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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CINDY ALEGRE, an individual, et al.,

Plaintiffs,

v.

UNITED STATES, et al.,

Defendants.

Case No.: 16-cv-2442-AJB-KSC

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

DATE: July 19, 2018
TIME: 2:00 p.m.
CTRM: 4A
JUDGE: Hon. Anthony J. Battaglia

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I. Introduction

On February 26, 2018, Plaintiffs filed a Third Amended Complaint ("TAC") asserting the First through Tenth Causes of Action against the United States, the Department of Interior, and several employees acting their official capacity (hereinafter "Defendants"). Defendants bring this motion to dismiss on the grounds that (1) the Court lacks subject matter jurisdiction over the First and Third Causes of Action because there has been no final agency action; (2) the Second Cause of Action is moot and time-barred; (3) the Court lacks subject matter jurisdiction over the Fourth through Tenth Causes of Action, because the United States has not waived sovereign immunity; (4) the Fourth and Sixth through Tenth Causes of Action raise time-barred claims; and (5) the Fourth, Fifth, Seventh and Ninth Causes of Action fail to state a claim.

II. The Court Should Dismiss Plaintiffs' First Three Causes of Action

A. Plaintiffs' Allegations Related To Plaintiffs' Enrollment Applications

In 2005, the 129 'Group A Plaintiffs' submitted applications for enrollment in the Band. (TAC ¶¶ 28-29) The Band's Enrollment Committee approved the applications based on its conclusion that the common ancestor of all of the Group A Plaintiffs, Modesta Contreras, should have her blood degree increased from 3/4 to 4/4. (TAC ¶¶ 29-30) On April 10, 2005, the Band's General Council also approved the Group A Plaintiffs' applications for Band membership. (TAC ¶ 30) On September 12, 2005, the Band wrote to the Superintendent of the Southern California Agency of the Bureau of Indian Affairs (the "Superintendent") indicating its belief that pursuant to (former) 25 C.F.R. Part 48, the Group A Plaintiffs should be enrolled. (TAC ¶ 31) On September 22, 2005, the Band's Enrollment Committee sent a letter to the Superintendent requesting the Bureau of Indian Affairs ("BIA") increase Modesta Contreras' blood degree from 3/4 to 4/4. (TAC ¶ 32)

On December 8, 2005, the Superintendent wrote a letter indicating "the preponderance of the evidence does not sufficiently demonstrate that Modesta [Contreras] is full blood." (TAC ¶ 33) On January 31, 2006, the Pacific Regional Director of BIA ("Regional Director") concurred with the Superintendent's analysis. (TAC ¶ 34) On April

7, 2006, the BIA made a final decision to deny the Band's Enrollment Committee's request to increase Modesta Contreras' blood degree. (TAC ¶¶ 36-37.)

On or about May 6, 2016, Plaintiffs met with BIA officials, including the Superintendent. (TAC ¶ 46) On May 23, 2016, Plaintiffs provided enrollment documents to the BIA. (TAC ¶ 47)

B. Facts From Dutschke Declarations

On April 10, 2005, the Band's General Council purported to approve Resolution # SP041005-01, seeking to enroll 211 individuals into the Band. (Ex. 1, Dutschke Decl., ¶ 3) Rudolph Contreras, Vice-Chairman of the Tribe's Business Committee, presided over the meeting. (Id.) The Band's General Council provided those individuals Roll numbers 430 through 641, except no one received Roll number 607. (Id.)

On or about April 18, 2005, Mr. Contreras hand carried Resolution # SP041005-01 to the Superintendent, requesting approval of the Resolution. (Id. ¶ 4) By letter dated May 6, 2005, the Superintendent informed Mr. Contreras that he was unable to reach the question of whether to approve the enrollment actions addressed by Resolution # SP041005-01 because the meeting at which the resolution was passed was not valid pursuant to the Band's Constitution. (Id. ¶ 5) The letter stated that the Superintendent's decision could be appealed to the BIA Regional Director within 30 days of receipt of the decision, and that if no appeal was filed, the decision would become final for the Department of the Interior. (Id. ¶ 5) A copy of the letter was also sent to the Tribe's Chairman, Allen E. Lawson, the Tribe's Secretary/Treasurer, Angela Martinez McNeal, and another member of the Tribe's Business Committee. (Id. ¶ 5)

On or about May 11, 2005, Mr. Contreras filed a Notice of Appeal with the BIA Regional Director appealing the Superintendent's decision declining to validate Resolution # SP041005-01. (Id. ¶ 6) By letter dated September 1, 2005, the BIA Regional Director informed Mr. Contreras that he affirmed the Superintendent's decision declining to validate Resolution # SP041005-01 because of the invalidity of the meetings during which the resolution was passed, and because the Band failed to submit to the BIA the applications

and supporting documents for which approval was sought. (Id. ¶ 7) The letter stated that the BIA Regional Director's decision affirming the Superintendent's decision could be appealed to the Interior Board of Indian Appeal ("IBIA") within 30 days of receipt of the decision, and that if no appeal was filed, the decision would become final for the Department of the Interior. (Id. ¶ 7) A copy of the letter was also sent to the Tribe's Chairman, Mr. Lawson. (Id. ¶ 7) No appeal of the Regional Director's decision was received by the IBIA. (Id. ¶ 8) Therefore, the BIA Regional Director's decision affirming the Superintendent's decision declining to validate Resolution # SP041005-01 is final for the Department of the Interior in accordance with 25 CFR Part 2. (Id. ¶ 8)

By letter to the Superintendent, dated September 12, 2005, and signed by the Band's Chairman, Mr. Lawson, and two other members of the Band's Tribal Council, the Council stated that the Band's Constitution delegated enrollment decisions to the BIA, and that the Council supported approval of the applications for enrollment attached to the letter. (Id. ¶ 9) By letter dated September 22, 2005, the Band's Enrollment Committee requested the Superintendent increase the blood degree for Modesta (Martinez) Contreras ("Modesta Contreras") from 3/4 to 4/4 degree blood of the Band. (Id. ¶ 10) By letter dated September 27, 2005, the Superintendent acknowledged that on September 23, 2005, 179 enrollment applications were hand-carried to his office. (Id. ¶ 11) In the same letter, the Superintendent acknowledged receipt of a blood degree change request letter dated September 22, 2005, from the Band's Enrollment Committee for Modesta Contreras. (Id. ¶ 11)

By letter dated December 8, 2005, the Superintendent forwarded the blood degree change request for Modesta Contreras to the Regional Director, and stated that the Superintendent's Office determined that the preponderance of the evidence did not demonstrate that Modesta Contreras' blood degree should be increased. (Id. ¶ 12) By letter dated February 3, 2006, the Regional Director forwarded the blood degree change request to the BIA's Chief of the Division of Tribal Government Services, and stated that the Regional Director's Office agreed with the Superintendent that the evidence did not substantiate changing Modesta Contreras' blood degree. (Id. ¶ 13) By letter dated April 7,

2006, addressed to the Band's Chairman, Allen Lawson, the BIA's Acting Principal Deputy Assistant Secretary – Indian Affairs issued a final decision for the Department of the Interior that insufficient evidence existed to warrant increasing Modesta Contreras' blood degree from 3/4 to 4/4. (Id. ¶ 14)

By letter dated April 14, 2006, the Band's Enrollment Committee told the Band's members that of the 179 enrollment applications provided to the Superintendent in September 2005, 150 required an increase in the blood degree of a single ancestor, 22 met the requirements of the Band, and 7 did not. (Id. ¶ 17)

By letter dated April 21, 2006, the Superintendent provided the Band's Enrollment Committee with the Department of the Interior's April 7, 2006, blood degree decision for Modesta Contreras. (Id. ¶ 18) In the same letter, the Superintendent explained he was returning the original enrollment applications of Modesta Contreras' descendants for the Band's review, since the determination not to increase Modesta Contreras' blood degree would affect the Band's analysis of the applications. (Id. ¶ 18) Since that time, no BIA official made any decision regarding the enrollment applications. (Id. ¶ 19) Since their return, the Band has not returned the applications, or sent the BIA any further requests to approve or disapprove enrollment applications for the Plaintiffs in this suit. (Id. ¶ 19)

By letter dated May 3, 2006, the Band's Enrollment Committee told the Superintendent it received the April 7, 2006, decision denying the request to increase the blood degree for Modesta Contreras. (Id. ¶ 20) The letter also stated that after conducting its own independent review of the issue, the Band's Enrollment Committee agreed with the decision not to increase Modesta Contreras' blood degree. (Id. ¶ 20) Furthermore, the Enrollment Committee stated that once it had completed its review of the enrollment applications affected by the BIA's denial of a blood degree increase for Modesta Contreras, it would prepare and mail to each applicant a letter informing each applicant of the BIA's decision and the agreement of the Enrollment Committee. (Id. ¶ 20)

By letter dated July 28, 2006, the Band's Enrollment Committee told the Superintendent that it had determined that 139 listed individuals whose applications had

been reviewed by the Enrollment Committee were determined ineligible for enrollment because they did not possess sufficient blood degree. (Id. ¶ 21) The Band advised that all notices were sent via certified mail with copies of 25 C.F.R. Part 62 concerning enrollment appeals. (Id. ¶ 21) The Band has never provided the actual enrollment applications of the individuals listed in its attachment to the July 28, 2006, letter to the BIA. (Id. ¶ 21)

By letter dated May 23, 2016, Plaintiffs' attorney provided the Superintendent certain enrollment applications. (Id. ¶ 22) By letter dated March 7, 2017, the Superintendent forwarded the 87 enrollment applications submitted by Plaintiffs' attorney to the Band's Enrollment Committee for enrollment determinations by the Committee consistent with 25 CFR Part 48 and the Band's Constitution. (Id. ¶ 22) Since the BIA sent the applications to the Band, the Band has not returned the applications or sent the BIA any further requests to approve or disapprove enrollment applications for the Plaintiffs in this suit. (Id. ¶ 22)

C. Relevant Legal Standards

1. Motion to Dismiss for Lack of Subject Matter Jurisdiction

"A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a factual attack, the challenger may rely on evidence extrinsic to the complaint. See Safe Air for Everyone, 373 F.3d at 1039; see also Tritz v. U.S. Postal Service, 721 F.3d 1133, 1141 n.6 (9th Cir. 2013) (court may properly consider declaration submitted with motion to dismiss for lack of subject matter jurisdiction in factual attack). The Ninth Circuit has explained:

> In resolving a factual attack on jurisdiction, the district court may review: evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. The court need not presume the truthfulness of the plaintiff's allegations. "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction."

Safe Air for Everyone, 373 F.3d at 1039 (internal citations omitted and emphasis added).

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The United States may bring a motion to dismiss for lack of subject matter jurisdiction on the ground that sovereign immunity has not been waived. See Harger v.

Dep't of Labor, 569 F.3d 898, 903 (9th Cir. 2009).

2. Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted

"Dismissal is proper when the complaint does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory." Chubb Custom Ins. Co. v. Space Systems/Loral, Inc., 710 F.3d 946, 956 (9th Cir. 2013). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. The plausibility standard requires more than the sheer possibility or conceivability that a defendant has acted unlawfully, rather, factual allegations must be enough to raise a right to relief above the speculative level. See id. at 678–79, "Where 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." Id. at 678.

Although allegations of fact are normally taken as true and construed in the light most favorable to the nonmoving party, the Court need not accept as true allegations that are merely conclusory, unwarranted deductions of fact, unreasonable inferences that are contradicted by matters properly subject to judicial notice or by exhibit referred to or incorporated by reference into the complaint, or that are legal conclusions that cannot reasonably be drawn from the facts alleged. See Iqbal, 556 U.S. at 678-79; Gonzalez v. Planned Parenthood of Los Angeles, 759 F.3d 1112, 1115 (9th Cir. 2014); Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1145 n.4 (9th Cir. 2012); Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004). Furthermore, although leave to amend should be given freely, Doe v. United States, 58 F.3d 494, 497 (9th Cir.1995), a district court may dismiss without leave where a plaintiff's proposed amendments would fail to cure the pleading deficiencies and amendment would be futile. See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990) (per curiam).

3. A District Court Lacks Subject Matter Jurisdiction Over Federal Defendants Unless Sovereign Immunity Has Been Waived

To confer subject matter jurisdiction in an action against the United States, its agencies, or its employees acting in their official capacity, there must be both a waiver of sovereign immunity, and a statutory authority vesting a district court with subject matter jurisdiction. See Alvarado v. Table Mountain Rancheria, 509 F.3d 1008, 1016 (9th Cir. 2007). The United States is immune from suit unless it consents to waive its sovereign immunity. See Lehman v. Nakshian, 453 U.S. 156, 160 (1981). "The doctrine of sovereign immunity applies to federal agencies and to federal employees acting within their official capacities." Hodge v. Dalton, 107 F.3d 705, 707 (9th Cir. 1997). The consent of the United States to be sued through a waiver of sovereign immunity is a prerequisite for jurisdiction over any such defendants. See United States v. Mitchell, 463 U.S. 206, 212 (1983). "A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. Mitchell, 445 U.S. 535, 538 (1980). The plaintiff bears the burden of demonstrating an unequivocal waiver of sovereign immunity. See Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir. 1983). Unless a plaintiff can point to such a waiver, the court lacks jurisdiction to hear the action and the claim must be dismissed for lack of subject matter jurisdiction. See Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982).

D. The Court Lacks Subject Matter Jurisdiction Over Plaintiffs' First and Third Cause of Action Because There Has Been No Final Agency Action

1. Federal Courts Only Have Subject Matter Jurisdiction Over Tribal Enrollment Disputes When They May Appropriately Review the BIA's Actions Pursuant to the Administrative Procedure Act

Federal courts normally lack jurisdiction regarding the adjudication of tribal disputes, especially controversies pertaining to tribal membership, because Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government, including matters of membership, and are unconstrained by constitutional provisions limiting federal or state authority, including the Fifth

Amendment); Alto v. Black, 738 F.3d 1111, 1115 (9th Cir. 2013) ("In view of the importance of tribal membership decisions and as part of the federal policy favoring tribal self-government, matters of tribal enrollment are generally beyond federal judicial scrutiny."); Martinez v. S. Ute Tribe, 249 F.2d 915, 920 (10th Cir.1957) ("[C]ourts have consistently recognized that in absence of express legislation by Congress to the contrary, a tribe has the complete authority to determine all questions of its own membership, as a political entity."); see also Fondahn v. Native Village of Tyonek, 450 F.2d 520, 522 (9th Cir.1971) (agreeing with Tenth Circuit's conclusion in Martinez "that a dispute involving membership in a tribe does not present a federal question").

A federal court may sometimes indirectly review a tribal enrollment decision under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., if the BIA takes a final agency action in reviewing a tribe's membership determination, when tribal law explicitly permits such review by the BIA. See Alto, 738 F.3d at 1123; see also Miranda v. Jewell, No. EDCV 14-00312-VAP (DTBx), 2015WL 226024, at *6-*7 (C.D. Cal. Jan. 15, 2015). "The APA's waiver of sovereign immunity contains several limitations," including "§ 704, which provides that only '[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review.'" Gallo Cattle Co. v. U.S. Dep't of Agric., 159 F.3d 1194, 1198 (9th Cir. 1998) (emphasis added); see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990) ("When . . . review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'"); Alto, 738 F3d at 1124 (only reviewing the BIA's disenrollment order because that was final agency action).

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2. The Court Lacks Subject Matter Jurisdiction Over The First and Third Causes of Action Because the APA Does Not Waive Sovereign Immunity Since There Has Been No Final Agency Action

Plaintiffs' first cause of action seeks this Court to order Defendants to adjudicate the Group A Plaintiffs' applications pursuant to the (former) 25 C.F.R., Part 48 regulations, to become members of the Band, and to do so pursuant to 25 C.F.R. § 61.11(b), based on Defendants' alleged violation of the Administrative Procedures Act ("APA"). (TAC page 46) Plaintiffs' third cause of action seeks similar relief, and for the Court to order that Plaintiffs' ancestor Modesta (Martinez) Contreras ("Modesta Contreras") is a full blooded member of the Band, as a declaratory judgment or pursuant to a writ of mandamus. (TAC page 46) Plaintiffs allege that they have been waiting for over 12 years (since September 12, 2005, when applications were sent to the Superintendent) for their applications to be adjudicated by the BIA.[1] (TAC ¶¶ 31, 64)

Plaintiffs' first and third causes of action both seek review of the BIA's handling of the Group A Plaintiffs' applications to become members of the Band. Therefore, both claims must rely on the APA as a potential waiver of sovereign immunity, and need to be analyzed as APA claims. See Alto v. Black, 738 F.3d 1111, 1117 (9th Cir. 2013) (concluding plaintiffs' claims for declaratory and injunctive relief "may therefore be fairly characterized as claims for judicial review of agency action under the APA," even though "only [one] claim is explicitly denominated as an APA claim" since the claims "all involve challenges to the propriety of the BIA's decision").

There has been no waiver of sovereign immunity for such claims because the BIA never took a final agency action regarding the Group A Plaintiffs' applications. Rather, after the Band's General Council purported to approve Resolution # SP041005-01, seeking to enroll approximately 211 individuals into the Band, the Superintendent, and later the

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[1] Plaintiffs' first and third causes of action uses a 'Gish Gallop' technique, including multiple constitutional allegations into each claim that are repeated in other causes of action, and citing statutes and regulations that have no relevance to the claims (i.e., 25 U.S.C. § 48 allows tribes to direct employment of blacksmiths, mechanics, teachers, and farmers; 25 C.F.R. part 61 is only relevant when the Secretary of Interior compiles rolls of Indians pursuant to statutory authority, whereas here the BIA is acting pursuant to tribal law). In this motion, Defendants first demonstrate the invalidity of Plaintiff's APA and similar claims, and later demonstrate the invalidity of Plaintiffs' constitutional claims.

Regional Director, informed the Band that they were unable to reach the question of whether to approve the enrollment actions because the meeting at which the resolution was passed was not valid pursuant to the Band's Constitution.[2] (Dutschke Decl. ¶¶ 5, 7) Although both Rudolph Contreras, who hand-carried the Resolution to the Superintendent, and the Band's Chairman were informed that the Band must appeal that decision to the IBIA (pursuant to 43 C.F.R. § 4.310 – 4.340), or else the decision would be final for the Department of the Interior, no appeal was taken. (Dutschke Decl. ¶¶ 7-8)

Under section 10(c) of the APA, 5 U.S.C. § 704, a party may not judicially challenge an agency action regarding which the party did not exhaust the available process of administrative relief if the agency has promulgated a regulation requiring that an administrative appeal be taken before judicial review of the agency action can be obtained. See Stock W. Corp. v. Lujan, 982 F.2d 1389, 1393 (9th Cir. 1993). The BIA has promulgated such a regulation, 25 C.F.R. § 2.6(a), which requires a party to exhaust administrative appeals, including appealing an Area Director's decision to the IBIA, before the party can seek judicial review of an adverse decision. See id. at 1393-94. The BIA similarly requires parties to file an appeal based on alleged inaction of a BIA official pursuant to 25 C.F.R. § 2.8. See Aguayo v. Salazar, No. 12CV00551-WQH-KSC, 2012 WL 1069018, at *5 (S.D. Cal. Mar. 29, 2012). These requirements allow the BIA "to develop a complete factual record and to apply their expertise and discretion" and to insure that a district court "will have before it a factual record to review, not merely an administrative decision to contradict." White Mountain Apache Tribe v. Hodel, 840 F.2d 675, 677 (9th Cir. 1988). If a party fails to follow an agency's requirement to exhaust an administrative appeals process, a federal court may not assert jurisdiction to review the agency action not so exhausted. See id.; see also McKart v. United States, 395 U.S. 185, 193 (1969) ("[N]o

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[2] The Regional Director also indicated that he could not reach the question of whether to approve the applications since the applications were not provided to him (Dutschke Decl. ¶ 7) in violation of former 25 C.F.R. § 48.7.

one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.").

Since the BIA's determination that the meeting at which Resolution # SP041005-01 was passed was not valid pursuant to the Band's Constitution was not appealed to the IBIA, that decision may not be challenged at this time. Furthermore, since the BIA determined Resolution # SP041005-01 was not validly passed, they were unable to reach the question of whether to approve the enrollment applications addressed by the resolution. (Dutschke Decl. ¶¶ 5, 7) Therefore, there was no final agency action regarding whether to approve those applications pursuant to the regulations formerly found at 25 C.F.R., Part 48. Accordingly, this Court lacks jurisdiction to review the BIA's actions related to those applications under the APA, and must dismiss Plaintiffs' first cause of action. Cf. Rattlesnake Coal. v. U.S. E.P.A., 509 F.3d 1095, 1104–05 (9th Cir. 2007) ("The APA applies to waive sovereign immunity only after final agency action."); Alegre v. Jewell, No. 16-CV-2442-AJB-KSC, 2017 WL 3525278, at *10 (S.D. Cal. Aug. 15, 2017) ("[T] he Court finds there is no final agency action . . . [a]ccordingly, the Court lacks subject matter jurisdiction over this particular claim.").

During the period the Band could have appealed the BIA's decision that the meeting at which Resolution # SP041005-01 was purportedly approved was invalid, the Band instead tried a different tactic. The General Council sent 179 applications to the Superintendent asking him to forward them to the Regional Director for approval pursuant to the (former) Part 48 regulations. (Dutschke Decl. ¶¶ 9, 11) Soon thereafter, the Band's Enrollment Committee petitioned the Regional Director (through the Superintendent) to increase the blood degree for Modesta Contreras from 3/4 to 4/4 degree blood of the Band. (Dutschke Decl. ¶ 10)

In one sense, these two requests are connected: the 179 applicants were descendants of Modesta Contreras, and therefore whether they could meet the minimum 1/8 blood of

the Band requirement[3] depended, at least in part, on how much blood of the Band Modesta Contreras had. (TAC ¶ 15, 16, 28, 46, 110, 129, 131) But importantly, the request to increase Modesta Contreras' blood degree and the request to approve the various applications are two different processes, controlled by different subsections of the former Part 48 regulations incorporated into the Band's Constitution. The process to apply to join the Band begins with the steps outlined by 25 CFR §§ 48.4 and 48.7: applications are filed with the Superintendent, who determines if they are "duly filed," and then refers the applications to the Band's Enrollment Committee, which reviews the applications and subsequently files with the Regional Director, through the Superintendent, those applications which it approves, and those applications not approved with a statement of the reasons for the disapproval. (Dutschke Decl. ¶ 11) If those initial processes are completed, then the Regional Director, pursuant to 25 CFR § 48.8, determines the applicants who are eligible for enrollment in accordance with the provisions of 25 CFR §48.5. (TAC ¶ 39) If the Regional Director disagrees with the Enrollment Committee's determination, the Regional Director notifies the applicant of such pursuant to § 48.9 (TAC ¶ 39), and the applicant can appeal the decision to higher officials within the BIA/Department of Interior pursuant to 25 C.F.R §§ 48.9 - .11. 25 C.F.R., Part 61, which concerns the compilation of rolls of Indians by the Secretary of the Interior pursuant to statutory authority, and which is not relevant to this process, since former Part 48 Regulations are tribal law, not a federal statute, and therefore do not apply pursuant to 25 C.F.R. § 61.2, and because the Part 48 Regulations would supersede any contradictory procedures outlined by Part 61, even if they did apply. (Dutschke Decl. ¶ 1)

The request to increase Modesta Contreras' blood degree from 3/4 to 4/4, however, did not involve former 48 CFR § 48.4 - .11. Rather, the request to increase her blood degree invoked former 48 CFR § 48.14(c), which requires requests to correct degree of blood of

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[3] Former 25 C.F.R. § 48.5 requires a minimum of 1/8 degree of blood of the Band for enrollment. (TAC ¶ 16)

the Band to be made by the Regional Director "if such corrections are supported by evidence satisfactory to him." (Dutschke Decl. ¶ 12)

Therefore, the BIA appropriately responded to the request to increase Modesta Contreras' blood degree: 1) the Superintendent forwarded the request to the Regional Director with a recommendation that the request be denied; 2) the Regional Director agreed with the Superintendent's analysis that the evidence did not substantiate the requested change in blood degree and forwarded his decision to the BIA's Chief of the Division of Tribal Government Services pursuant to the BIA's July 26, 1965, policy for Determining Degree of Indian Blood for purposes of making a final blood degree determination; and 3) the BIA's Acting Principal Deputy Assistant Secretary – Indian Affairs issued a final decision for the Department of the Interior that insufficient evidence existed to warrant increasing Modesta Contreras' blood degree from 3/4 to 4/4, which was sent to the Band's Chairman, and to the Enrollment Committee.[4] (Dutschke Decl. ¶¶ 12-14, 18)

Accordingly, Plaintiffs' complaint that the BIA violated former 25 CFR § 48.9 by failing to provide them notice of their decision denying the request to increase Modesta Contreras' blood degree (TAC ¶¶ 34-39) is without merit. Simply stated, the request to increase Modesta Contreras' blood degree did not come from Plaintiffs, it came from the Band's Enrollment Committee. Therefore it was appropriate for the decision denying the request to be sent back to the Enrollment Committee (as well as to the Band's Chairman), and not to Plaintiffs. (Dutschke Decl. ¶¶ 10, 14, 18)

The correctness of the BIA's actions is also evident by a straightforward reading of former § 48.9, which states, "If the director determines an applicant is not eligible for enrollment in accordance with the provisions of §48.5, he shall notify the applicant in writing of his determination and the reasons therefor." (TAC ¶ 39) Modesta Contreras was

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[4] Since more than six years passed since that final decision was made, the statute of limitations has run on the Band or Plaintiffs challenging that decision. See Aguayo v. Jewell, 827 F.3d 1213, 1226 (9th Cir. 2016) (28 U.S.C. § 2401's six-year statute of limitations applied to actions under the APA).

not an "applicant" for enrollment into the Band since she was not applying to become a member of the Band. Cf. (former) § 48.4(a) (requiring an applicant to list his or her name and address on their application to become a member of the Band). Rather, Modesta Contreras was a historical member of the Band. (TAC ¶ 110) Therefore, those subsections of former Part 48 outlining the process of applying to the Band, 48.4 – 48.11, including § 48.9's notice requirement, were not applicable to the request to increase Modesta Contreras' blood degree.

Regardless, the Court lacks subject matter jurisdiction to hear Plaintiffs' claim that the BIA did not appropriately handle their applications to join the Band pursuant to the APA because the BIA did not take a final agency action with regard to those applications. Rather, at the same time the BIA provided the Band's Enrollment Committee its decision denying the request to increase Modesta Contreras' blood degree, it returned the original enrollment applications of Modesta Contreras' descendants for the Band to review. Such action was appropriate for numerous reasons:

- Pursuant to the Band's Constitution, which incorporates former 25 CFR Part 48, specifically §§ 48.1, 48.4 and 48.7, applications filed with the Superintendent are examined to determine if they are "duly filed," and if so are sent back to the Band's Enrollment Committee for its review. (Dutschke Decl. ¶ 2) Therefore, it was appropriate for the BIA to send the applications to the Band's Enrollment Committee for its review.
- Furthermore, as discussed above, the BIA determined the meeting at which Resolution # SP041005-01 was passed was invalid pursuant to the Band's Constitution. That decision was not appealed to the IBIA, and therefore the Regional Director's decision was final for the Department of the Interior. Therefore, it was appropriate to send the applications associated with that resolution to the Enrollment Committee so that it could restart the process of reviewing the applications and sending them to the BIA for approval if appropriate.

- Moreover, the BIA's decision not to increase Modesta Contreras' blood degree materially affected whether her descendants contained sufficient blood degree to join the Band. Therefore, it was appropriate for the BIA to send Plaintiffs' applications to the Band's Enrollment Committee so that the Enrollment Committee could determine in the first instance whether the Band thought it was appropriate to support Modesta Contreras' descendants applications based on the changed factual circumstances from the Band's original decision, that is that Modesta Contreras' blood degree was 3/4, rather than the 4/4. In other words, the Band's initial support of Plaintiffs' applications was based on its presumption that Modesta Contreras' blood degree would be increased. Since that presumption turned out to be incorrect, the Band's Enrollment Committee needed to consider whether they would support the applications given that Modesta Contreras' blood degree was 3/4.[5]

For all of these reasons, it was appropriate for the BIA to return Plaintiffs' applications to the Band without taking any final action regarding whether or not Plaintiffs had at least 1/8 blood of the Band or whether they should be members of the Band. This action did not constitute "final agency action" because it did not: (1) "mark the 'consummation' of the agency's decisionmaking process," or (2) "determine the applicants' rights or obligations or constitute a decision from which legal consequences flowed." Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (stating two requirements for agency action to be considered final). For one, the return of the applications to the Band is not necessarily

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[5] Plaintiffs are great-grandchildren of Modesta Contreras. Therefore, if Modesta Contreras was 4/4 blood degree, her great-grandchildren would have at least 1/8 blood of the Band, which is the minimum required for membership. Since Modesta Contreras was found to only have 3/4 blood degree, however, her great-grandchildren with no other relatives in another line with blood of the Band, only have 3/32 blood of the Band, which is less than 1/8. The Band's Enrollment Committee was in the superior position to determine, in the first instance, if any of Plaintiffs had any other lines of relative with blood of the Band to allow them to potentially exceed the 1/8 threshold, or if their only source of Blood is Modesta Contreras, leaving them short of the minimum required for Band membership.

the BIA's last word on the matter. Instead, if the applications are returned to the BIA pursuant to 25 C.F.R. §§ 48.7 and 48.8, the BIA would speak again on the matter. See Or. Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 984 (9th Cir.2006) (first prong of the test is not satisfied unless the agency "has rendered its last word on the matter"). Second, the actions the BIA did take in sending the applications to the Band were interlocutory in nature; the BIA will continue processing Plaintiffs' applications if and when they are returned by the Band. See Bennett, 520 U.S. at 178 (first prong is not satisfied if the agency's action is "merely tentative or interlocutory in nature").

Third, none of the BIA's decisions thus far directly changes Plaintiffs' rights and obligations. Rather the BIA's actions have left Plaintiffs' statuses unchanged, as non-members of the Band who may apply to enroll in the Band. See Fairbanks N. Star Borough v. U.S. Army Corps of Engineers, 543 F.3d 586, 593–97 (9th Cir. 2008) (second prong requires that the agency's decision directly change the plaintiff's rights and obligations, rather than leaving the plaintiff's status unchanged until a later action is taken, because agency action that does not immediately impose an obligation, deny a right, or fix some legal relationship is not judicially reviewable).[6] Fourth, since none of the BIA's actions thus far have immediately imposed an obligation, denied a right, or fixed some legal relationship of or to Plaintiffs, their claims are not judicially reviewable due to lack of finality. See Franklin v. Massachusetts, 505 U.S. 788, 797 (1992) ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.").[7] For any or all of these reasons, the Court lacks

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[6] Therefore, "[n]ot every agency 'decision . . . [that] has immediate financial impact,' or even 'profound [economic] consequences' in the real world, is final agency action. Fairbanks N. Star Borough, 543 F.3d at 596.

[7] The fact that the BIA has not taken a final agency action is further demonstrated by its and Plaintiffs' recent actions regarding Plaintiffs' applications. In May 2016, The BIA requested that Plaintiffs resubmit their enrollment applications. (TAC ¶ 46) Plaintiffs' attorney then provided the Superintendent 87 enrollment applications, which the Superintendent forwarded to the Band's Enrollment Committee on March 7, 2017 (as is required by § 48.7 after determining the applications are duly filed). (TAC ¶ 47; Dutschke Decl. ¶ 22) The Band has not returned the applications to the BIA. (Dutschke Decl. ¶ 22) If the Band were to do so, The BIA would apply the procedures outlined in Part 48 and reach

subject matter jurisdiction over Plaintiffs' first and third causes of action because they are not challenging any final agency action by the BIA. Accordingly, those claims should be dismissed with prejudice.

E. The Court Should Dismiss Plaintiffs' Second Cause of Action Because of Mootness and the Running of the Statute Of Limitations

Plaintiffs' second cause of action seeks an order pursuant to the APA directing Defendants to republish 25 C.F.R. § 48.5 without subsection (f). (TAC ¶¶ 80-97 & page 46) The regulations at Title 25, Part 48 no longer exist in the Code of Federal Regulations. (Dutschke Decl. ¶ 1) Rather, after being adopted in 1960, and redesignated to Part 76 in 1987, the regulations were removed in 1996. See Alto v. Black, 738 F.3d 1111, 1116 & n.1 (9th Cir 2013). Therefore, the Court lacks subject matter jurisdiction over Plaintiffs' moot second cause of action. See Hall v. Beals, 396 U.S. 45, 48 (1969) (a claim is moot when it has "lost its character as a present, live controversy of the kind that must exist if [a court is] to avoid advisory opinions on abstract propositions of law."); Foster v. Carson, 347 F.3d 742, 745 (9th Cir. 2003) (when a claim is moot, it must be dismissed for lack of subject matter jurisdiction). Any contradictory result would call for the Court to order the reinstatement of a regulation that has not existed for over 20 years, which is beyond this Court's power.

Furthermore, regardless of the truth of Plaintiffs' allegations regarding the passing of the Part 48 regulations prior to 1960, those facts are irrelevant, and any decision regarding Plaintiffs' second cause of action would be meaningless, because in 1971, the Band chose

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a final agency action on the applications. As it is, however, even if this Court were to conclude that Plaintiffs should be members of the Band, in order for Plaintiffs to actually become members of the Band, Defendants would need the Band to submit to the BIA the applications that were forwarded by the BIA to the Band, with a request to the BIA for approval of Band enrollment determinations in order for the BIA to make a final decision concerning the applications consistent with 25 CFR §§ 48.7 and 48.8 and Article III of the Band's Constitution, or the BIA would need to receive new applications and Band enrollment determinations for review and processing consistent with the procedures set forth at 25 CFR Part 48 and Article III of the Band's Constitution. Otherwise, Defendants have no authority to make Plaintiffs members of the Band. (Dutschke Decl. ¶ 23)

to adopt the Part 48 regulations as they were written at that time – including subsection (f) – into their Constitution. See Alto, 738 F.3d at 1116, Dutschke Decl. ¶ 1. This Court is powerless to order Defendants to do anything with regard to the former Part 48 regulations that would change the Band's Constitution. Therefore, again, the Court lacks subject matter jurisdiction over Plaintiffs' moot second cause of action.

Moreover, the general statute of limitations applicable to civil actions against the United States provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action accrues." 28 U.S.C. § 2401(a); see also Hells Canyon Pres. Council v. U.S. Forest Serv., 593 F.3d 923, 930 (9th Cir. 2010) ("APA claims are subject to a six-year statute of limitations"). A suit "against a federal official based on that person's official actions" is a suit "against the United States" for purposes of the six-year limitations period. Mason v. Judges of U.S. Court of Appeals for District of Columbia, 952 F.2d 423, 425 (D.C. Cir. 1991).

Plaintiffs' second cause of action necessarily accrued more than six years before Plaintiffs filed this suit. The regulations that form the basis of Plaintiffs' second cause of action were publicly published since 1960. Therefore, the claim accrued in the mid-sixties, more than 50 years ago. Therefore, Plaintiffs' second cause of action is time barred by 28 U.S.C. § 2401(a), and should be dismissed with prejudice.

III. The Court Should Dismiss the Fourth through Tenth Causes of Action

A. Summary of Fourth through Tenth Causes of Action

Plaintiffs' Fourth through Tenth Causes of Action all seek money damages against Defendants. (TAC 47:20-49:18) Specifically, in their Fourth Cause of Action, Plaintiffs assert that Defendants made "rules, regulations, [and] decisions that affect Plaintiffs" without "the correct delegation of power authority as required by Title 25, U.S.C. § 1a." (Id. ¶¶ 119-25) They specifically challenge two agency actions: (1) the preparation of a membership roll by BIA employee Francis Muncy in 1994; and (2) the return of Plaintiffs' enrollment applications by BIA employee Amy Dutschke to the Band's Enrollment Committee in 2006. (Id. ¶¶ 35-41, 124-25)

Plaintiffs' Fifth Cause of Action seeks damages for alleged Fifth Amendment due process violations arising out of Defendants' administrative review of Plaintiffs' enrollment applications in 2006. They allege that Ms. Dutschke violated former 25 C.F.R. §§ 48.8 and 48.9 when she "failed to review and make a decision [adjudicate] Plaintiffs' applications" for membership and "failed to notify Plaintiffs of her actions." (Id. ¶ 130)

By their Sixth Cause of Action, Plaintiffs assert Fifth Amendment due process claims arising out of Defendants' regulatory actions undertaken decades ago. They allege that Defendants violated the Fifth Amendment by failing in 1959 to "give statutory notice of the changes they made to [former] 25 C.F.R. § 48.5." (Id. ¶¶ 50-53, 139)

Plaintiffs' Seventh Cause of Action asserts Fourteenth Amendment equal protection claims arising out of two separate administrative events. First, they allege that Defendants denied them equal protection of the laws in 2005, when the BIA enrolled "22 of their cousins." (Id. ¶¶ 144-45) Second, they contend that BIA employees misconstrued the governing regulations in 1965 and acted on this misconstruction in 1994 to enroll "Non-San Pasqual individuals" in the Band. (Id. ¶¶ 124, 146-53)

In their Eighth Cause of Action, Plaintiffs allege a "history of over 160 years" of misconduct and contend that Defendants have violated common-law trust principles and breached their fiduciary duty owed to Plaintiffs by, among other things, allegedly failing to grant them "their reserve" in 1870, failing to protect them from "white squatters," promulgating former 25 C.F.R. § 48.5 in 1959, and, more recently, failing to adjudicate Plaintiffs' enrollment applications. (Id. ¶¶ 157-78)

Plaintiffs' Ninth Cause of Action asserts a civil rights claim based on allegations that Defendants' alleged failure to adjudicate Plaintiffs' enrollment applications in 2006 and their "actions [in 1994] in enrolling non-San Pasqual persons" has "deprived" Plaintiffs of due process and equal protection resulting in their loss of property rights, including their "per capita payments." (Id. ¶¶ 179-83)

Finally, by their Tenth Cause of Action, Plaintiffs allege that Defendants' administrative actions "over 108 years" that have allowed "non-San Pasqual blood persons

to squat on [tribal] land" constitutes a breach of fiduciary duty that has resulted in a diminution in Plaintiffs' land rights. (Id. ¶¶ 184-87)

The United States seeks dismissal of these claims because (1) Plaintiffs have violated the Court's Orders and Rules 8 and 41 by failing to expressly cite a basis for a waiver of sovereign immunity for each claim; (2) even if Plaintiffs could cure their pleading defects, there is no basis for a waiver of sovereign immunity; (3) the bulk of Plaintiffs' claims are time-barred; and (4) Plaintiffs have failed to plead facts stating a claim against Defendants.

B. Sovereign Immunity Bars Plaintiffs' Claims

Because "a suit against [federal] employees in their official capacity is essentially a suit against the United States," Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985), the viability of Plaintiffs' Fourth through Tenth Causes of Action depends on whether the United States has waived sovereign immunity and has consented to be sued for these claims. See United States v. Mitchell, 445 U.S. 535, 538 (1980).

On two prior occasions, this Court has instructed Plaintiffs to clearly identify the basis for any alleged waiver of sovereign immunity as to each cause of action. (Order [ECF #43], 10:5-12:20; Order [ECF #59], 2:12-19) Notwithstanding the Court's instruction, the Fourth through Tenth Causes of Action contain no express allegations concerning an alleged waiver of sovereign immunity. Plaintiffs' repeated failure to follow the Court's instructions is alone sufficient grounds for dismissal under Rules 8(a)(1) and 41(b). Cf. Blaylock v. United States, 2017 WL 2196765, *2 (D. Ariz. April 12, 2017), report and recommendation adopted, 2017 WL 2172002 (D. Ariz. May 17, 2017); Besada v. U.S. Citizenship & Immigration Servs., 2012 WL 1536969, *1 (W.D. Wash. Apr. 30, 2012); Am. State Bank & Tr. Co. of Williston v. Anderson, 2011 WL 6217046, *2 (D. Mont. Dec. 14, 2011).

As they have done previously, Plaintiffs will likely cite to their alleged basis for a waiver of sovereign immunity for the first time in opposition to this motion. For now, Defendants are left to speculate regarding their theory. Perhaps, for example, Plaintiffs will cite to 28 U.S.C. §§ 1331 and 1367 for the alleged waiver, as they reference these provisions repeatedly throughout the TAC. See TAC ¶¶ 1, 6, 127, 138, 142, 158, 180, 185. It is well

settled, however, that these general jurisdiction statutes do not operate to waive sovereign immunity. See Dunn & Black v. United States, 492 F.3d 1084, 1088 n.3 (9th Cir. 2007) (held 28 U.S.C. §§ 1331 and 1367 "cannot be construed" as a waiver of sovereign immunity); Hughes v. United States, 953 F.2d 531, 539 n.5 (9th Cir. 1992).

Alternatively, Plaintiffs may argue that 28 U.S.C. § 1500 waives sovereign immunity. See TAC ¶ 8 (citing Section 1500 as a jurisdictional basis for their money damages claims). Yet, Plaintiffs' reliance on this provision would be similarly misplaced. Section 1500 addresses the jurisdiction of the Court of Federal Claims over actions against the United States in instances in which the same claim is pending "in any other court." This provision, however, does not independently operate to waive sovereign immunity. See Sanborn v. United States, 453 F.Supp. 651, 654-55 (E.D. Cal. 1977).

Finally, the APA—an Act repeatedly referenced throughout the TAC—does not supply the requisite waiver for a money damages claim. Section 702 of the Act expressly waives sovereign immunity only in actions "seeking relief other than money damages." 5 U.S.C. § 702; see Tucson Airport Auth. V. Gen. Dynamics Corp., 136 F.3d 641, 645 (9th Cir. 1998) ("the APA's waiver . . . does not apply to claims for 'money damages'").

More likely, Plaintiffs' failure to expressly cite to a basis for an alleged waiver of sovereign immunity is—particularly given the history of this litigation—simply a reflection of the fact that the United States has not consented to be sued for the money claims at issue. For example, the limited waiver of sovereign immunity set forth in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346 and 2671 *et seq.*, does not apply to claims predicated on alleged violations of the United States Constitution or other federal statutes and regulations. See Xue Lu v. Powell, 621 F.3d 944, 951 (9th Cir. 2010); Love v. United States, 60 F.3d 642, 644 (9th Cir. 1995); *Chen v. United States*, 854 F.2d 622, 626 (2d Cir. 1988); Gelley v. Astra Pharm. Prod., Inc., 610 F.2d 558, 562 (8th Cir. 1979).

Nor does the Tucker Act, 28 U.S.C. § 1491, or the Indian Tucker Act, 28 U.S.C. § 1505, supply the requisite waiver, because only the Court of Federal Claims may hear such actions. See Dettling v. United States, 948 F.Supp.2d 1116, 1129-30 (D. Hawaii 2013).

While the Little Tucker Act, 28 U.S.C. § 1346(a)(2), grants concurrent jurisdiction to the district courts to hear claims not exceeding $10,000, Plaintiffs cannot predicate their money damages claims on this provision because they have not waived their excess damages. Moreover, "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act." United States v. Mitchell, 463 U.S. 206, 216 (1983). Instead, "the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" Id. at 216-17 (internal citation omitted). Here, Plaintiffs' claims are based on alleged violations of federal laws that do not mandate a right of recovery in damages. See, e.g. LeBlanc v. United States, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (held the Fifth Amendment does not provide for money damages against the government); Mullenberg v. United States, 857 F.2d 770, 773 (Fed. Cir. 1988) (same); United States v. Navajo Nation, 537 U.S. 488, 506 (2003) (common-law trust principles cannot save a breach of fiduciary claim if the plaintiff fails to identify a "specific rights-creating or duty-imposing statutory or regulatory prescription[]").

Because Plaintiffs have not, and cannot, identify a basis for the alleged waiver of sovereign immunity for their Fourth through Tenth Causes of Action, these claims should be dismissed with prejudice.

C. Plaintiffs' Time-Barred Claims Must Be Dismissed

As noted above, the general statute of limitations applicable to civil actions against the United States is "six years after the right of action accrues." 28 U.S.C. § 2401(a). With the sole exception of Plaintiffs' claims arising out of Defendants' administrative review of their enrollment applications, all of Plaintiffs' claims accrued decades ago and are time barred. These claims include those predicated on (1) the BIA's alleged failure to grant the Band a land "reserve" in 1870 and failing to protect the Band from "white squatters" beginning in 1910 (TAC ¶¶ 169-70, 182, 186 (Eighth, Ninth and Tenth Causes of Action)); (2) the BIA's promulgation in 1959 of former 25 C.F.R. § 48.5 (TAC ¶¶ 50-53, 139, 171 (Sixth and Eighth Causes of Action)); (3) the BIA's alleged misconstruction of the

governing regulations in 1965 (id. ¶¶ 148-53 (Seventh Cause of Action)); (4) the BIA's preparation of a membership roll in 1994 (id. ¶¶ 124, 147 (Fourth and Seventh Causes of Action)); and (5) the BIA's alleged unlawful enrollment of "22 of [Plaintiffs'] cousins" in 2005 (id. ¶¶ 144-45 (Seventh Cause of Action)).

Notably, Plaintiffs identify each of these events as discrete acts that have harmed them. Accordingly, Plaintiffs cannot argue their claims survive based on a theory that these transactions are part of a series of continuing violations. Cf. National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002) (held in context of employment discrimination cases that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges"). Because each discrete act of alleged wrongdoing "starts a new clock for filing charges alleging that act," see id., Plaintiffs' claims are time-barred and should be dismissed.

D. Plaintiffs Fail to State a Claim

1. 25 U.S.C. § 1a Does Not Create a Cause of Action

Plaintiffs allege in their Fourth Cause of Action that Defendants have failed to delegate authority in a manner that complies with 25 U.S.C. § 1a. This provision, however, does not expressly create a private right of action, nor does research reveal any case law recognizing any such claim. Moreover, while Plaintiffs caption their Fourth Cause of Action as a civil rights claim, they fail to plead with specificity the particular Constitutional protection that they contend was violated. Accordingly, the Fourth Cause of Action fails to state a claim upon which relief may be granted and should be dismissed.

2. The Fourteenth Amendment Is Inapplicable

Plaintiffs' Seventh Cause of Action is expressly based on the Fourteenth Amendment. (TAC ¶ 142) The Fourteenth Amendment, however, is inapplicable in suits against federal employees. See Scott v. Reno, 902 F. Supp. 1190, 1195 (C.D. Cal. 1995). The Court, therefore, should dismiss the Seventh Cause of Action.

3. Plaintiffs Fail to State a Due Process Claim

The "first inquiry in every due process challenge is whether the plaintiff has been

deprived of a protected interest in 'property' or 'liberty.'" Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999) ("Only after finding the deprivation of a protected interest do we look to see if the [government's] procedures comport with due process"). Here, Plaintiffs allege in their Fifth and Ninth Causes of Action that Defendants have deprived them of property interests in the form of expected benefits associated with membership in the Band. (See, e.g., TAC ¶¶ 135, 181) Yet to have a protected property interest, Plaintiffs must demonstrate more than a mere expectation of benefits. Cf. Am. Mfrs., 526 U.S. at 61.

In American Manufacturers, injured employees challenged Pennsylvania's workers' compensation procedures that authorized the withholding of medical payments subject to review by a "utilization review organization." The employees alleged that, "in withholding workers' compensation benefits without predeprivation notice and an opportunity to be heard, the state and private defendants, acting 'under color of state law,' deprived them of property in violation of due process." Id. at 47-48. The Supreme Court concluded that the injured employees did not have a constitutionally protected property interest in their medical benefits unless they could show that the expenses were "reasonable and necessary" as required by the state statute. Id. at 60 (noting that the state law required "that disputes over the reasonableness and necessity of particular treatment . . . be resolved *before* an employer's obligation to pay—and an employee's entitlement to benefits—arise") (italics in original). Because the employees had only an expectation of benefits, and had not established their entitlement to the benefits, they had no protected property interest. Id. ("While they have indeed established their initial *eligibility* for medical treatment, they have yet to make good on their claim that the particular medical treatment they received was reasonable and necessary") (italics in original).

Consistent with American Manufacturers, Plaintiffs must show that they possess the requisite blood degree as required by tribal law in order to have a protected property interest. Accordingly, Plaintiffs' alleged "eligibility" for membership does not implicate a property interest subject to due process protection. Cf. Am. Mfrs., 526 U.S. at 61 (claimants' "due process claims falter[] for lack of a property interest"). The Fifth and Ninth Causes of

Action, therefore, should be dismissed for failure to state a claim.

4. Plaintiffs Fail to State an Equal Protection Claim

To state an equal protection claim, a plaintiff must plead allegations demonstrating that the defendant intentionally treated him or her differently than others similarly situated and that the defendant had no rational basis for the difference in treatment. See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008). In support of their Seventh Cause of Action, Plaintiffs allege that they have been denied equal protection "because Defendants . . . have treated the Jose Juan descendant Plaintiffs differently than 22 of their cousins, who were also enrolled in 2005, at the same time as the Plaintiffs." (TAC ¶ 144) Plaintiffs, however, fail to allege that their "cousins" are similarly situated. Indeed, they cannot. As demonstrated in the accompanying declaration of Harley Long, Tribal Operations Officer for the BIA, Pacific Region, the 22 individuals referenced by Plaintiffs were approved for membership because they derive their requisite blood degree from a lineage that is different from Plaintiffs' ancestry. (Ex 2, Long Decl., ¶ 4) Because Plaintiffs have not, and cannot, plead facts demonstrating disparate treatment, the Seventh Cause of Action should be dismissed.

IV. Conclusion

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

DATED: March 26, 2018

Respectfully submitted,

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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-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:

UNITED STATES' NOTICE OF MOTION AND MOTION TO DISMISS THIRD 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: March 26, 2018

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