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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Cindy Alegre, et. al. Plaintiffs, v. UNITED STATES OF AMERICA; et.al. Defendants.	Case No. 16-cv-2442-AJB-KSC consolidated with Case No. 3:17-cv-01149-AJB-KSC PLAINTIFFS RESPONSE AND OPPOSITION TO DEFENDANTS MOTION TO DISMISS PLAINTIFFS SECOND AMENDED COMPLAINT Date: January 11, 2018 Time: 2 p.m. Court Room:4A

PLAINTIFFS RESPONSE AND OPPOSITION TO DEFENDANTS MOTION TO DISMISS PLAINTIFFS SECOND AMENDED COMPLAINT

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I

INTRODUCTION

A COURT ORDER FILED AUGUST 15, 2017

On August 15, 2017, this Court Dismissed Plaintiffs' First Amended Complaint in 16-cv-2442 under Rule 8(a); Granted Plaintiffs' Motion to Consolidate 16-cv-2442 with 17-cv-01149; Dismissed complaint in 17-cv-0938 and Dissolved the TRO; The Court ordered Plaintiffs to file a consolidated complaint in lead case 16-cv-2442 within 30 days. Defendants were ordered to file a responsive pleading no later than thirty days after the consolidated complaint was filed. See, Order, Page 21. The Court used different language on page 21 than was used on page 2, wherein the Court stated: "Failure to comply with Rule 8(a) **may** subject Plaintiffs' complaint to dismissal with prejudice." [Emphasis added]. Plaintiffs' filed their consolidated SAC within 15 days on September 6, 2017, well within the 30 day time limit. Defendants' filed their instant Motion to Dismiss the day it was due, October 6, 2017.

B PLAINTIFFS' FACTUAL ALLEGATIONS

The Gravamen of Plaintiffs' SAC falls under the APA and is clearly stated: "[I]t was Dutschke who unilaterally decided to deny the Enrollment Committee's request to correct Modesta Martinez's blood level from 3/4/ to 4/4 . . . It was Dutschke who unilaterally failed to give (sic Group A) Plaintiffs the required statutory notice of her actions in violation of 25 USC 48.9. It was Dutschke who unilaterally returned Group A Plaintiffs' applications to the illegal Enrollment Committee without adjudicating Group A Plaintiffs' applications in violation of 25 U.S.C. 48.8 and 48.9." [21:19-26; 22:1-2; 34:61 fn 9]. Moore has failed to either order Dutschke to follow statutory requirements or to act in her stead. The underlying facts supporting all of Group A Plaintiffs' causes of actions as alleged

in Plaintiffs' SAC are sound and clearly stated in paragraphs 52 - 62; 67 - 70; 79 - 80; 87 - 101.[1] In fact the Defendants, in all of their Motions to Dismiss, have never challenged the factual basis for Plaintiffs' complaints. The Exhibits filed with Plaintiffs complaints have provided documentation to support all of Plaintiffs' factual allegations. This Court should view Plaintiffs' factual allegations in the light most favorable to Plaintiffs. [See, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)]

C **STATEMENT OF LIABILITY FOR EACH DEFENDANT**

Defendants have liability to Plaintiffs for the following acts, or omission to act: First Claim [Pg.42] is brought by Group A Plaintiffs against DUTSCHKE and MOORE in their official capacities and as individuals. [SAC ¶¶22, 23; 86-103]. Second Claim by Group B Plaintiffs is against ZINKE as Secretary of the Department of Interior; BLACK as Acting Assistant Secretary - Indian Affairs; LOUDERMILK as Director Bureau of Indian Affairs. Each acting within their official capacities and each being responsible for the acts of their predecessors as alleged in [SAC ¶¶19, 20, 21; 104-110]. Third Claim by all Plaintiffs is against all Defendants in their official capacity. [SAC ¶¶111-127]. Fourth Claim brought by Group A Plaintiffs is against DUTSCHKE and MOORE, as individuals and in their official capacity and ZINKE, BLACK, and LOUDERMILK, in their official

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[1]If this Court gives Plaintiffs leave to amend, Plaintiffs will eliminate the Historical Background allegations contained in SAC ¶¶ 27-50, eliminate Pages 38-41, redact SAC ¶¶ 51-73, in addition to other redacting changes and clarify the issues of sovereign immunity and liability as discussed in this Response and Opposition. Plaintiffs purpose for alleging the Historical facts in their SAC is to show the Defendants' motives and reasons for failing to follow statutory mandates as discussed in this Response.

capacity, who are responsible for the acts of DUTSCHKE and MOORE. [SAC ¶¶128-131]. Fifth Claim by Group B Plaintiffs is brought against ZINKE, BLACK, LOUDERMILK in their official capacity. [SAC ¶¶132-137]. Sixth Claim by all Plaintiffs is brought against ZINKE, BLACK, and LOUDERMILK in their official capacity. [SAC ¶¶138-145]. Seventh Claim brought by all Plaintiffs is brought against DUTSCHKE and MOORE in their individual and official capacities and against ZINKE, BLACK, and LOUDERMILK in their official capacities and to the extent that they are responsible for the acts and/or omission to act of DUTSCHKE and MOORE. [SAC ¶¶146-166]. Eighth Claim by Group B Plaintiffs is brought against ZINKE, BLACK, LOUDERMILK in their official capacities. [SAC ¶¶167-188]. Ninth Claim is by Group B Plaintiffs against ZINKE, BLACK, LOUDERMILK in their official capacities. [SAC ¶¶189-193] Tenth Claim is against all Defendants in their official capacity. [SAC ¶¶194-223]. Eleventh Claim brought by all Plaintiffs is against ZINKE, BLACK, LOUDERMILK, DUTSCHKE and MOORE as individuals and in their official capacity. [SAC ¶¶224-242].

II

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

A. SUMMARY OF DEFENDANTS' MOTION TO DISMISS

The Defendants aver: "The SAC still fails to identify the basis for any alleged waiver of sovereign immunity as to each cause of action, still fails to identify and distinguish the alleged wrongful conduct of each Defendant, and remains excessively long (This same complaint was reiterated in Section D [8:14-25]). "The SAC, therefore, should be dismissed pursuant to Rule 8(a) and Rule 41(b)." Defendants base their motion to dismiss on Rule 8(a) and or Rule 41(b) [3:2-22]; Sovereign Immunity [3-8] (Plaintiffs fail to identify a specific basis for

the alleged waiver of sovereign immunity as to each cause of action [5:1-2];[2] and "the SAC is devoid of allegations regarding the Individual defendants." [8-9]. (This statement is factually incorrect. As stated in Paragraph I-B above and for the reasons stated below, Defendants' arguments fail.)

B. RULE 8, FEDERAL RULES OF CIVIL PROCEDURE.

1. Plaintiffs' complaint is not excessive, verbose, or repetitive.

Defendants apparently forgot that Plaintiffs combined two complaints: 16-cv-2442 complaint containing 250 pages with 616 pages of exhibits with 17-cv-01149 complaint containing 70 pages and 149 pages of exhibits. These 320 pages were reduced to 103 pages with only 19 exhibits. In addition, the combination of the two cases resulted in an addition of 19 new defendants who are federally enrolled in the San Pasqual Mission Band of Indians. Furthermore, this Court should ignore the cases that Defendants cite in support of their motion to dismiss under Rule 8 because the cases cited are either: 1) Unpublished cases that are not precedent, controlling, or applicable; 2) District Court cases from districts other than this district which are not precedent, controlling, or applicable; and 3) Cases that are factually distinguishable from the case at bar. In the alternative, Plaintiffs request leave to amend to file their Third Amended Complaint pursuant to the holdings in several of the cases cited by the Defendants. These cases are discussed below.

a. Cal. Coal. For Families & Children v. San Diego Cnty. Bar Assn., 657 Fed.Appx.675, 677-78 (9th Cir. 2016 (unpublished) and Polk v. Beard, 692 F. App'x 938 (9th Cir. 2017 (unpublished)

Plaintiffs recognize that although citation to unpublished cases in California

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[2] Defendants ignored all the jurisdictional statutes alleged by Plaintiffs in paragraphs 1-8 and 83 of their SAC];

state courts is prohibited, Federal Courts allow the use of unpublished cases pursuant to Ninth Circuit Rules 32-1; 36-3(b). The use of unpublished cases are not precedential, but merely persuasive. *McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004). See, *Sorrell v. McKee*, 290 F.2d 965, 971 (9th Cir. 2002); *Avarenge-Villalobos v. Reno*, 133 F.Supp.2d 1164, 1167-8 (ND Cal. 2000). Plaintiffs urge this Court to ignore the case citations for unpublished cases cited by the Defendants. If there was substantive law on this subject, then there would be published cases for the Defendants to cite. Furthermore, Defendants did not attach a copy of these unpublished case to their Motion and Plaintiffs have searched the Ninth Circuit unpublished data base with no avail. Therefore, Plaintiffs can not respond to these cases.

b. Mc Henry v. Renne, 84 F.3d 11762 (9th Cir. 1996)

The Court in *McHenry v. Renne,* 84 F.3d 1176,1177,1180 (9th Cir.1996) complained that the plaintiff's complaint mixed allegations of relevant facts, irrelevant facts, political argument, and legal argument in a confusing way that contained narrative ramblings, and story telling. Yet, the Court gave the plaintiff, who handed out free food in the park along with political literature, an opportunity to file a Third Amended Complaint even though his claims were set out in a single sentence 30 lines long. The Court also noted that McHenry's complaint was one out of a long history of complaints filed by McHenry against the City of San Francisco. Inspite of the Court's description of the complaint, the Court granted Plaintiff "one last opportunity to file a proper complaint." [i.e. third amended complaint]. Plaintiffs' SAC is not like the *McHenry* complaint: the facts are clearly stated, in chronological order without any political comments, and modeled after this Court's statement of facts in its Order dated August 15, 2017. Therefore, in the alternative to denying Defendants' Motion to Dismiss, this Court should

grant Plaintiffs one last opportunity to amend their complaint based on *McHenry* and the discussion in this response.

c. Nevijel v. North Coast Life Ins. Co., 651 F.2d 671

Defendants cited several cases wherein the attorney of record was the same attorney for all cases: Attorney Cissna. In *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981) the Court stated: "Even though the Appellees moved immediately for dismissal, appellants did not respond for over 19 months. . . . This is only one of many [cases] in which Mr. Cissna has alleged a wide ranging conspiracy to harm FOL and FSW. As stated previously, Mr. Cissna was president of both corporations. The history of the litigation of these other cases also supports the conclusion that the trial court's dismissal of this action was not an abuse of discretion." The Court listed Cissna's cases that he had filed [including *Schmidt v. Herrmann* (infra)] and stated: "These cases reveal a history of non-compliance with the Federal Rules of Civil Procedure on the part of Mr. Cissna." The Plaintiffs [and their attorneys] in the case at bar do not have a history of non-compliance with the Federal rules of Civil Procedure; have not filed the number of cases that Attorney Cissna filed; have met all court dates, have not asked for any extensions of time, and have not acted in an irresponsible manner. *Nevijel* is factually distinguishable and therefore not applicable to the case at bar and should not be considered by this Court.

Another Cissna case cited by Defendants was *Schmidt v. Herrmann*, 614 F.2d 1221 (1980), a Bankruptcy case. The case was dismissed on the grounds of 8(a), (e), 9 (b) [heightened pleading for fraud] but the Court granted leave to amend. The Court, in dismissing his Second Amended complaint stated: " . . they contain conclusory allegations on the history of this complex litigation; there are no specific allegations as to instances of fraud . . . it would appear that attorney

Cissna was attempting to write a confusing statement of a non-existing cause of action . . . or a pleading containing averments of the particular circumstance constituting the alleged fraud as required by Rule 9(b), FRCivP. . . . Failure to file understandable pleadings . . . convoluted statements." *Schmidt* is not controlling or applicable to the facts in this case. Plaintiffs' causes of action are real and specifically pled. This Court should deny Defendants' Motion to Dismiss. Or, in the alternative, grant Plaintiffs leave to amend.

d. Gottschalk v. City and County of San Francisco, 964 F.Supp.2d 1147, 1154-55 (N.D. Cal. 2013).

The *Gottschalk* case is a case out of the Northern District Court of California and is therefore not controlling or precedent. Gottschalk unsuccessfully applied for employment with the San Francisco Human Rights Commission. Her First Amended Complaint was dismissed pursuant to Rule 8(a). She was given an opportunity to file a Second Amended Complaint, which she did. But, she failed to timely file a response to the Defendants' Motion to Dismiss, although she filed a two page opposition paper a week late. The Court held that "dismissal was only proper where "the very prolixity of the complaint made it difficult to determine just what circumstances were supposed to have given rise to various causes of actions." Gottschalk's amended complaint "remains rambling, confusing, and often unintelligible. Plaintiff's (Gottschalk) factual allegations are contained in choppy, grammatically irregular sentences that make it difficult to discern exactly what Plaintiff is trying to communicate. . . . the organization of her complaint is often confusing. . . no class allegations at the beginning . . . are requested to be certified as class actions. . . . The complaint remains rambling, difficult to follow, and consists in large part of unsupported conclusory allegations. . . generalized political grievances or allegations of conspiracies without clear connection to

specific facts . . . "

Gottschalk's Second Amended Complaint was ultimately dismissed for failure to state a claim due to the doctrine of sovereign immunity which barred her claims under Title VII, FTCA, Section 1981, 1983, and 1985 claims. As discussed below the Doctrine of Sovereign Immunity does not bar all of Plaintiffs' claims. In contrast to *Gottschalk*, The San Pasqual complaint is fully comprehensible; it is grammatically correct, not rambling, not difficult to follow, does not contain conclusory allegations and is factually based. Part of Gottschalk's problem was that she failed to plead sufficient facts. That is not the case here. *Gottschalk* is distinguishable from the case at bar and should not be used as a basis for this Court's consideration of Defendants' Motion to Dismiss.

e. Bank of America v. Knight, 725 F.3d 815 (2013)

Bank of America v. Knight involved a bankruptcy wherein the Bank was suing their accountants to recover the 34 million dollars the bank lost when Knight Industries went bankrupt. The court stated: "A contention that 'the defendants looted the corporation' - without any details about who did what-is inadequate. Liability is personal. . . . The Rules of Civil Procedure set up a system of notice pleading. Each defendant is entitled to know what he or she did that is asserted to be wrongful. A complaint based on a theory of collective responsibility must be dismissed. That is true even for allegations of conspiracy. Although every conspirator is responsible for others' acts within the scope of the agreement, it remains essential to show that a particular defendant joined the conspiracy and knew of its scope." The District Court dismissed the Bank's Third Amended Complaint and the Appellate court stated: "Perhaps the Bank could have shown, in its appellate briefs, that it is at last aware of the problem and able to fix the defects. Yet, the briefs are as maddeningly vague as the complaint." *Knight* at 819. Plaintiffs have, with detail, addressed Defendants' complaints in this

response and have indicated the changes they would make if this Court allows them to file a Third Amended Complaint. (See Fn 1, supra). Plaintiffs' SAC contains plausible claims, and cited the correct jurisdictional statements in paragraphs 1 - 8; 83. Therefore, Plaintiffs' SAC should not be dismissed. See, *Ashcroft v. Iqbal,* 556 U.S. 662 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

C. RULE 12(b)(1) DISMISSAL BASED ON SOVEREIGN IMMUNITY - FAILURE TO STATE A CLAIM

Although the Defendants did not bring their Motion to Dismiss under 12(b)(1) F.R.Civ.P, Plaintiffs are treating their motion as if it is also a 12(b)(1) motion. The Defendants cite the Court's dicta claiming that Plaintiffs violated the court's order. [See DMD page 3, lines 25-26]. Since this language was only dicta, Plaintiffs did not violate this court's order. As discussed below, Plaintiffs clearly alleged the different basis for Defendants' waiver of sovereign immunity and other jurisdictional statements in SAC¶¶1 - 8; 83 et. cet.

1. SOVEREIGN IMMUNITY

In order to overcome Defendants' Motion to Dismiss Plaintiffs' causes of action, Plaintiffs realize that they must show the statutory authority that waives Defendants' Sovereign Immunity. To do this three steps are involved: First, Plaintiffs must establish that this Court has the jurisdiction to hear their claims; Second, Plaintiffs must state the statutes they rely on for their cause of action; and Third, if the statute that is the foundation for Plaintiffs' cause of action does not waive the Government's sovereign immunity on its face, then Plaintiffs are required to identify which statute waives the Government's sovereign immunity. In ¶¶1-8 and 83 of Plaintiffs' SAC, Plaintiffs clearly laid out twelve legal basis for their claims. Plaintiffs will put these statutes in perspective to show that the Government has waived its Sovereign Immunity in the specific claims alleged.

Step One: Plaintiffs' claims of jurisdiction are rooted in federal question jurisdiction: Title 28 U.S.C. 1331. This general federal jurisdiction is applicable to all of Plaintiffs' eleven causes of action.

Step Two: Plaintiffs' statutory claims as pled in counts One (violation of Due Process), Three (violation of Equal Protection), Seven (Violation of the APA), Eight (Breach of Fiduciary Duty), and Ten (Declaratory Relief/Mandamus) arise out of 25 USC 48, [48.5,7,8,9,10, and 25 CFR 61.11(b)]. Plaintiffs seek judicial review based on general Federal Jurisdiction pursuant to 28 USC 1331, and pursuant to a specific authorization in the substantive statute [25 USC 48], in addition to the general review provisions of the APA and the enabling statute in 25 USC 2.

Step Three: Plaintiffs' causes of action for violation of 25 U.S.C. 48 are reviewable under the Administrative Procedures Act - 5 USC 702, 704, 706, 706(1); 5 USC 551(13) and 5 USC 555(b). Title 5 USC 702 grants a waiver of Sovereign Immunity so this Court can review the agency action at issue in this case. Jurisdiction to review agency action is conferred by 28 U.S.C. 1331. Since the APA is not an independent grant of jurisdiction but a waiver of sovereign immunity, *Califano v. Sanders*, 430 U.S. 99, 105-107 (1977), the Plaintiffs claims arise from Defendants' violation of the mandates of 25 USC 48, 25 CFR 48, and 25 CFR 61.11(b). In addition, Defendants violated the APA rulemaking mandated in 5 USC 553(b), as discussed infra in section 2(b)(5) of this response.

2. FIRST, THIRD, SEVENTH, AND EIGHTH CAUSES OF ACTION

Plaintiffs have plead the necessary facts, jurisdictional statutes, enabling statutes, and waiver of sovereign immunity statutes in their Second Amended Complaint: [SAC ¶¶ Par 1:7; 83:17, 18 (25 USC 2); 99: 16.] In this case judicial

review is sought pursuant to the specific provisions of 25 CFR 48, giving this Court specific authorization from the substantive statute, in addition to the general review provisions of the Administrative Procedures Act [APA]. Section 702[3] of the APA "waives sovereign immunity for actions against federal government agencies, seeking non-monetary relief,[4] if the agency conduct is otherwise subject to judicial review." *Sheeran v. Army & Air Force Exch. Serv.*,619 F.2d 1132, 1139 (5th Cir. 1980), rev'd on other grounds, 456 U.S. 728 (1982) see also *Armendariz-Mata v. U.S. Dep't of Justice*, 52 F.3d 679, 682 (5th Cir. 1996). "Congress intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by 702 . . ." [5 USC 702]. [See,

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[3]Section 702 contains two separate requirements for establishing a waiver of sovereign immunity. *Lujan v. Nat'l Wildlife Fed*, 497 U.S. 8761 (1990). First, plaintiff must identify some "agency action" affecting him in a specific way, which is the basis for his entitlement for judicial review, id., This "agency action" for the purposes of 702 is set forth by 5 U.S.C. 551(13) and is defined as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13). Second, the plaintiff must show that he has "suffered legal wrong because of the challenged agency action or is adversely affected or aggrieved by that action within the meaning of a relevant statute." *Lujan*, 497 U.S. at 883. These requirements apply to any waiver of sovereign immunity pursuant to 702. Plaintiffs have satisfied these pleading requirements in their SAC.

[4]The Prayer in Plaintiffs' SAC specifically states: "damages as allowed by law." [See: Pgs 96:16; 97:14; 98:7; 99:3,22;100:3,21.].

Jaffee v. United States, 592 F.2d 718-719 (3rd Cir.), *cert. denied*, 443 U.S. 961 (1979) for illumination of 702' s legislative history. These standards were discussed in the cases cited by Defendants: *Hughes v. United States*, 953 F.2d 531 (9th Cir. 1992) [a tax case] wherein the Court found that the Secretary of State failed to properly delegate his authority and the Anti-Injunction Act , 26 USC 7421, was a bar to waiver of sovereign immunity under 5 USC 702].

Section 702 also waives immunity for claims where a person is "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 USC 702. This type of waiver applies when judicial review is sought pursuant to a statutory or non-statutory cause of action that arises completely apart from the general provisions of the APA. *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir.1980). **There is no requirement of 'finality' for this type of waiver to apply.** [The requirement of "finality" comes from 704 and has been read into 702 in cases where review is sought pursuant only to the general provisions of the APA. *Sierra Club v. Peterson*, 228 F.3d 559, 565 (5th Cir. 2000); *Amer. Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir. 1999).]. Pursuant to this case law, this Court has jurisdiction to adjudicate Plaintiffs' claims based on statutory violations and the APA.

In the APA, Congress granted a private right of action to enforce federal rights against federal agencies. [5 U.S.C. §702] ("a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof."). The APA grants a general waiver of sovereign immunity. Because 5 U.S.C. 702 creates the right of action expressly, there is no need to look for an implied right of action against the federal government. The APA, then waives the federal government's sovereign immunity over suits "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to

act in an official capacity or under of legal authority," unless another statute "that grants consent to suit expressly or impliedly forbid the relief which is sought."[5]

Plaintiffs have alleged that the agency's findings of fact are arbitrary or capricious, and the agency used improper procedures in its decision making. The Agency's erroneous findings of fact have resulted in an incorrect conclusion of law which triggers review under the APA. [See Seventh Cause of Action].[6]

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[5]Group A Plaintiffs have prudential standing to challenge the Secretary's final decision. [Alleged in ¶¶14, 15, 98] A person suing under the APA must assert an interest that is "arguably within the zone of interests to be protected or regulated by the statute" that he says was violated. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U. S. 150, 153 (1970). Plaintiffs' federal recognition, and economic, injuries are within the APA's "zone of interest". See, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2204-10 (2012).

[6]Under the APA only final agency actions can be reviewed in court. 5 U.S.C. 704. An agency action is final if: (1) the decision marks the completion "of the agency's decision making process," and (2) is a decision "by which rights or obligations have been determined, or **from which legal consequence will flow**." [emphasis added]. *Bennett v. Spear*, 520 U.S. 154, 177-178, (1997) Final agency action "amounts to a definitive statement of the agency's position" or "has a direct and immediate effect on the day to day operations" of the concerned party. *Indus. Customers of NW Util. v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005). Plaintiffs have alleged final agency action in ¶¶56, 58, 59, 60.

Section 704 limits judicial review to final agency action. But, there is a test for "final agency action". In *Bennett v. Spear*, 520 U.S. 154(1997) the court held that finality required satisfaction of elements: (1) "the action must mark the 'consummation of the agency's decision-making process – it must not be of a merely tentative or interlocutory nature," and (2) "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow." *Id.* at 178. In this case the first element is satisfied because the agency offered its "last word" on the subject. [SAC ¶¶56, 58, 59, 60] *Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct.1807, 1813, 814 (2016). The Court in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007) suggested that the presumption could be overcome if it were shown that the agency "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 823-35, 833 n.4 (1985). Where no administrative hearings are permitted, the order becomes final. *Sackett v. Environmental Protection Agency*, 132 S.Ct. 1367, 1372 (2012). Plaintiffs' factual statement alleges that as to the issue regarding Modesta (Martinez) Contreras, the decision was final. [See SAC ¶¶ 56, 58, 59, 60, 68].

Final agency action can include, as 5 U.S.C. 551(13) provides, agency inaction which is the failure to make an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. Plaintiffs have pled these allegations at SAC ¶¶62, 70, 93, 94, 95, 99, 101. Title 5 U.S.C. 706(1) requires a reviewing court to compel agency action that is "unlawfully withheld or unreasonably delayed." In *Northern v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), the Court held that an APA inaction claim must challenge an agency's failure to take a legally required and discrete action. [See Request for Declaratory relief and /or mandamus, infra].

3. TENTH CAUSE OF ACTION: DECLARATORY JUDGMENT - MANDAMUS

Mandamus is an order from a court directing a party to take a certain action, such as commence a rulemaking or complete an adjudication. *Telecommunications Research & Action Center v. FCC,* 750 F.2d 70, 77-78 (D.C. Cir. 1984). In the case at bar, the agency's delay of over 12 years is so egregious as to warrant mandamus. Plaintiffs recognize that 28 U.S.C. 2201 [declaratory judgment statute] is procedural only in that 2201 is not a grant of jurisdiction, but a grant of remedial powers. *Cal. Shock Trauma Air Rescue v. State Compensation Insurance Fund, et. al.*, 636 F.3d 538 (9th Cir. 2011) It is about an independent grant of jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 105-107 (1977). Claims of jurisdiction are generally rooted in federal question jurisdiction: Title 28 U.S.C. 1331 and APA 5 U.S.C. 706. Title 28 U.S.C. 1331 grants original jurisdiction to federal courts over any action "in the nature of mandamus to compel an officer or employee of the United States of any [federal] agency to perform a duty owed the plaintiff. Title 28 USC 1331; 28 USC 1361. *Brownell v. Ketcham*, 84 F.3d 1172 (9th Cir. 1996) (Declaratory Judgment Act - 28 USC 2201-2202 is not a consent of the United States to be sued, it merely grants an additional remedy in cases where jurisdiction already exists.) *Commercial Casualty Ins. Co. v. Fowles*, 154 F.2d 864 (9th Cir. 1946)]. Section 706(1) of the APA provides that a court can compel an agency to act when the agency action is discrete and demanded by the law. Title 25 USC 48 demanded specific acts of the defendants and they ignored the statute. Title 5 U.S.C. 706(1) only applies, as in the case at bar, when "an agency has ignored a specific legislative command." *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). [See SAC ¶¶ 194-223]. In the case at bar, federal jurisdiction exists pursuant to 28 U.S.C. 1331; Mandamus jurisdiction exists pursuant to the 5 U.S.C. 706(1) and 28 U.S.C. 2201(which waive sovereign

immunity); and statutory jurisdiction exists pursuant to 25 U.S.C. 48. (48.5,7, 8, 9, 10, and 61.11).

Furthermore, under the APA agency actions must be completed "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 USC 555(b). Courts have jurisdiction under the APA to hear claims brought against an agency for unreasonable delay, and the APA provides that courts shall compel any action unreasonably delayed or unlawfully withheld. If a delay becomes egregious, courts will compel an agency to take prompt action. The Supreme Court has ruled that a court is permitted to compel an agency to take action, but cannot determine what conclusion the agency shall ultimately reach on the issue. The APA states that the courts shall "compel agency action unlawfully withheld or unreasonably delayed." *Id.* Plaintiffs have plead the facts that are the basis for this claim in SAC ¶¶ 194-223.[7] This Court has jurisdiction to compel agency action as requested by Plaintiffs in their tenth cause of action.

Title 28 U.S.C., 1361 confers on the district courts "jurisdiction of any action in the nature of mandamus to compel" a federal officer, employee, or agency "to perform a duty owed to the plaintiff." The mandamus jurisdiction conferred by this provision is available only if the plaintiff has a clear right to

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[7]Congress intended the courts to play a role in ensuring that agencies fulfill their obligation to act within a reasonable time. *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77-78 (D.C. Cir. 1984). Section 706(1) states that the court "shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 555(b), 706(1). A claim for unreasonable delay can only be brought against an agency for actions that the agency is legally obligated to take. Plaintiffs' claims have been pending since 2005 - 12 years to act is not a reasonable time under the facts and circumstances of this case.

relief, the duty breached is "a clear nondiscretionary duty," [*Pittston Coal Group v. Sebben*, 488 U.S. 105, 121 (1988) quoting *Heckler v. Ringer*, 466 U.S. 602, 616 (1984)]. Mandamus in the case at bar is appropriate because the claim is clear, the duty of the officer is ministerial, and plainly prescribed by statute as to be free from doubt. [If a federal official goes far beyond any rational exercise of discretion mandamus may lie even when the action is within the statutory authority granted. *Telecommunications Research & Action Center v. FCC,* 750 F.2d 70, 77-78 (D.C. Cir. 1984)] (the Court established guidelines to consider when determining whether an agency delay warrants mandamus).

Title 5 U.S.C. 703 has been amended to allow suit to be brought against the United States or any of its agencies or officers. Sovereign immunity defense has been withdrawn only with respect to actions seeking specific relief other than money damages, such as an injunction declaratory judgment, or a writ of mandamus. *Bowen v. Massachusetts*, 487 U.S. 879 (1988). See, *Medlmmune, Inc. v. Genetech, Inc.*, 549 U.S. 118 (2007) (guidelines for declaratory judgment jurisdiction).[8] The defendants are not protected by sovereign immunity.

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[8]Declaratory judgment Act 28 U.S.C. 2201 is not an independent source of federal jurisdiction. The purpose of that Act is merely to provide an additional remedy once jurisdiction is found to exist on another ground. *Bensen v State Bd. Of Parole and Probation*, 384 F.2d 238, 239 (9th Cir. 1967), *cert. denied*, 391 U.S. 954 (1968). *Schilling v. Roer*, 363 U.S. 666, 677 (1960). A Declaratory judgment is appropriate when it will terminate the controversy giving rise to the proceeding in as much as it often involves only an issue of law on undisputed or relatively undisputed facts. Frequently, a summary proceeding.

4. EIGHTH CAUSE OF ACTION: BREACH OF FIDUCIARY DUTY

Before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law. *City of Hope Nat. Med. Ctr. V. Genetech, Inc.*, 43 Cal.4th 375, 386 (2008). In the case at bar, the Defendants are charged by statute with a fiduciary duty pursuant to 25 U.S.C. 2; Secretary of Interior Order No. 3335 (8/20/14). ¶168 SAC.

In *Jachetta v. United States*, 265 F.3d 1017, 1024-25 (9th Cir. 2001) Plaintiff's Breach of Fiduciary Duty claim was discussed by the 9th Circuit which stated: "A cause of action for breach of a duty imposed by statute or case law, and not by contract, is a tort action **and the FTCA may waive sovereign immunity for this claim**. *Marlys Bear Med. v. United States ex rel. Sec'y of Dep't of Interior*, 241 F.3d 1208, 1218 (9th Cir. 2001) (permitting an FTCA action in which the plaintiff brought a breach of fiduciary duty claim where Montana law allowed tort claims for breach of fiduciary duty regardless of the source of that duty). Since the Defendants' fiduciary duty is imposed by federal statute 25 USC 2 and this Court has general jurisdiction to hear Plaintiffs' claims, pursuant to *Jachetta* the federal statute imposing the fiduciary duty waives the Defendants' sovereign immunity claim under the FTCA.

5. SECOND CAUSE OF ACTION: VIOLATION OF DUE PROCESS IN PROMULGATING 48.5(f).

As discussed under section B-2 supra, the APA grants jurisdiction for Plaintiffs' claims alleged in their SAC because the APA waives the Defendants' sovereign immunity. In the case at bar, Defendants ZINKE, BROWN, LOUDERMILK, (and/or their predecessors) failed to comport with the APA rule making requirements when 25 CFR 48 was adopted. As a result 48.5(f) is void which has resulted in an unconstitutional taking of Group B Plaintiffs' lands, title,

income, and heritage. The APA informal rulemaking is a three-step process governing the adoption of legislative rules. Legislative rules are as binding as statutes because they must be followed by the public and the agency issuing them.

Informal rulemaking begins with the publication of a notice of proposed rulemaking in the Federal Register. In the first step, the notice must describe the proposed rule or the subject and issues to be considered and must be sufficient to alert interested parties of the subject matter of the regulations and their probable impact. 5 U.S.C. 553(b). To assure public participation in the process, the notice of proposed rulemaking must solicit comments. In the second step, the agency receives and considers public comments. The process concludes with publication of final regulations and a basis and purpose statement reviewing the reasons for rulemaking, the agency's consideration of comments received, and the rational for the rule adopted. The result of informal rulemaking is a set of legislative rules having the force and effect of law.

Each stage of the rulemaking process is subject to potential legal challenge. The rulemaking notice must explain what the agency proposes to do and why. Title 5 U.S.C. 553(b) proposed rulemaking must be sufficiently detailed to offer the public a reasonable opportunity to comment. **"When the final rule is sufficiently divergent from the proposed rule, it may be challenged on the ground that the initial notice was inadequate to put the public on notice that the resulting rule was contemplated by the agency and thus one that could have been commented upon. In this regard the notice of proposed rulemaking may be found insufficient if the final regulations were not a 'logical out growth' or not 'sufficiently foreshadowed' in the notice of proposed rulemaking.** [Emphasis added]. *CSX Transportation v. Surface Transportation Board*, 584 F.3d 1076 (D.C. Cir. 2009). See, *American Radio Relay League v. Federal Communications Commission*, 524 F.3d 227, 236 (D.C.

Cir. 2008). If the agency issues a legislative rule without engaging in notice and comment rulemaking, the resulting rule is procedurally invalid. Pursuant to these cases, 48.5(f) is invalid.[9] The facts and evidence clearly show defendants did not follow 5 USC 553(b) and, instead, fraudulently inserted 48.5(f). The agency went so far as to tell each of the other employees not to show the change adding 48.5(f) to the San Pasqual Enrollment Committee - keeping in mind that the named defendants are responsible for the acts of their predecessors.

6. FOURTH CAUSE OF ACTION - DENIAL OF PROPERTY RIGHTS

Group A Plaintiffs bring their Fourth claim for denial of property rights against DUTSCHKE and MOORE and the BIA based on the agency's liability for the actions of its employees. They bring this claim under the APA which has been discussed at length above. Because of DUTSCHKE's actions that violated 25 USC 48 Plaintiffs have been denied their property rights. Sovereign immunity is waived as discussed above at II-B-1.

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[9]The Federal Register "is the official daily publication for rules, proposed rules, and notices of Federal agencies and organization, . . . " The notice must include the date the rule will come into effect, the legal authority the agency that had proposed the rule under, and the substance of the rule. After notice is given the agency is required to solicit and accept public comments on the rule. The Notice and comment requirements are set forth at 5 USC 553(b). The Courts have repeatedly warned that rules subject to the APA cannot be afforded the force and effect of law" unless they are promulgated pursuant to the "minimum essential rights and procedures set out in the APA".

7. FIFTH CAUSE OF ACTION DIMINUTION OF LAND RIGHTS

Group B Plaintiffs bring their Fifth claim for Violation of civil rights: unconstitutional diminution of land rights granted pursuant to 1910 patent signed by Taft against ZINKE BLACK, and LOUDERMILK in their official capacities. This claim is based on the void and unconstitutional section 48.5(f) that was enacted into law in violation of the requirements of the APA rulemaking prerequisites. The issue of sovereign immunity has been discussed supra at II-B-1.

8. SIXTH CAUSE OF ACTION-RE: DELEGATION OF DUTY

Group A Plaintiffs bring their Sixth claim for Violation of civil rights: unconstitutional delegation or no delegation of duty, authority, or power against ZINKE, BLACK, and LOUDERMILK in their official capacity. Title 25 USC 1a requires Defendants ZINKE, BLACK, and LOUDERMILK to properly delegate power to subordinate employees DUTSCHKE and MOORE and other unnamed employees. Without proper delegation of authority DUTSCHKE's and MOORE's acts, as well as all other employees who have not been properly delegated to act, are void and unconstitutional. This cause of action is brought under the APA which waives the government's immunity as discussed in sections II-B-1.

9. ELEVENTH CAUSE OF ACTION - CONSPIRACY TO VIOLATE CIVIL RIGHTS

The Court in *Morse v. N. Coast*, 118 F.3d 1338 (9th Cir. 1997) discussed 42 USC 1983 actions "under the color of state law." In *Morse* Defendants filed motion to dismiss under Fed R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Plaintiff alleged only federal action so the Court concluded that she intended the action to be brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) rather than under 42 USC 1983. [See, *Morse*, fn 4]. The Court in *FDIC v. Meyer,* 510 U.S. 471 (1944) addressed the *Bivens* Action and concluded that although *Bivens* did not extend to

Federal Agencies, federal employees as individuals were liable. This Court should consider Plaintiffs' Eleventh Cause of Action to be brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiffs listed "all defendants" but probably should have been more specific and stated "By all Plaintiffs against all defendants: ZINKE, BLACK, LOUDERMILK, DEUTSCHKE and MOORE as the defendants who are individually liable. Plaintiffs realize that the Government does not waive sovereign immunity under 42 USC 1981, 1985, 1986 unless there is a state statute that would hold the government actors and agencies liable as if they were acting as a private person. [See, *Davis v. DOJ*, 204 F.3d 723 (2000), *Delta Savings Bank vs USA*, 265 F.3d 1017 (2001)]. The Court in *Penalber-Fosa v. Fortno-Burset*, 631 F.3d 592 (2011) stated that the Ninth Circuit has not yet held that 1981 claims against federal employees are barred by sovereign immunity.

D. LEAVE TO AMEND

Pursuant to the cases cited above, Plaintiffs request this Court grant them leave to amend their SAC in lieu of dismissing their SAC. There is precedent for granting leave to amend. See, *Penalber-Fosa v. Fortno-Burset*, 631 F.3d 592 (2011). (The plaintiff's factual allegations are ordinarily assumed to be true in passing on the adequacy of the complaint, which need not plead evidence). See, e.g. *Sepulveda-Villarinni v. Dep't Educ*. 628 F.3d 25, 30 (1st Cir. 2010); *Sandler v. E. Airlines, Inc.*, 649 F.2d 19, 20 (1st Cir. 1981 (per curiam). The Court in *Penalber-Fosa* granted leave to amend even though the allegations had bald assertions, unsupportable conclusions, and speculation. The Court held that the interest of justice "warrants leave to amend complaint against "John Doe" Defendants. . ." See, *Rivera-Gomez v. De Castro,* 843 F.2d 631 (1st Cir. 1988). See also, *Ardalan v. McHugh,* 13-cv-01138-LHK N.D. CA 2013. (Leave to amend was granted).

III

CONCLUSION

This Court should deny Defendants' Motion to Dismiss or, in the alternative grant Plaintiffs leave to amend their SAC in lieu of dismissing their SAC. There is precedent for granting leave to amend. See, *Penalber-Fosa v. Fortno-Burset*, 631 Ff.3d 592 (2011); e.g. *Sepulveda-Villarinni v. Dep't Educ*. 628 F.3d 25, 30 (1st Cir. 2010); *Sandler v. E. Airlines, Inc.*, 649 F.2d 19, 20 (1st Cir. 1981 (per curiam).

DATED: October 19, 2017

Respectfully submitted,

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Alexandra McIntosh

/s/ Carolyn Chapman
Carolyn Chapman