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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA

7
8 CLIFFORD M. LEWIS, et al.,
9 Plaintiffs,
10
11 v.
12 KEN SALAZAR, et al.,
13 Defendants.

1:10-cv-01281-OWW-DLB
MEMORANDUM DECISION REGARDING
DEFENDANTS MOTIONS TO DISMISS
SECOND AMENDED COMPLAINT
(Docs. 50, 52)

14
15 I. INTRODUCTION.

16 Plaintiffs bring this action against Ken Salazar, the
17 Secretary of the Interior of the United States of America ("the
18 Secretary"), and various private individuals ("Individual
19 Defendants"). Plaintiffs first amended complaint ("FAC") was
20 dismissed on May 3, 2011. (Doc. 41).

21 Plaintiffs filed a second amended complaint ("SAC") on May 5,
22 2011. (Doc.43). Individual Defendants filed a motion to dismiss
23 the SAC on June 1, 2011. (Doc. 50). The Secretary also filed a
24 motion to dismiss on June 1, 2011. (Doc. 52). Plaintiff filed
25 opposition to the motions to dismiss on July 11, 2011. (Docs. 53,
26 54). Defendants filed replies on July 25, 2011. (Docs. 55, 57).

27 II. FACTUAL BACKGROUND.

28 In or about 1916, the United States purchased a parcel of land

1 in Fresno County, California and thereafter held the land in trust
2 for the Table Mountain Band of Indians. The land became known as
3 the Table Mountain Rancheria ("Rancheria"). The Rancheria was
4 considered an Indian Reservation and "Indian Country." Rancheria
5 residents were recognized as Indians for the purposes of federal
6 law.

7 **The California Rancheria Termination Act**

8 In 1958, Congress passed the California Rancheria Termination
9 Act ("CTRA"). The CTRA called for the distribution of all
10 rancheria lands and assets to individual tribe members and called
11 for a plan "for distributing to individual Indians the assets of
12 the reservation or Rancheria, including the assigned and the
13 unassigned lands, or for selling such assets and distributing the
14 proceeds of sale, or conveying such assets to a corporation or
15 other legal entity organized or designed by the group, or for
16 conveying such assets to the group, as tenants in common." The
17 CTRA called for the government to give notice to all residents of
18 the Rancheria who were recognized and designated as Indians under
19 the 1916 Act before the land could be distributed. In addition, the
20 government was required to survey the land of the Rancheria. The
21 government was then required to improve or construct all roads
22 serving the Rancheria, to install or rehabilitate irrigation,
23 sanitation, and domestic water systems, and to exchange land held
24 in trust for the Rancheria.

25 All Indians who received a portion of the assets distributed
26 under the CTRA were ineligible to receive any more federal services
27 rendered to them based on their status as Indians. All Indians who
28 did not receive a portion of the assets were still eligible to

1 receive federal services rendered to them based on their status as
2 Indians.

3 The SAC alleges that very few of the Indians were given
4 actual, written or constructive notice of CRTA, and that those few
5 who received notice were given land by the government. The few
6 Indians that were given land are the Individual Defendants named in
7 this action: Clarence Jones, Lester Burrough, E.B. Barnes, Lewis
8 Barnes, William Walker, Aaron Jones, Carolyn Walker and Twila
9 Burrough. Any land not conveyed to the named Defendant Indians was
10 to be earmarked and conveyed to a legal entity formed solely to
11 receive the remaining parcels for the benefit of those Indians who
12 did not receive any land under the initial distribution.

13 **1983 Settlement Agreement**

14 On or about March 28, 1983, the United States District Court
15 for the Northern District of California [in an action entitled
16 *Table Mountain Rancheria Association et al. v. James Watt et al.*
17 Case No. C-80-4595 MHP] entered a stipulated judgment ("Watt
18 Judgment") which re-instated the plaintiffs who had not
19 participated in the 1958 distribution as Indians under the laws of
20 the United States prior to the 1958 CRTA and who were entitled to
21 the benefits which they enjoyed prior to 1958. The district court
22 ordered the Secretary of the Interior to prepare and provide to
23 Plaintiffs a list of federal services, benefits, and programs and
24 the eligibility criteria which were available to Indians because of
25 their status as Indians between May 2, 1973 and June 25, 1975. The
26 Secretary did not comply.

27 Plaintiffs contend the Secretary's failure to comply with the
28 Watt Judgment has caused Plaintiffs to expend great sums of their

1 own funds to gain access to services, benefits and programs which
2 the Secretary failed to provide to them. Plaintiffs have been
3 deprived of the federal services, benefits, and programs including
4 but not limited to education, medical care and services, vocational
5 training and services, housing services, repatriation of remains,
6 observation of rituals and income from the land.

7 The SAC alleges that Rancheria land not transferred in the
8 1958 CRTA and was to be held in trust by the Secretary of the
9 Interior for the benefit of persons living on the Rancheria. This
10 land is described specifically in the Watt Judgment and during the
11 past twenty-seven years that land has increased in value and has
12 produced great revenues and income. None of the revenues or income
13 have been distributed to the Plaintiffs. Plaintiffs allege that
14 Individual Defendants failed to represent the members as required
15 under the Watt Judgment, and that they have a fiduciary
16 relationship and a fiduciary duty to account for the revenues and
17 distribute the income to the Plaintiffs, their heirs, assigns,
18 executors, administrators and successors.

19 **III. LEGAL STANDARD.**

20 Dismissal under Rule 12(b)(6) is appropriate where the
21 complaint lacks sufficient facts to support a cognizable legal
22 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699
23 (9th Cir.1990). To sufficiently state a claim to relief and
24 survive a 12(b)(6) motion, the pleading "does not need detailed
25 factual allegations" but the "[f]actual allegations must be enough
26 to raise a right to relief above the speculative level." *Bell Atl.*
27 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Mere "labels and
28 conclusions" or a "formulaic recitation of the elements of a cause

1 of action will not do." *Id.* Rather, there must be "enough facts to
2 state a claim to relief that is plausible on its face." *Id.* at 570.
3 In other words, the "complaint must contain sufficient factual
4 matter, accepted as true, to state a claim to relief that is
5 plausible on its face." *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129
6 S.Ct. 1937, 1949 (2009) (internal quotation marks omitted).

7 The Ninth Circuit has summarized the governing standard, in
8 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint to
9 survive a motion to dismiss, the nonconclusory factual content, and
10 reasonable inferences from that content, must be plausibly
11 suggestive of a claim entitling the plaintiff to relief." *Moss v.*
12 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.2009) (internal
13 quotation marks omitted). Apart from factual insufficiency, a
14 complaint is also subject to dismissal under Rule 12(b)(6) where it
15 lacks a cognizable legal theory, *Balistreri*, 901 F.2d at 699, or
16 where the allegations on their face "show that relief is barred"
17 for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215 (2007).

18 In deciding whether to grant a motion to dismiss, the court
19 must accept as true all "well-pleaded factual allegations" in the
20 pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not,
21 however, "required to accept as true allegations that are merely
22 conclusory, unwarranted deductions of fact, or unreasonable
23 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
24 (9th Cir.2001). "When ruling on a Rule 12(b)(6) motion to dismiss,
25 if a district court considers evidence outside the pleadings, it
26 must normally convert the 12(b)(6) motion into a Rule 56 motion for
27 summary judgment, and it must give the nonmoving party an
28 opportunity to respond." *United States v. Ritchie*, 342 F.3d 903,

1 907 (9th Cir. 2003). "A court may, however, consider certain
2 materials-documents attached to the complaint, documents
3 incorporated by reference in the complaint, or matters of judicial
4 notice-without converting the motion to dismiss into a motion for
5 summary judgment." *Id.* at 908.

6 **IV. Discussion.**

7 **A. First and Second Causes of Action**

8 Plaintiffs' first cause of action is advanced only against the
9 Secretary. The caption to the first cause of action states:
10 "Failure to Provide Federally Mandated Services, Programs, and
11 Benefits (Violation of 25 U.S.C. § 13 & 25 U.S.C. § 1901, Fifth and
12 Fourteenth Amendments) (Breach of Fiduciary Duty)." The SAC's
13 second cause of action asserts conspiracy against the Secretary and
14 various individuals. Both claims are unintelligible.

15 The facts and statutory references set forth in the SAC's
16 first cause of action fail to satisfy the fundamental notice
17 pleading requirement set forth in Rule 8 of the Federal Rules of
18 Civil Procedure. No cognizable claim against the Secretary can be
19 discerned from the allegations set forth in the SAC. According to
20 Plaintiffs' opposition to the Secretary's motion to dismiss, the
21 first cause of action asserts the following claims: (1) a claim
22 under 5 U.S.C. § 702 challenging the Secretary's "executing of the
23 acceptance of the conveyance;" (Doc. 54, at 6 n.3); (2) a claim
24 under 25 U.S.C. § 13¹ for unspecified violations of that statute
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27 ¹ The Snyder Act, 25 U.S.C. § 13, does not provide a basis for a private right
28 of action for money damages. *E.g., White Mt. Apache Tribe v. United States*, 249
F.3d 1364, 1372 (Fed. Cir. 2001).

1 (Id. at 12-13); (3) a claim under 25 U.S.C. § 1901 *et seq.*² arising
2 out of the Secretary's abuse "of his power in dealing with Indian
3 children and their families as it relates to tribal rituals and the
4 mores of the tribal culture" (Id. at 13); and (4) a Fifth Amendment
5 takings claim predicated on the transfer of real property to the
6 United States in 1984 (Id. at 13-14).³ None of the claims
7 Plaintiff seeks to allege in the first cause of action are pled
8 with sufficient clarity to permit reasoned analysis. Although the
9 Secretary's motion attempts to address the merits of Plaintiffs'
10 specific claims, Plaintiffs' opposition states that "Defendant's
11 description and analysis of what the allegations are in the SAC are
12 very different than what Plaintiffs believe they actually alleged."
13 (Doc. 54, Opposition at 4). The inability of the Secretary-and the
14 court-to discern what the SAC intends to allege demonstrates the
15 extent to which the SAC is deficient.

16 In addition to attempting to address the merits of the claims
17 asserted in Plaintiffs' SAC, the Secretary's motion to dismiss
18 invokes the United States' sovereign immunity. A plaintiff in a
19 lawsuit against the United States must point to an unequivocal
20 waiver of sovereign immunity. *E.g., Holloman v. Watt*, 708 F.2d
21 1399, 1401 (9th Cir. 1983). The Secretary correctly notes that
22 Plaintiffs have not identified any valid waiver of sovereign
23

24 ² In Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901 *et seq.*, regulates
25 proceedings for termination of parental rights, adoptions, and foster care
26 placement involving Indian children. *E.g., Nielson v. Ketchum*, 640 F.3d 1117,
1119 (10th Cir. 2011). How ICWA relates to Plaintiffs' property-based claims is
unknown.

27 ³ As noted in the memorandum decision dismissing Plaintiffs' FAC, "Plaintiffs
28 concede that *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) does not
provide a jurisdictional basis for their constitutional claims..." (Doc. 26,
Opposition at 6). It is dismissed with prejudice.

1 immunity related to the claims advanced in the SAC.

2 Plaintiffs contend that 5 U.S.C. § 702 provides the United
3 States' waiver of sovereign immunity with respect to Plaintiffs'
4 claims against the Secretary. The limited waiver embodied in
5 section 702 does not effect a waiver for claims against the United
6 States for money damages. 5 U.S.C. § 702 (permitting actions
7 against the United States "seeking relief other than money
8 damages"); *e.g.*, *Harger v. DOL*, 569 F.3d 898, 906 (9th Cir. 2009)
9 (damages claim outside scope of section 702's waiver). Further,
10 the United States' waiver of sovereign immunity under the section
11 702 does not extend to Plaintiffs claims under, *inter alia*, 25
12 U.S.C. § 13 and 25 U.S.C. § 1901 *et seq.*⁴

13 During the hearing on the motion to dismiss Plaintiffs' FAC,
14 the court admonished Plaintiffs that they would be given only one
15 more opportunity to amend their complaint in order to articulate
16 cognizable claims. Rather than remedy the deficiencies that
17 required dismissal of the FAC, Plaintiffs' SAC creates more
18 confusion by invoking wildly divergent statutory claims unsupported
19 by relevant factual allegations. After three attempts, Plaintiffs
20 have not come close to stating a single cognizable claim against
21 the Secretary. Plaintiffs' claims against the Secretary are
22 DISMISSED WITH PREJUDICE.

23 **B. Breach of Fiduciary Duty Claims**

24 The third and fourth causes of action in the SAC assert breach
25 of fiduciary duty against various Individual Defendants.

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27 ⁴ The United States has waived sovereign immunity with respect to certain claims
28 for money damages related to Indian Tribal Claims; such claims must be prosecuted
in the Court of Federal Claims, not a district court. See, *e.g.*, *White Mt.*
Apache, 537 U.S. at 1132.

1 Plaintiffs invoke either *Bivens v. Six Unknown Fed. Narcotics*
2 *Agents*, 403 U. S. 388 (1971) or, in the alternative, 42 U.S.C. §
3 1983 as the basis for the third cause of action. (SAC at 22-23).
4 It appears Plaintiffs claim is that, by breaching a fiduciary duty
5 owed to Plaintiffs', Individual Defendants effected a taking under
6 color of law in violation of Plaintiffs' due process rights. The
7 fourth cause of action is based on the alternative contention that
8 Individual Defendants were private actors for the purposes of the
9 conduct complained of. There are three categories of conduct
10 underlying both of Plaintiffs' breach of fiduciary duty claims: (1)
11 Defendants' conveyance of the subject real property to the United
12 States in 1984; (2) Defendants' failure to distribute revenue to
13 Plaintiffs during the period from 1958 to 1983; and (3) Defendants'
14 failure to distribute revenue to Plaintiffs during the period from
15 1983 to present.

16 Plaintiffs' third cause of action is subject to a two-year
17 statute of limitation, as the forum state's statute of limitations
18 for personal injury actions apply to section 1983 claims as well as
19 *Bivens* claims. *E.g.*, *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir.
20 2004) (section 1983); *Matthews v. Macanas*, 990 F.2d 467, 468-69
21 (9th Cir. 1993) (*Bivens*); Cal. Civ. Proc. Code § 335.1.
22 Plaintiffs' fourth cause of action is subject to a four-year
23 statute of limitation. See Cal. Civ. Proc. Code § 343.
24 Plaintiffs' claims are time barred.⁵ With respect to Plaintiffs'

25
26 ⁵ In reaching the statute of limitations issue, the court in no way suggests that
27 Plaintiffs have properly alleged any cognizable claims or that Individual
28 Defendants are not entitled to sovereign immunity as a tribal governing body.
Although the SAC is unintelligible, it is clear that Plaintiffs have failed to
plead facts sufficient to establish any possibility that their claims are not
time barred. It is unnecessary to reach any additional arguments.

1 claim that Defendants breached their fiduciary duty to Plaintiffs'
2 by conveying the subject real property to the United States, the
3 statute of limitations began to run decades ago at the time of
4 conveyance in 1984. The statute of limitations on such claims also
5 began to run decades ago on Plaintiff's claims regarding the
6 distribution of income.

7 Plaintiffs cite *Tademy v. Union Pac. Corp.*, 520 F.3d 1149
8 (10th Cir. 2008); *Hunter v. Sec. of U.S. Army*, 565 F.3d 986 (6th
9 Cir. 2009); *Carpinteria Valley Farms v. City of Santa Barbara*, 344
10 F.3d 822 (9th Cir. 2003); *Walsh v. National Computer Systems, Inc.*,
11 332 F.3d 1150, 1157 (8th Cir. 2003), and *National Railroad*
12 *Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) for the proposition
13 that the continuing violations doctrine applies to Defendants'
14 "pattern and practice" of failing to distribute revenue to
15 Plaintiffs. None of the cases cited by Plaintiffs are relevant to
16 Plaintiffs' invocation of the continuing violations doctrine.

17 In *Tademy*, the Tenth Circuit held that a jury could determine
18 that separate discrete discriminatory acts were constituent parts
19 of a continuous practice of discrimination. 520 F.3d at 1161. In
20 *Hunter*, the Sixth Circuit rejected a plaintiff's conclusory
21 contention that discrete discriminatory acts constituted an ongoing
22 pattern of discrimination. 565 F.3d at 994. In *Carpenteria*, the
23 Ninth Circuit "expressed no opinion" on whether plaintiffs could
24 amend their discrimination complaint to allege that various
25 discrete acts of purported discrimination established a "systematic
26 pattern-or-practice" claim. 344 F.3d at 829 n.3. In *Walsh*, the
27 Eight Circuit held that a plaintiff properly alleged a continuing
28 pattern of related discriminatory events rather than discrete

1 discriminatory actions concerning pregnancy discrimination. 332
2 F.3d at 1157. In *Morgan*, the Supreme Court noted that it had no
3 occasion to consider whether the plaintiff had a viable "pattern-
4 or-practice" claim. 536 U.S. at 123, n.9.

5 The fact that an alleged violation of law causes continuing
6 impacts does not warrant application of the continuing violations
7 doctrine. *E.g.*, *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir.
8 2001). In *Knox*, the California Department of Corrections ("CDC")
9 suspended a criminal defense attorney's visitation and mail
10 privileges with inmates in all CDC prisons. Plaintiff invoked the
11 continuing violations doctrine, arguing that each time she was
12 denied access to one of her clients housed in a CDC prison, a new
13 violation of her rights occurred. The Ninth Circuit rejected the
14 plaintiff's contention:

15 this court has repeatedly held that a mere continuing
16 impact from past violations is not actionable. Knox's
17 cause of action accrued when she received Tristan's
18 permanent and complete suspension letter on January 20,
19 1996. The continuing violation doctrine is inapplicable
20 because Knox has failed to establish that a new violation
occurs each time she is denied her visitation or mail
privileges. Rather, the CDC's subsequent and repeated
denials of Knox's privileges with her clients is merely
the continuing effect of the original suspension.

21 *Id.* at 1013 (citations and quotations omitted).

22 The SAC does not allege facts sufficient to establish that a
23 new violation of law occurs each time a revenue distribution is
24 made excluding Plaintiffs.⁶ In the memorandum decision dismissing
25 the FAC, Plaintiffs were admonished that conclusory allegations of

27 ⁶ In fact, the SAC does not allege any facts concerning when such distributions
28 have been made; Plaintiffs advance only the conclusory allegation that Defendants
have distributed revenues amongst themselves. No further details are alleged.

1 "continuing violations" are insufficient, and that sufficient
2 factual matter must be alleged in order to avoid the obvious
3 statute of limitations problems presented by Plaintiffs' claims.
4 (Doc. 38 at 8-9). After three attempts, Plaintiffs have failed to
5 allege facts sufficient to suggest that any of their claims for
6 relief are not time-barred. Plaintiffs' third and fourth causes of
7 action are DISMISSED, with prejudice.

8 **ORDER**

9 For the reasons stated, IT IS ORDERED:

10 1) The SAC's first and second causes of action are DISMISSED
11 WITH PREJUDICE;

12 2) The SAC's third and fourth causes of action are DISMISSED
13 WITH PREJUDICE; and

14 3) Defendants shall file a form of order consistent with this
15 memorandum decision within five days of electronic service of
16 this decision.

17 IT IS SO ORDERED.

18 Dated: August 29, 2011

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE