

ATTACHMENT G

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FILED

AUG 28 2003

**CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DANNY WILLIAMS et al.,

NO. CIV. S-01-2040 WBS JFM

Plaintiffs,

v.

O R D E R

UNITED STATES OF AMERICA; NEAL
McCALEB, Assistant Secretary
of the Interior for Indian
Affairs; RONALD JAEGER, Area
Director, Bureau of Indian
Affairs, Sacramento Area
Office; and DALE RISLING, Sr.,
Superintendent, Central
California Agency, Sacramento
Area Office,

Defendants.

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This action is before the court on defendants' motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendants also move to strike certain exhibits attached to the declaration of plaintiffs' counsel Dennis G. Chappabitty, submitted in support of plaintiffs' opposition to dismissal.

As the court noted at the hearing on defendants' motion to dismiss, the parties' briefings fail to address the most

1 fundamental jurisdictional defects presented by the First Amended
2 Complaint. Because this has an independent obligation "to
3 inquire sua sponte whenever a doubt arises as to the existence of
4 federal jurisdiction", Mt. Healthy City Bd. of Ed. v. Doyle, 429
5 U.S. 274, 278 (1977), the court addresses those jurisdictional
6 defects in this Order and will give plaintiffs the opportunity to
7 amend their complaint accordingly.

8 Federal courts are courts of limited jurisdiction and
9 possess only that power authorized by the Constitution and by
10 statute. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S.
11 375, 377 (1994). "It is to be presumed that a cause lies outside
12 this limited jurisdiction, and the burden of establishing the
13 contrary rests upon the party asserting jurisdiction." Id.;
14 McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 182-183
15 (1936). Therefore, "[a] plaintiff suing in a federal court must
16 show in his pleading, affirmatively and distinctly, the existence
17 of whatever is essential to federal jurisdiction, and, if he does
18 not do so, the court, on having the defect called to its
19 attention or on discovering the same, must dismiss the case,
20 unless the defect be corrected by amendment." Tosco Corp. v.
21 Cmtys. For a Better Env't, 236 F.3d 495, 499 (9th Cir 2001).
22 (citing Smith v. McCullough, 270 U.S. 456, 459 (1926)).

23 In the instant case, plaintiffs have named as
24 defendants the United States of America, and BIA officials Neal
25 McCaleb, Ronald Jaeger, and Dale Risling ("the federal
26 defendants"). Absent a waiver, sovereign immunity bars suits
27 against the federal government or its agencies and officials.
28 Id.; Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985);

1 see also United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It
 2 is axiomatic that the United States may not be sued without its
 3 consent and that the existence of consent is a prerequisite for
 4 jurisdiction"). The "terms of [the United States'] consent to be
 5 sued in any court define that court's jurisdiction to entertain
 6 the suit." United States v. Sherwood, 312 U.S. 584, 586 (1941).
 7 Plaintiffs, therefore, bear a burden of "alleg[ing] both a basis
 8 for the court's jurisdiction, . . . and a specific statute
 9 containing a waiver of the government's immunity from suit" for
 10 each of their causes of action. Thomas v. Pierce, 662 F. Supp.
 11 519, 523 (D. Kan. 1987). With that burden in mind, the court
 12 examines each of plaintiffs' causes of action.

13 1. Administrative Procedure Act

14 In their first cause of action, plaintiffs seek
 15 declaratory relief based on their allegation that the BIA
 16 promulgated a rule without complying with the notice-and-comment
 17 requirements of the APA under 5 U.S.C. § 553(b) through (d). The
 18 APA provides a waiver of sovereign immunity in suits for non-
 19 monetary damages seeking judicial review of an agency action. 5
 20 U.S.C. § 702¹; The Presbyterian Church (U.S.A.) v. United States,
 21 870 F.2d 518, 524-25 (9th Cir. 1989) ("[O]n its face, the 1976
 22 amendment of § 702 waives sovereign immunity in all actions
 23

24 ¹ 5 U.S.C. § 702 states in pertinent part:

25 An action in a court of the United States seeking
 26 relief other than money damages and stating a claim
 27 that an agency or an officer or employee thereof acted
 28 or failed to act in an official capacity or under color
 of legal authority shall not be dismissed nor relief
 therein be denied on the ground that it is against the
 United States or that the United States is an
 indispensable party

1 seeking relief from official misconduct except for money
2 damages.").

3 Despite this waiver of sovereign immunity, however, the
4 jurisdiction of the court to review the decisions of an
5 administrative agency under the APA is limited. Not every action
6 taken by a governmental agency is reviewable under the APA, and
7 not everyone dissatisfied by agency action has standing to
8 challenge such action. Specifically, 5 U.S.C. § 704 provides
9 that only "[a]gency action made reviewable by statute and final
10 agency action for which there is no other adequate remedy in a
11 court, are subject to judicial review."

12 Here, plaintiffs appear to allege that the BIA took a
13 final agency action reviewable by this court because "the
14 distribution list, as applied by the BIA toward the plaintiffs,
15 constitutes a 'rule' under the APA" to which the notice-and-
16 comment requirements apply. (First Amended Complaint ¶¶ 46-47).

17 The promulgation of a rule has been recognized as a
18 "final agency action" subject to judicial review. FTC v.
19 Standard Oil Co., 449 U.S. 232, 239-40 (1980). However, not
20 every activity undertaken by an agency constitutes "rule-making"
21 subject to the notice-and-comment requirement. The court fails
22 to see how the list of termination-era distributees can
23 constitute a "rule" within the statutory context of the APA, when
24 the APA defines a "rule" as "the whole or a part of an agency
25 statement of general or particular applicability and future
26 effect designed to implement, interpret, or prescribe law or
27 policy or describing the organization, procedure, or practice
28 requirements of an agency and includes the approval or

1 prescription for the future of rates, wages, corporate or
2 financial structures or reorganizations thereof, prices,
3 facilities, appliances, services or allowances therefor or of
4 valuations, costs, or accounting, or practices bearing on any of
5 the foregoing." 5 U.S.C. § 551(13).²

6 In sum, plaintiffs have failed to allege BIA conduct
7 constituting action over which this court has jurisdiction to
8 review. Accordingly, plaintiffs' first cause of action will be
9 dismissed.

10 2. Due Process

11 The second cause of action alleges that defendants
12 deprived plaintiffs of their Fifth Amendment due process rights
13 when plaintiffs were denied their interest in full tribal
14 membership. Plaintiffs' allegations, however, fail to identify
15 what specific conduct on the part of the federal defendants
16 created the due process deprivation, when that conduct occurred,
17 or the causal connection between that conduct and plaintiffs'
18 injuries-in-fact. While the court is mindful of the liberal
19 notice pleading standards, the First Amended Complaint, as it
20 currently stands, is so vague that the court cannot determine
21 whether plaintiffs have stated a justiciable due process cause of
22 action under the "case and controversy" requirement of Article
23 III. See Simon v. Eastern Kentucky Welfare Rights Organization,
24 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the

25 ² Moreover, "the notice-and-comment requirements apply .
26 . . . only to so-called 'legislative' or 'substantive' rules; they
27 do not apply to 'interpretative rules, general statements of
28 policy, or rules of agency organization, procedure, or
practice.'" Lincoln v. Vigil, 508 U.S. 182, 196 (1993) (citing 5
U.S.C. § 553(b)).

1 judiciary's proper role in our system of government than the
 2 constitutional limitation of federal court jurisdiction to actual
 3 cases or controversies.").

4 Plaintiffs have therefore failed to meet their burden
 5 of demonstrating this court's jurisdiction over this claim, and
 6 the claim will be dismissed.

7 3. Indian Reorganization Act

8 In their third cause of action, plaintiffs allege that
 9 defendants have violated 25 U.S.C. §§ 476(f) and (g) of the IRA.
 10 Sections 476(f) and (g) read as follows:

11 (f) Privileges and immunities of Indian tribes;
 12 prohibition on new regulations

13 Departments or agencies of the United States shall
 14 not promulgate any regulation or make any decision
 15 or determination pursuant to the Act of June 18,
 16 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as
 17 amended, or any other Act of Congress, with
 respect to a federally recognized Indian tribe
 that classifies, enhances, or diminishes the
 privileges and immunities available to the Indian
 tribe relative to other federally recognized
 tribes by virtue of their status as Indian tribes.

18 (g) Privileges and immunities of Indian tribes;
 19 existing regulations

20 Any regulation or administrative decision or
 21 determination of a department or agency of the
 22 United States that is in existence or effect on
 23 May 31, 1994, and that classifies, enhances, or
 24 diminishes the privileges and immunities available
 to a federally recognized Indian tribe relative to
 the privileges and immunities available to other
 federally recognized tribes by virtue of their
 status as Indian tribes shall have no force or
 effect.

25 Nothing in these statutes reflects a Congressional intent to
 26 provide a private right of action to individuals, much less an
 27 unequivocal waiver of sovereign immunity for such private
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1 actions. Plaintiffs have not cited, and the court cannot find,
2 any authority to support the existence of such legislative
3 intent. Accordingly, plaintiffs' third cause of action will be
4 dismissed.

5 4. Breach of Hardwick Judgment

6 Plaintiffs' fourth cause of action is labeled "Breach
7 of Hardwick Judgment." (First Amended Complaint at 15).

8 Although this cause of action was vaguely couched a breach of
9 contract claim under the Tucker Act (Id. ¶ 3, 67) in the First
10 Amended Complaint, plaintiffs admitted during oral argument that
11 the gravamen of this cause of action -- and indeed the entire
12 case -- is that the federal defendants have failed to comply with
13 their obligations under the Hardwick judgment.

14 During oral argument, the court asked plaintiffs to
15 identify the jurisdictional basis and the ~~waiver of sovereign~~
16 ~~immunity~~ that would allow such a cause of action to proceed in
17 ~~this court~~. In response, plaintiffs suggested that a judgment
18 rendered by one district court is tantamount to a statute
19 conferring jurisdiction and a waiver of sovereign immunity on
20 another district court to hear a different case relating to the
21 breach of that judgment. Plaintiffs have not cited, nor is the
22 court aware of, any cases signaling such an upheaval in our
23 jurisdictional jurisprudence.

24 As the court suggested during oral hearing, the proper
25 recourse for plaintiffs to address what they perceive to be
26 defendants' failure to comply with the Hardwick judgment would be
27 to seek relief by way of civil contempt and sanctions in that
28 case. This court, of course, expresses no opinion about any


1 issue bearing on the likelihood of success of such a motion, only
2 the opinion that plaintiffs have failed to demonstrate that
3 jurisdiction rests in this court. Accordingly, plaintiff's
4 fourth cause of action will be dismissed.

5 5. Motion to Strike

6 Defendants have moved to strike Exhibit D and portions
7 of Exhibit F attached to Chappabitty's declaration on the ground
8 that they are filled with inadmissible hearsay. Because the
9 court's analysis did not require the consideration of those
10 exhibits, defendants' motion to strike is moot.

11 IT IS THEREFORE ORDERED that the First Amended
12 Complaint be, and the same hereby is, DISMISSED with leave to
13 amend. Plaintiffs shall have thirty days from the date of this
14 Order to file a second amended complaint consistent with this
15 Order.

16 DATED: August 27, 2003

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18 WILLIAM B. SHUBB
19 UNITED STATES DISTRICT JUDGE
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