JEFFREY H. WOOD
Acting Assistant Attorney General
ANDREA L. BERLOWE
Senior Counsel
U.S. Department of Justice
Environment and Natural Resources Division
Law and Policy Section
P.O. Box 7415
Washington, DC 20044-7415
Email: andrea.berlowe@usdoj.gov
Telephone: (202) 305-0478
Facsimile: (202) 514-4231

Attorneys for the United States

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

WENDY DEL ROSA, *et al.*,

Plaintiffs,

v.

RYAN ZINKE, Secretary of the United States Department of the Interior, *et al.*,

Defendants.

CASE NO. 2:17-cv-01750-TLN-CMK

BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINT

[Fed. R. Civ. P. 12(b)]

Date: **April 19, 2018**
Time: **2:00 pm, PDT**
Courtroom: **2, 15th Floor**
Judge: **Hon. Troy L. Nunley**

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INTRODUCTION

Plaintiffs[1] bring this action alleging the United States Department of the Interior ("Interior") must insert itself into an internal dispute regarding governance of the Alturas Indian Rancheria so that it may contract with the appropriate tribal governing body. Plaintiffs appear to challenge Interior's decision to enter into contracts with an opposing tribal faction for fiscal years 2015, 2016, and 2017, arguing that Interior's actions violate the Administrative Procedure Act ("APA") and unnamed "federal common law," and breach an undefined trust obligation purportedly owed to Plaintiffs.

This Court lacks jurisdiction over Plaintiffs' claims for several reasons. First and foremost, Plaintiffs have not demonstrated the constitutional minima required for standing to sue. Even if Plaintiffs could meet the standing prerequisites, the Court still would lack jurisdiction to hear them because each of Plaintiffs' claims would require this Court to delve into an internal governance dispute between tribal factions, which it lacks jurisdiction to do. In addition, Plaintiffs have not asserted any underlying statutory violation upon which their APA claim might rest. Finally, the actions Plaintiffs challenge are committed to agency discretion and, therefore, excluded from the APA's waiver of sovereign immunity.

Assuming, *arguendo*, Plaintiffs could establish this Court's jurisdiction to hear their claims, the Complaint should be dismissed because it fails to state a claim upon which relief can be granted. Plaintiffs cannot articulate any "federal common law" that would require Interior to insert itself into the Tribe's internal governance dispute because no such law exists. In addition, Plaintiffs do not base their breach of trust claim on any statutory obligation, which is a necessary element of such a claim. Again, Plaintiffs cannot do so because no such statutory obligation exists. Finally, even if Plaintiffs could

[1] Wendy Del Rosa, an enrolled member of the Alturas Indian Rancheria ("the Tribe"), is the lead plaintiff in this case. The Complaint identifies Ms. Del Rosa as a member of the Tribe's general council and business committee, and also purports to bring claims on behalf of the Tribe. The question of who has authority to speak on behalf of the Tribe, however, is a presently a matter of internal dispute among Ms. Del Rosa and other members of the Tribe. Thus, for purposes of this motion, the United States simply will use the term "Plaintiffs" without taking a position regarding the dispute.

establish a factual and legal predicate for their claims, they cannot show that extraordinary mandamus relief is available here because no "ministerial duty" exists. The Court should dismiss Plaintiffs' claims.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

The Indian Self Determination Act ("ISDA"), Pub. L. No. 93-638 ("Section 638"), 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 5301 *et seq.*), governs contracting between the Bureau of Indian Affairs ("BIA") and federally recognized Indian tribes. The BIA – a component of the Department of the Interior – provides a broad range of programs and services, both directly and through section 638 contracts with tribes and tribal organizations, to members of over 560 federally-recognized tribes. Congress appropriates money to BIA for the operation of Indian programs annually in a lump-sum appropriation, then BIA allocates available funds among the federally recognized tribes.

At the request of a tribe, the ISDA "direct[s]" the Secretary of the Interior to enter into a self-determination contract (also known as a "section 638 contract") with a tribe or tribal organization to administer any program or service that is currently provided by the Secretary for the benefit of the tribe. *See* 25 U.S.C. § 5321(a)(1). The Act defines "tribal organization" to include, *inter alia*, "any legally established organization of Indians which is controlled, sanctioned, or chartered by" "the recognized governing body of any Indian tribe." 25 U.S.C. § 5304(l). Thus, when a tribe requests that BIA enter into a section 638 contract for a function the agency would otherwise carry out, BIA must engage with the tribe on a government-to-government basis.

BIA's regulations establish numerous requirements regarding approval and award of section 638 contracts and associated funding. *See* 25 C.F.R. part 900. Once a tribe submits a request to contract, the agency must either award or decline the request within 90 days. 25 U.S.C. 5321(a)(2); 25 C.F.R. § 900.16-18. If the agency does not act on the proposal within 90 days, the contract is deemed approved. 25 C.F.R. § 900.18.

> The Act limits the bases on which the agency may decline a contracting proposal to the following:
>
> (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
> (B) adequate protection of trust resources is not assured;
> (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;
> (D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 5325(a) of this title; or
> (E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

25 U.S.C. § 5321(a)(2).

BIA must recognize some tribal government, even if only on an interim basis for contracting purposes, where it is necessary to work with a tribal entity to ensure continuation of essential, day-to-day services on the reservation. *Goodface v. Grassrope*, 708 F. 2d 335, 338-39 (8th Cir. 1983). BIA has the authority and duty to decide which tribal entity to recognize as the tribal government for purposes of government-to-government relations and must: (1) "do so in harmony with principles of tribal self-determination;" (2) "effect as little disruption as possible on tribal sovereignty and self-determination;" and, (3) to the extent they impact BIA's decision, ensure that tribal court rulings and interpretations of tribal law are reasonable. *Ransom v. Babbitt*, 69 F. Supp. 2d 141, 150-152 (D.D.C. 1999) (citations omitted). BIA recognition of a tribal government on an interim basis acknowledges that the tribe, not the federal government, ultimately must resolve tribal government disputes.

Where BIA determines that an internal dispute exists within a tribe regarding the authority of any particular faction to act on the tribe's behalf, BIA has discretion to recognize the last uncontested tribal governing body for purposes of conducting government-to-government relations on an interim basis. *See Goodface*, 708 F. 3d at 340; *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1186 (E.D. Cal. 2009) ("BIA determination of a Tribal Council for government-to-government purposes is within the province of BIA."). BIA administrative discretion to identify a governing body for purposes of

government-to-government relations concerning BIA's contracting obligations with tribes contrasts with its non-discretionary obligations relating to the contracting process, such as contract declination. *See* 25 U.S.C. § 5321(a)(2).

If BIA declines a contract proposal, the agency must notify the tribe in writing and provide assistance to the tribe to overcome the objection. *Id.* § 5321(a)(2), (b). A tribe may request an informal conference, begin an administrative appeal, or proceed directly in federal district court. *Id.* §§ 5321(b)(3), 5331(a); 25 C.F.R. § 900.31; 25 C.F.R. §§ 900.153–.157. In contrast, Interior administratively adjudicates, pursuant to 25 C.F.R. Part 2, discretionary decisions such as BIA's decision to identify a tribal governing body for contracting purposes.

II. FACTUAL BACKGROUND

Much of the conflict between BIA and Plaintiffs to date has centered on disputes between various factions of tribal members over tribal membership and the legitimate tribal governing body. For purposes of this case, the first section 638 contract requests to BIA occurred in 2010 during the pendency of an administrative appeal to the Interior Board of Indian Appeals (IBIA) regarding tribal membership. At the time, the BIA Superintendent, Northern California Agency, informed the requesters that he was unable to act on the contract requests based on his understanding that, absent express permission from IBIA, BIA lacks jurisdiction to act on any matter that is pending on appeal before the IBIA. *Alturas Indian Rancheria v. Northern California Agency Superintendent*, 52 IBIA 7, 8-9 (2010) (affirming BIA's determination that it was precluded from taking action on an ISDA proposal because a tribal membership and governance dispute was the subject of an appeal before the IBIA). One of the tribal factions sued the agency seeking an order compelling BIA to immediately award and fund the section 638 contract based on the statutory mandate to award a contract within 90 days of submission, absent one of five statutory bases for declining a request. *Alturas Indian Rancheria v. Kenneth L. Salazar, et al.*, Case No. 2:10-CV-01997-LKK-EFB, (E.D. Cal.) ("*Alturas I*"); *see also* 25 U.S.C. § 5321; 25 CFR § 900.16-18. The parties

settled the litigation stipulating that, *inter alia*, the tribal business committee consisted of Phillip Del Rosa, Chairman, Darren Rose, Vice-Chairman, and Wendy Del Rosa, Secretary. *See Alturas I*, Case No. 2:10-CV-01997-LKK-EFB, ECF No. 126, ¶ 1 (filed 1/13/12).

Later in 2012, after executing the settlement agreement, the Tribe again split into factions that disputed the composition of its rightful governing body. The current factions consist of the Plaintiffs in this case ("Plaintiffs' faction") and another comprised primarily of Phillip Del Rosa and Darren Rose ("Rose faction"). *E.g.*, ECF No. 1, Ex. I at 1-2; Ex. H at 1-2; Ex. G at 2.

III. PROCEDURAL BACKGROUND

On October 15, 2015, in response to renewed requests to contract for fiscal year 2015 ("FY15") from both the Rose faction and the Plaintiffs' faction, the BIA Regional Director, Pacific Region, awarded a section 638 contract to the last uncontested governing body of the Tribe on an interim basis until the Tribe could resolve its governance disputes. The Regional Director selected the business committee named in the 2012 settlement agreement as the Tribe's last uncontested governing body based on a Report of Tribal Election submitted to the Superintendent, following its regular tribal election on April 2, 2012, in which the tribal general council, *inter alia*, affirmed that the composition of the business committee identified in the Settlement Agreement was elected. Plaintiffs appealed the Regional Director's decision regarding the FY15 contract to the IBIA.

While that appeal was pending, the Superintendent received a section 638 contract proposal for fiscal year 2016 ("FY16"). In April 2016, he returned the request citing a lack of jurisdiction pending either a decision by the IBIA or resolution of the tribal governance dispute; the Regional Director affirmed that decision and Plaintiffs did not appeal the decision to the IBIA. ECF No. 1, Ex. H at 2. In February 2017, while the IBIA appeal of the FY15 contract decision remained pending, the Superintendent received a section 638 contract proposal for fiscal year 2017 ("FY17"). Noting the lack of any indication that the Tribe had resolved its internal governance dispute, the Superintendent again

returned the request to contract. ECF No. 1, Ex. J at 1.

On June 30, 2017, the IBIA issued an Order upholding the BIA's FY15 decision, on an interim basis, to contract with the business committee elected in 2012 as the last undisputed governing body of the Tribe. *Alturas Indian Rancheria & Wendy Del Rosa v. Pacific Reg'l Dir., Bureau of Indian Affairs*, 64 IBIA 236 (2017). The IBIA Order also affirmed the Superintendent's view that, in accordance with 25 C.F.R. part 2, he lacked jurisdiction to make any further contracting decisions while the IBIA appeal of the FY15 decision was pending, provided the Tribe had not yet resolved its internal governance dispute. 64 IBIA at 246-247.

The IBIA held it was appropriate for the BIA to recognize the last undisputed tribal officials on an interim basis in situations where the agency is required to take a federal action involving government-to-government relations with a tribe, but competing tribal factions do not agree on who represents that tribe for such purposes. 64 IBIA at 243-44. The IBIA further found that the determination of which faction constituted the last undisputed tribal government was within the agency's discretion. *Id.* at 243. Finally, the IBIA held the Regional Director properly exercised her discretion in choosing the business committee elected in April 2012 as the last undisputed tribal government because Appellants acknowledged the results of the April 2012 election and "[n]o one challenged the conduct or results" of that election. *See id.* at 241 (citing Appellant's Opening Brief at 15-16).

In addition to Appellant's admission, the IBIA also found record support for the Regional Director's decision and noted that, "the parties' disagreement over whether the 2012 or the 2014 business committee constitutes the last undisputed business committee provides additional support for giving BIA wide latitude in determining with whom it will deal on an interim basis." 64 IBIA at 243. Finally, the IBIA found that the Regional Director properly refrained from considering the factions' competing allegations of misconduct and voting ineligibility, given her "lack of 'authority to intrude into the internal affairs of the Tribe to determine which faction's actions are valid because doing so would

require…delv[ing] into membership issues.'" *Id.* at 245-46.

Following the IBIA's Order, the Rose faction renewed its request to contract with BIA for FY16 and FY17. ECF No. 1, Ex. L. In July 2017, the BIA indicated that, given the continued internal governance disputes among the factions, the agency would continue to recognize the business committee elected in April 2012 as the last uncontested tribal government for purposes of conducting government-to-government business between the BIA and the Tribe. ECF No. 1, Ex. N. Plaintiffs objected to the BIA Superintendent, claiming that the IBIA Order did not authorize the agency to recognize the Rose faction for anything other than approval of the FY15 contract and, therefore, the Rose faction had "no right to obtain" FY16 and FY17 contract funds – i.e., contesting the rightful governance of Tribe. ECF No. 1, Ex. O. Pursuant to the IBIA Order, and in light of the continuing factional dispute, the BIA executed FY16 and FY17 contracts with the Rose faction as the last uncontested governing body of the Tribe. ECF No. 1, Ex. P. Plaintiffs did not appeal these contracting decisions within the Department of the Interior.

Plaintiffs' Complaint challenges the IBIA Order, as well as the BIA's FY16 and FY17 section 638 contracting decisions, on the same three grounds. First, Plaintiffs allege that recognizing the April 2012 business committee for purposes of government-to-government relations between the Tribe and the BIA "constitutes an impermissible interference in the internal affairs of the Tribe in direct violation of federal common law." ECF No. 1, ¶¶ 27-31. Second, Plaintiffs assert that, such recognition violates "federal common law and the APA," 5 U.S.C. § 701, *et seq*. ECF No. 1, ¶¶ 32-36. Third, Plaintiffs contend that Interior's "failure…to recognize and enforce the General Council's decision removing [Phillip] Del Rosa from the office of Chairman and recognizing the right of the Tribe to govern itself, constitutes a breach of the United States [sic] fiduciary trust duties owned [sic] to the Tribe by the United States." *Id.* ¶¶ 37-41.

STANDARD OF REVIEW

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), a court must consider whether the Plaintiffs' allegations are sufficient to meet their burden of establishing the court's jurisdiction over its claims. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Federal courts "possess only that power authorized by Constitution and statute" and, therefore, Plaintiffs must identify a statute or constitutional provision that provides jurisdiction. *Id.* In a suit against the United States, Plaintiffs also must identify an applicable waiver of sovereign immunity to establish jurisdiction. *United States v. Mitchell*, 463 U.S. 206, 212 (1983). It is the Plaintiffs' burden to establish that the court has subject matter jurisdiction to hear the case. *Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001), *abrogated on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

In contrast, when reviewing a motion to dismiss under Rule 12(b)(6), a court generally must accept a complainant's factual allegations as true. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984); *Cruz v. Beto*, 405 U.S. 319, 322 (1972). The same does not apply, however, to legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). The complaint must be dismissed if plaintiffs cannot prove any set of facts that would entitle them to relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (internal quotation marks and citation omitted).

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO HEAR PLAINTIFFS' CLAIMS.

It is axiomatic that "federal district courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute." *K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1027 (9th Cir. 2011) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546,

552 (2005). Article III of the Constitution limits the jurisdiction of federal courts to actual cases or controversies. *Already, LLC, v. Nike, Inc.*, 568 U.S. 85, 90 (2013). There exists a general presumption against federal court jurisdiction and "the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted).

One of the pillars of the case-or-controversy requirement is standing to sue.

> [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180–81 (2000) (internal quotation marks and citation omitted).

Another foundational premise of law is that the United States cannot be sued without its consent. *United States v. Bormes*, 568 U.S. 6, 9-10 (2012) (citations omitted); *United States v. Navajo Nation*, 556 U.S. 287, 289 (2009). Any waiver of sovereign immunity "cannot be implied but must be unequivocally expressed," and, absent clear congressional intent to the contrary, is narrowly construed. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (internal quotation and citations omitted).

In addition, the Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (citing cases). "This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' to the extent that sovereignty has not been withdrawn by federal statute or treaty." *Id.* (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). Consequently, federal courts repeatedly hold that adjudication of internal tribal disputes is outside their jurisdiction. *See Williams v. Lee*, 358 U.S. 217, 221–22 (1959); *Smith v. Babbitt*, 100

F.3d 556, 559 (8th Cir. 1996); *see also In re: Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003) ("*Meskwaki Casino*"); *Sac & Fox Tribe of the Mississippi in Iowa, Election Bd. v. Bureau of Indian Affairs*, 439 F.3d 832, 835 (8th Cir. 2006) ("*Sac & Fox*"); *Timbisha Shoshone Tribe*, 687 F. Supp. 2d at 1185 (E.D. Cal. 2009) (citing *Nero v. Cherokee Nation*, 892 F.2d 1457, 1463 (10th Cir. 1989)).

Here, Plaintiffs lack standing to sue because they cannot demonstrate the constitutional minima necessary for standing. Even if Plaintiffs could demonstrate standing to sue, their claims should be dismissed because the Court lacks jurisdiction for other reasons. For example, adjudicating Plaintiffs' claims would require this Court to insert itself into an internal tribal governance dispute, which it lacks jurisdiction to do. In addition, Plaintiffs have not identified an underlying statutory violation that might support their claim that Interior violated the APA. Finally, the decisions about which Plaintiffs complain are committed to agency discretion by law and, therefore, excluded from the APA's waiver of sovereign immunity. Plaintiffs' claims should be dismissed in their entirety.

A. Plaintiffs Lack Standing To Sue.

As with any jurisdictional requirement, Plaintiffs bear the burden of demonstrating their standing to bring each of their claims and for "each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quoting *Laidlaw*, 528 U.S. at 185); *Tyler v. Cuomo*, 236 F.3d 1124, 1131 (9th Cir. 2000) (plaintiff must establish each constitutional standing requirement) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiffs have not demonstrated a cognizable injury, let alone one that is "fairly traceable" to Interior, or that this Court can redress. Consequently, Plaintiffs lack standing to bring their claims and the Court should dismiss them.[2]

[2] It is unclear whether the Tribe is a proper plaintiff. Assuming, *arguendo*, that Ms. Del Rosa is a member of the Tribe's business committee, it is unclear whether she can sue on behalf of the Tribe because the Tribe's Constitution states that the general council is the "governing body" of the Tribe,

Plaintiffs have not demonstrated a concrete, particularized injury required to establish their standing to sue. In fact, Plaintiffs do not articulate any injury at all beyond the Complaint's boilerplate allegation that they "will suffer irreparable harm for which [they] will have no adequate remedy at law." ECF No. 1, ¶¶ 35, 41. Nowhere do Plaintiffs elaborate on the supposed "irreparable harm" they may suffer. The only assertion they make beyond this generic language is that the Tribe "will be deprived of its right to govern itself under its own tribal laws." *See, e.g.*, ¶ 35.[3] But nothing about the section 638 contracting decisions at issue here precludes the Tribe from governing itself, and Plaintiffs offer nothing to support the bald assertion otherwise. General assertions such as these cannot establish a concrete and particularized injury-in-fact for standing purposes. *Spokeo, Inc., v. Robins*, --- U.S. ---, 136 S. Ct. 1540, 1548-49 (2016) ("particularized" injury "must affect the plaintiff in a personal and individual way" and "concrete" injury "must actually exist," not be "abstract") (internal quotations omitted).

In addition, Plaintiffs cannot demonstrate that any alleged injury is traceable to Interior's decision to recognize the last uncontested governing body of the Tribe for federal contracting purposes. *See Bullcreek v. U.S. Dept. of Interior*, 426 F. Supp. 2d 1221, 1230-31 (D. Utah 2006) (injury alleged by individual tribal member from Interior's interim selection of tribal leadership for section 638 contracting purposes not traceable to such selection). Pursuant to the ISDA, Interior must contract with the Tribe absent one of five statutory justifications for rejecting a contract proposal. *See Band of Cahuilla & Cupeño Indians v. Jewell*, 729 F.3d 1025, 1033 (9th Cir. 2013).

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and delineates particular powers that the general council and the business committee hold concurrently. ECF No. 1, Ex. A at 2-4. Determining whether one business committee member may bring suit on behalf of the Tribe requires the Court to delve into internal governance matters, which it should not do. In addition, as an individual tribal member Ms. Del Rosa cannot rely on 28 U.S.C. § 1362 as a basis for jurisdiction as that provision is only available to tribes, not individual members.

[3] Ironically, depriving the Tribe of its right to govern itself under tribal law is precisely what Plaintiffs ask this Court to do by ordering Interior to validate disputed internal tribal governance actions taken by Plaintiffs' faction against Phillip Del Rosa after the undisputed 2012 election.

Indeed, Plaintiffs do not challenge Interior's decision to contract with the Tribe, and none of the statutory reasons for rejecting a contract proposal exist. Rather, Plaintiffs challenge Interior's choice of tribal factions with which to contract, asserting that the Rose faction has no legitimate claim to tribal governance. Thus the underlying dispute, though couched as a challenge to Interior's decision to choose a tribal governing body for the purpose of government-to-government relations, is actually a dispute between Plaintiffs' faction and the Rose faction. Consequently, Plaintiffs have not made the requisite traceability showing.

Finally, Plaintiffs' claims are not redressable. "Redressability requires an analysis of whether the court has the power to right or to prevent the claimed injury." *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1199 (9th Cir. 2017) (internal quotation omitted). "Even assuming that [a plaintiff] has suffered injury in fact, [if] the federal courts have no power to right or to prevent that injury," then the plaintiff fails to show redressability and is deprived of standing. *Id.* Here, Plaintiffs ask this Court to redress their alleged injuries by recognizing a 2012 action purportedly removing Phillip Del Rosa as tribal Chairman and stripping him of his right to vote in tribal matters. To do so, the Court would have to adjudicate a tribe's application of its own laws to its own members, an action falling squarely within the realm of tribal governance disputes into which a federal court should not wade.

This court refused to confer standing under similar circumstances in *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1184 (E.D. Cal. 2009). The *Timbisha* court found that, "to determine whether Plaintiffs have standing[,] . . . the Court must interject itself into the internal affairs of the Tribe," which would necessitate consideration of "tribal law as it relates to elections." *Id.* at 1184–85. The court found it lacked authority to determine standing, noting that, where resolution of a complaint ultimately turns on the "parties' election dispute" and the court cannot determine the issue of standing without resolving that election dispute, then plaintiffs fail "to sustain

their burden to demonstrate that they have standing to purse th[e] action." *Id*.

More recently, the federal district court in Arizona found plaintiffs lacked standing in a case that is illustrative here. *See Picayune Rancheria of Chukchansi Indians v. Henriquez*, No. CV-13-01917-PHX-DGC, 2013 WL 6903750, at *1 (D. Ariz. Dec. 31, 2013). In *Picayune Rancheria*, all three factions in an internal tribal council leadership dispute sought acknowledgment of their faction's control of the tribe's housing authority from the Department of Housing and Urban Development (HUD), and with such acknowledgment, access to certain HUD funding. *Id.* Unable to determine which faction to deal with, HUD restricted access to new users to its funding system. *Id.* at *2. One faction sued HUD, arguing its decision injured them by restricting their access as the rightful tribal council, and constituted, *inter alia*, a violation of the APA, federal common law, and HUD's fiduciary duty to the tribe. *Id.* The district court found the plaintiffs lacked standing on all claims, as their injury could only be redressed through a court resolution of the underlying internal tribal dispute. *Id.* at *3.

Having established none of the three constitutional requirements for standing to sue in federal court, Plaintiffs cannot clear the initial hurdle required to pursue their claims. As a result, the Court should dismiss the Complaint.

B. Even if Plaintiffs Could Satisfy Standing Prerequisites, the Court Would Lack Jurisdiction to Address Their Claims.

This Court also lacks jurisdiction over Plaintiffs' claims for several other reasons. As an initial matter, Plaintiffs have not sustained their burden of demonstrating this Court's jurisdiction to involve itself in internal tribal governance disputes between two competing tribal factions. In addition, the United States has not waived sovereign immunity for Plaintiffs' generic claims alleging a violation of "federal common law" and "breach of trust." While the APA provides a limited waiver of sovereign immunity to challenge certain federal actions, it does not create an independent cause of action in the absence of a "relevant statute" or other violation of federal law. Finally,

Interior's decision to identify the Tribe's last uncontested governing body for the purpose of government-to-government relations on an interim basis is not guided by any federal law; rather, it is an entirely discretionary action and, therefore, not reviewable under the APA.

1. Neither Interior nor the Court has jurisdiction to resolve internal tribal disputes of the nature presented.

First and foremost, the Court lacks jurisdiction over Plaintiffs' claims because judicial review necessitates delving into internal tribal disputes regarding membership and governance. The Supreme Court has held that adjudication of internal tribal disputes is generally outside the jurisdiction of the federal courts and, therefore, nonjusticiable. *See Williams v. Lee*, 358 U.S. 217, at 221–22 (1959) ("the internal affairs of the Indians remain[] *exclusively* within the jurisdiction of whatever tribal government existed"). "Unless surrendered by the tribe, or abrogated by Congress, tribes possess an inherent and *exclusive* power over matters of internal tribal governance." *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1185 (E.D. Cal. 2009) (emphasis added) (citing *Nero v. Cherokee Nation*, 892 F.2d 1457, 1463 (10th Cir. 1989). As such issues are "most properly left to tribal authorities," federal courts do not have jurisdiction to hear claims which, at their core, involve "essentially an intra-tribal dispute." *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996); *see also Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003) (*Meskwaki Casino Litigation*) (citing *United States v. Wheeler*, 435 U.S. 313, 323–36 (1978)). Thus, "[i]n cases involving tribal affairs, [federal courts] exercise [federal question] jurisdiction only when federal law is determinative of the issues involved." *Sac & Fox Tribe of the Mississippi in Iowa, Election Bd. v. Bureau of Indian Affairs*, 439 F.3d 832, 835 (8th Cir. 2006) (*Sac & Fox Tribe*). Tribal election, leadership, and enrollment disputes are precisely the type of non-justiciable, internal tribal matters over which federal courts lack jurisdiction. *See Sac & Fox*, 439 F.3d at 835; *Meskwaki Casino*, 340 F.3d at 763; *Timbisha Shoshone Tribe*, 687 F. Supp. 2d at 1185.

Plaintiffs claim that Interior acted arbitrarily and capriciously in violation of "federal

common law" and the APA, and breached its trust obligation to the Tribe, when it recognized the Tribe's last undisputed governing body on an interim basis for ISDA contracting purposes. ECF No. 1, ¶¶ 27-36. But the relief Plaintiffs seek is a declaration "that [Interior] acted arbitrary and capriciously in violation of federal common law and the APA, by recognizing [Phillip] Del Rosa as the Chairman of the Tribe with the right to vote in all tribal matters." Prayer for Relief ¶ 1 (emphasis added). Thus, while Plaintiffs complain that Interior violated the law by allegedly disregarding "the General Council's decision removing [Phillip] Del Rosa from office and suspending his right to vote," they ask this Court to similarly disregard the results of the last uncontested tribal election and substitute Plaintiffs' faction for the Rose faction as the Tribe's rightful governing body. Neither Interior nor the Court has the jurisdiction to do so.

In *Goodface*, a contending tribal council in a disputed tribal election brought an action against the BIA under the APA for refusing to officially recognize either of the rival councils. 708 F.2d at 337. The Eighth Circuit found that "the district court overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute." *Id.* at 339. Applying *Goodface*, the court in *Hammond v. Jewell* recently held it cannot "engage in [an] inquiry" that requires addressing the merits of an underlying internal tribal dispute. 139 F. Supp. 3d 1134, 1140 (E.D. Cal. 2015). The *Hammond* court specifically discussed how *Goodface* applies to APA challenges over which it typically has jurisdiction:

> Even if this court somehow interprets plaintiff's allegations as attacking the BIA's decision that plaintiff was not a member of the Tribal Council that it recognized for interim government-to-government relations and that the decision is subject to attack under the APA, the court could not assess plaintiff's claims without "interpreting the tribal constitution and bylaws and addressing the merits" of plaintiff's removal by the Tribal Council. Similar to the BIA, the court lacks jurisdiction to engage in this inquiry.

Id. (citing *Goodface*, 708 F.2d at 339 ("[D]istrict court[s] overstep[s] the boundaries of [their] jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election

dispute.")).

When reviewing the challenged actions, this Court cannot assess Plaintiffs' claims without interpreting the Tribe's constitution and laws. But it lacks jurisdiction to make such an inquiry and, therefore, it should dismiss the claims in their entirety.

2. The APA does not waive sovereign immunity absent an underlying statute.

Plaintiffs identify no waiver of sovereign immunity that would allow their claims to proceed. The Complaint cites only one legal provision addressing the question of sovereign immunity but, ultimately, it does not provide the necessary express and unequivocal waiver for their claims. *See* ECF No. 1, ¶ 34.[4] But the wording of the APA, and the case law interpreting it, are very clear that the waiver of sovereign immunity does not apply to Plaintiffs' claims. The APA does not create a free-standing cause of action against the United States, but instead waives sovereign immunity for claims by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute…" 5 U.S.C. § 702 (emphasis added). *See Oregon Nat. Res. Council v. Thomas*, 92 F.2d 792, 797-99 (9th Cir. 1996); *Preferred Risk. Mut. Ins. Co.*, 86 F.3d at 792. Here, Plaintiffs do not identify a statute Interior allegedly violated when it contracted with the Tribe's last uncontested governing body in fiscal years 2015-2017. Rather, their "Second Cause of Action" simply reasserts their "First Cause of Action" for an alleged "Violation of Federal Common Law," ECF No. 1, ¶¶27-31, and couches it in the APA's language regarding the scope of judicial review (5 U.S.C. § 706(2)). ECF No. 1, ¶¶ 33, 34-36. Plaintiffs' attempt to piggy-back APA jurisdiction to the scope of judicial review under the APA is

[4] None of the statutory provisions cited in paragraph 2 of the Complaint waives sovereign immunity. *See, generally, Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of State of Montana*, 792 F.2d 782, 792 (9th Cir. 1986) (civil actions brought by tribes, 28 U.S.C. §1362); *White v. Admin'r of Gen. Serv. Admin.*, 343 F.2d 444, 447 (9th Cir. 1965) (mandamus, 28 U.S.C. § 1361); *Preferred Risk Mut. Ins. Co. v. U.S.*, 86 F.3d 789, 791-91 (8th Cir. 1996) (federal question, 28 U.S.C. § 1331).

unavailing. As explained, *infra*, Plaintiffs cannot articulate any applicable federal common law that would require Interior to insert itself into the internal governance dispute between two competing tribal factions.

3. Section 638 contracting decisions and selection of a tribe's last uncontested governing body are committed to agency discretion.

Finally, the clear wording of the APA excepts from its purview "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Supreme Court has held that challenges to an agency's "allocation of funds from a lump-sum appropriation" is committed to agency discretion by law and, therefore, unreviewable under the APA. *Lincoln v. Vigil*, 508 U.S. 182, 192-94 (1993) (reasoning that, "the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."). Thus, to the extent Plaintiffs' challenge Interior's allocation of funds to the Tribe, this Court lacks jurisdiction to hear such a claim.

Moreover, Interior's decision regarding which disputed tribal faction to recognize on an interim basis for purposes of section 638 contracting is wholly discretionary, and is guided primarily by federal law and policy to avoid inserting the federal government into tribal governance disputes whenever possible. 64 IBIA at 243; *see also Goodface*, 708 F. 2d at 339 (Though district court was correct in ordering BIA to recognize one tribal governing body with which to interact, it lacked jurisdiction to decide which one.); *Hammond*, 139 F. Supp. 3d. at 1139-40 (court lacked authority to adjudicate challenges to BIA's decision dealing with "last uncontested tribal council" in 638 contracting). To the extent Plaintiffs challenge Interior's interim recognition of the 2012 business committee for government-to-government relations given its status as the Tribe's last uncontested governing body the Court lacks jurisdiction to hear that claim, as well.

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM, SO THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(6).

The Complaint also should be dismissed because it fails to state a claim upon which relief may be granted. Pursuant to Rule 12(b)(6), a federal court should not entertain claims if the party asserting them cannot demonstrate the factual predicate for bringing them. Here, each of Plaintiffs' claims emanates from the same underlying grievance – the federal government chose to recognize the rival Rose faction over Plaintiffs' faction as the last undisputed governing body for ISDA contracting purposes because the Tribe's election in April 2012 was the last in which the outcome was undisputed. Plaintiffs have not demonstrated, and cannot demonstrate, that this decision violates any applicable federal common law or trust responsibility, or the APA.

A. There is No Applicable "Federal Common Law" upon which Plaintiffs May Base a Claim.

Plaintiffs' First and Second Causes of Action rely on a nebulous assertion of "federal common law" and claim they are entitled to relief because Interior violated the undefined law. ECF No. 1, ¶¶ 27-36. Plaintiffs do not provide any support, however, for their generic assertion regarding not only the existence, but a violation, of any applicable federal common law. In fact, none exists. Plaintiffs' barebones assertions to the contrary do not form the basis for either the First or Second Cause of Action and, therefore, they should be dismissed.

B. The United States Does Not Owe a Generic Trust Obligation to Plaintiffs that Supports Their Claim.

Plaintiffs' Third Cause of Action alleges a breach of trust by Interior, but a general allegation of a trust obligation cannot sustain their claim. Plaintiffs have not articulated a sufficient basis to support the existence of a trust obligation here at all, let alone a breach of such obligation.

The Supreme Court recently examined a similar breach of trust claim in the context of a section 638 contract dispute in *Menominee Indian Tribe of Wisconsin v. U.S.*, --- U.S. ---, 136 S.Ct. 750 (2016). The Menominee Tribe argued that "the special relationship between the United States

and Indian tribes, as articulated in the ISDA," provided federal common law upon which a court could rely for equitable tolling of the statute of limitations for challenging a contract decision. *Id.* at 757. The Court did not refute the existence of a "'general trust relationship between the United States and the Indian tribes,'" but found that "any specific obligations the Government may have under that relationship are 'governed by statute rather than the common law.'" 136 S.Ct. at 757 (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011)).

Likewise, Plaintiffs have not cited any statute that might give rise to the trust obligation they allege Interior violated here, and no such statute exists. Plaintiffs' Third Cause of Action must fail.

C. Plaintiffs Cannot Show that Mandamus Relief is Available in Any Event.

Plaintiffs have not articulated anything that would justify the extraordinary mandamus relief they seek pursuant to 28 U.S.C. 1361. Given the dearth of support for such a remedy, Plaintiffs' request should be denied and their claims dismissed.

Mandamus is an extraordinary remedy that federal courts invoke only sparingly and in unusual circumstances. *See Independence Min. Co., Inc. v. Babbitt*, 105 F.3d 502, 505 (9th Cir. 1997); *Oregon Nat. Res. Council v. Harrell*, 52 F.3d 1499, 1508 (9th Cir 1994). A court may grant mandamus relief when the plaintiff satisfies three prerequisites: "(1) the plaintiff's claim is clear and certain; (2) the duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available." *Harrell*, 52 F.3d at 1508 (internal quotations omitted). Plaintiffs allege none of these elements here.

Assuming, *arguendo*, that Plaintiffs could satisfy the first and third prongs of the mandamus test, they do not identify any such duty here; in fact, none exists. It is well-settled that "[a]n act is ministerial only if it is a positive command and so plainly prescribed as to be free from doubt." *United States v. Walker*, 409 F.2d 477, 481 (9th Cir. 1969). Plaintiffs cannot point to a "positive command…so plainly prescribed as to be free from doubt" that requires Interior to recognize a

particular tribal faction, let alone Plaintiffs' faction, for purposes of government-to-government relations while the Tribe resolves its internal governance disputes. Likewise, Plaintiffs can point to no "positive command" that Interior insert itself into tribal affairs by choosing which governance actions after the 2012 undisputed election were valid when such actions are the subject of dispute between factions of the Tribe. Indeed, the clear weight of legal authority is to the contrary, as described above. As a result, Plaintiffs cannot demonstrate that mandamus relief is warranted here and their request for such extraordinary relief must fail.

CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction to hear Plaintiffs' claims and should dismiss the Complaint in its entirety. To the extent the Court has jurisdiction, it should dismiss the Complaint for failure to state a claim upon which relief may be granted.

RESPECTFULLY SUBMITTED,

DATED: March 19, 2018

JEFFREY H. WOOD
Acting Assistant Attorney General

By: */s/ Andrea L. Berlowe*
ANDREA L. BERLOWE
Senior Counsel

Of Counsel:
Karen Koch
U.S. Department of the Interior
Office of the Regional Solicitor