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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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PATRICK HAMMOND III,
Plaintiff,
v.
SALLY JEWELL, Secretary of
the U.S. Department of the
Interior; INTERIOR BOARD OF
INDIAN APPEALS, U.S.
Department of the Interior;
AMY DUTSCHKE, Regional
Director, Pacific Regional
Office, Bureau of Indian
Affairs; TROY BURDICK,
Superintendent, Central
California Agency, Bureau of
Indian Affairs,
Defendants.

CIV. NO. 1:15-00391 WBS SKO
MEMORANDUM AND ORDER RE: MOTION
TO DISMISS

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Plaintiff alleges he was ousted from the leadership of
the Picayune Rancheria of Chukchansi Indians Tribe in violation
of tribal law and brought this suit against numerous federal
defendants seeking reinstatement to the Tribal Council.

1 Presently before the court is defendants' motion to dismiss for
2 lack of subject matter jurisdiction pursuant to Federal Rule of
3 Civil Procedure 12(b)(1) and for failure to state a claim
4 pursuant to Rule 12(b)(6).

5 I. Factual and Procedural Background

6 Plaintiff was elected to the Tribal Council of the
7 Picayune Rancheria of Chukchansi Indians Tribe in December 2008.
8 (Compl. ¶ 10.) After initially suspending plaintiff from the
9 Tribal Council for alleged violations of the tribal Ethics
10 Ordinance, the Tribal Council permanently removed him on June 17,
11 2011 after a hearing. (Id. ¶¶ 13-14.)

12 Following the December 3, 2011 election, three factions
13 were embroiled in a power struggle over tribal leadership,
14 resulting in legal disputes in the Tribal Court and even
15 violence. (Id. ¶¶ 19-23.) Plaintiff was not a member of any of
16 the factions and it does not appear that their leadership
17 disputes were related to plaintiff's removal from the Tribal
18 Council. Asserting conflicting claims of leadership, all three
19 factions submitted contracts under the Indian Self-Determination
20 and Education Assistance Act ("ISDEAA") to the Bureau of Indian
21 Affairs ("BIA"). (See id. ¶ 23; Defs.' Ex. B. at 1 ("Feb. 11,
22 2014 BIA Decision") (Docket No. 16-2).)

23 The BIA Superintendent returned the contract requests
24 from all three factions and concluded it would recognize the
25 results of the disputed December 1, 2012 election. (Feb. 11,
26 2014 BIA Decision at 6.) All three factions appealed the
27 Superintendent's decision and the BIA Regional Director affirmed
28 the decision to return all three contract requests, but vacated

1 the decision to recognize the results of the disputed election
2 because the BIA did not have "the authority to determine which of
3 the opposing factions['] interpretation of the Tribe's law is
4 correct." (Id.) The Regional Director determined that
5 "recognition of a government is essential for the purpose of
6 contracting under the ISDEAA and that the BIA "will conduct
7 business, on an interim basis, with the last uncontested Tribal
8 Council elected December 2010." (Id.) The Regional Director did
9 not identify plaintiff as a member of that Tribal Council because
10 "[t]he record reflects that Nokomis Hernandez was appointed by
11 the Tribal Council to replace Patrick Hammond, III." (Id. at 3
12 n.3.)

13 Two factions and plaintiff appealed that decision to
14 the BIA Office of Hearings and Appeals and a two-judge panel
15 concluded that exigent circumstances justified making the
16 Regional Director's decision to recognize the 2010 Tribal Council
17 "for government-to-government purposes" effective immediately.
18 (Defs.' Ex. C at 5 ("Feb. 9, 2015 BIA Decision") (Docket No. 16-
19 3).) Although plaintiff had appealed "the Regional Director's
20 acceptance of his subsequent removal from the Council and
21 replacement," the panel did not address the merits of that
22 dispute in its February 9, 2015 decision. (Id. at 5 n.2.)

23 Plaintiff initiated this lawsuit, alleging he was
24 "unethically and unconstitutionally removed from his position on
25 the Tribal Council." (Compl. ¶ 15.) He further alleges that he
26 attempted to seek help from defendants in resolving his allegedly
27 wrongful removal, but defendants "failed to exercise their
28 inherent authority to correct this manifest injustice and error."

1 (Id. ¶ 17.) Plaintiff asserts claims for violations of (1) 42
2 U.S.C. § 1983 based on a denial of procedural due process; (2)
3 the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302; and (3)
4 the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 et seq.
5 He asks the court to vacate the February 11, 2014 and February 9,
6 2015 BIA decisions, declare that his removal by the Tribal
7 Council was invalid and void, and declare that he is a member of
8 the Tribal Council. (Id. at 8-9.) Defendants now move to
9 dismiss the Complaint for lack of subject matter jurisdiction
10 pursuant to Rule 12(b)(1) or, alternatively, for failure to state
11 a claim upon which relief can be granted pursuant to Rule
12 12(b)(6).

13 II. Discussion

14 Rule 12(b)(1) authorizes a court to dismiss an action
15 over which it lacks subject matter jurisdiction. When a party
16 challenges the court's jurisdiction, the party invoking its
17 jurisdiction bears the burden of proving that jurisdiction
18 exists. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,
19 376 (1994); Tosco Corp. v. Cmtys. for a Better Env't, 236 F.3d
20 495, 499 (9th Cir. 2001), abrogated on other grounds by Hertz
21 Corp. v. Friend, 559 U.S. 77 (2010).

22 On a Rule 12(b)(6) motion to dismiss, the court must
23 accept the allegations in the complaint as true and draw all
24 reasonable inferences in favor of the plaintiff. See Scheuer v.
25 Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by
26 Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S.
27 319, 322 (1972). To survive a motion to dismiss, a plaintiff
28 must plead "only enough facts to state a claim to relief that is

1 plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S.
2 544, 570 (2007). This “plausibility standard,” however, “asks
3 for more than a sheer possibility that a defendant has acted
4 unlawfully,” and where a plaintiff pleads facts that are “merely
5 consistent with a defendant’s liability,” it “stops short of the
6 line between possibility and plausibility.” Ashcroft v. Iqbal,
7 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557).

8 A. Section 1983 and ICRA Claims

9 “Internal matters of a tribe are generally reserved for
10 resolution by the tribe itself, through a policy of Indian self-
11 determination and self-government as mandated by the Indian Civil
12 Rights Act.” Timbisha Shoshone Tribe v. Kennedy, 687 F. Supp. 2d
13 1171, 1185 (E.D. Cal. 2009) (O’Neill, J.). A district court thus
14 generally lacks jurisdiction to resolve matters of internal
15 tribal governance.¹ Id. As the BIA recognized in its February
16 11, 2014 decision, “the determination of tribal leadership is
17 quintessentially an intra-tribal matter raising issues of tribal
18 sovereignty.” (Feb. 11, 2014 BIA Decision at 6 (quoting Hamilton
19 v. Acting Sacramento Area Dir., 29 I.B.I.A. 122, 123, 1996 WL

20 ¹ There is an exception where a tribe’s own governing
21 documents vest federal agencies with ultimate authority over
22 certain decisions. Alto v. Black, 738 F.3d 1111, 1115, 1123 (9th
23 Cir. 2013) (recognizing that the BIA had authority to decide a
24 membership dispute where the tribe’s own constitution required
25 the BIA to approve the deletion of individual’s names from
26 membership). The Constitution of the Picayune Reservation does
27 not vest the BIA with the authority to review internal tribal
28 leadership disputes. (See Defs.’ Ex. A (Constitution of the
Picayune Reservation); see also Feb. 11, 2014 BIA Decision at 6
 (“There is no provision in the Tribe’s Constitution or federal
law that provides the BIA with authority to determine which of
the opposing factions[’] interpretation of the Tribe’s law is
correct”).)

1 165057, at *2 (Mar. 12, 1996)); see also In re Sac & Fox Tribe
2 of Miss. in Iowa/Meskwaki Casino Litig., 340 F.3d 749, 763-64
3 (8th Cir. 2003) (holding that the district court lacked
4 jurisdiction to resolve an internal tribal election dispute); see
5 Timbisha, 687 F. Supp. at 1185 (considering elections to be among
6 the internal affairs of the tribe that do not come within the
7 purview of review by federal courts).

8 Here, plaintiff's § 1983 and ICRA claims are based on
9 the allegation that his removal from the Tribal Council violated
10 tribal law, and his prayer for relief asks the court to order
11 that he be reinstated on the Tribal Council. Because plaintiff
12 seeks "a form of relief that the federal courts cannot provide,
13 namely, resolution of [an] internal tribal leadership dispute,"
14 the court lacks jurisdiction over his claims. In re Sac & Fox
15 Tribe, 340 F.3d at 763; see also Timbisha, 687 F. Supp. 2d at
16 1185 (holding that the plaintiff's claims were non-justiciable in
17 federal court because they would require the court to resolve the
18 parties' election dispute, an issue central to tribal self-
19 determination and self-government). Accordingly, the court must
20 grant defendants' motion to dismiss plaintiff's § 1983 and ICRA
21 claims for lack of subject matter jurisdiction.²

22 B. APA Claim

23
24 ² Plaintiff's ICRA claim also fails because "ICRA does
25 not operate against the federal government." Cal. Valley Miwok
26 Tribe v. Salazar, 967 F. Supp. 2d 84, 93 (D.D.C. 2013); see also
27 25 U.S.C. § 1302(a)(8) ("No Indian tribe in exercising powers of
28 self-government shall-- . . . deny to any person within its
jurisdiction the equal protection of its laws or deprive any
person of liberty or property without due process of law")
(emphasis added).

1 The APA permits a reviewing court to review a "final
2 agency action," 5 U.S.C. § 704, and "hold unlawful and set aside
3 actions, findings, and conclusions found to be . . . arbitrary,
4 capricious, an abuse of discretion, or otherwise not in
5 accordance with law." Id. § 706(2)(A). "The federal question
6 for § 1331 purposes is whether the BIA violated the APA; that it
7 is claimed to have done so in a case involving application of
8 tribal law does not matter, any more than it would matter to
9 § 1331 jurisdiction over an APA case involving an issue of state
10 law." Alto v. Black, 738 F.3d 1111, 1124 (9th Cir. 2013).

11 Under the APA, "[a] person suffering a legal wrong
12 because of agency action, or adversely affected or aggrieved by
13 agency action within the meaning of a particular statute, is
14 entitled to judicial review thereof." 5 U.S.C. § 702 (emphasis
15 added). "Section 702 does not create substantive rights. There
16 is no right to sue for a violation of the APA in the absence of a
17 'relevant statute' whose violation 'forms the legal basis for
18 [the] complaint.'" El Rescate Legal Servs., Inc. v. Exec. Office
19 of Immigration Review, 959 F.2d 742, 753 (9th Cir. 1991) (quoting
20 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990)).

21 "Absent a statute with substantive standards, judicial
22 review is precluded because there is no 'law to apply [and] "no
23 meaningful standard against which to judge the agency's exercise
24 of discretion.'" Eason Land Co., LLC v. Sec'y of U.S. Dep't of
25 Interior, No. 2:14-CV-00951-SU, 2015 WL 1538501, at *11 (D. Or.
26 Apr. 7, 2015) (quoting Or. Nat'l Res. Council v. Thomas, 92 F.3d
27 792, 798 (9th Cir. 1996) (alteration in original)); see also Pub.
28 Lands for the People, Inc. v. U.S. Dep't of Agric., 733 F. Supp.

1 2d 1172, 1180 (E.D. Cal. 2010) ("A claim that an agency acted
2 arbitrarily and capriciously for purposes of the APA cannot
3 'stand free of any other law.' Instead, the APA provides a
4 mechanism for enforcing obligations arising under other
5 authority." (quoting Or. Nat'l Res. Council, 92 F.3d at 798)).

6 Here, plaintiff's Complaint does not allege what
7 statute provides the substantive standards to review the BIA's
8 decision and appears to allege only a deficient, free-standing
9 claim that the BIA's decision was "arbitrary and capricious" in
10 violation of the APA.

11 To the extent plaintiff relies on the Due Process
12 Clause as the "standard against which to judge the agency's
13 exercise of discretion," Or. Nat'l Res. Council, 92 F.3d at 798,
14 this claim must fail. "To assert a procedural due process claim
15 under the Fifth Amendment, [the plaintiff] must first establish a
16 constitutionally protected interest. [The plaintiff] must have
17 more than a unilateral expectation of it; instead, she must have
18 a legitimate claim of entitlement." Stanley v. Gonzales, 476
19 F.3d 653, 660 (9th Cir. 2007) (citing Bd. of Regents of State
20 Colleges v. Roth, 408 U.S. 564, 569-70 (1972)). "Property
21 interests, of course, are not created by the Constitution.
22 Rather they are created and their dimensions are defined by
23 existing rules or understandings that stem from an independent
24 source such as state law--rules or understandings that secure
25 certain benefits and that support claims of entitlement to those
26 benefits." Roth, 408 U.S. at 577.

27 Here, the system of tribal leadership and plaintiff's
28 ability and right to serve on the Tribal Council stem exclusively

1 from the Constitution of the Picayune Reservation. (See Defs.'
2 Ex. A at arts. VII, X (Constitution of the Picayune
3 Reservation).) Plaintiff cannot plausibly allege that any
4 federal or state statute or right gave him a legitimate claim of
5 entitlement to his continued service on the Tribal Council. Cf.
6 Hoopa Valley Tribe v. Christie, 812 F.2d 1097, 1102 (9th Cir.
7 1986) (holding that even though a federal statute gives "Indians
8 . . . a preference for appointment to vacancies in the
9 administration of services or functions affecting Indians," such
10 as the BIA, the statute "did not create proprietary rights to
11 their jobs").

12 Even assuming the BIA decisions could be challenged
13 under the APA, plaintiff does not challenge the limited decision
14 the BIA reached in this case. "The BIA, in its responsibility
15 for carrying on government relations with the Tribe, is obligated
16 to recognize and deal with some tribal governing body in the
17 interim before resolution of [] election dispute[s]." Goodface
18 v. Grassrope, 708 F.2d 335, 339 (8th Cir. 1983). In the
19 decisions challenged in this case, the BIA acted within its
20 limited authority to recognize tribal leadership on an interim
21 basis for the limited purpose of government-to-government
22 dealings. As the BIA explained, it lacked the ability to resolve
23 the election disputes and expressly refrained from interfering
24 with the tribe's sovereignty in that respect. (See Feb. 11, 2014
25 BIA Decision at 6 (recognizing that it "does not have the
26 authority to determine the Tribe's permanent leadership"); Feb.
27 9, 2015 BIA Decision at 5.)

28 Plaintiff does not challenge the BIA's decision

1 regarding whom to deal with in the interim for "government-to-
2 government" purposes while the Tribe resolves its leadership
3 disputes. Instead, plaintiff seeks review of the BIA's refusal
4 to address the merits of his allegedly unlawful removal from the
5 Tribal Council in violation of tribal law. (See Compl. ¶ 2
6 ("Review of the subject decision and subsequent determination to
7 make that decision effective is sought insofar as said decision
8 states that 1) the Tribal Council's removal of plaintiff from the
9 Tribal Council on or about June 17, 2011, is valid action; 2)
10 plaintiff is not a member of the Tribal Council pursuant to the
11 election held on December 5, 2010, and; 3) plaintiff is not a
12 member of the last undisputed Tribal council.").)

13 In Goodface, tribe factions similarly disputed a tribal
14 election and the BIA refused to recognize either faction and
15 indicated it would "deal with both councils on a de facto basis."
16 708 F.2d at 337. The Eighth Circuit held that the BIA "acted
17 arbitrarily and capriciously by effectively creating a hiatus in
18 tribal government" and was "obligated to recognize and deal with
19 some tribal governing body in the interim before resolution of
20 the election dispute." Id. at 338-39. It further explained,
21 however, that the district court "should not have addressed the
22 merits of the election dispute" in reviewing the BIA's action and
23 "overstepped the boundaries of its jurisdiction in interpreting
24 the tribal constitution and bylaws and addressing the merits of
25 the election dispute." Id. at 339.

26 Even if this court somehow interprets plaintiff's
27 allegations as attacking the BIA's decision that plaintiff was
28 not a member of the Tribal Council that it recognized for interim

1 government-to-government relations and that the decision is
2 subject to attack under the APA, the court could not assess
3 plaintiff's claims without "interpreting the tribal constitution
4 and bylaws and addressing the merits" of plaintiff's removal by
5 the Tribal Council. Similar to the BIA, the court lacks
6 jurisdiction to engage in this inquiry.³ Id.

7 C. Conclusion

8 In Lewis v. Norton, the Ninth Circuit observed that
9 "[t]he plaintiffs of course did not sue the tribe directly, but
10 filed this action against the federal agencies responsible for
11 the regulation of tribal affairs, including gaming. They did so
12 because they recognized that tribal immunity would create, at the
13 least, a serious obstacle." 424 F.3d 959, 963 (9th Cir. 2005).
14 The Ninth Circuit explained that the plaintiffs' "efforts to do
15 an end run around tribal immunity must also fail" because
16 "tribes, not the federal government, retain authority to
17 determine tribal membership." Id. A plaintiff cannot simply sue
18 the federal government in an attempt to avoid tribal immunity
19 with respect to intra-tribal affairs. The Tribal Council removed
20 plaintiff from his leadership position and plaintiff's avenue to

21 ³ Nor do the other cases plaintiff cites aid his
22 position. In Salazar, a tribal faction challenged only the BIA's
23 determination of the faction it would recognize for government-
24 to-government relations and the district court did not identify
25 the controlling standard for review under the APA. See 967 F.
26 Supp. 2d at 89. Payton v. U.S. Department of Agriculture
27 involved a farmer's challenge under the APA of a Department of
28 Agriculture decision and thus tribal sovereignty and immunity
were not implicated. 337 F.3d 1163, 1165, 1168 (10th Cir. 2003).
The BIA decision reviewed in Bernard v. U.S. Department of
Interior, dealt with the BIA's own alleged misconduct and
similarly did not involve tribal sovereignty or immunity. 674
F.3d 904, 906-07 (8th Cir. 2012).

1 challenge that action remains with the Tribe.

2 Accordingly, because the court lacks jurisdiction to
3 hear plaintiff's § 1983 and ICRA claims and plaintiff fails to
4 allege a cognizable claim under the APA over which the court
5 could exercise jurisdiction, the court must grant defendants'
6 motion to dismiss. Because the court finds that all of
7 plaintiff's claims are subject to dismissal, the court need not
8 address defendants' alternative argument that plaintiff lacks
9 Article III standing.

10 IT IS THEREFORE ORDERED that defendants' motion to
11 dismiss be, and the same hereby is, GRANTED.

12 Plaintiff has twenty days from the date this Order is
13 signed to file an amended complaint, if he can do so consistent
14 with this Order.

15 Dated: October 7, 2015

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17 **WILLIAM B. SHUBB**
18 **UNITED STATES DISTRICT JUDGE**

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