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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

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11 MANUEL CORRALES, JR., a California  
resident,

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Plaintiff,

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v.

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15 AMY DUTSCHKE, in her official  
capacity as the Regional Director of the  
Bureau of Indian Affairs, Sacramento,  
16 California; et al.,

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17 Defendants.

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Case No.: 23-cv-1876-JLS-DDL

**DEFENDANTS' REPLY IN  
SUPPORT OF MOTION TO  
DISMISS**

Date: January 25, 2024

Time: 1:30 p.m.

Judge: Hon. Janis L. Sammartino

Defendants moved to dismiss Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). As set forth in the moving papers, the Court lacks jurisdiction over Plaintiff's requests to compel agency action and to review the BIA Letter under 706(2)(A), and Plaintiff has failed to state a claim upon which such relief can be granted. Furthermore, Plaintiff's declaratory judgment claim should be dismissed, and the Court lacks jurisdiction to decide an issue of tribal authority. Defendants respectfully request that their motion be granted.

1           **A. Plaintiff’s Second Cause of Action Should be Dismissed for Lack of**  
2           **Subject Matter Jurisdiction and Failure to State a Claim.**

3           Plaintiff’s second cause of action seeks an order, pursuant to 28 U.S.C. § 1361 or  
4 5 U.S.C. § 706(1), compelling Defendants to state that Burley had authority to sign the  
5 Fee Agreement on behalf of the Tribe in December 2007. *See* ECF No. 1 at 8, ¶ 29  
6 (“Plaintiff requests the Court order Defendants to clarify”); ECF No. 1 at 9, ¶ 4 (Prayer  
7 for Relief requesting an order “[d]irecting Defendants to clarify”); ECF No. 1 at 3, ¶ 7  
8 (citing 28 U.S.C. § 1361, the Mandamus Act); ECF No. 1 at 3, ¶ 9 (citing 5 U.S.C.  
9 § 706). Dismissal of the second cause of action is warranted because Plaintiff cannot  
10 identify any statute or regulation that requires such agency action. *See Illinois v.*  
11 *Ferriero*, 60 F.4th 704, 714 (D.C. Cir. 2023) (a mandamus claim must be dismissed for  
12 lack of subject matter jurisdiction absent a showing that defendant owes a clear  
13 nondiscretionary duty); *Mendondo v. Centinela Hosp. Ctr.*, 521 F.3d 1097, 1104 (9th  
14 Cir. 2008) (dismissal under Rule 12(b)(6) is appropriate when the complaint lacks a  
15 cognizable legal theory).

16           Plaintiff’s opposition argues that BIA has a “broad duty” to manage Indian affairs  
17 pursuant to 25 U.S.C. § 2, *see* ECF No. 12 at 12:7-9, and a “mandatory duty to monitor  
18 the performance of its 638 self-determination contracts” pursuant to 25 U.S.C. §§ 5329,  
19 5330, *see* ECF No. 12 at 12:25-27. However, Plaintiff’s reliance on these provisions is  
20 misplaced for two reasons. First, the Complaint makes no reference to 25 U.S.C. § 2 or  
21 25 U.S.C. §§ 5329, 5330, nor does the Complaint allege the duties Plaintiff now claims  
22 Defendants owe him based on those provisions. “[I]t is axiomatic that the complaint  
23 may not be amended by the briefs in opposition to a motion.” *Apple Inc. v. Allan &*  
24 *Associates Limited*, 445 F. Supp. 3d 42, 59 (N.D. Cal. 2020).

25           Further, neither 25 U.S.C. § 2 nor 25 U.S.C. §§ 5329-5330 stands for the  
26 proposition that Defendants owe a mandatory, non-discretionary duty to provide a  
27 statement that Burley had tribal authority to enter into the Fee Agreement on behalf of  
28 the Tribe with Plaintiff in December 2007. *See* 25 U.S.C. § 2 (providing for the

1 delegation of authority to manage Indian affairs to the Commissioner of Indian Affairs);  
2 25 U.S.C. §§ 5329, 5330 (concerning self-determination contracts entered into between  
3 a tribe and the Secretary of the Interior); *see also* 25 U.S.C. § 5304(j) (defining “self-  
4 determination contract” as “a contract entered into under subchapter I . . . between a  
5 Tribal organization and the appropriate Secretary for the planning, conduct, and  
6 administration of programs or services that are otherwise provided to Indian Tribes and  
7 members of Indian Tribes pursuant to Federal law, subject to the condition that . . . no  
8 contract entered into under subchapter I . . . shall be considered to be a procurement  
9 contract”). To the contrary, Congress has provided that there is no duty to approve or  
10 validate a contract concerning legal services. *See* 25 U.S.C. § 81(f)(1) (providing that  
11 “[n]othing in this section shall be construed to . . . require the Secretary to approve a  
12 contract for legal services by an attorney”).

13        “[A] claim under § 706(1) can proceed only where a plaintiff asserts that an  
14 agency failed to take a *discrete* agency action that it is *required to take*.” *Norton v. S.*  
15 *Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis in original). The Supreme Court  
16 has noted that the “[t]he prospect of pervasive oversight by federal courts over the  
17 manner and pace of agency compliance with [broad] congressional directives is not  
18 contemplated by the APA.” *Id.* at 67. Further, the party seeking mandamus must show  
19 that “its right to issuance of the writ is clear and indisputable.” *Vince v. Mabus*, 956 F.  
20 Supp. 2d 83, 87 (D.D.C. 2013) (quoting *Gulfstream Aerospace Corp. v. Mayacamas*  
21 *Corp.*, 485 U.S. 271, 289 (1988)). Plaintiffs are not entitled to relief “if the act they seek  
22 to compel is discretionary, as government officials have no clear duty to perform such  
23 acts and petitioners have no clear right to compel them to do so.” *Thomas v. Holder*,  
24 750 F.3d 899, 903-04 (D.C. Cir. 2014) (finding Attorney General has discretion on  
25 whether and how to classify a controlled substance and could not be compelled to  
26 reclassify). And while “a court can compel the agency to act” under certain  
27 circumstances, it has “no power to specify what the action must be.” *Norton*, 542 U.S.  
28 at 65.

1 Plaintiff has not and cannot point to a mandatory, non-discretionary, discrete duty  
2 to provide a letter stating that a certain person had tribal authority to enter into a contract  
3 for legal services with Plaintiff in December 2007. Accordingly, Plaintiff's second  
4 cause of action must be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1)  
5 and 12(b)(6).

6 **B. Plaintiff's Third Cause of Action Should be Dismissed for Lack of**  
7 **Subject Matter Jurisdiction.**

8 Plaintiff's third case of action asks the Court to "set aside" BIA's "refus[al] to  
9 clarify Burley's authority in 2007 when she entered into the subject Fee Agreement with  
10 Plaintiff" in its letter dated September 27, 2023, on the basis that the agency's response  
11 was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with  
12 law" in violation of 5 U.S.C. § 706(2)(A). ECF No. 1 at 8. Dismissal of this claim for  
13 lack of subject matter jurisdiction is warranted because (1) the 2023 BIA Letter did not  
14 make any determination as to Plaintiff's rights and, as such, was not a final agency  
15 action, *see Gallo Cattle Co. v. U.S. Dep't of Agriculture*, 159 F.3d 1194, 1199 (9th Cir.  
16 1998); and (2) the agency action was discretionary in nature and there exists no  
17 meaningful standard against which this Court may judge the response, *see Perez v. Wolf*,  
18 943 F.3d 853, 860 (9th Cir. 2019).

19 In his opposition, Plaintiff ignores this authority and fails to articulate any  
20 meaningful standard against which this Court may judge BIA's "refus[al] to clarify  
21 Burley's authority." Instead, Plaintiff inappropriately advances new allegations and  
22 arguments that BIA "acted inconsistently with its prior decisions." *See* ECF No. 12 at  
23 11:17-22.

24 To the extent Plaintiff is arguing that BIA failed to act, Plaintiff's arguments are  
25 inapposite. The Supreme Court has explained that "[a] 'failure to act' is not the same  
26 thing as a 'denial.' The latter is the agency's act of saying no to a request; the former is  
27 simply the omission of an action without formally rejecting a request." *Norton*, 542 U.S.  
28 at 63. There has been no failure to act on behalf of Defendants. In 2023, Defendants

1 responded to Plaintiff and declined his request to have BIA state that Burley had the  
2 requisite authority to enter into the Fee Agreement on behalf of the Tribe. Defendants  
3 also responded in 2010 to Plaintiff's prior request to approve the Fee Agreement.  
4 Further, to the extent that Plaintiff seeks review of Defendants' 2010 declination,  
5 pursuant to 25 U.S.C. § 81, to approve the Fee Agreement, Plaintiff has presented his  
6 request for relief for the first time in his opposition, the claim has not been  
7 administratively exhausted, the claim is untimely, and Plaintiff's contentions should not  
8 be considered by the Court.

9 Alternatively, to the extent Plaintiff is now arguing that BIA has been  
10 inconsistent, his arguments fail. In 2010, Defendant declined to approve the Fee  
11 Agreement based on 25 U.S.C. § 81. In 2023, in line with its 2010 declination, BIA  
12 declined to state that Burley had authority to enter into the Fee Authority and that  
13 Plaintiff was entitled to legal fees paid for from the RSTF Trust held by the California  
14 Gambling Commission (i.e., approve the Fee Agreement). There has been no  
15 inconsistency concerning BIA and the Fee Agreement.

16 Here, Plaintiff has failed to assert that the 2023 BIA Letter is an agency action  
17 appropriate for judicial review under the APA, for which the federal government has  
18 waived immunity against. *See United States v. White Mountain Apache Tribe*, 537 U.S.  
19 465, 472 (2003) (plaintiff must set forth "a clear statement from the United States  
20 waiving sovereign immunity, together with a claim falling within the terms of the  
21 waiver"). Further, Plaintiff has pointed to no meaningful standard upon which the Court  
22 can review BIA's discretionary response of declining to state that Burley had tribal  
23 authority to enter into the Fee Agreement on behalf of the Tribe.<sup>1</sup> Accordingly,  
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25 <sup>1</sup> As noted above, Plaintiff's reliance on 25 U.S.C. § 2 and 25 U.S.C. §§ 5329-5330  
26 does not save his claims because these provisions are not cited in the Complaint.  
27 Moreover, neither provision provides the Court with a meaningful standard upon which  
28 to judge BIA's decision in 2023 to decline to state to Plaintiff that Burley had the  
requisite tribal authority in 2007 to enter into the Fee Agreement with Plaintiff on behalf  
of the Tribe. As Plaintiff points out, 25 U.S.C. § 2 provides broad authority to manage

1 Plaintiff's third cause of action should be dismissed for lack of subject matter  
2 jurisdiction.

3 **C. Plaintiff's Third Cause of Action Should be Dismissed for Failure to**  
4 **State a Claim Upon Which Relief May be Granted.**

5 Plaintiff has also failed to state a claim for review under 706(2)(A) upon which  
6 relief may be granted. Plaintiff's third cause of action alleges that BIA's refusal to state  
7 that Burley had authority to enter into the Fee Agreement on behalf of the Tribe in 2007  
8 was arbitrary and capricious and contrary to law. ECF No. 1 at 29-30, ¶¶ 2-6. Within  
9 his opposition, Plaintiff argues that BIA's declination was arbitrary, capricious, an  
10 abuse of discretion, or otherwise not in accordance with law because "the agency has  
11 inexplicably acted inconsistently with its prior decisions." ECF No. 12 at 11 (emphasis  
12 omitted).

13 To be sure, "[u]nexplained inconsistency' between agency actions is 'a reason  
14 for holding an interpretation to be an arbitrary and capricious change.'" *Organized*  
15 *Village of Kake v. U.S. Dep't of Agriculture*, 795 F.3d 956, 966 (9th Cir. 2015) (quoting  
16 *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).  
17 Specifically, agency action may be found arbitrary and capricious if "the agency has  
18 relied on factors which Congress has not intended it to consider, entirely failed to  
19 consider an important aspect of the problem, offered an explanation for its decision that  
20 runs counter to the evidence before the agency, or is so implausible that it could not be  
21 ascribed to a difference in view or the product of agency expertise." *Protect our*  
22 *Communities Foundation v. Jewell*, No. 13CV575 JLS (JMA), 2014 WL 1364453, at  
23 \*2 (S.D. Cal. Mar. 25, 2014) (quoting *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206  
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26 Indian affairs, and, thus, offers no meaningful standard to judge conduct. Further, 25  
27 U.S.C. §§ 5329-5330 does not provide a meaningful standard for review as Plaintiff is  
28 seeking review of conduct concerning the Fee Agreement in order to receive payment  
from the RSTF Trust held by the Commission; Plaintiff is not seeking review of conduct  
concerning a self-determination contract entered into between a tribe and the Secretary.

1 (9th Cir. 2004)). Yet here, Plaintiff has failed to identify any regulation, rule, or  
2 procedure that was applied inconsistently by Defendants. Indeed, Plaintiff has failed to  
3 identify any regulation, rule, or procedure that required Defendants to act.

4 Plaintiff cannot identify any such regulation, rule, or procedure, because  
5 Congress has directed that there is no mandate to approve or acknowledge agreements  
6 before they are entered into between tribes and attorneys. 25 U.S.C. § 81 (providing that  
7 “[n]othing in this section shall be construed to require the Secretary to approve a  
8 contract for legal service by an attorney”). Further, “[f]or nearly two centuries now,  
9 [federal law has] recognized Indian tribes as distinct, independent political  
10 communities, qualified to exercise many of the powers and prerogatives of self-  
11 government.” *Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316, 327  
12 (2008) (citations omitted). “[T]ribes are subject to plenary control by Congress,” but  
13 they also remain “separate sovereigns pre-existing the Constitution.” *Santa Clara*  
14 *Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). “Thus, unless and until Congress acts, the  
15 tribes retain their historic sovereign authority.” *Michigan v. Bay Mills Indian Cmty*, 134  
16 S. Ct. 2024, 2030 (2014) (citation omitted).

17 After Plaintiff entered into the Fee Agreement with Burley, in 2009 he sought  
18 BIA approval of the Fee Agreement. ECF No. 1 at 5, ¶ 18. BIA responded to Plaintiff  
19 in 2010, declining to approve the Fee Agreement pursuant to the 2000 amendment to  
20 25 U.S.C. § 81, which no longer required BIA to approve contracts for legal services.  
21 ECF No. 1 at 24. On June 24, 2023, Plaintiff wrote a letter to BIA explaining that he is  
22 seeking payment of legal fees from the RSTF Trust and requested that Defendants  
23 provide Plaintiff “a short letter clarifying that at the time Burley executed the Fee  
24 Agreement with [Plaintiff, her] authority included signing the subject Fee Agreement  
25 for legal services that included litigation on behalf of the Tribe.” ECF No. 1 at 12. On  
26 September 27, 2023, Defendants declined Plaintiff’s request. ECF No. 1 at 60.  
27 Defendants’ declination was consistent with 25 U.S.C. § 81 and its 2010 response.  
28 Defendants recognize that Plaintiff may be frustrated with his long endeavors, but the

1 2023 BIA Letter was consistent with its prior acts, in accordance with the law, and not  
2 arbitrary or capricious.

3 As explained, Plaintiff cannot point to any procedure, statute, or regulation that  
4 was violated, missed, or not considered. Accordingly, his third cause of action should  
5 also be dismissed for failure to state a claim.

6 **D. Plaintiff’s First Cause of Action Should be Dismissed.**

7 Defendants moved to dismiss Plaintiff’s first cause of action, which seeks  
8 declaratory relief that “Burley had the authority to enter into the subject Fee  
9 Agreement,” *see* ECF No. 1 at 6-7, ¶ 24, on the basis that Plaintiff fails to identify a  
10 basis for subject matter jurisdiction. *See Jarrett v. Resor*, 426 F.2d 213, 216 (9th Cir.  
11 1970) (“[T]he Declaratory Judgment Act is not a jurisdictional statute.”). In opposition,  
12 Plaintiff argues that his claim should survive because he “has invoked jurisdiction under  
13 the APA.” ECF No. 12 at 16: 19-23. However, as explained above, Plaintiff’s  
14 mandamus and APA claims lack jurisdiction and fail to state a claim. Accordingly,  
15 Plaintiff’s declaratory relief claim must also be dismissed. *See City of Reno v. Netflix,*  
16 *Inc.*, 52 F.4th 874, 878 (9th Cir. 2022) (“The Declaratory Judgment Act does not  
17 provide a cause of action when a party, such as [Plaintiff], lacks a cause of action under  
18 a separate statute and seeks to use the Act to obtain affirmative relief.”).

19 **E. The Court Lacks Jurisdiction to Decide Tribal Authority.**

20 Within the Complaint, Plaintiff requests that the Court itself find that Burley had  
21 the proper tribal authority in 2007 to enter into the Fee Agreement on behalf of the  
22 Tribe. *See* ECF No. 1 at 2, ¶ 3; ECF No. 1 at 9, ¶¶ 1, 3 (Prayer for Relief). As Plaintiff  
23 provided no legal basis, cause of action, or jurisdictional basis for the Court to consider  
24 the request, Defendants moved to dismiss the request. ECF No. 11 at 20. Substantively,  
25 Defendants also moved to dismiss the claim because Plaintiff’s request requires a  
26 determination of tribal law and an internal tribal dispute, and the Court lacks jurisdiction  
27 to decide an issue of tribal authority. *See Santa Clara Pueblo*, 436 U.S. at 72 n.32 (“A  
28 tribe’s right to define its own membership for tribal purposes has long been recognized



1 as central to its existence as an independent political community.”); *Cayuga Nation v.*  
2 *Tanner*, 824 F.3d 321, 327 (2d Cir. 2016) (“federal courts lack authority to resolve  
3 internal disputes about tribal law”). Plaintiff continues to fail to assert or point to any  
4 portion of his Complaint that explains how the Court may consider his request.

5 In his opposition, Plaintiff confusingly asserts that his suit is not based upon an  
6 APA review of the 2023 BIA Letter, but that instead “the Complaint seeks a resolution  
7 of what the BIA meant or intended in 2004 when it designated Burley as a ‘person of  
8 authority’ for the Tribe” and states that the Court may make that determination. ECF  
9 No. 12 at 17:27-18:10. However, Plaintiff has failed to provide any basis for the Court  
10 (or BIA) to consider this request. Accordingly, Plaintiff’s request of the Court must be  
11 dismissed.

12 For the foregoing reasons, and those set forth in the moving papers, Defendants  
13 respectfully request that the Court grant their motion to dismiss Plaintiff’s Complaint.

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Dated: January 18, 2024

Respectfully Submitted,  
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