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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 CINDY ALEGRE, an individual, et al.,

11 Plaintiffs,

12 v.

13 UNITED STATES, et al.,

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

**FEDERAL DEFENDANTS' MOTION TO
DISMISS FOR LACK OF
JURISDICITON THIRD CAUSE OF
ACTION IN FOURTH AMENDED
COMPLAINT**

DATE: January 9, 2019
TIME: 2:00 p.m.
CTRM: 4A
JUDGE: Hon. Anthony J. Battaglia

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18 Defendants United States of America and the Department of the Interior, and
19 Defendants Michael Black, Weldon Loudermilk, Amy Dutschke, and Javin Moore sued in
20 their official capacities, hereby move to dismiss for lack of subject matter jurisdiction
21 Plaintiffs' third claim in their Fourth Amended Complaint alleging violations of Plaintiffs'
22 Fifth Amendment rights to Equal Protection. A Memorandum of Points and Authorities in
23 support of this motion is provided on the subsequent pages.
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1 **I. Introduction**

2 On September 9, 2019, Plaintiffs filed a Fourth Amended Complaint (4AC) alleging:
3 1) an Administrative Procedures Act (APA) claim, 2) a claim seeking declaratory relief or
4 a writ of mandate;¹ and 3) a claim alleging the United States, the Department of Interior,
5 and the above-named federal officials sued in their official capacities (collectively Federal
6 Defendants)² violated Plaintiffs' Fifth Amendment Equal Protection rights. (ECF No. 105)
7 Federal Defendants hereby move to dismiss Plaintiffs' third claim alleging equal protection
8 violations since such claims are barred by sovereign immunity. Therefore, the Court must
9 dismiss for lack of subject matter jurisdiction.

10 **II. Argument**

11 As the Court has previously noted, although Plaintiffs have filed amended complaints
12 several times, the core facts alleged in each of them is that the BIA mistakenly failed to
13 affirm the San Pasqual Band of Mission Indians' 2005 determination that Modesta Martinez
14 Contreras had 4/4 blood degree of the Band rather than 3/4, and mistakenly failed to notify
15 Plaintiffs of that conclusion, thereby preventing certain descendants of Modesta (the Group
16 A Plaintiffs) to be enrolled into the Band. (ECF No. 98 at 2-3.) In each of their amended
17 complaints, however, Plaintiffs have added additional allegations of perceived wrongs.
18 Some of those additional allegations are associated with the BIA's conduct regarding the
19 Group A Plaintiffs' enrollment applications. Other allegations, however, have to do with
20 the historical creation and early proceedings of the San Pasqual Band of Mission Indians
21 (the Band) stretching back over a century. Following this pattern, in the third cause of action
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24 ¹ Plaintiffs' first two claims are similar to claims Plaintiffs have previously
25 raised in that they seek review of the Bureau of Indian Affairs handling of Group A
26 Plaintiffs' applications to enroll in the San Pasqual Band of Mission Indians, Federal
27 Defendants do not challenge those claims in this motion.

28 ² Actions against an agency of the United States, or an officer of the United
States operating in his or her official capacity, is treated as a claim against the United States.
See Solida v. McKelvey, 820 F.3d 1090, 1095 (9th Cir. 2016); Balser v. Dep't of Justice,
Office of U.S. Tr., 327 F.3d 903, 907 (9th Cir. 2003).

1 in Plaintiffs’ 4AC, Plaintiffs now allege that Federal Defendants violated the Equal
2 Protection Clause of the Fifth Amendment by:

- 3 • enrolling non-San Pasqual persons into the Band;
- 4 • enrolling Group A Plaintiffs’ cousins into the Band, but not them;
- 5 • holding Plaintiffs to a higher blood quantity standard than other members of
6 the Band;
- 7 • denying Group A Plaintiffs notice of BIA’s conclusions and an opportunity to
8 submit additional documents to support their application for membership;
- 9 • targeting and discriminating Plaintiffs;
- 10 • using the wrong standard of review when considering Modesta’s blood degree;
- 11 • failing to consider Plaintiffs’ total Indian Blood when determining whether to
12 approve enrollment applications into the Band, as they had for others;
- 13 • enacting former 25 C.F.R. § 48.5(f);³
- 14 • manipulating facts and documents in order to allow certain persons to
15 inappropriately enroll in the Band, including inserting the words “blood of the
16 Band” into clauses of 25 C.F.R. Part 45, and then misinterpreting that phrase
17 to allow total Indian Blood to be used to enroll certain persons into the Band;
- 18 • ignoring the Band’s Enrollment Committee’s objections to the enrollment of
19 certain persons into the Band.⁴

20 (4AC ¶¶ 125-138 (ECF No. 105-1 at 18-23).) Plaintiffs seek money damages on this claim.
21 (4AC at 41 (ECF No. 105-1 at 26).)

22 Although there are numerous legal problems with Plaintiffs’ claim, including statute
23 of limitations and failure to join a necessary party (the Band) defenses, as well as labeling
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25 ³ As the Court has noted, 25 C.F.R. Part 45 was removed from the Code of
26 Federal Regulations in 1996, nine years before the alleged acts regarding Group A
27 Plaintiff’s enrollment applications, although the former regulations are incorporated into
the Band’s tribal law. (ECF No. 98 at 11 (citing, inter alia, Alto v. Black, 738 F.3d 1111,
1116 (9th Cir. 2013))

28 ⁴ At least the first and last three bullet points appear to be based on alleged facts
occurring over half a century ago.

1 claims that have nothing to do with Equal Protection as violations of such, Federal
2 Defendants are cognizant of the Court’s admonition against ‘kitchen sink’ motions.
3 Therefore, Federal Defendants move to dismiss the third cause of action in Plaintiffs’ 4AC
4 based on its simplest and most obvious flaw—the United States has not waived sovereign
5 immunity over such a claim, and therefore the Court lacks subject matter jurisdiction. See
6 McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988) (“The question whether the
7 United States has waived its sovereign immunity against suits for damages is, in the first
8 instance, a question of subject matter jurisdiction.”).

9 The United States may not be sued absent an explicit and unequivocal waiver of its
10 sovereign immunity. See Lane v. Pena, 518 U.S. 187, 2096 (1996); see also United States
11 v. Testan, 424 U.S. 392, 400–01 (1976) (“In a suit against the United States, there cannot
12 be a right to money damages without a waiver of sovereign immunity, and we regard as
13 unsound the argument . . . that all substantive rights of necessity create a waiver of
14 sovereign immunity such that money damages are available to redress their violation.”).
15 Sovereign immunity similarly shields federal agencies from suit. See F.D.I.C. v. Meyer,
16 510 U.S. 471, 475 (1994). Also, the bar of sovereign immunity cannot be avoided by
17 naming officers and employees of the United States in their official capacities as
18 defendants; such a suit is also precluded by sovereign immunity absent express statutory
19 waiver. See Gilbert v. DaGrossa, 756 F.2d 1455, 1458, 1460 (9th Cir. 1985). A party
20 asserting a claim against the United States has the burden of demonstrating an unequivocal
21 waiver of sovereign immunity. See United States v. Park Place Assocs., Ltd., 563 F.3d 907,
22 924 (9th Cir. 2009).

23 Although Plaintiffs do not identify in the 4AC the basis for any alleged waiver of
24 sovereign immunity as to their third cause of action,⁵ they do allege they may bring their
25 civil rights claim pursuant to 28 U.S.C. § 1343 and the Fifth Amendment to the United
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27 ⁵ The Court has previously instructed Plaintiffs to identify the basis for any
28 alleged waiver of sovereign immunity as to each of their causes of action. (ECF No. 59 at
2:12-18; ECF No. 43 at 11:17-12:4).

1 States Constitution. (4AC ¶ 5 (ECF No. 105 at 8).) But general jurisdictional statutes such
 2 as 28 U.S.C. § 1343 cannot waive the government’s sovereign immunity.⁶ See Hughes v.
 3 United States, 953 F.2d 531, 539 n.5 (9th Cir. 1992); Jachetta v. United States, 653 F.3d
 4 898, 908 (9th Cir. 2011) (“28 U.S.C. § 1343(a)(3) does not waive sovereign immunity.”);
 5 Salazar v. Heckler, 787 F.2d 527, 528 (10th Cir. 1986) (28 U.S.C. § 1343(a)(4) does not
 6 include any waiver of sovereign immunity); Beale v. Blount, 461 F.2d 1133, 1138 (5th Cir.
 7 1972) (“Section[]1343, Title 28, United States Code, may not be construed to constitute
 8 waiver[] of the federal government’s defense of sovereign immunity.”); Brian v. Gugin,
 9 853 F. Supp. 358, 363 (D. Idaho 1994), aff’d, 46 F.3d 1138 (9th Cir. 1995) (“28 U.S.C.
 10 § 1343 . . . cannot be used to waive the government’s sovereign immunity and the
 11 government cannot be sued for damages for alleged violations of the Constitution”);
 12 Easterly v. Dep’t of Army, No. CIVS07-1259JAM DADPS, 2008 WL 2054798, at *5 (E.D.
 13 Cal. May 9, 2008), report and recommendation adopted sub nom. Easterly v. Dep’t of the
 14 Army, No. CVS071259JAMDADPS, 2008 WL 11387090 (E.D. Cal. Sept. 26, 2008)
 15 (“Neither § 1983 nor § 1985 contains a waiver of sovereign immunity with respect to federal
 16 agencies and federal officials, and therefore plaintiff’s claims under 42 U.S.C. §§ 1983 and
 17 1985 should be dismissed.”). Furthermore, nothing in the Fifth Amendment even purports
 18 to grant jurisdiction over claims for money damages, much less constitutes a waiver of
 19 sovereign immunity.⁷ See Carruth v. United States, 627 F.2d 1068, 1081 (Ct. Cl. 1980)
 20 (“This court has no jurisdiction over claims based upon the Due Process and Equal
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23 ⁶ A fortiori, statutes such as 28 U.S.C. § 1500, which limit a court’s jurisdiction,
 24 do not waive sovereign immunity. That statute states, “The United States Court of Federal
 25 Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his
 26 assignee has pending in any other court any suit or process against the United States”
 This statute, which Plaintiffs refer to in the eighth paragraph of the 4AC, cannot be
 construed as an explicit and unequivocal waiver of sovereign immunity.

27 ⁷ To confer subject matter jurisdiction in an action against the United States,
 28 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).

1 Protection guarantees of the Fifth Amendment, because these constitutional provisions do
2 not obligate the Federal Government to pay money damages).

3 Plaintiffs' failure to identify a basis to argue that the United States has waived its
4 sovereign immunity to allow the third claim of the 4AC is because no such waiver exists.
5 As the Ninth Circuit has stated, "[C]ourts lack subject matter jurisdiction to hear
6 constitutional damage claims against the United States, because the United States has not
7 waived sovereign immunity with respect to such claims." Rivera v. United States, 924 F.2d
8 948, 951 (9th Cir. 1991) (affirming dismissal of claims brought under the First and Fifth
9 Amendments); see also Clemente v. United States, 766 F.2d 1358, 1362-64 (9th Cir. 1985)
10 (reversing district court's award of compensatory and punitive damages against United
11 States for violating Fifth Amendment rights of the plaintiff because sovereign immunity
12 strips jurisdiction over such a claim); Arnsberg v. United States, 757 F.2d 971, 980 (9th
13 Cir. 1985) (no implied right of action against the United States under the Fourth
14 Amendment); Orion Ins. Grp. v. Washington State Office of Minority & Women's Bus.
15 Enterprises, No. 16-5582 RJB, 2016 WL 6805335, at *5 (W.D. Wash. Nov. 17, 2016), aff'd
16 sub nom. Orion Ins. Grp. v. Washington's Office of Minority & Women's Bus. Enterprises,
17 754 F. App'x 556 (9th Cir. 2018) (dismissing claim for alleged violation of the Equal
18 Protection clause because no waiver of sovereign immunity for such a claim); Nassiri v.
19 Berryhill, No. 15-CV-0583-WQH-NLS, 2017 WL 3055709, at *1 (S.D. Cal. July 19, 2017),
20 reconsideration denied sub nom. Nassiri v. Tran, No. 15-CV-0583-WQH-NLS, 2018 WL
21 295974 (S.D. Cal. Jan. 3, 2018) (J. Hayes stating that he dismissed constitutional tort claims
22 because plaintiff failed to demonstrate waiver of sovereign immunity);⁸ Boyd v. United
23 States, No. 15-CV-03494-BLF, 2017 WL 1133512, at *7 (N.D. Cal. Mar. 27, 2017), aff'd
24 sub nom. Boyd v. United States Dep't of the Treasury, 713 F. App'x 648 (9th Cir. 2018)
25 (dismissing equal protection claim based on sovereign immunity). Since sovereign
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28 ⁸ J. Hayes was quoting from his order docketed as ECF No. 79 in 15-CV-0583-
WQH.

1 immunity bars the third claim in Plaintiffs’ 4AC, the Court must dismiss that claim for lack
2 of subject matter jurisdiction with prejudice. See Hutchinson v. United States, 677 F.2d
3 1322, 1327 (9th Cir. 1982); Gottschalk v. City & Cnty. of San Francisco, 964 F.Supp.2d
4 1147, 1162 (N.D. Cal. 2013) (2013) (“As the United States has not waived its sovereign
5 immunity with respect to claims brought under §§ 1981, 1983, and 1985, these claims as
6 brought against Federal Defendants must be dismissed with prejudice.”); Campbell v. U.S.
7 Dep’t of Educ., No. 10–CV–266 JLS (WMc), 2010 WL 2605803, at *3 (S.D. Cal. June 28,
8 2010) (“[S]ince sovereign immunity also bars Plaintiff’s claims, they must be DISMISSED
9 WITH PREJUDICE for lack of subject matter jurisdiction.”).

10 **III. Conclusion**

11 For the reasons stated above, the Court should grant Federal Defendants’ motion to
12 dismiss the third claim in Plaintiffs’ Fourth Amended Complaint with prejudice.

13 DATED: October 7, 2019

Respectfully submitted,

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