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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

REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT

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

Date: **June 14, 2018**
Time: **2:00 pm, PDT**
Courtroom: **2, 15th Floor**
Judge: **Hon. Troy L. Nunley**

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INTRODUCTION

At its core, adjudication of Plaintiffs' claims would require this Court to choose among tribal factions that openly dispute which one has the authority to enter into contracts with the Bureau of Indian Affairs (BIA). In its challenged contracting decisions, BIA explained the pending dispute between two factions of the Alturas Indian Rancheria, one comprised of Plaintiff Wendy Del Rosa ("Plaintiffs' faction"), and the other of Darren Rose and Phillip Del Rosa ("the Rose faction"), citing voluminous evidence, including competing contracting proposals from each faction. Before the dispute between these factions arose, the last uncontested Business Committee of the Tribe consisted of Plaintiff Wendy Del Rosa, Darren Rose, and Phillip Del Rosa. Faced with the statutory requirement to enter into certain contracts absent limited exceptions not present here, the BIA exercised its discretion under federal law to choose a tribal governing body with which to engage in government-to-government business, such as the challenged section 638 contracts, despite the extant dispute. Thus, the BIA contracted with the last uncontested Business Committee of the Tribe as required by statute, the courts, and the Interior Board of Indian Appeals (IBIA).

In response to the United States' Motion to Dismiss the Complaint, Plaintiffs do not address whether tribal governance actually was in dispute at the time BIA entered into the challenged contracts. But the record is clear that the membership and governing status of Phillip Del Rosa was very much in dispute between Plaintiffs' faction and the Rose faction at that time. Plaintiffs instead argue that BIA and this Court must accept Plaintiffs' version of events and defer to a 2013 internal tribal action removing Mr. Del Rosa as Chairman and stripping him of his rights as a voting member of the Tribe and, in essence, disregard the subsequent factional dispute regarding tribal governance. While they couch their requests in lofty language about comity and tribal self-determination, doing what Plaintiffs ask would require the Court and BIA to choose sides in this long running internal dispute. Federal law is clear that they cannot do so. Consequently, the Court should grant the motion

to dismiss the Complaint.

ARGUMENT

I. PLAINTIFFS HAVE NOT SATISFIED THE MANDATORY PREREQUISITES TO FEDERAL COURT JURISDICTION.

"In determining whether a challenge to subject matter jurisdiction is warranted under [Rule] 12(b)(1), the court need not accept the factual allegations in the complaint as true." *Chaganti v. I2 Phone Intern., Inc.*, 635 F.Supp.2d 1065, 1070 (N.D. Cal. 2007) (*citing Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir.1979)). Plaintiffs[1] have not established this Court's jurisdiction over their claims and, therefore, the Complaint should be dismissed.

A. Plaintiffs' Characterization of the Facts is Insupportable.

The United States' Opening Brief[2] explained the dispute between Plaintiffs' faction and the Rose faction, as well as the BIA contracting decisions for fiscal years 2015, 2016, and 2017 in light of this longstanding intra-tribal dispute. U.S. Br. at 4-8. In response, Plaintiffs rely on a fundamentally flawed factual premise that ultimately erodes the foundation on which all their claims depend. Their Opposition focuses almost exclusively on internal tribal events that simply are not at issue here, and, therefore, cannot establish this Court's jurisdiction over their claims.

Plaintiffs devote a substantial portion of their Opposition to recounting a 2013 tribal "quasi-judicial" process in which the General Council prosecuted Phillip Del Rosa for violations of tribal law. *E.g., id*. at 1-6, 10-16. They then base their standing and their substantive claims on the outcome and

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[1] In its Opening Brief (*see note 2, infra*) the United States noted the existence of a question regarding whether the Tribe was a proper plaintiff. U.S. Br. at 10-11, n.2. In response, Plaintiffs recount Ms. Del Rosa's status as a member of the Tribe and its Business Committee, and conclude that, therefore, she has the authority to act on behalf of the Tribe. Pl. Opp. at 17. But accepting Plaintiffs' conclusions in this regard would require the Court to review tribal governance matters, which it should not do.

[2] This brief will refer to the United States' Brief in Support of Motion to Dismiss Complaint as "Opening Brief" and cite to it as "U.S. Br." It will refer to Plaintiffs' Opposition to Defendants' Motion to Dismiss Complaint as "Plaintiffs' Opposition" and cite to it as "Pl. Opp."

alleged consequences of that process. *E.g.*, *id.* at 16 (Plaintiff Wendy Del Rosa "only seeks to have the Court order the BIA to recognized [sic] the Judgment entered by the General Council [against Phillip Del Rosa] in this case").

Plaintiffs' arguments must fail for two reasons. First, Plaintiffs fundamentally mischaracterize the BIA contracting decisions at issue. Plaintiffs assert that, by entering into section 638 contracts with the last uncontested governing body of the Tribe, BIA "overruled the General Council's decision and unilaterally reinstated Phillip Del Rosa as the Chairman of the Tribe with the authority to vote on the Business Committee and to administer the Tribe's 638 Contract funds." Pl. Opp. at 10. In reality, BIA never opined, let alone decided, that Phillip Del Rosa "is the Chairman of the Tribe and can vote in Tribal affairs," or "interfere[d] in the ability of the Tribe, acting through its Business Committee, composed of Darren Rosa [sic] and [Wendy] Del Rosa, to make governmental decision [sic] about how the Tribe's government will operate on a day-to-day basis." *Id.* at 17-18. Rather, the challenged BIA decisions were limited exclusively to conducting government-to-government interactions under the Indian Self Determination Act (ISDA) during the pendency of factional disputes within the Tribe.

Plaintiffs' characterization of BIA's contracting decisions is belied by the express wording of the decisions themselves, none of which opined on the questions of whether Mr. Del Rosa could "vote in Tribal affairs" or "how the Tribe's government [would] operate on a day-to-day basis," as Plaintiffs allege. *Compare* ECF No. 1, Ex. F at 1 ("[BIA] does not have the authority to address the present and lengthy tribal membership issues") (emphasis added), *with id.* at 2 ("In order to prevent a hiatus in the government-to-government relationship with the [Tribe], [BIA] must determine with whom it can conduct business in its government-to-government relationship with the [Tribe]," and, therefore, it "will turn to the last undisputed Tribal Business Committee[3]…[to] conduct business on an interim basis")

[3] This refers to the Business Committee "agreed upon in the January 11, 2012, Settlement Agreement, filed in the United States District Court, and signed by Judgement [sic] Lawrence K. Karlton (*Alturas Indian Rancheria v. Kenneth L. Salazar, et al., No. 2:10-CV-01997-LKK-EFB*)." ECF No. 1, Ex. G at 2.

(emphasis added). *See id.*, Ex. G at 3 (BIA "may implement appropriate measures for conducting business with a tribe during a tribal leadership dispute, and may need to recognize certain individuals as tribal officials on an interim basis, pending final resolution by the tribe, including recognizing the last undisputed officials.") (emphasis added), Ex. I at 1 (BIA "was unable to determine whether either [f]action's [contracting] request validly represented the governing body of the Tribe."), 2 (affirming Superintendent's decision on FY16 and FY17 contract proposals until "a decision by the [Interior Board of Indian Appeals], or evidence that the Tribe has resolved [the governing] dispute internally."); and, Ex. J at 1. *See* U.S. Br. at 5-7.

None of the BIA contract decisions made any effort to resolve the ongoing disputes between the Plaintiffs' faction and the Rose faction. To the contrary, BIA merely notified both factions of the only option available to the Agency in light of the ongoing intra-tribal disputes regarding governance, BIA's lack of authority to involve itself in such disputes, and the narrowly proscribed statutory bases on which BIA may decline a section 638 contract proposal. *See* U.S. Br. at 2-3. Following the IBIA decision on June 30, 2017, BIA notified the last uncontested tribal Business Committee that it would "be conducting business in its government-to-government relationship with the [Tribe] through the Tribes' Business Committee elected April 2, 2012." ECF No. 1, Ex. N. Like those before it, this decision offered no opinion on the ongoing intra-tribal dispute between Plaintiffs' faction and the Rose faction, but instead informed the competing factions of the actions BIA would take to fulfill its obligations under ISDA section 638 and its implementing regulations.

Second, even setting aside Plaintiffs' mischaracterizations of BIA's contracting decisions, the internal adjudication of tribal law violations against Phillip Del Rosa in 2013 simply is not relevant to whether there existed an internal governance dispute at the time BIA made its decisions regarding 638

contracts for fiscal years 2015, 2016, and 2017. The record is clear about the existence of such a dispute between the Plaintiffs' faction and the Rose faction at all relevant times. *E.g.*, ECF No. 1, Ex. E (contracting request from Plaintiffs' faction for FY15), Ex. F at 1 (acknowledging BIA's receipt of conflicting contract requests for FY15), Ex. H at 1 (same for FY16). Plaintiffs gloss over the existence of the tribal governance disputes that form the very core of the BIA contracting decisions they challenge and the law governing this Court's jurisdiction to hear their claims. Given these internal disputes, however, Plaintiffs cannot demonstrate either standing to sue, or the other prerequisites of jurisdiction over their claims.

B. Plaintiffs Have Not Demonstrated Their Standing to Sue.

In its Opening Brief, the United States described the limited nature of this Court's jurisdiction and Plaintiffs' burden of establishing standing to sue, which is one of the pillars of federal court jurisdiction. U.S. Br. at 8-13. The Opening Brief addressed each of the three constitutional minimum requirements for standing to sue and explained that, in light of Plaintiffs' failure to clear this initial hurdle to jurisdiction, the Court should dismiss their Complaint. *Id.* at 10-13.

In response, Plaintiffs first argue, "there is no doubt that the Tribe has standing to bring an action to enforce its Judgment [against Mr. Del Rosa]. Ms. Del Rosa is a member of the General Council, which is the governing body of the Tribe. In addition, she is a member of the Tribe's Business Committee. Under the Tribe's Constitution, the powers of the General Council are delegated to the Business Committee for the purpose of carrying out the day to day business affairs of the Tribe. The Tribe is a governmental entity that can only speak and act through its elected officials. As an official of the Tribe, Ms. Del Rosa has the right to represent the interests of the Tribe to seek comity of the Tribe's General Council Judgment." Pl. Opp. at 17.

But these conclusory statements are fatally flawed for two reasons. First, Plaintiffs cite no authority whatsoever for the legal conclusion that a single member of the three-member Business

Committee may act on behalf of the entire Business Committee, let alone the General Council or the Tribe. Second, even accepting Plaintiffs' legal conclusions regarding Ms. Del Rosa's authority as true, the Rose faction also is comprised of at least one member of the Business Committee and General Council – Darren Rose. *See* Pl. Opp. at 17-18. These internal contradictions render Plaintiffs' assertions of standing insupportable because, if Ms. Del Rosa can speak on behalf of the Business Committee and the Tribe for purposes of this lawsuit, the same should be true for Mr. Rose in his request to enter into a government-to-government contract with BIA.

More importantly, though, to resolve the conflict between Plaintiffs' faction and the Rose faction, both the BIA and this Court would be required to delve into internal tribal legal issues involving the membership status of Mr. Del Rosa. Neither has jurisdiction to do so. *See* U.S. Br. at 11, n.3. Plaintiffs' remaining standing arguments rely on these same conclusions regarding internal tribal legal issues and, therefore, must fail. *E.g.*, Pl. Opp. at 17 (asserting cognizable injury to Ms. Del Rosa because the contracting decisions purportedly "denied her the right to govern the Tribe and carry out her duties under the laws of the Tribe"); *id.* at 16, 18 (asserting the contradictory redressability arguments that Ms. Del Rosa "only seeks to have the Court order the BIA to recognized [sic] the Judgment entered by the General Council in this case," and that such an order "will prevent the Federal Official's [sic] from interfering in the internal affairs of the Tribe").[4]

Plaintiffs have not sustained their burden of demonstrating their standing to sue. Consequently, the Court should dismiss the Complaint for want of jurisdiction.

C. Assuming Plaintiffs had Established Standing, the Court Still Would Lack Jurisdiction over Their Claims.

As explained in the Opening Brief, Plaintiffs also have not established this Court's jurisdiction

[4] Plaintiffs' Opposition does not address the traceability prong of the constitutional test for standing to sue. Thus, regardless of their other arguments, Plaintiffs have not demonstrated a necessary prerequisite to judicial review.

over their claims because they have not identified a waiver of sovereign immunity that allows them to sue the United States. U.S. Br. at 13-17. Absent a waiver of sovereign immunity, it is axiomatic that no party may sue the United States. *Id.* at 13, 16-17. While the Administrative Procedure Act (APA) contains a waiver of sovereign immunity for certain claims against the United States, such claims must be grounded in a specific provision of federal law, not a nebulous assertion of "federal common law" or a broad trust obligation to tribes. *Id.* at 8-10, 13-17. In addition, BIA's choice of which competing faction to contract with under section 638 is committed to agency discretion and, therefore, not subject to judicial review under the APA. *Id.* at 17.

In response, [5] Plaintiffs advance generalized arguments regarding a tribe's "exclusive" "authority over internal matters," and assert that the "quasi-judicial proceeding" against Phillip Del Rosa in 2013 resolved any internal tribal disputes over tribal leadership and the BIA must abide by that decision. Pl. Opp. at 10, 12-13. In addition to disregarding the indisputable fact that an internal dispute over tribal governance existed at the time BIA made the challenged contracting decisions (*see supra*), Plaintiffs' arguments do not address the issue of whether a waiver of sovereign immunity exists that would allow Plaintiffs to bring their claims against the United States in the first place. Nor do they address whether the section 638 contracting decision is committed to agency discretion by law.

The broad legal principles described in Plaintiffs' Opposition cannot confer jurisdiction over their specific claims where such jurisdiction does not otherwise exist. Rather, Plaintiffs must point to a specific waiver of sovereign immunity by the United States and demonstrate that there is law to apply.

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[5] As a preliminary matter, Plaintiffs' Opposition addresses a basis for their claims that does not appear in the Complaint and, therefore, is not properly before this Court. Plaintiffs argue that the Court has jurisdiction over their claims because federal question jurisdiction under 28 U.S.C. §1331 includes constitutional violations and the challenged decisions violate the United States Constitution's Indian Commerce Clause. Pl. Opp. at 9 (citing U.S. Const., Art. I, § 8, cl. 3). Even if such a claim were properly pled, the plain wording of the Indian Commerce Clause makes clear the intent to grant authority to Congress to, *inter alia*, "regulate Commerce with…the Indian Tribes," not grant the BIA or the federal courts jurisdiction to decide matters of internal dispute within a tribe.

U.S. Br. at 18-24. Because they have done neither, their claims must be dismissed.

II. PLAINTIFFS' GENERIC ALLEGATIONS OF FACT, INTERSPERSED WITH LEGAL CONCLUSIONS, FAIL TO STATE A CLAIM UNDER RULE 12(b)(6).

Even if Plaintiffs could satisfy the prerequisites to federal court jurisdiction, they have not articulated anything beyond vague "federal common law" violations or generic "breach of trust" claims, neither of which is cognizable as a free-standing claim, as explained in the United States' Opening Brief. *See* U.S. Br. at 18-19. Thus, even accepting the factual allegations in their Complaint as true,[6] Plaintiffs have failed to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Plaintiffs' Opposition uses lofty language about comity between sovereigns, a generalized fiduciary obligation of the federal government to tribes, and Indian self-determination. *See* Pl. Opp. at 6-9.[7] While they attempt to draw a legal distinction between claims for equitable relief and claims for money damages, arguing that a generalized trust obligation controls the former, the primary case upon which they rely contradicts their argument. Pl. Opp. at 8 (citing *Navajo Tribe of Indians v. U.S.*, 624 F.2d 981, 997 (Cl. Ct. 1980) (*Navajo Tribe*)). *Navajo Tribe* stated unequivocally that, "if no tribal money or property is involved and the question is, for instance, whether the United States has a general fiduciary obligation to educate Indians, the existence of the special relationship for that purpose depends upon the proper interpretation of the terms of some authorizing document (e.g. statute, treaty, executive order)." 624 F.2d at 998 (emphasis added).[8] Plaintiffs also attempt to distinguish *United*

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[6] Courts accept "all plausible allegations as true" in reviewing a motion to dismiss under Rule 12(b)(6). *Olympic Forest Coal. v. Coast Seafoods Co.*, 884 F.3d 901, 905 (9th Cir. 2018) (emphasis added).

[7] Plaintiffs also appear to meld their "federal common law" and "breach of trust" arguments, so we address them together here. *See* Pl. Opp. at 8 ("when tribes, as in this case, have sought equitable relief against the Government arising for a breach of its common law trust duty owed to tribes…) (emphasis added).

[8] Regardless of its ultimate holding, *Navajo Tribe* cannot override the Supreme Court's later statements upon review of a challenge to section 638 contracting decisions. *See* U.S. Br. at 18-19 (citing *Menominee Indian Tribe of Wisconsin v. U.S.*, --- U.S. ---, 136 S.Ct. 750, 757 (2016)

States v. Jicarilla Apache Nation, 564 U.S. 162, 165 (2011) (*Jicarilla Apache*), a case to which the Supreme Court cited in its decision in *Menominee Indian Tribe of Wisconsin v. U.S.*, --- U.S. ---, 136 S.Ct. 750, 757 (2016). *See* Pl. Opp. at 7-9. In doing so, however, Plaintiffs utterly disregard the *Menominee* Court's clear and unequivocal statement rejecting a generalized trust responsibility in the context of similar challenges to section 638 contracting decisions. *See* U.S. Br. at 25-26 (citing *Menominee*, 136 S.Ct. at 757).

In sum, the Court should dismiss Plaintiffs' claims pursuant to Rule 12(b)(6) because they cannot articulate any set of facts that would establish a free-standing breach of trust or "federal common law" cause of action.

CONCLUSION

For the foregoing reasons, Plaintiffs have not sustained their burden to establish this Court's jurisdiction over their claims. Even if they had done so, Plaintiffs have failed to state a claim upon which this Court may grant relief. For these reasons, the Complaint should be dismissed.

RESPECTFULLY SUBMITTED,

DATED: May 31, 2018.

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(*Menominee*) ("We do not question the general trust relationship between the United States and the Indian tribes, but any specific obligations the Government may have under that relationship are governed by statute rather than the common law.") (internal quotation omitted)).