UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CAROLYN NEW HOLY, STEPHANIE STAR COMES OUT and SANDRA FIRE LIGHTNING,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, DANIELLE DAUGHTERY[1], Deputy Regional Director, and JOHN M. LONG, Acting Superintendent[2],

Defendants.

Case: 19-05066-JLV

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and in accordance with Local Rule 7.1(B), Defendants, by and through counsel, submit the following brief in support of Defendants' Motion to Dismiss. This brief is supported, in part, by the Declarations of John M. Long and Danelle McQuillen, along with the exhibits attached thereto. Dismissal is appropriate because this Court lacks subject matter jurisdiction over the matters raised in the Complaint, and because the Complaint fails to state a claim upon which relief may be granted.

FACTUAL BACKGROUND

On May 8, 2019, the Bureau of Indian Affairs ("BIA"), Pine Ridge Agency ("Agency"), received a letter from the Oglala Sioux Tribe ("OST" or "Tribe") Constitutional Reform Task Force ("Task Force"). Declaration of John M. Long ("Long Decl.") at ¶ 4, Exhibit A. The letter

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[1] The Deputy Regional Director's name is Danelle McQuillen (formerly "Daugherty").
[2] John Long currently serves as Superintendent for the BIA's Pine Ridge Agency.

requested a Secretarial election[3] regarding proposed amendments to OST's Constitution, and was accompanied by a petition with signatures to support the request. Id. at ¶¶ 4-5, Ex. A, B. The letter cited Article XI of the OST Constitution: "It shall be the duty of the Secretary of the Interior to call an election on any proposed amendment, at the request of two-thirds (2/3) of the [Tribal] council, or upon presentation of a petition signed by one-third (1/3) of the qualified voters, members of the Tribe." Long Decl. at ¶ 4; Ex. A; see also id. at ¶ 9, Exhibit F. The letter further stated that as of September 2018, the OST Enrollment Office indicated there were a total of 12,283 eligible voters. Id. at ¶ 4, Ex. A. Accordingly, the minimum number of signatures required was 4,094. The letter asserted that the petition contained 4,801 signatures. Id. at ¶ 6, Ex. A.

On May 9, 2019, the Agency sent letters to the OST President, as well as to the Task Force, acknowledging receipt of the petition and stating that the Official Filing Date was May 8, 2019. Long Decl. at ¶ 7, Ex. C, D. The letters stated that the BIA was in the process of reviewing the petition under the applicable regulations. Id. On that same day, the Agency also sent a letter to the OST Enrollment Office asking for a list of eligible voters. Id. at ¶ 6, Ex. E. According to Article VII of the OST Constitution, "[a]ll members of the Tribe 18 years or over, who have resided on the reservation for a period of one year immediately prior to any election shall have the right to vote." Id. at ¶ 10, Ex. F. The Agency also consulted with the BIA's Great Plains Regional Office ("Regional Office") regarding which figure to use as the total number of eligible voters in the Oglala Sioux Tribe, as well as the proper scope and parameters of the review of the petition under the regulations. Id. at ¶ 11. The Regional Office advised the Agency that it would be appropriate

[3] A Secretarial election is a Federal election conducted by the Secretary of the Department of Interior pursuant to the Department of Interior's regulations, which prescribe the Department's procedures for authorizing and conducting elections when Federal statute or the terms of a tribal governing document require the Secretary of the Interior to conduct and approve an election to adopt, amend, or revoke tribal governing documents or charters. 25 C.F.R. §§ 81.1, 81.4.

to use the number cited by the Task Force—12,283—as the total number of eligible voters in the Tribe. Id. at ¶ 12; see also Declaration of Danelle McQuillen ("McQuillen Decl.") at ¶¶ 4-5.

The Agency then performed a thorough review of the signatures on the petition in accordance with 25 C.F.R. § 81.62 and determined that the petition contained an insufficient number of valid signatures. Long Decl. at ¶¶ 13-14; McQuillen Decl. at ¶¶ 6-7. On June 17, 2019, the Acting Regional Director timely issued a decision on the validity of the petition pursuant to 25 C.F.R. § 81.62(b). McQuillen Decl. at ¶ 8; Exhibit A. The decision stated that the total number of signatures on the petition was 4,856, but there were only 3,564 valid signatures, which is less than the 4,094 signatures required for a valid petition under the OST Constitution. Id. The decision explained that the BIA rejected the following categories of signatures as invalid: (1) signatures where the individual could not be verified as an eligible voter by the OST Enrollment Office, (2) duplicate and triplicate signatures, (3) minors, (4) illegible signatures, (5) individuals living off-reservation, and (6) notary-attested signatures where the collector's signature was not on the petition page or the notary seal was missing, which makes a signature inadequate under 25 C.F.R. § 81.55.[4] Id. Pursuant to 25 C.F.R. § 81.62(b)(2), the June 17, 2019, decision correctly stated that it was a final agency action on the status of the petition. Id. at ¶ 9; Ex. A.

STANDARDS OF REVIEW

Defendants move to dismiss Plaintiffs' complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and 12(b)(6) for failure to state a claim upon which relief may be granted.

[4] Because the petition did not have sufficient signatures, the content of the petition was not formally evaluated by the BIA under 25 C.F.R. § 81.60(c).

I. Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1).

"Subject matter jurisdiction . . . is a threshold requirement which must be assured in every federal case." Turner v. Armontrout, 922 F.2d 492, 493 (8th Cir. 1991). "In determining whether jurisdiction exists, a district court is free to weigh evidence to satisfy itself as to its power to hear a case." Phillips v. Messerli & Kramer P.A., CIV 08-4419 DWF/JJG, 2008 WL 5050127, at *2 (D. Minn. Nov. 20, 2008) (citing Osborn v. United States, 918 F.2d 724, 730 (8th Cir. 1990)). "A district court may consider matters outside the pleadings in determining its jurisdiction, and doing so does not convert a motion to dismiss into a motion for summary judgment." Id. (citing Deuser v. Vecera, 139 F.3d 1190, 1192 n.3 (8th Cir. 1998)). "[N]o presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims." Osborn, 918 F.2d at 730. Ultimately, the plaintiff bears the burden of establishing that jurisdiction does, in fact, exist. Id.

II. Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6).

To survive a motion to dismiss for failure to state a claim, the plaintiff must plead facts sufficient to "raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). "Courts must accept a plaintiff's specific factual allegations as true but are not required to accept a plaintiff's legal conclusions." Brown v. Medtronic, Inc., 628 F.3d 451, 459 (8th Cir. 2010) (citing Twombly, 550 U.S. at 556). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

ARGUMENT

Plaintiffs do not allege that BIA officials violated a mandatory statute or regulation when they issued a decision regarding the validity of the petition signatures. Rather, Plaintiffs assert that

BIA officials acted "arbitrarily, capriciously, and in direct violation of federal law and their trust responsibility" by failing to use their discretion under 25 C.F.R. § 1.2 to *sua sponte*[5] waive the one-year time limit on the collection of signatures imposed by 25 C.F.R. § 81.58. Docket 1 at ¶ 46. Plaintiffs further assert that the one-year time limit is "arbitrary, simplistic, unnecessary, and has no meaningful basis for the regulatory restriction." Id. Accordingly, in the interest of fairness, Plaintiffs urge this Court to require that the BIA exercise its discretion in Plaintiffs' favor, thereby waiving the one-year time limit on the collection of petition signatures and granting Plaintiffs a six-month extension of time to gather petition signatures. As set forth in further detail below, these allegations relate to the Agency's discretionary exercise of power, thereby depriving this Court of subject matter jurisdiction. Further, the allegations otherwise fail to state a claim upon which relief may be granted. The Court should therefore dismiss the instant action.

I. The Court Lacks Subject Matter Jurisdiction over Plaintiffs' Complaint.

Plaintiffs assert that this Court has jurisdiction over the underlying Complaint pursuant to 18 U.S.C. § 1331, 18 U.S.C. § 1964(c), and 5 U.S.C. § 702. Because none of these statutes actually confer jurisdiction upon this Court, the Complaint should be dismissed for lack of subject matter jurisdiction.

A. General Federal Question Jurisdiction Does Not Apply in the Absence of an Express Waiver of Sovereign Immunity.

Section 1331 grants district courts original jurisdiction over civil actions arising under the Constitution, laws, or treaties of the United States. 18 U.S.C. § 1331. "Nevertheless, § 1331 does not, of its own force, waive the federal government's sovereign immunity from suit." Jefferson Cty., Mo. v. United States, 644 F. Supp. 178, 181 (E.D. Mo. 1986) (citing DeVilbiss v. Small Bus.

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[5] Notably absent from the Complaint is any assertion that the Task Force requested a waiver of the one-year time limit imposed by 25 C.F.R. § 81.58.

Admin., 661 F.2d 716, 718 (8th Cir. 1981)). "In the absence of an express waiver of immunity by Congress, suits against the United States are barred by the doctrine of sovereign immunity." Id. (citing Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands, 461 U.S. 273, 280 (1983)). "Similarly, suits against a federal agency are barred." Id. (citing Gnotta v. United States, 415 F.2d 1271, 1277 (8th Cir. 1969)). "This bar is jurisdictional—that is, unless a statutory waiver exists, the district court lacks jurisdiction to entertain a suit against the United States or its agency." Id. (citing United States v. Sherwood, 312 U.S. 584, 586 (1941); United States v. 3317.39 Acres of Land, 443 F.2d 104, 106 (8th Cir. 1971)). As will be discussed in further detail below, neither of the additional grounds cited by Plaintiffs to establish jurisdiction operate as a waiver of sovereign immunity. Accordingly, Defendants are entitled to sovereign immunity and the Court cannot exercise federal question jurisdiction over Plaintiffs' cause of action.

B. Plaintiffs Have Not Alleged Facts to Establish Subject Matter Jurisdiction under 18 U.S.C. § 1964(c).

Section 1964 grants federal courts jurisdiction over matters arising under the Racketeer Influenced and Corrupt Organization ("RICO") Act, 18 U.S.C. §§ 1961-1968. The particular subpart cited by Plaintiffs—§ 1964(c)—vests private litigants with authority to sue for treble damages for injury to their business or property. Although alleged as a jurisdictional ground for relief, the facts set forth in Plaintiffs' Complaint do not support a civil RICO action as contemplated by 18 U.S.C. §§ 1961-1968. See generally Docket 1. Accordingly, the RICO Act does not operate to confer subject matter jurisdiction upon this Court.

C. The Administrative Procedures Act Does Not Authorize Judicial Review of Actions Committed to Agency Discretion by Law.

The Administrative Procedures Act ("APA") is not an independent basis for subject matter jurisdiction. Jefferson County, 644 F. Supp. at 181 (citing Califano v. Sanders, 430 U.S. 99, 105

(1977)). "Rather, the APA waives sovereign immunity for suits seeking non-monetary relief from agency action." Id.; see 5 U.S.C. § 702 (providing for judicial review of agency action). "However, this waiver is limited by [5 U.S.C.] § 701," which explicitly preserves sovereign immunity in cases where the action at issue has been committed to agency discretion by law. Id.

Plaintiffs' Complaint raises issues with Defendant's failure to exercise discretion under 25 C.F.R. § 1.2 to *sua sponte* waive the one-year time limit on the collection of signatures imposed by 25 C.F.R. § 81.58. Pursuant to 25 C.F.R. § 1.2, the Secretary "retains the power to waive or make exceptions to his regulations . . . in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians." The Secretary's authority to waive the regulation now at issue is therefore discretionary. Because Congress has explicitly exempted discretionary agency actions from judicial review, the waiver of sovereign immunity in § 702 does not apply. In the absence of any other applicable jurisdictional ground, this Court must dismiss Plaintiffs' cause of action for lack of subject matter jurisdiction.

II. Plaintiffs' Complaint Fails to State a Claim upon which Relief May Be Granted.

As previously noted, Plaintiffs do not challenge the Defendants' determination that the petition did not have the requisite number of valid signatures. Instead, Plaintiffs assert that BIA officials violated federal law and their trust responsibility when they failed to use the discretion granted to them under 25 C.F.R. § 1.2 to waive the one-year time limit on the collection of signatures imposed by 25 C.F.R. § 81.58 and permit Plaintiffs additional time to collect the requisite number of signatures. Docket 1 at ¶¶ 38, 46. Plaintiffs further assert that the one-year time limit is "arbitrary, simplistic, unnecessary, and has no meaningful basis for the regulatory restriction." Id. at ¶ 43. Because neither of these allegations rise to the level of a cognizable claim

under the APA, the Court should dismiss Plaintiffs' Complaint for failure to state a claim upon which relief may be granted.

A. BIA Officials Have No Duty to Exercise Discretion in Plaintiffs' Favor and Otherwise Acted Reasonably by Complying with the Time Constraints Imposed by 25 C.F.R. § 81.58.

Plaintiffs argue that Defendants had the authority and the duty to waive the one-year time limit for collecting signatures under 25 C.F.R. § 81.58 and permit a six-month extension of time for the collection of signatures. Docket 1 at ¶ 38. Plaintiffs further assert that in failing to waive the one-year time limit, Defendants acted "arbitrarily, capriciously, and in direct violation of federal law and their trust responsibility." Id. at ¶ 46. To support this argument, Plaintiffs explain that circumstances beyond their control, including the size of the Tribe and the OST Reservation, as well as the extreme social and economic challenges faced by the Tribe, caused them to halt the collection of signatures "at various points throughout the signature collection period." Docket 1 at ¶¶ 14-18, 39, 44.

Plaintiffs' argument lacks any legal foundation. Under 25 C.F.R. § 1.2, "the Secretary retains the power to waive or make exceptions to his regulations ... where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians." As Plaintiffs acknowledge, this means the authority to waive a regulation is purely discretionary; and when the authority to waive a regulation is purely discretionary, there can be no duty.

Defendants' duty with respect to processing and reviewing the underlying petition was to comply with the regulations set forth at 25 C.F.R § 81, which outline the process by which a petitioner can request a Secretarial election.[6] Relevant to the underlying petition, 25 C.F.R. §

[6] Notably, the language of 25 C.F.R. § 81.58 does not expressly indicate that the BIA may choose to grant an extension of time to petitioners, and Plaintiffs do not allege that they requested an extension of time from the BIA during the one-year time period.

81.58 states that "[t]ribal members have one year from the date of the first signature to gather the required signatures." And, in accordance with 25 C.F.R. § 81.57, the requisite number of signatures is to be determined by each individual Tribe and any governing document or charter of incorporation. In the case of the Oglala Sioux Tribe, the Tribal Constitution indicates that the Secretary of the Interior will "call an election on any proposed amendment, at the request of two-thirds (2/3) of the [Tribal] council, or upon presentation of a petition signed by one-third (1/3) of the qualified voters, members of the Tribe."

When Plaintiffs submitted their petition to the BIA, they asserted that the Tribe had 12,283 enrolled members, and that the requisite number of signatures was therefore 4,094. Utilizing these numbers and the applicable regulations, Defendants reviewed the underlying petition and determined that only 3,564 signatures were valid. As a result, the petition was denied. Plaintiffs do not dispute Defendants' determination that the petition contained an insufficient number of valid signatures, nor do Plaintiffs dispute that Defendants properly denied the petition without reaching its substance. Plaintiffs' only dispute is that Defendants should have granted Plaintiffs additional time to collect signatures.

Absent from Plaintiffs' Complaint is any allegation that they requested a waiver under 25 C.F.R. § 1.2 of the one-year time limit imposed by 25 C.F.R. § 81.58. Accordingly, to grant Plaintiffs the relief they request, the Court would have to find that it was an abuse of discretion for Defendants to comply with relevant regulations rather than waive the regulations *sua sponte*. Plaintiffs cannot show that the BIA acted arbitrarily and capriciously by complying with the regulations, nor can Plaintiffs show that the BIA acted arbitrarily and capriciously when it failed to *sua sponte* permit additional time for the collection of signatures. The Court should therefore dismiss Counts I and III for failure to state a claim upon which relief may be granted.

B. The One-Year Time Limit Imposed through 25 C.F.R. § 81.58 is Reasonable.

Plaintiffs argue that the one-year limit on the collection of petition signatures is "arbitrary, simplistic, unnecessary, and has no meaningful basis for the regulatory restriction." Docket 1 at ¶ 43. While the one-year time limit may be arbitrary, the APA does not prohibit arbitrary action; it prohibits arbitrary and capricious action. Arbitrariness is unavoidable in legislation. Rules must include deadlines. One year may be arbitrary, but it is eminently reasonable. Accordingly, the Court should dismiss Count II for failure to state a claim upon which relief may be granted.

CONCLUSION

This Court lacks subject matter jurisdiction over the underlying Complaint. Further, the causes of action set forth in the Complaint fail to state a claim upon which relief may be granted. The Court should therefore dismiss Plaintiffs' Complaint.

Dated this 6th day of April, 2020.

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