UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAYUGA NATION, *et al.*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 17-1923 (CKK)
RYAN ZINKE, *et al*.	)	
Defendants.	)	

FEDERAL DEFENDANTS' PARTIAL MOTION TO DISMISS

Federal Defendants[1] hereby move pursuant to the Federal Rules of Civil Procedure 12(b)(1), and (6) to dismiss this action. The Court is respectfully referred to the accompanying memorandum of points and authroities in further support of this motion.

Respectfully submitted,

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[1] Federal Defendants, as reflected in the Complaint, include: Ryan Zinke, Michael Black, Bruce Maytubby, Weldon Loudermilk, United States Department of the Interior and the Bureau of Indian Affairs. *See* Complaint (ECF 1). Defendant Black is sued in both his individual and official capacities. *Id*.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANTS' PARTIAL MOTION TO DISMISS

Defendants Ryan Zinke, in his official capacity as Secretary of the Interior; Michael Black, in his official capacity as Acting Assistant Secretary – Indian Affairs and in his individual capacity; Bruce Maytubby, in his official capacity as Eastern Regional Director, Bureau of Indian Affairs, United States Department of the Interior; Weldon "Bruce" Loudermilk, in his official capacity of Director, Bureau of Indian Affairs, United States Department of the Interior; United States Department of the Interior; and the Bureau of Indian Affairs, ("Defendants" or "Federal Defendants"), by and through undersigned counsel, hereby request the Court to dismiss the Complaint pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Plaintiffs' fail to state a claim under *Bivens*.

INTRODUCTION

Plaintiffs in this case are an entity calling itself the Cayuga Nation, which claims to be the rightful leadership of the Cayuga Nation of New York, and its purported tribal officials. Plaintiffs have brought various Administrative Procedure Act and constitutional

challenges to the Department of the Interior's July 13, 2017 final agency decision to recognize Plaintiffs' rival faction as the proper leadership of the Nation. The July decision affirmed on appeal a previous administrative decision from the Bureau of Indian Affairs' Eastern Regional Director similarly recognizing Plaintiffs' rival faction as the Nation's leadership. The July decision was issued by Michael Black, who Plaintiffs have named in both his official and individual capacity. Complaint ¶ 17. At the time of the July decision, Mr. Black was the Department of the Interior official exercising the delegable authority of the Office of the Assistant Secretary – Indian Affairs pursuant to the Vacancies Reform Act, 5 U.S.C. § 3341 *et seq*. Mr. Black had assumed jurisdiction over Plaintiffs' appeal from the Eastern Regional Director's decision pursuant to 25 C.F.R. § 2.20(c) and 43 C.F.R. § 4.332(b), an assumption that Plaintiffs unsuccessfully challenged before the Interior Board of Indian Appeals. At no point during the pendency of Plaintiffs' administrative appeals process was Mr. Black involved in the case in anything other than his official capacity. Mr. Black has since been reassigned to the Department of the Interior's Bureau of Reclamation.

LEGAL STANDARDS

A Rule 12(b)(1) motion to dismiss for lack of jurisdiction may be presented as a facial or factual challenge. "A facial challenge attacks the factual allegations of the complaint that are contained on the face of the complaint, while a factual challenge is addressed to the underlying facts contained in the complaint." *Al-Owhali v. Ashcroft*, 279 F. Supp. 2d 13, 20 (D.D.C. 2003) (internal quotations and citations omitted). When defendants make a facial challenge, the district court must accept the well-pleaded allegations contained in the complaint as true and consider the factual allegations in the light most favorable to the non-moving party. *Erby v. U.S.*, 424 F.

Supp. 2d 180, 182 (D.D.C. 2006). With respect to a factual challenge, the district court may consider materials outside of the pleadings to determine whether it has subject matter jurisdiction over the claims. *Jerome Stevens Pharmacy, Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). The plaintiff bears the responsibility of establishing the factual predicates of jurisdiction by a preponderance of evidence. *Erby*, 424 F. Supp. 2d at 182.

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994) (internal citations omitted). "If sovereign immunity has not been waived, a claim is subject to dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction." Courts "may not find a waiver unless Congress' intent is 'unequivocally expressed' in the relevant statute." *Johnson v. Veterans Affairs Med. Ctr.*, 133 F. Supp. 3d 10, 14 (D.D.C. 2015) (internal citations omitted).

In order to survive a Rule 12(b)(6) motion, the plaintiff must present factual allegations that are sufficiently detailed "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). As with facial challenges to subject-matter jurisdiction under Rule 12(b)(1), a district court is required to deem the factual allegations in the light most favorable to the non-moving party when evaluating a motion to dismiss under Rule 12(b)(6). *Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006). However, "[w]here 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." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 557) (internal citations omitted). A "court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more

than conclusions, are not entitled to the assumption of truth." *Iqbal*, 129 S.Ct. at 1950.

ARGUMENT

I. Plaintiffs' Constitutional Claims are Futile and Cannot Withstand an Immunity Defense

Plaintiffs' constitutional claims, *i.e.*, claims under *Bivens* are subject to dismissal as Plaintiffs have failed to state a claim for relief and have certainly failed to allege facts to support a claim that withstands the defense of qualified immunity. Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It is well settled that government officials such as the individual defendant enjoy a qualified immunity from constitutional and statutory claims against them. *See Saucier v. Katz*, 533 U.S. 194, 200-01 (2001); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity analysis was explained in *Harlow*:

> government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known.

457 U.S. at 818. And, a defendant's subjective good faith is not relevant to the qualified immunity analysis, *id*. at 815-18; rather, in making this assessment, the Supreme Court said a right is clearly established when "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. An official is not shielded

from liability where he "could be expected to know that certain conduct would violate statutory or constitutional rights." *See Farmer v. Moritsugu*, 163 F.3d 610, 613 (D.C. Cir. 1998); *accord Siegert v. Gilley*, 500 U.S. 226, 231-32 (1991) (A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all); *see also Wilson v. Layne*, 526 U.S. 603, 609 (1999)(A court performing a qualified immunity inquiry must determine whether the plaintiff has alleged the deprivation of an actual constitutional right); *Fernandors v. Dist. of Columbia*, 382 F. Supp. 2d 63, 70-71 (D.D.C. 2005); *Int'l Action Ctr. v. United States*, 365 F.3d 20, 24 (D.C. Cir. 2004) (internal quotation marks and citations omitted). Courts may "exercise their sound discretion in deciding which of the two prongs . . . should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (removing the requirement of courts to adhere to the linear two-step process previously required by *Saucier v. Katz*, 533 U.S. 194 (2001)).

The whole purpose of qualified immunity is to protect public officials "from the costs associated with the defense of damages actions" by rooting out meritless lawsuits at the earliest point possible in the litigation process. *Crawford-El v. Britton*, 523 U.S. 574, 590 (1998). As the Supreme Court explained in *Davis v. Scherer*, 468 U.S. 183, 197 (1984), "[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue." Moreover, "[e]ven defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated

that their conduct was unreasonable under the applicable standard." *Id*. at 190.

Thus, in developing the doctrine of qualified immunity, the Supreme Court has sought to strike a balance "between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Anderson*, 483 U.S. at 639 (quotation omitted). Recognizing that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery," *Harlow*, 457 U.S. at 817-18, the Court balanced those competing interests by establishing a higher threshold for holding public officials personally liable for constitutional violations. For a public official to be liable for damages, that official must have violated a constitutional right, and that right must have been "clearly established" -- "[t]he contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." *Anderson*, 483 U.S. at 640 ("qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law'") (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Numerous circuits have placed the burden on the plaintiff to come forward with evidence sufficient to create a genuine issue as to whether defendant's conduct was objectively reasonable in light of clearly established law. *See, e.g., Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992); *Washington v. Newsom*, 977 F.2d 991 (6th Cir. 1992); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499 (11th Cir. 1990); *Hannon v. Turnage*, 892 F.2d 653 (7th Cir. 1990); *Pleasant v. Lovell*, 876 F.2d 787 (10th Cir. 1989). And the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), reemphasizes the need for the Courts carefully to assess what facts (as opposed to legal conclusions) are alleged and whether those facts suffice to satisfy the pleading requirements applicable in Federal litigation. *See Ashcroft v. Iqbal*, 556 U.S. at 678 (affirming

dismissal where allegations failed to overcome qualified immunity).

Plaintiffs have not alleged how the Defendant Black has violated any constitutional rights of Plaintiffs. And, even if some violation could be identified from Plaintiffs' allegations, the Plaintiffs have not alleged that the right was so clearly established that Plaintiffs' claims could withstand the defense of qualified immunity.

Plaintiffs' constitutional claim is premised on a purported Due Process right under the Fifth Amendment, specifically, Plaintiffs' asserted rights such that a decision-maker who participates both in deciding a matter and in appellate review of that decision violates the constitutional principle of due process. Complaint ¶ 153. No such duty was owed to Plaintiffs under then-existing (or current) constitutional law, and if the Court were to conclude that such a duty does exist, the duty was not clearly established at the time of the events; thus, the Defendants would be entitled to qualified immunity.

> As the Supreme Court explained in *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 196, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests." *Cf. Martinez v. State of California,* 444 U.S. 277, 283–85, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980) (finding that state parole board had no particular constitutional obligation to an individual killed by a paroled prisoner).

Smith v. D.C., 413 F.3d 86, 93 (D.C. Cir. 2005); accord *McGaughey v. District of Columbia*, 734 F. Supp. 2d 14, 18 (D.D.C. 2010), aff'd, 684 F.3d 1355 (D.C. Cir. 2012) (The public duty doctrine covers instances where the plaintiff contends that a defendant police officer failed to do what reasonably prudent police employees would have done in similar circumstances); *Estate of Phillips v. D.C.*, 455 F.3d 397, 404-08 (D.C. Cir. 2006) (rejecting due process claim against former Fire Chief based on asserted violation of "constitutionally protected liberty, interests in

life, personal security [and] bodily integrity" for failure to ensure compliance with appropriate standards, where fire fighters were not in a special relationship, and further rejecting the suggestion that such a relationship existed by virtue of laws limiting travel and residence of the firefighters). Here, at best, Plaintiffs allege that a decision-maker who participates both in deciding a matter and in appellate review of that decision violates the constitutional principle of due process. Complaint ¶ 153. Nothing in the Constitution provided or provides a duty (clearly-established or otherwise) owed by Defendants to Plaintiffs that this particular act does not happen.

Plaintiffs offer no factual basis to believe that Defendant Black owed them any special duty under the Constitution. They therefore fail to state a claim for relief; and certainly they fail to state a claim that can withstand the defense of qualified immunity. Here, Plaintiffs have alleged alternative remedies under the APA (Count I) and their Fifth Amendment claim against the agency (Count V). The availability of those remedies alone counsel against extending *Bivens* cause of action based on a "class of one" equal protection claim against the individual Defendant Black. *See Wilson v. Libby,* 535 F.3d 697, 706 (D.C. Cir. 2008) (observing that "the availability of *Bivens* remedies does not turn on the completeness of the available statutory relief.").

However, even if no alternative remedies exist, the Court should hesitate to extend *Bivens* to cover Plaintiffs' constitutional claim in this case. *XP Vehicles v. U.S. Dep't of Energy* is instructive here. 18 F. Supp. 3d 38, 75 (D.D.C. 2015). In *XP Vehicles*, the Department of Energy rejected plaintiff's application for a federal loan to fund the manufacturing of energy-efficient vehicles. *Id.* at 45. Unhappy with the loan rejection, the plaintiff sued the Department of Energy and several officials in their personal capacities. The plaintiff alleged that these defendants

engaged in inappropriate administration of the federal loan program that worked to the disadvantage of the plaintiff in violation of the due process protections under the Constitution and in contravention of the APA. *Id.* On the Fifth Amendment claims, the court in *XP Vehicles* dismissed the plaintiff's *Bivens* claim against the individual defendants and held that no cause of action exists that would permit monetary damages recovery from the individual defendants. *Id.* at 67. The court noted that it found no case that identifies "implied Fifth Amendment due process … Bivens claims arising out of the denial of a federal loan application." *Id.* at 68. In reaching this conclusion, the court observed that "courts should be reluctant to allow a *Bivens* action to proceed where the precise scope of that action remains uncertain." Id. at 70 (*citing Wilkie*, 551 U.S. at 560-61).

The *XP Vehicles* court noted that the plaintiff's *Bivens* claims were based on "amorphous allegations of political cronyism in the context of the administration of government loan programs." *Id*. The court concluded that the contours of the plaintiff's Bivens action were unclear as the "requested Fifth Amendment action might relate only to denial of a government loan on the alleged basis of impermissible political consideration, or it could cover a wide range of interaction between the government and private citizens in the context of government benefits and contracting." *Id*. at 71. The court rejected the plaintiff's argument that absent remedies under Bivens, the company has no other meaningful relief. *Id*. at 71. The court concluded that it was not "willing to find that a *Bivens* action is available to permit the recovery of monetary damages against the individual defendants on the grounds that those officials were motivated by political favoritism with respect to their administration of government loan programs in a manner that violated the Plaintiff's constitutional rights." *Id*. at 72.

Plaintiffs' claims in this case are similar to those in *XP Vehicles*. Here, Plaintiffs allege that prior to assuming the title Acting Assistant Secretary – Indian Affairs and adjudicating the appeal of the Regional Director's decision, Defendant Black inappropriately participated in the July decision itself, first as BIA Director and, "on information and belief", later as Special Advisor to the BIA Director. Complaint ¶¶121-123.

Specifically, Plaintiffs appear to allege that Defendant Black failed to fairly adjudicate the question of the Plaintiffs' lawful government and federal recognition of that government. According to Plaintiffs, Defendant Black, by both participating in the July 2017 Decision and reviewing and affirming that Decision on appeal, allegedly acted in bad faith and allegedly violated Plaintiffs' constitutionally protected due process rights. Complaint ¶ 165.

At base, Plaintiffs' claims are "grounded in amorphous allegations" of bias in the administration of government funding in connection to the Indian Self-Determination and Education Assistance Act ("ISDEAA"). These types of allegations, where the plaintiffs merely allege that government officials, in their personal capacities, harbored some unspecified personal agenda against them and hurt their interests are not cognizable as a *Bivens* cause of action. *See XP Vehicles*, 118 F. Supp. 3d at 71. The Court should follow the Supreme Court's footsteps in the last 35 years and decline to extend a *Bivens* cause of action where Plaintiffs' allegations are grounded on amorphous claims of purported bias.

II. Special Factors Counsel Hesitation in the Creation of a Bivens Remedy

The courts have long recognized that special factors counseling against the creation of an alternative *Bivens*-type remedy must be recognized where a comprehensive statutory scheme has been established to provide relief in a given area or where other reasons (such as separation of

powers principles) counsel hesitation. *See Ziglar v. Abbasi*, *supra*, 2017 WL 2621317 at *10-*14-*24 *Wilson v. Libby*, 535 F.3d 697, 704-10 (D.C. Cir. 2008) (concluding that the Privacy Act constitutes a special factor precluding a *Bivens* remedy, even though the statute does not afford complete relief to the plaintiffs); *Davis v. Billington*, 681 F.3d 377, 381-82 (D.C. Cir. 2012); *Mittleman v. U.S. Treasury*, 773 F. Supp. 442, 454 (D.D.C. 1991) (Privacy Act bars plaintiff's constitutional claims); *Weiss v. Int'l Bhd. of Elec. Workers*, 729 F. Supp. 144, 147 (D.D.C. 1990) (to the extent that plaintiff's emotional injuries were the result of the stressful work situation created by the defendant, her claim of intentional infliction of emotional distress must be dismissed as subsumed within Title VII); *Bush v. Lucas*, 462 U.S. 367 (1983) (comprehensive procedural and substantive provisions of the Civil Service Reform Act constitute "special factors" counseling hesitation against a *Bivens* remedy); *Brown v. GSA*, 425 U.S. 820 (1976) (Title VII is the sole remedy for federal employees complaining of job discrimination on account of sex or race); *Gleason v. Malcomb*, 718 F.2d 1044, 1048 (11th Cir. 1983) (special factors counsel against a *Bivens* remedy where plaintiff could have sought equitable relief pursuant to the Administrative Procedure Act ("APA")); *GasPlus, L.L.C. v. U.S. Dep't of Interior*, 466 F. Supp. 2d 43, 50 (D.D.C. 2006) (APA constitutes special factor warranting dismissal of *Bivens* claims); *Dearsman v. Kurtz*, 516 F. Supp. 1255, 1259-60 (D.D.C. 1981) (Civil Service Reform Act and Title VII constituted exclusive remedies for adverse actions and discrimination in the federal workplace, precluding plaintiff's due process claims); *accord United States v. Stanley*, 483 U.S. 669, 683-84 (1987) (special factors counselling hesitation include the unique disciplinary structure of the Military Establishment and Congress's activity in the field).

Here, Plaintiff has identified the APA as a statute that could, under the proper circumstances, offer it the level of relief to which they might be entitled. This constitutes a special factor counseling hesitation in the creation of a *Bivens* remedy. Accordingly, Plaintiffs' individual-capacity claim should be dismissed. Complaint ¶ 100-139. *GasPlus, L.L.C. v. U.S. Dep't of Interior*, 466 F. Supp. 2d 43, 50 (D.D.C. 2006) (stating the APA constitutes special factor warranting dismissal of *Bivens* claims.)

CONCLUSION

Wherefore, for the reasons set forth herein, Plaintiffs' claims as to Defendant Michael Black in his individual capacity should be dismissed.

Respectfully submitted,

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