

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION**

CAROLYN NEW HOLY, STEPHANIE
STARR COMES OUT, SANDRA FIRE LIGHTNING,

Case No. 19-05066-JLV

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
INTERIOR, BUREAU OF INDIAN AFFAIRS,
DANIELLE MCQUILLEN, Deputy Regional Director,
JOHN M. LONG, Superintendent,

Defendants.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Plaintiffs CAROLYN NEW HOLY, STEPHANIE STAR COMES OUT AND SANDRA FIRE LIGHTNING (Plaintiffs) submit this memorandum in opposition to Defendants' Motion to Dismiss for lack of subject matter jurisdiction. This Opposition is based on this Memorandum and the Declaration of Stephanie Star Comes Out (Declaration of Star Comes Out) with attached exhibits, the Declaration of Valentina Merdanian (Declaration of Merdanian) with attached exhibits and the Declaration of Nakina Mills (Declaration of Mills) with attached exhibit.

Plaintiffs explicitly disclaim the assertion of 18 U.S.C. §§ 1961 et. seq. in its complaint; the inclusion of this statute was a typographical error.

I. INTRODUCTION

Plaintiffs' Complaint in the instant action includes three causes of action: Breach of Trust Responsibility by the Defendants, Fairness Dictates an Extension of Time pursuant to 25 C.F.R. § 2.1, and the one-year requirement for collecting signatures contained in 25 C.F.R. § 81.58 is arbitrary, simplistic, unnecessary and has no meaningful basis for the regulatory restriction. In their motion to dismiss, generally, Defendants argue that Plaintiffs have not plead facts sufficient to state a claim for relief and that 25 C.F.R. § 2.1 is discretionary and therefore not an appropriate basis for legal action. The Rules of Civil Procedure only require a Plaintiff to plead facts sufficient to state a claim thereby putting defendant on notice. The Plaintiffs have met this burden as to each and every count in the Complaint. Furthermore, the facts and counts contained in the Complaint are clearly more than an allegation of an Administrative Procedures Act violation, as contended by the Government. Given that Plaintiffs have asserted a violation of the government's trust responsibility, Plaintiffs should be provided the opportunity to fully develop their case and Defendants motion should be denied.

II. BACKGROUND

In early 2017, the Oglala Sioux Tribe (OST) started to investigate whether it was appropriate to amend its constitution. To that end it developed a Task Force who had the unenviable job of completely overhauling the OST Constitution. In October of that year, the Task Force was formally authorized by the OST Tribal Council, this Task Force it included a number of individuals which include but are not limited to, Plaintiffs. Declaration of Star Comes Out, paragraphs 2 & 3; Declaration of Merdanian, paragraph 2; Declaration of Mills, paragraph 2. The Task Force set to work on developing a Constitution that would implement marked

changes that were in the best interest of the Tribe, for example increased educational requirements for Tribal Council members and the judiciary.

Once the Constitutional revisions had been completed the Task Force began the process of circulating the amendments throughout the Tribe and educating the members as to the contents and breadth of the proposed changes. The Task Force held informational meetings in all of the OST Districts and developed a detailed PowerPoint presentation to not only educate the Tribe but to elicit response and feedback from the membership.

The Bureau of Indian Affairs (BIA), through its Deputy Regional Director, was integrally involved throughout the process and the Task Force kept in regular contact with Ms. Daughtery (for the sake of clarity and consistency, Plaintiffs have used Ms. Daughtery's maiden name). Declaration of Star Comes Out, paragraphs 5, 7 & 9; Declaration of Merdanian, paragraphs 3 & 5; Declaration of Mills, paragraph 3. Ms. Daughtery participated in numerous conference calls, group and individual emails as well as one on one discussions with members of the Task Force and they relied on her guidance throughout the process. Declaration of Star Comes Out, paragraphs 5 & 9; Declaration of Merdanian, paragraphs 4 & 5; Declaration of Mills, paragraph 4. The members of the Task Force believed they could rely on Ms. Daughtery to provide them with good counsel and they reasonably believed that she was in a position to successfully guide them through the secretarial election process. Declaration of Star Comes Out, paragraph 11; Declaration of Merdanian, paragraphs 5 & 6; Declaration of Mills, paragraph 4. It was the understanding of the Task Force that Ms. Daughtery could be relied on for accurate and thoughtful advice and counsel, as that was part of her duties at the BIA. Declaration of Star Comes Out, paragraph 11; Declaration of Merdanian, paragraphs 5 & 6; Declaration of Mills, paragraphs 3 & 4.

While the Task Force was in the process of collecting signatures, it became obvious that some of the proposed constitutional amendments might exclude some individuals currently in positions of power and at various times funding was withheld and the Task Force was otherwise curtailed in its ability to obtain petition signatures. OST is one of the largest Tribes in the United States and is hindered by many issues such as low educational rates, generally poor health of its members, inadequate health care, poor quality roads and infrastructure. These difficulties, in conjunction with the targeted budgetary reductions made a difficult task even more so, however the Task Force persevered.

When the Task Force believed it had the requisite number of signatures for its petition to proceed with the secretarial election, Plaintiff New Holy submitted the OST petition to the BIA in May of 2019. This was several weeks before the end of the one year statutorily defined collection period.

When the BIA decision was rendered in June of 2019, the letter stated it was a final decision. Declaration of Star Comes Out, paragraph 6. The Members of the Task Force turned to Ms. Daughtery and asked what else could be done, was there an ability to appeal the decision and the like. Declaration of Star Comes Out, paragraph 11; Declaration of Merdanian, paragraphs 4 & 6; Declaration of Mills, paragraph 4. The Task Force members believed they could rely on and trust the counsel provided by Ms. Daughtery. The members of the Task Force believed that if there was a specific way to request a waiver or otherwise get an extension of time, that Ms. Daughtery would have told them what to do or how to handle the request. Declaration of Star Comes Out, paragraphs 7, 9, 10 & 11; Declaration of Merdanian, paragraph 6; Declaration of Mills, paragraph 4. Despite having a trust responsibility to the Tribe, and the Task Force was an authorized entity of the Tribe, Ms. Daughtery did not provide adequate

counsel on how to request a waiver or request reconsideration or otherwise obtain an extension of time. Declaration of Star Comes Out, paragraphs 10 & 11; Declaration of Merdanian, paragraph 4; Declaration of Mills, paragraph 4.

In her Declaration, Ms. Daughtery states that the Task Force never requested a waiver. This is a technicality. The members of the Task Force may not have used that specific language because they did not know the ‘magic words’ however they did seek guidance and assistance on what options they had and how best to proceed, and namely what the appeal process was. Declaration of Star Comes Out, paragraph 11; Declaration of Merdanian, paragraphs 4 & 6; Declaration of Mills, paragraphs 3 & 4.

III. ANALYSIS

A. The Federal Rules Only Require Facts to Put the Defendant on Notice.

The Federal Rules of Civil Procedure do not require claimant to set out in detail facts upon which he bases his claim, rather the Rule requires only a short, plain statement of the claim which will give defendant fair notice of what the plaintiff is claiming and the grounds upon which it rests. *Conley v. Gibson*, 355 U.S. 41 (1957); *Dura Pharms, Inc. v. Broudo*, 544 U.S. 336 (2005). Rule 8 of the Fed.R.Civ. P. requires only that the litigant construct a complaint which truly and accurately reflects the basis upon which he believes he should recover and one which gives fair notice to party against whom relief is sought. *Reed v. Board of Education*, 460 F.2d 824 (8th Cir. 1972). While clarity and precision are desirable in any pleading, the Federal Rules require little more than indication of type of litigation that is involved and a generalized summary of claims sufficient to afford fair notice to parties. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979); *Friedlander v. Cimino*, 520 F.2d 318 (2d Cir. 1975). In

order to survive a motion to dismiss, plaintiffs' allegations must only satisfy the minimum requirement of notice. *Triad Assocs. v. Robinson*, 10 F.3d 492 (7th Cir. 1993).

In this case, Plaintiffs' Complaint has clearly provided pleadings sufficient to afford Defendants adequate notice of each of the asserted claims and the basis for such. This is true for all counts of the Complaint and when filing a Rule 12 Motion to Dismiss, the burden is on Defendants to prove that Plaintiffs have not met this standard. They have not met their burden.

B. The Court Must Accept Plaintiffs Facts as True and Consider the Entire Complaint

Additionally, when faced with a Rule 12 motion to dismiss, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true. *Tellabs, Inc. v. Makor Issues and Rights, Ltd.*, 551 U.S. 308 (2007); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). Courts must also consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12 motion to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. *Tellabs* at 322-323.

Therefore, in this case, the Court must look at the entirety of the Plaintiffs Complaint and accept all of the facts as true. Defendants have tried to argue that the Plaintiffs did not properly request a waiver from the BIA. However, the declarations and exhibits attached thereto evidence that the Plaintiffs did in fact seek other options within the BIA and did not receive proper and appropriate assistance from Ms. Daughtery. It somehow does not seem fair or appropriate for the BIA to rest on its failure to meet its trust responsibilities to the Plaintiffs, as part of the basis for it to now seek a dismissal of the action.

Finally, when dealing with a Native American trust responsibility case, the trial court should give Plaintiffs every opportunity to present their case. *See Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 928-929 (9th Cir. 2008) (Permitting the APA claims to proceed.). Here, the Defendants own statements have created conflicting issues relating to the BIA's trust responsibility. It is wholly appropriate for the Court to allow the matter to proceed and give Plaintiffs the opportunity to obtain more information and facts and possibly discover a basis to amend the complaint and therefore preserve all of Plaintiffs' claims.

C. The Complaint Contains More than Merely APA Issues.

Defendants focus their motion to dismiss on Plaintiffs request that the Defendants use 25 C.F.R. § 1.2 and that such is discretionary and therefore there is no cause of action. Without conceding that 25 C.F.R. § 1.2 is wholly discretionary, Plaintiffs assert that there is far more involved and recited in its complaint and that reliance on 25 C.F.R. § 1.2 is a clear mechanism to remedy the injustice detailed herein. To focus on one count of the Complaint is to ignore the law as well as the facts established in Plaintiffs Complaint. Additionally, since the Supreme Court has consistently applied the principle that statutes passed for the benefit of Indian tribes are to be liberally construed in favor of the Indians, and any doubt as to a statute's proper construction is to be resolved in their favor. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Ashcroft v. United States Dept. of Interior*, 679 F.2d 196, 198 (9th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983). We find it concerning that in a case alleging breach of trust responsibility, the government argues it has the ultimate discretion to ignore what is fair and right and in the best interests of the tribe.

Defendants have also alleged that the United States has made no waiver of its sovereign immunity. The United States has assumed a trust responsibility to the Native Tribes, and it is laughable that Defendants argue it has sovereign immunity herein.

IV. CONCLUSION

Plaintiffs' Complaint alleged three counts against the Defendants and in its Complaint and further detailed herein, Defendant Daughtery breached her responsibility to the Tribe and the Task Force. When members of the Task Force asked her for guidance and the appeals process, she had a duty to fully and accurately detail the necessary steps the Task Force would have to make to preserve its rights. By failing to inform them that they must request a waiver or lose their legal rights, Ms. Daughtery breached her duty and that of the BIA. The Plaintiffs' complaint has given the Defendants adequate notice of the asserted claims and the matter should be allowed to proceed. For all of these reasons, Plaintiffs respectfully request that the Court deny Defendants' motion.

Dated: June 4, 2020

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