, if they demonstrate that the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained. See United States v. Mitchell, 463 U.S. 206, 216-17 (1983). The United States cites multiple cases demonstrating that the Fifth Amendment's Due Process and Equal Protection Clauses do not provide for money damages against the Government.

In response, Plaintiffs argue 28 U.S.C. § 1343(a)(1) – (a)(2) (and or § 1331) provides the Court jurisdiction.[6] As Defendants state in their initial motion, to confer subject matter jurisdiction in an action against a sovereign, there must be both statutory authority vesting a district court with subject matter jurisdiction and a waiver of sovereign immunity. See Alvarado v. Table Mountain Rancheria, 509 F.3d 1008, 1016 (9th Cir. 2007). "Absent a waiver of sovereign immunity, courts have no subject matter jurisdiction over cases against the government", "including its agencies and its employees." Kaiser v. Blue Cross of California, 347 F.3d 1107, 1117 (9th Cir. 2003). Therefore, even if § 1343 or § 1331 authorized jurisdiction over claims similar to Plaintiffs' sixth, seventh, and thirteenth causes of action against other defendants, those statutes do not waive sovereign immunity. See Jachetta v. United States, 653 F.3d 898, 908 (9th Cir. 2011) (28 U.S.C. § 1343(a)(3) does not waive sovereign immunity); Hughes v. U.S., 953 F. 2d 531, 539 n. 5 (9th Cir. 1992)

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[6] Plaintiffs also suggest that they could bring similar claims against federal employees in their individual capacities pursuant to Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). A Bivens-type implied damages remedy for Constitutional violations has only been approved in three situations: plaintiffs injured by federal officers who violate prohibition against unreasonable searches and seizures; plaintiffs who face gender discrimination in their employment in violation of equal protection; and prisoners denied medical care in violation of Eighth Amendment's Cruel and Unusual Punishments Clause. See Ziglar v. Abbasi, 137 S. Ct. 1843, 1854–55 (2017). Expanding a Bivens remedy in any new context "is now a 'disfavored' judicial activity," such that the Supreme Court has "consistently refused to extend Bivens to any new context or new category of defendants." Id. at 1857. Therefore, this Court should deny Plaintiffs' request to file an amended complaint alleging causes of action similar to their claims in the FAC under a Bivens theory, as any attempt to do so would be futile.

(general jurisdictional statutes such as 1331 and 1340 do not waive sovereign immunity); Ploof v. Internal Revenue Serv., 2016 WL 2987005, at *1 (N.D. Cal. May 24, 2016) ("neither 28 U.S.C. §§ 1331, 1340 nor 1343 constitute a waiver of sovereign immunity") (unpublished); Behrens v. Gossett, 1997 WL 672069, at *3 (C.D. Cal. June 9, 1997), aff'd, 173 F.3d 859 (9th Cir. 1999) (unpublished) ("the general jurisdictional statute for civil rights matters, 28 U.S.C. § 1343, is not a waiver of sovereign immunity").

Since Plaintiffs fail to identify a waiver of sovereign immunity regarding their sixth, seventh, or thirteenth causes of action, the Court must dismiss those claims for lack of subject matter jurisdiction with prejudice.

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

Plaintiffs' eighth, ninth, and tenth causes of action seeking monetary damages for Defendants' alleged violations of the APA should be dismissed for lack of subject matter jurisdiction since there is no waiver of sovereign immunity for such claims under the APA. Plaintiffs, without citation, state one of the two types of remedies available under the APA "is for damages under Plaintiffs' violation of constitutional rights claims based on Defendants' violation of statutory mandates." (Pls' Opp. 27.) As Defendants argue, section 702 of the APA states it only provides consent to suit against the Government in actions "seeking relief other than money damages." Accordingly, the Court should dismiss with prejudice Plaintiffs' eighth, ninth, and tenth causes of action.

3. No 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' do not refute that their eleventh cause of action should be dismissed for lack of subject matter jurisdiction, but only indicate they might be able to re-plead a similar claim under the Federal Tort Claims Act ("FTCA").[7] (Pls' Opp. 34-35.) Accordingly, the Court should dismiss this claim with prejudice.

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[7] A claim purportedly brought under the FTCA must be preceded by the filing of an administrative claim which is either denied or deemed denied after six months; otherwise it must be dismissed for lack of subject matter jurisdiction. See 28 U.S.C. §

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

Defendants argued Plaintiffs' fourteenth cause of action seeking monetary damages based on Defendants' alleged fraud and misrepresentation must be dismissed because such claims "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). Plaintiffs fail to oppose this argument, other than stating they can re-plead the claim pursuant to the FTCA. But § 2680(h) specifically bars a claim for fraud and misrepresentation under the FTCA. See Alexander v. United States, 787 F.2d 1349, 1350-511 (9th Cir. 1986). Therefore, the claim must be dismissed with prejudice for lack of subject matter jurisdiction.

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

Plaintiffs' fourth, fifth, and twelfth causes of action should be dismissed because of the running of the statute of limitations ("SOL"). In response, Plaintiffs summarily state that their claims should survive either because the claims are continuing violations, or because the SOL is tolled since the Band placed a moratorium on enrollment in August 2009. (Pls' Opp 16-18;33-34; ECF No. 13-80 – 13-82.) Even if the Band's enrollment moratorium could serve to toll the statute of limitations regarding any of Plaintiffs' claims, it is irrelevant regarding the claims that Defendants moved to dismiss since the SOL for those claims expired long before 2009. As Defendants established in their motion to dismiss, the SOL would have run, at the latest in the early 1970's.

Although the way Plaintiffs pled their claims might cause some superficial confusion

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2675(a); Jerves v. United States, 966 F.2d 517, 519 (9th Cir. 1992). A premature complaint can neither be cured by belatedly presenting an FTCA administrative claim to the agency after a federal suit has been filed, nor by allowing a plaintiff to amend his complaint; a complaint must be dismissed and a new action initiated if and when the jurisdictional requirements of the FTCA are met. See McNeil v. United States, 508 U.S. 106, 110-113 (1993) Duplan v. Harper, 188 F.3d 1195, 1199 (10th Cir.1999). Plaintiffs allege they received denials to their administrative claims on or about December 2016. (ECF No. 13 at 31 (¶ 49.) Plaintiffs initiated this suit on September 28, 2016. (ECF No. 1.) Therefore, Plaintiffs may not amend their complaint to add FTCA actions based on their denied administrative claims, but must file any such claims in a new suit.

regarding the identity of the actions that trigger the statute of limitations, a careful reading of their claims will show that Defendants accurately described them. For instance, in the 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 live there for the last 107 years. (ECF No. 13-4, ¶ 525-528.) The fact that Plaintiffs add in the concluding paragraph of their claim allegations regarding Defendants' failure to appropriately process their enrollment applications does not change the gravamen of the cause of action, alleging misbehavior over a century ago. It is that alleged action that triggers the SOL. Defendants describe the triggering events for the other challenged claims in their initial motion.

Plaintiffs' argument that the SOL has not been triggered because of unexplained "continuing violations" is equally without merit. The continuing violations doctrine extends the accrual of a claim in cases alleging unlawful discrimination on the basis of a protected status if a continuing system of discrimination violates an individual's rights up to a point in time that falls within the applicable limitations period. See Douglas v. California Dep't of Youth Auth., 271 F.3d 812, 822 (9th Cir.), amended, 271 F.3d 910 (9th Cir. 2001); New-Howard v. Shinseki, 2012 WL 2362546, at *21 n.11 (E.D. Pa. June 21, 2012) (unpublished); Ortega v. Hous. Auth. of City of Brownsville, 572 F. Supp. 2d 829, 835 (S.D. Tex. 2008). Plaintiffs' fourth, fifth, and twelfth causes of action do not allege unlawful discrimination based on a protected status. Therefore, the continuing violations doctrine is inapplicable.

Furthermore, even in the employment discrimination context, the continuing violations doctrine does not apply to discrete discriminatory acts, such as termination or refusal to hire. Rather, it only applies to claims involving situations based on non-discrete actions, such as those creating a hostile work environment, where a series of racial jokes, racially derogatory acts, negative comments regarding the capacity of racial minorities to be supervisors, and use of various racial epithets can be used to prove the discrimination, even if some of the acts fall outside the limitations period. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 112-21 (2002). Importantly, the harmful effects of time-barred

discrete acts are not relevant for limitations purposes. See Frost v. Diocese of San Bernardino Education and Welfare Corporation for the Benefit of Saint Catherine of Alexandria, et al., 302 F. App'x. 729, 730 (9th Cir. 2008) (citing Garcia v. Brockway, 526 F.3d 456, 462–63 (9th Cir.2008)).

Here, Plaintiffs' claims should be dismissed because the running of the statute of limitations is based on discrete acts. As previously discussed, Plaintiffs' twelfth cause of action is based on alleged wrongful act of allowing an individual without blood of the Band to become a member in 1910. That is a discrete act, and any alleged harmful effects from that act are not relevant in determining the running of the statute of limitations. Similarly, 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.) These alleged acts are discrete, and therefore are not subject to the continuing violations doctrine. Therefore, the Court should dismiss with prejudice Plaintiffs' fourth, fifth, and twelfth claims as they are time barred by 28 U.S.C. § 2401(a).

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

Plaintiffs argue that they have satisfied Rule 8's requirements for a "short and plain statement" of the grounds for relief. Defendants respectfully disagree. Plaintiffs' 249-page FAC, with 866 pages of exhibits, is sufficiently prolix, replete with redundancy, verbose, and confusing, that if 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).

E. CONCLUSION

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

DATED: July 28, 2017

Respectfully submitted,

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Acting United States Attorney

s/ *George Manahan*
George Manahan
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:

REPLY BRIEF IN SUPPORT 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: July 28, 2017

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

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