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6
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8
9 IN THE UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11
12 CINDY ALEGRE, *et al.*,
13 Plaintiffs,
14 v.
15 UNITED STATES OF AMERICA, *et*
al.,
16 Defendants.

CASE NO.: 3:16-cv-02442-AJB-KSC

CASE NO.: 3:17-cv-01149-AJB-KSC

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
UNITED STATES' MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

[FRCP 8(a), 41(b)]

DATE: January 11, 2018
TIME: 2:00 p.m.
CTRM: 4A
JUDGE: Hon. Anthony J. Battaglia

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22 Defendants United States of America, the Department of the Interior, the Bureau of
23 Indian Affairs, and the individuals named herein in their official capacities¹ (collectively

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26 ¹ Unlike the First Amended Complaint, the Second Amended Complaint now purports to
27 assert claims against two Defendants—Amy Dutschke and Javin Moore—in their official
28 *and* individual capacities. SAC ¶¶ 22-23. Because Defendants Dutschke and Moore have
only recently been served and their representation has not been determined, they are not
parties to this motion in their individual capacities.

1 “Defendants”) respectfully submit the following memorandum of points and authorities in
2 support of their motion to dismiss the Second Amended Complaint.

3 **I. INTRODUCTION**

4 On August 15, 2017, this Court granted Defendants’ motion to dismiss Plaintiffs’
5 First Amended Complaint (“FAC”) pursuant to Rule 8(a) of the Federal Rules of Civil
6 Procedure. See Order [Doc. #43]. Dismissal was warranted because the FAC (1) was
7 excessively verbose and repetitive; (2) failed to clearly identify the basis for Defendants’
8 waiver of sovereign immunity as to each cause of action; and (3) “impermissibly group[ed]
9 all of the Defendants together without distinguishing between the alleged conduct of each
10 Defendant.” *Id.*, 10:5-12:20 (internal quotations omitted). In affording leave to amend,
11 the Court gave express instructions to Plaintiffs to avoid repeated Rule 8 violations:

12 Plaintiffs must (1) succinctly set forth the facts that serve as the basis for their
13 claims (as illustrated by the [five-page] Facts section of this order);
14 (2) delineate each Defendant’s role in the wrongs perpetuated against Plaintiffs;
15 and (3) state the basis for the Court’s subject matter jurisdiction and
16 Defendants’ waiver of sovereign immunity as to each cause of action. Failure
17 to comply with Rule 8(a) may result in dismissal with prejudice under Rule
18 41(b).

19 *Id.*, 13:6-11.

20 Plaintiffs did not follow this Court’s instructions in drafting their Second Amended
21 Complaint (“SAC”). The SAC still fails to identify the basis for any alleged waiver of
22 sovereign immunity as to each cause of action, still fails to identify and distinguish the
23 alleged wrongful conduct of each Defendant, and remains excessively long. The SAC,
24 therefore, should be dismissed pursuant to Rule 8(a) and Rule 41(b).²

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27 ² Should the Court deny Defendants’ Motion to Dismiss, Defendants will seek to challenge
28 the SAC on additional grounds, including but not limited to lack of subject matter
jurisdiction because of, *inter alia*, sovereign immunity and lack of standing pursuant to
Fed. R. Civ. P. 12(b)(1), lack of feasibility of joining a required party pursuant to Fed. R.
Civ. P. 19(b), and expiration of the statute of limitations pursuant to Fed. R. Civ. P. 12(b)(6)
and or 12(c). Waiting until after the Court rules on this motion to bring these other motions,
if necessary, conserves the parties’ and the Court’s resources.

II. ARGUMENT

A. Standard for Rule 8(a) and/or Rule 41(b) Dismissal

Rule 8(a)(1)-(2) of the Federal Rules of Civil Procedure requires a complaint to contain (1) “a short and plain statement of the grounds for the court’s jurisdiction;” and (2) “a short and plain statement of the claim showing the pleader is entitled to relief.” A complaint violates Rule 8 and is subject to dismissal 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 v. Renne*, 84 F.3d 1172, 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.

Pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, courts may dismiss an action for a plaintiff’s failure to comply with a court order. For example, where, like here, a plaintiff fails to comply with an order to amend a complaint in a manner that satisfies Rule 8, dismissal pursuant to Rule 41(b) may be appropriate. *See McHenry*, 84 F.3d at 1177-80 (9th Cir. 1996); *Polk v. Beard*, 692 F. App’x 938 (9th Cir. 2017) (unpublished); *Gottschalk v. City and County of San Francisco*, 964 F.Supp.2d 1147, 1154-55 (N.D. Cal. 2013).

B. The SAC Violates the Court’s Order by Failing to Identify a Basis for a Waiver of Sovereign Immunity as to Any of Its Causes of Action.

In its Order, the Court directed Plaintiffs to allege the precise basis for Defendants’ waiver of sovereign immunity “as to each cause of action.” Order, 13:9-10. The Court explained that the Plaintiffs were required to identify the statutory basis for their claims in order to avoid confusion regarding subject matter jurisdiction. Specifically, the Court

1 identified the following flaws with the FAC that were factors in granting Defendants' Rule
2 8 motion:

3 Plaintiffs invoke the Administrative Procedure Act for the first through third
4 and ninth through eleventh causes of action, but ask for relief the Court has no
5 power to grant under the APA. *Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir.
6 2013) (stating that the relief available under the APA is “affirmation, reversal
7 or remand of the agency action”). Similarly, Plaintiffs purportedly invoke the
8 Federal Tort Claims Act for the fourteenth cause of action, but the FTCA does
not waive sovereign immunity for claims of fraud and misrepresentation. 28
U.S.C. § 2680(h) (exempting misrepresentation and deceit from the FTCA’s
waiver of immunity); *Owyhee Grazing Ass’n v. Field*, 637 F.2d 694, 697 (9th
Cir. 1981) (“[C]laims against the United States for fraud or misrepresentation
by a federal officer are absolutely barred by 28 U.S.C. § 2680(h).”).

9 *Id.*, 11:19-12:4.

10 Section I of the SAC, entitled “Jurisdiction and Venue,” fails to comply with the
11 Court’s instructions. SAC ¶¶ 1-10. Rather, Section I merely lists several statutes—
12 including general jurisdiction provisions (e.g., 28 U.S.C. §§ 1331 and 1343), various civil
13 rights provisions (e.g., 42 U.S.C. §§ 1981 and 1985), and the Federal Tort Claims Act
14 (“FTCA”)—as the basis for subject matter jurisdiction. See SAC ¶¶ 1, 6-7. Yet, these
15 provisions either supply no basis for a waiver of sovereign immunity or, in the case of the
16 FTCA, supply only a limited waiver. See *Jachetta v. United States*, 653 F.3d 898, 907-908
17 (9th Cir. 2011); *Hughes v. United States*, 953 F.2d 531, 539 n.5 (9th Cir. 1992) (general
18 jurisdiction statutes do not waive sovereign immunity); See *Jachetta*, 653 F.3d at 908;
19 *Ardalan v. McHugh*, 2013 WL 6212710, *12-13 (N.D. Cal. Nov. 27, 2013) (civil rights
20 statutes do not waive sovereign immunity); *F.D.I.C. v. Meyer*, 510 U.S. 471, 477-78 (1994)
21 (the FTCA’s waiver is limited in scope). By listing these provisions without any reference
22 to the specific causes of action or any discussion of how these provisions relate to sovereign
23 immunity, Plaintiffs have failed to cure their Rule 8 defects.

24 Similarly, Section IV of the SAC, captioned “Sovereign Immunity is Inapplicable,”
25 fails to comply with Rule 8 and the Court’s Order. See SAC ¶¶ 74-85. Section IV mainly
26 repeats factual allegations already made elsewhere in the SAC and indicates whether they
27 are facts Plaintiffs are or are not challenging. Then, in paragraph 83, Plaintiffs repeat and
28 augment their general list of statutes and constitutional provisions (omitting the FTCA)

1 that they allege constitute the statutory basis for their claims, but they fail to identify a
2 specific basis for the alleged waiver of sovereign immunity as to each cause of action.

3 Plaintiffs fail to cure these deficiencies in the individual causes of action in their
4 SAC. Most glaringly, Plaintiffs' Ninth Cause of Action appears to bring a claim against
5 the United States, its agencies, and its officers acting in their official capacities for "Fraud
6 and Misrepresentation." SAC ¶¶ 189-193. In dismissing the FAC, the Court made it clear
7 that the FTCA does not supply a basis for waiving sovereign immunity to assert a fraud
8 claim. Order, 11:23-12:4. In the SAC, the Ninth Cause of Action does not specifically
9 identify the FTCA as its statutory basis. But, if the FTCA is not the basis for this claim,
10 then Defendants and the Court are left to speculate whether Plaintiffs are predicating their
11 claim on one or more of the roughly 15 separate statutes and constitutional provisions
12 generally listed in paragraphs 1, 6, 7 and 83 of the SAC. As a result, the Ninth Cause of
13 Action remains unclear, confusing and in violation of this Court's Order and Rule 8.

14 Another example of Plaintiffs' failure to comply with Rule 8 and the Court's Order
15 is the Seventh Cause of Action for "Violation of Administrative Procedures Act" ("APA").
16 SAC ¶¶ 146-166. Plaintiffs' prayer for relief for the Seventh Causes of Action includes a
17 demand for money damages—an element of relief that this Court has already advised it
18 cannot grant under the APA. SAC 100:5-21 (seeking "[d]amages as allowed by law");
19 Order, 100:21. Furthermore, Plaintiffs' Seventh Cause of Action also asserts civil rights
20 violations. *See* SAC ¶ 154. It is unclear, therefore, whether Plaintiffs are asserting an APA
21 claim or a constitutional claim, and if the latter, under what theory Plaintiffs allege that
22 Defendants have waived sovereign immunity.

23 Indeed, despite this Court's clear direction to "state the basis for . . . Defendants'
24 waiver of sovereign immunity as to each cause of action," Order, 13:9-10, none of the
25 eleven separately-pled causes of action of the SAC include an express allegation regarding
26 sovereign immunity. *See* SAC ¶¶ 86-137 (seeking money damages and various forms of
27 declaratory relief for alleged civil rights violations in the First through Fifth Causes of
28 Action, without addressing sovereign immunity); ¶¶ 138-145 (seeking money damages and

1 a declaration regarding the alleged unconstitutional acts of federal employees in the Sixth
2 Cause of Action, without addressing sovereign immunity); ¶¶ 167-188 (seeking money
3 damages for breach of fiduciary duty in the Eighth Cause of Action, without addressing
4 sovereign immunity); ¶¶ 194-242 (seeking money damages and declaratory relief for
5 conspiracy in the Tenth and Eleventh Causes of Action, without addressing sovereign
6 immunity).

7 To be sure, as is the case with the Seventh Cause of Action, Plaintiffs have cited
8 generally to some statutes in the context of one or more of their claims. Yet, without
9 express allegations regarding the waiver of sovereign immunity, the claims remain unclear
10 in violation of Rule 8 and this Court’s Order.

11 For example, the Eighth Cause of Action alleges a breach of duty created by the
12 Nonintercourse Act, SAC ¶ 170, yet the Nonintercourse Act provides no independent basis
13 for a waiver of sovereign immunity. *Cf. Alabama-Coushatta Tribe of Texas v. United*
14 *States*, 757 F.3d 484, 491–92 (5th Cir. 2014) (affirming dismissal of tribe’s breach of
15 fiduciary duty claim based on Nonintercourse Act because the Court lacked subject-matter
16 jurisdiction since the tribe failed to allege agency action sufficient to trigger the sovereign
17 immunity waiver of the APA).³ The Eighth Cause of Action, therefore, fails to comply
18 with Rule 8 and the Court’s Order.

19 Similarly, Plaintiffs’ Tenth Cause of Action seeks declaratory relief or a Writ of
20 Mandamus requiring enrollment of the Group A Plaintiffs into the Band. SAC ¶¶ 196,
21 221-223. Yet, neither the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, nor the
22 Mandamus Statute, 28 U.S.C. § 1361, waives sovereign immunity. *See Brownell v.*

23
24 ³ Furthermore, Plaintiffs allege that Defendants’ actions breaching their fiduciary duty
25 stretches over a period of 160 years of actions against the San Pasqual Band. But the San
26 Pasqual Band is not a party to this action, and Plaintiffs fail to allege how such century-old
27 alleged acts are relevant to claims that might be brought by Plaintiffs without being subject
28 to statute of limitations and/or laches defenses. Rather, Plaintiffs seem to be taking a
“kitchen sink” approach to their allegations, which adds prolixity and confusion to the
SAC. *Cf. Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 946–47 (7th Cir. 2013) (“kitchen
sink” approach to pleading frustrates Rule 8’s objective to frame the issues and provide the
basis for informed pretrial proceedings).

1 *Ketcham Wire & Mfg.*, 211 F.2d 121, 128 (9th Cir. 1954) (“[T]he Declaratory Judgment
2 Act . . . is not a consent of the United States to be sued, and merely grants an additional
3 remedy in cases where jurisdiction already exists in the court”); *Spicer v. Jensen*, 210 F.3d
4 385 (9th Cir. 2000) (“The Mandamus Statute itself does not waive sovereign immunity”);
5 *see also Burns Ranches, Inc. v. U.S. Dep’t of the Interior*, 851 F. Supp. 2d 1267, 1271 (D.
6 Or. 2011) (citing cases holding Declaratory Judgment Act does not waive sovereign
7 immunity). The basis for any alleged waiver, therefore, is unclear.⁴

8 Also, Plaintiffs’ Eleventh Cause of Action seeks money damages—and punitive
9 damages—for “Conspiracy to Interfere with Civil Rights,” and their claim is brought
10 “pursuant to” 42 U.S.C. §§ 1985 and 1986. SAC ¶ 225. However, because civil rights
11 statutes do not supply a basis for a waiver of sovereign immunity, and no other statutory
12 basis for the claim is identified, the Eleventh Cause of Action violates Rule 8 and the
13 Court’s Order. *See Davis v. U.S. Dep’t of Justice*, 204 F.3d 723, 726 (7th Cir. 2000)
14 (“Sovereign immunity . . . bars §§ 1985(3) and 1986 suits brought against the United States
15 and its officers acting in their official capacity.”); *Affiliated Professional Home Health*
16 *Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir.1999) (per curiam) (sovereign
17 immunity bars claims against the United States under Sections 1985 and 1986); *see also*
18 *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1020 (9th Cir. 2001) (stating district court
19 granted 12(b)(1) motion to dismiss causes of action based on § 1985(3) and § 1986,
20 because of federal government’s sovereign immunity); *Morse v. N. Coast Opportunities,*
21 *Inc.*, 118 F.3d 1338, 1343 (9th Cir. 1997) (42 U.S.C. “§ 1983 precludes liability in federal
22 government actors.”).

23 Plaintiffs have failed to follow the Court’s order to state the basis for the Defendants’
24 waiver of sovereign immunity as to each cause of action. Dismissal under Rule 8(a)(1)

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26 ⁴ To the extent Plaintiffs claim they are relying on the APA as a waiver of sovereign
27 immunity regarding the Tenth Cause of Action, despite not stating so in the SAC, the claim
28 is redundant to Plaintiffs’ Seventh Cause of Action. *See R.T. Vanderbilt Co. v. Babbitt*,
113 F.3d 1061, 1065 (9th Cir. 1997) (if remedy exists under APA, similar claim for
mandamus relief analyzed as APA claim).

1 and Rule 41(b), therefore, is warranted. *Cf. Blaylock v. United States*, No.
2 CV1700006TUCRMLCK, 2017 WL 2196765, *2 (D. Ariz. April 12, 2017), report and
3 recommendation adopted, No. CV1700006TUCRMLCK, 2017 WL 2172002 (D. Ariz.
4 May 17, 2017) (dismissing complaint and requiring plaintiff to amend to plead the basis of
5 the Court’s jurisdiction, including an express waiver of sovereign immunity by the United
6 States, to avoid dismissal pursuant to Rule 8(a)(1); *Besada v. U.S. Citizenship &*
7 *Immigration Servs.*, No. C11-0997JLR, 2012 WL 1536969, *1 (W.D. Wash. Apr. 30,
8 2012) (dismissing plaintiff’s first and second amended complaints for, *inter alia*, failing to
9 allege facts indicating that a waiver of sovereign immunity permitted suit against an agency
10 of the United States as required by Rule 8(a)(1)); *Am. State Bank & Tr. Co. of Williston v.*
11 *Anderson*, No. CV 10-154-BLG-RFC, 2011 WL 6217046, *2 (D. Mont. Dec. 14, 2011)
12 (Rule 8(a)(1) requires basis for waiver of sovereign immunity to be set forth in complaint).

13 **C. The SAC is Devoid of Allegations Regarding the Individual Defendants.**

14 As an additional basis for dismissal of the FAC, the Court found that Plaintiffs had
15 named numerous individual Defendants, but had failed to “delineate each Defendant’s role
16 in the wrongs perpetuated against Plaintiffs.” Order, 12:5-7 (noting the FAC is “devoid of
17 any factual allegations against, for example, Zinke, Black, and Loudermilk”). In their
18 SAC, Plaintiffs now include new allegations regarding Defendant Dutschke’s role in
19 handling the enrollment applications of some of the Plaintiffs. *See, e.g.*, SAC ¶¶ 22, 101.
20 However, as to Defendants Zinke, Black, Loudermilk, and Moore, Plaintiffs plead only
21 that these individuals are supervisory federal employees, and Plaintiffs assert no allegations
22 that these individuals engaged in any specific, wrongful acts. *See* SAC ¶¶ 19-21, 23.

23 As against Defendant Moore, Plaintiffs’ failure to plead specific conduct is
24 particularly problematic, because Plaintiffs seek to hold Defendant Moore personally
25 liable. *See* SAC ¶¶ 23, 86-103 (asserting civil rights claims against Defendant Moore
26 personally, but failing to identify any wrongful conduct on his part).

27 The confusion created by these pleading defects is compounded by Plaintiffs’
28 decision to plead each cause of action against “all Defendants.” Occasionally, Plaintiffs

1 state that each Defendant is sued only in his or her “official capacity.” *See, e.g.*, SAC 61:4-
 2 9 (pleading the Fifth Cause of Action “against all Defendants in Their Official Capacity”).
 3 More often, however, Plaintiffs’ claims are pled against “all Defendants” without any
 4 indication as to whether one or more Defendants are being sued in their individual capacity.
 5 *See, e.g.*, SAC 63:1-5 (pleading the Sixth Cause of Action “against all Defendants”). As a
 6 result, the SAC violates Rule 8 by failing to clearly identify who Plaintiffs are suing and
 7 for what specific wrongs. Because Plaintiffs have failed to cure these defects after being
 8 placed on notice by the Court’s Order, dismissal is warranted. *Cf. Bank of Am., N.A. v.*
 9 *Knight*, 725 F.3d 815, 818 (7th Cir. 2013) (“Each defendant is entitled to know what he or
 10 she did that is asserted to be wrongful. A complaint based on a theory of collective
 11 responsibility must be dismissed”); *Penalbert-Rosa v. Fortuno-Burset*, 631 F.3d 592, 594–
 12 95 (1st Cir. 2011) (“[A]n adequate complaint must include not only a plausible claim but
 13 also a plausible defendant”).

14 **D. The SAC Remains Excessively Long and Repetitive.**

15 Plaintiffs have reduced their 250-page FAC down to 103 pages. But Plaintiffs have
 16 still failed to comply with the Court’s directive to “succinctly set forth the facts that serve
 17 as the basis for their claims.” Order, 13:6-8. Specifically, the SAC remains “replete with
 18 repetition,” including, for example, fourteen separate allegations that Frank Trask’s
 19 descendants “have no San Pasqual blood” (SAC ¶¶ 35, 38, 39, 42, 45, 109, 113, 116, 117,
 20 119, 135, 184, 229, 237), thirteen separate references to Modesta’s alleged full blood
 21 degree (SAC ¶¶ 22, 53, 55, 77, 92, 202, 210, 214, 215, 216, 217, 220, 234), seven separate
 22 references to Defendant Dutschke’s allegedly “erroneous” determination regarding
 23 Modesta blood degree (SAC ¶¶ 58, 59, 80, 96, 100, 182, 191), and five separate allegations
 24 that the Trask family has been “squatting” on tribal lands for generations (SAC ¶¶ 36, 37,
 25 135, 179, 180).⁵

26 _____
 27 ⁵ The propriety of dismissal for failure to comply with Rule 8 does not depend on whether
 28 the complaint is “wholly without merit.” *McHenry*, 84 F.3d at 1179. Rather, the
 requirement that 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.*

1 Indeed, the Court identified many of these repetitive allegations in its Order when it
2 directed Plaintiffs to succinctly redraft their claims. Order, 11:1-16. Accordingly,
3 Plaintiffs' lengthy and repetitive SAC not only violates Rule 8, but also violates this
4 Court's express instructions. Dismissal, therefore, is warranted.

5 **III. CONCLUSION**

6 For the foregoing reasons, Defendants respectfully move the Court for an order
7 dismissing Plaintiffs' Complaint pursuant to Rule 8(a) and Rule 41(b) of the Federal Rules
8 of Civil Procedure.

9 Date: October 6, 2017

Respectfully submitted,
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By /s/ Glen F. Dorgan
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