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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 **FEDERAL DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS** DATE: July 19, 2018 TIME: 2:00 p.m. CTRM: 4A JUDGE: Hon. Anthony J. Battaglia

I. The Court Should Dismiss Plaintiffs' First and Third Causes of Action

A. Defendants' 12(b)(1) Motion Not a Summary Judgment Motion

Plaintiffs argue Defendants' Rule 12(b)(1) motion "must comport with Rule 56" since there are factual challenges." Not true. The Ninth Circuit has explained:

> The standards applicable to a Rule 12(b)(1) speaking motion differ greatly from the standards for ruling on a motion for summary judgment. Faced with a factual attack on subject matter jurisdiction, 'the trial court may proceed as it never could under Rule 12(b)(6) or Fed.R.Civ.P. 56. . . . (N)o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Thornhill Pub. Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979).

Furthermore, Thornhill does not require the Court conclude Plaintiff's allegations are frivolous before dismissing for a lack of subject matter jurisdiction. Rather, the portion of Thornhill cited by Plaintiffs states an exception to the general rule for challenges to claims brought under the Sherman Act. A substantive requirement of such claims is that interstate commerce be involved, which is also the jurisdictional requirement. Therefore, a motion challenging the existence of a sufficient relationship with interstate commerce should be accorded Rule 56 treatment, or be dismissed for failure to state a claim when the allegations are frivolous. See id. at 733-34. Here, Defendants move to dismiss Plaintiffs' first and third causes of action based on a lack of final agency action, which is not part of the substantive claim. Therefore, Defendants' motion is a standard Rule 12(b)(1) factual attack based on a lack of final agency action. Cf. Cabaccang v. U.S. Citizenship & Immigration Servs., 627 F.3d 1313, 1317 (9th Cir. 2010) ("[D]istrict courts lack jurisdiction to review denials of status adjustment if removal proceedings are simultaneously pending" because not final agency action); see also Kansas ex rel. Schmidt v. Zinke, 861 F.3d 1024, 1034 (10th Cir. 2017); Invention Submission Corp. v. Rogan, 357 F.3d 452, 460 (4th Cir. 2004); Peoples Nat. Bank v. Office of Comptroller of Currency of U.S., 362 F.3d 333, 337 (5th Cir. 2004).

B. The Court Lacks Jurisdiction Over First and Third Causes of Action

Plaintiffs' first and third causes of action clearly request the Court to review BIA's handling of the Group A Plaintiffs' applications to become members of the Band pursuant

to the APA.[1] The first cause of action is entitled "Violation of Administrative Procedures Act," repeatedly cites 5 U.S.C. §§ 702, 704, and 706 (TAC ¶¶ 57, 59, 63-65), and repeatedly asks the Court to conclude that BIA's actions were arbitrary and capricious (TAC ¶¶ 59, 63, 69-71, 76). Although the third cause of action purports to seek declaratory relief or a writ of mandamus, it too repeatedly cites 5 U.S.C. §§ 702, 704, and 706 (TAC ¶¶ 101,105), and repeatedly asks the Court to conclude that BIA's actions were arbitrary and capricious (TAC ¶¶ 102, 104, 105). Therefore, both claims seek judicial review of the BIA's actions under the APA. Cf. Alto v. Black, 738 F.3d 1111, 1117 (9th Cir. 2013) (claims for declaratory and injunctive relief, including those arguing a violation of procedural due process, "involve challenges to the propriety of the BIA's decision [and] may therefore be fairly characterized as claims for judicial review of agency action under the APA"). "It is well established" that "under the APA," "a reviewing court analyzes [a] decision under the 'arbitrary and capricious' standard" only if "an agency has taken [a] final agency action." Mt. St. Helens Mining & Recovery Ltd. P'ship v. United States, 384 F.3d 721, 727 (9th Cir. 2004); see also Rattlesnake Coal. v. U.S. E.P.A., 509 F.3d 1095, 1105 (9th Cir. 2007).[2]

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[1] To the extent other claims are raised, the bases for dismissing such claims are discussed below.

[2] Plaintiffs briefly cite Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518, 524 (9th Cir.1989), which concluded that § 702's waiver of sovereign immunity is not limited to cases challenging agency action as defined by the APA; and that with regard to such non-agency-action claims, § 702 waives sovereign immunity without the requirement of final agency action. The Ninth Circuit has admitted there is an intra-circuit split on these points. See E.E.O.C. v. Peabody W. Coal Co., 610 F.3d 1070, 1086 (9th Cir. 2010) ("In Gallo Cattle Co. v. United States Department of Agriculture, 159 F.3d 1194 (9th Cir.1998), we stated that "the APA's waiver of sovereign immunity contains several limitations," including the "final agency action" requirement that we had considered irrelevant in Presbyterian Church. We held that, because the plaintiffs failed to challenge "final agency action," the waiver of sovereign immunity did not apply. In Gros Ventre Tribe v. United States, 469 F.3d 801 (9th Cir.2006), we discussed but declined to resolve the tension between the two cases, observing that there is "no way to distinguish The Presbyterian Church from Gallo Cattle."). This Court need not consider this tension because Plaintiffs' first and third causes of action are challenging agency action – BIA's actions on the Group A Plaintiffs' applications. See 5 U.S.C. § 701(b)(2); id. § 551(11)(C), (13). Therefore, § 704's final agency action requirement is applicable. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990) (when "review is sought not pursuant to specific authorization in [a] substantive statute, but only under the general review provisions of the APA, the "agency action" in question must be "final agency action.").

BIA never took a final agency action regarding the Group A Plaintiffs' applications to join the Band. Rather, as detailed in Defendants' initial motion, BIA first informed the Band that it was unable to decide whether to approve enrollment because the meeting at which the resolution purporting to approve the applications was passed was not valid under the Band's Constitution. Later, after the Band admitted its Constitution delegated enrollment decision to BIA and sent 179 enrollment applications to BIA, the BIA returned those applications to the Band because: 1) it was appropriate to do so pursuant to the Band's Constitution after a review to determine if the applications were "duly filed;" and 2) the BIA had recently denied the Band's request to increase Modesta Contreras' blood degree, and therefore the Band needed to reconsider whether or not they would support the Group A Plaintiffs' applications in light of that new fact. See ECF No. 68-1 at 18-26.[3]

None of the examples Plaintiffs cite as final agency action is a decision denying the Group A Plaintiffs' applications to join the Band. The April 7, 2006, decision by the Acting Assistant Deputy Secretary of Indian Affairs was a decision not to approve the Band's request to increase Modesta Contreras' blood degree.[4] (ECF No. 68-2 ¶ 9; ECF No. 68-11) The Regional Director's decision affirming the Superintendent's decision declining to validate Resolution # SP041005-01 was not a substantive decision on the Group A Plaintiffs' applications, but a procedural decision that the resolution was not passed according to the Band's Constitution. Regardless, as detailed below, the Band subsequently sent the applications to BIA, but those applications were returned without a final decision.

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[3] Page references to filed documents are to the heading's blue page numbers.

[4] As previously explained, the request to increase Modesta Contreras' blood degree was made by the Band's Enrollment Committee (not Plaintiffs) pursuant to former 25 C.F.R. § 48.14(c) (not § 48.4 - .11). The Regional Director determined the evidence did not substantiate the requested increase, which was affirmed by the Acting Principal Deputy Assistant Secretary – Indian Affairs. That decision was communicated back to the Band's Enrollment Committee, and the Band's Chairman. (ECF No. 68-1 at 12; 21-23) Plaintiffs were uninvolved in this process, and therefore lack standing to challenge that decision. See Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982). Furthermore, since the final decision was made in April 2006, the statute of limitations ran six years later in 2012, and could not be challenged by anyone since then. See 28 U.S.C. 2401(a).

Plaintiffs receive no aid in overcoming the Court's lack of subject matter jurisdiction from 5 U.S.C. § 551(13), which defines "agency action" as including a "failure to act," nor from 5 U.S.C. § 706(1), which allows a court to "compel agency action unlawfully withheld or unreasonably delayed." A "claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004). Here, BIA did not fail to act at all. Rather, it acted in response to all of the actions taken in association with the Group A Plaintiffs' applications to join the Band:

- In May 2005, the Superintendent, and in September 2005, the Regional Director, informed Mr. Rudolph Contreras, Vice Chairman of the Band's Business Committee, and Allen E. Lawson, the Band's Chairman (among others) that they determined that they were 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. (ECF No. 68-2, ¶¶ 5, 7; ECF No. 68-5; ECF No. 68-6)
- Rather than appeal that decision, the Band's Chairman and two other member of the Band's Tribal Council, after agreeing that the Band's Constitution delegated enrollment decisions to the BIA, sent 179 enrollment applications to the Superintendent. (ECF No. 68-2, ¶¶ 9, 11; ECF No. 68-7; ECF No. 74 (Ex. H)) In April 2006, the BIA Superintendent returned the original enrollment applications of those applicants whose enrollment request was based on being descendants of Modesta Contreras[5] because the BIA's recent determination that insufficient evidence existed to warrant increasing Modesta Contreras' blood degree from 3/4 to 4/4 would affect the Band's analysis of those applications. (ECF No. 68-2, ¶¶ 14, 18; ECF No. 74 (Ex. M)) Regardless, as explained before, such action was appropriate under the Band's Constitution.

[5] "Group A Plaintiffs are . . . [a]ll direct lineal descendants of Modesta (Martinez) Contreras." TAC ¶ 15.

While the return of the applications was not a 'final agency action' pursuant to the APA, it was also not a failure to act. Rather, BIA took an action that was interlocutory in nature in sending the enrollment applications back to the Band's Enrollment Committee. The Band never returned the applications (ECF No. 68-2 ¶ 19), so BIA has never been placed in a position where it could take a final action regarding Plaintiffs' enrollment applications.[6] Therefore, this Court lacks subject matter jurisdiction over Plaintiffs' first and third causes of action and should dismiss them with prejudice.

II. The Second Cause of Action Should Be Dismissed As Moot

Plaintiffs' second cause of action challenges BIA's actions in 1959 which resulted in the enactment of former 25 C.F.R. Part 48, including § 48.5(f). Plaintiffs allege that subsection was added without the knowledge of members of the Band. Defendants move to dismiss that claim because it is moot since the Part 48 regulations, including § 48.5(f), were removed from the Code of Federal Regulations over 20 years ago. See Alto v. Black, 738 F.3d 1111, 1116 & n.1 (9th Cir. 2013); Alto v. Jewell, No. 11-CV-2276-BAS BLM, 2015 WL 5734093, at *1-*3 (S.D. Cal. Sept. 30, 2015), aff'd, 661 F. App'x 502 (9th Cir. 2016). The second cause of action is also moot because the only relevance to the former Part 48 regulations is that in 1971, the Band chose to incorporate those regulations, including § 48.5(f), into the Band's Constitution. See Alto, 738 F.3d at 1116; ECF No. 68-2 ¶ 1. No action the Court could take will change the fact that § 48.5(f) exists (only) as tribal law of the Band. Plaintiffs fail to address these arguments in their opposition brief, which acts as a waiver on the issues. See Stichting Pensioenfonds ABP v. Countrywide Fin. Corp., 802

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[6] Indeed, Plaintiffs' real dispute over their applications is with the Band. After BIA returned the applications in April 2006, the Band informed BIA that it had determined that 139 individuals were ineligible for enrollment, but never provided BIA those enrollment applications. (ECF No. 68-2, ¶ 21; ECF No. 74 (Ex Q)). Neither has the Band returned to BIA the 87 enrollment applications that BIA received from Plaintiffs' attorney in 2016. (ECF No. 68-2, ¶ 22; ECF No. 68-16) Unless the Band sends BIA the Group A Plaintiffs' applications along with the Band's decision regarding those applications, BIA cannot, consistent with the Band's Constitution and the procedures set for forth in former 25 CFR part 48, take action to potentially make the Group A Plaintiffs' members of the Band (regardless of how the Court rules in this suit). (ECF No. 68-2, ¶¶ 1, 2, 23; ECF No. 68-4)

F. Supp. 2d 1125, 1132 (C.D. Cal. 2011). Therefore, the Court should dismiss Plaintiffs' second cause of action for lack of subject matter jurisdiction.

III. The Court Should Dismiss the Second and Fourth - Tenth Causes of Action

A. Sovereign Immunity Bars the Fourth through Tenth Causes of Action

Twice this Court has instructed Plaintiffs to amend their complaint to identify the basis for any alleged waiver of sovereign immunity. (ECF No. 43 at 10:5-12:20; ECF No. 59 at 2:12-19). Yet the TAC remains silent as to sovereign immunity for the fourth through tenth causes of action. In their opposition brief, Plaintiffs argue that sovereign immunity is waived through (1) the Tribal Constitution, (2) 25 U.S.C. § 2, (3) the APA, (4) the Federal Tort Claims Act ("FTCA"), (5) 28 U.S.C. § 1353, (6) the Tucker Act, and (7) the Larson-Malone doctrine. Yet, Plaintiffs' opposition does not operate to amend their TAC. See Fabbrini v. City of Dunsmuir, 554 F.Supp.2d 1044, 1050 (E.D. Cal. 2008)). Therefore, dismissal of the fourth through tenth causes of action is warranted, with prejudice, pursuant to Rule 8(a) and Rule 41(b). Furthermore, even if Plaintiffs sought to amend a fourth time, any amendment would be futile, because Plaintiffs' theories either fail as a matter of law or are inapplicable to the claims at issue.

Plaintiffs' reliance on the Band's Constitution is misplaced because only Congress can waive sovereign immunity. See United States v. Testan, 424 U.S. 392, 399 (1976)). It is immaterial that the Constitution "incorporates" the Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq.*, because that Act only applies to Indian Tribes. See 25 U.S.C. § 1302.

Similarly, 25 U.S.C. § 2 does not supply the requisite waiver, as this provision merely sets forth the duties of the Commissioner of Indian Affairs to include the "management of all Indian affairs." See Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) (a waiver of the United States' sovereign immunity must be "unequivocally expressed").

Nor does the APA save Plaintiffs' claims. The fourth through tenth causes of action all seek money damages, see TAC, 47:20-49:18, while the APA only waives sovereign immunity in actions "seeking relief other than money damages." 5 U.S.C. § 702. And, while Plaintiffs seek additional declaratory relief under their fourth through seventh causes of

action, the non-monetary remedies they demand are identical to the relief sought through their express APA claims in the first and third Causes of Action. Compare, e.g., TAC, 57:4-17 with id., 55:10-56:19 (seeking identical relief)). The Court lacks subject matter jurisdiction over those claims, therefore, for the reasons described in the previous section.

The FTCA is also inapplicable because the FTCA does not apply to claims, such as those at issue here, that allege violations of the Constitution or other federal laws. See Xue Lu v. Powell, 621 F.3d 944, 951 (9th Cir. 2010)). While Plaintiffs contend that their breach of fiduciary duty claim should survive based on Jachetta v. United States, 653 F.3d 898 (9th Cir. 2011) and Marlys Bear Medicine v. United States, 241 F.3d 1208 (9th Cir. 2001), the claims at issue in those cases were premised on state law. See Jachetta, 653 F.3d at 905-06, 912 (applying Alaska law); Marlys Bear, 241 F.3d at 1218 (applying Montana law)). Here, Plaintiffs fail to cite to any California law that either serves as the source of the fiduciary duty at issue or recognizes federal law as the source of the duty. To the contrary, Plaintiffs allege that the source of the United States' fiduciary duty is either 25 U.S.C. § 2 or an order issued by DOI Secretary Jewell. (ECF No. 80 at 21:19-21). Accordingly, the eight cause of action is not actionable under the FTCA and must be dismissed. See Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York, 278 F.Supp.2d 313 (N.D. New York 2003) (dismissing FTCA counterclaim for breach of fiduciary duty where "duty to the Tribes derives exclusively from federal law").

Plaintiffs' contention that 28 U.S.C. § 1353 supplies the requisite waiver also fails. Section 1353 grants district courts original jurisdiction over "any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty." Because this provision "is a recodification of the jurisdictional portion of [25 U.S.C.] § 345," courts focus on Section 345 in evaluating the scope of any waiver. Jachetta, 653 F.3d at 906 (internal quote and citation omitted). Section 345 waives sovereign immunity "only with respect to . . . those seeking an original allotment." Id. at 906. But here, Plaintiffs do not seek an original allotment of land; they instead seek declaratory relief and money damages outside the scope of Section 345's

waiver. See id. at 907 (concluding Section 345 inapplicable because plaintiff "seeks only injunctive and monetary relief . . . rather than the issuance of an allotment").

Turning to the Tucker Act, 28 U.S.C. § 1491, Plaintiffs imply that they are prepared to waive damages beyond the $10,000 jurisdictional threshold. See Opp., 24:26 ("Each Plaintiff is allowed to recover up to $10,000 in damages"). Yet, the Tucker Act remains inapplicable until and unless they formally waive their excessive damages claims. 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 LeBlanc v. United States, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (no money damages pursuant to Due Process Clause); Mullenberg v. United States, 857 F.2d 770, 773 (Fed. Cir. 1988) (no money damages pursuant to Equal Protection Clause).

Finally, Plaintiffs rely on the Larson-Malone doctrine, which provides for an ultra vires exception to sovereign immunity when "an employee of the United States acts completely outside of his governmental authority." Jewel v. National Security Agency, 965 F.Supp.2d 1090, 1110 (N.D. Cal. 2013). Yet, the scope of the doctrine "is quite narrow," because "an ultra vires claim may only be asserted against officers in their individual or personal capacity." Id. at 1111, citing Larson, 337 U.S. at 687-89. Because Plaintiffs have sued federal employees in their official capacities, the action is "an unconsented suit against the United States barred by sovereign immunity." See United States v. Yakima Tribal Court, 806 F.2d 853, 860 (9th Cir. 1986).

B. Plaintiffs' Time-Barred Claims Must Be Dismissed

Defendants moved to dismiss Plaintiffs' second, fourth, and sixth through tenth causes of action as time barred pursuant to 28 U.S.C. § 2401(a). Plaintiffs do not deny that the events that form the basis of those claims occurred more than six years prior to the

initiation of this suit. Rather, Plaintiffs argue, citing Dodge v. United States, 362 F.2d 810 (Ct. Cl. 1966), that statutes of limitations are tolled whenever Indians sue the United States regarding trust property. Dodge, however, does not stand for the expansive rule proposed by Plaintiffs; its holding is instead limited to the context of tax transactions.[7] In Dodge, the Court of Claims concluded that an equitable exception existed regarding the three-year statute of limitations created by § 322(b)(1) of the 1939 Internal Revenue Code in suits seeking a refund of taxes paid when a federal Government official prepared the tax return for a noncompetent Indian[8] based on the Indian's trust income. See id. at 480-84. The Court of Claims later explained that this exception was necessary because, the federal official who prepared the return would not question a General Counsel's Memorandum that was later found to be incorrect. See Capoeman v. United States, 440 F.2d 1002, 1006-07 (Ct. Cl. 1971). But, as the Court of Claims explained, this does not mean that statutes of limitations do not run against Indians generally, as such a preference on racial grounds would "be repugnant to the Constitution." Id. at 1007-08 (concluding Tucker Act statute of limitations applicable to noncompetent Indian seeking to recover certain charges made by the United States related to the sale of timber standing on plaintiff's trust allotment). Here, Plaintiffs offer no basis for why the six-year statute of limitations should not apply to their APA action seeking review of the BIA's enactment of the Part 48 regulations over 50 years ago other than the mere facts that they are Indian, the suit is against the United States, and the suit involves trust property. The Court of Claims decisions described above do not support Plaintiffs' argument that statutes of limitations are always tolled based on such facts; rather Indians are generally subject to the same statutes of limitations as other litigants. See United

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[7] Furthermore, even within this limited context, the continuing viability of Dodge is in doubt. See Bruner v. United States, 159 Fed.Appx. 859, 862 (10th Cir. 2005) (unpublished) ("[I]n a case decided after [Dodge and a similar case], the Supreme Court has concluded that 'Congress did not intend the "equitable tolling" doctrine to apply to [the limitations period applicable to tax refunds].'" United States v. Brockamp, 519 U.S. 347, 354[](1997).").

[8] "A noncompetent Indian is one who holds allotted lands only under a trust patent and may not dispose of his property without the approval of the Secretary of the Interior." Stevens v. C. I. R., 452 F.2d 741, 743 n.1 (9th Cir. 1971).

States v. Mottaz, 476 U.S. 834, 851 (1986) ("[E]ven for Indian plaintiffs, '[a] waiver of sovereign immunity cannot be lightly implied but must be unequivocally expressed'"); Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 592 (9th Cir. 1990) ("Indian Tribes are not exempt from statutes of limitations governing actions against the United States."); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576 (Fed. Cir. 1988) ("[S]tatutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government.").

Accordingly, the Court should grant Defendants' motions to dismiss with prejudice Plaintiffs' second, fourth, and sixth through tenth causes of action.

C. Plaintiffs Fail to State a Claim

Plaintiffs fail to address the United States' contention that (1) the fourth cause of action fails to state a claim, because 25 U.S.C. § 1a does not create a private right of action and Plaintiffs have failed to plead the alleged constitutional violation with specificity; (2) the seventh cause of action is improperly based on the Fourteenth Amendment and failure to plead that the 22 cousins are similarly situated; and (3) the fifth and ninth causes of action fail to state a claim for due process violations because the property rights asserted by Plaintiffs—their contingent interest in membership—are not constitutionally protected interests. As explained above, Plaintiffs' silence on these issues acts as a waiver. Therefore, the Court should dismiss the fourth, fifth, seventh and ninth causes of action.

IV. Conclusion

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

DATED: April 23, 2018

Respectfully submitted,

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