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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CATHERINE RAMONA LIBERTY,	)	CV 14-77-M-DLC
	)	
Plaintiff,	)	**Defendants' Reply in**
	)	**Support of Their Motion to**
v.	)	**Dismiss Plaintiff's Amended**
	)	**Complaint or Alternatively,**
SALLY JEWEL, et al.,	)	**Motion for Summary**
	)	**Judgment**
Defendants.	)	

I. INTRODUCTION

Plaintiff fails to demonstrate any valid waiver of the United States' sovereign immunity and fails to identify any statute that could create the basis for a claim within the jurisdiction of this Court. For these reasons, the Court should dismiss her complaint.

The gravamen of Plaintiff's claims is that she wants the Secretary of the Interior ("Secretary") and through the Indian Self-Determination and Education Assistance Act of 1975 ("ISDEAA"), 25 U.S.C. §§ 450 – 458hh, the Confederated Salish and Kootenai Tribes (the "Tribe") to purchase her fractionated interest in the Hawkins Allotment. *See* Pl.'s Resp. to Defs.' Mot. to Dismiss & for Summ. J. 21, ECF No. 24. To support her claims, Plaintiff relies on the ISDEAA and the Indian Land Consolidation Act ("ILCA"), 25 U.S.C. §§ 2201-2221. These statutes, however, do not provide any waiver of the United States' sovereign immunity, nor do they provide Plaintiff with any private cause of action. Although Plaintiff would like the Secretary (or the Tribe) to purchase her fractionated interest through the ILCA, the statute provides no mandatory obligation for it to do so. While the ILCA authorizes the Secretary—and through the ISDEAA, the Tribe—to purchase fractionated interests in an allotment, such authority is discretionary. There is no obligation for Defendants or the Tribe to do so and those statutes do not permit lawsuits when the Secretary decides not to take such discretionary action.

In her response, Plaintiff alleges for the first time that in addition to the ISDEAA and the ILCA, § 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, provides a right for judicial review of her claims. ECF No. 24 at 13-14. This claim is not properly before the Court. However, even if it was—like the claims initially pled in the complaint—it must be dismissed. Plaintiff has not, and cannot, plead a claim for relief under § 702 because there is no final agency action.

Plaintiff's claims must be dismissed. Plaintiff fails to demonstrate a waiver of sovereign immunity or a grant of subject matter jurisdiction. Alternatively, Defendants are entitled to judgment as a matter of law because Plaintiff, as a member of the certified class in *Cobell v. Salazar*, No. 96-cv-1285 (D.D.C.) ("*Cobell*"), compromised, waived, and released Defendants from any liability associated with her allegations in this case of mismanagement of trust assets that occurred prior to September 30, 2009.

II. Plaintiff Still Fails to Show Subject Matter Jurisdiction.

In her Response, Plaintiff still fails to demonstrate a valid waiver of the United States' sovereign immunity. "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 & n.9 (1983) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Consent to be sued must be

"'unequivocally expressed' in the statutory text" and strictly construed in favor of the government. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). Plaintiff has not met her "'burden of pointing to . . . an unequivocal waiver of [sovereign] immunity.'" *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992). For that reason alone, her complaint must be dismissed.

Plaintiff now asserts three waivers of sovereign immunity and right to judicial review. First, she argues that § 450f of the ISDEAA provides a waiver; second, she argues that § 702 of the APA provides for a right of judicial review; and third, she argues that the ILCA provides a waiver. Because these statutes do not provide any waiver of sovereign immunity or right to judicial review, this case must be dismissed.

A. Section 450f of the ISDEAA Does Not Provide a Waiver of Defendants' Sovereign Immunity.

Plaintiff misreads § 450f of the ISDEAA. This section does not confer a general waiver of Defendants' sovereign immunity for Plaintiff's claim. Rather, this section provides a limited waiver of an Indian tribe's sovereign immunity within the limits and coverage of an insurance policy where such coverage is obtained or provided by the Secretary of the Interior or of Health and Human Services. *See* 25 U.S.C. § 450f(c):

> (1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance . . . for Indian tribes . . . carrying out

> contracts, grant agreements and cooperative agreements pursuant to this subchapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.
>
> * * *
>
> (3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

25 U.S.C. § 450f(c). This section is not a general waiver of the United States' sovereign immunity as Plaintiff asserts. This provision precludes an insurer from defeating a claim covered by a policy through invocation of a tribe's sovereign immunity. *Evans v. Little Bird*, 656 F. Supp. 872, 876-77 (D. Mont. 1987), *aff'd in part, rev'd in part*, 869 F.2d 1341 (9th Cir. 1989) ("The terms of subsection (c) are explicit. . . . The waiver of immunity contemplated by the express language of section 102(c) cannot be equated with a congressional waiver of a tribe's immunity from suit in federal court"). Here, there has been no covered claim made against the Tribe's insurance policy and this section is inapplicable to this lawsuit.

B. Section 702 of the APA Provides No Waiver of Sovereign Immunity for Plaintiff's Claims.

Plaintiff appears to argue that while the Mandamus Act, 28 U.S.C. § 1361,

may not provide a waiver of sovereign immunity, the APA "should apply to the relief Plaintiff seeks." ECF NO. 24 at 13. For the first time, Plaintiff argues that APA § 702 waives the United States' sovereign immunity for a failure to act. *See Id.* First, Plaintiff did not plead a violation of the APA and cannot seek to amend her complaint through a responsive pleading. Under FRCP 8, the "short and plain" statement in the complaint must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002) (quotations omitted). Plaintiff did not raise any APA claims in her complaint as grounds for seeking relief from Defendants. Raising these claims in an opposition to a motion to dismiss is insufficient to present the claims to a court. *See Navajo Nation v. USFS*, 535 F.3d 1058, 1080 (9th Cir. 2008); *see e.g.*, *Wasco Prod.s, Inc. v. Southwall Tech.s, Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings.") (internal quotations omitted)). Therefore, because Plaintiff did not identify this claim as a ground upon which to seek declaratory relief against Defendants, she may not bring it now.[1]

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[1] Defendants note that Plaintiff's Response may also be read to assert that a waiver of sovereign immunity exists under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680. ECF No. 24 at 2. For the reasons stated above, Plaintiff cannot assert a claim under the FTCA for the first time in her Response. Furthermore, Plaintiff has not asserted any action sounding in tort in her complaint and, even if she did, she would still have to demonstrate that she exhausted her administrative remedies as required by the FTCA, which provides the exclusive

Second, Plaintiff cannot plead a waiver of the United States' sovereign immunity pursuant to § 702 of the APA for her claims that Defendants have failed to require the Tribe to purchase her fractionated interest pursuant to the ILCA. The Supreme Court has stressed that § 702 "insist[s] upon an 'agency action.'" *Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 62 (2004). In *SUWA*, the Court made clear that:

> The APA [in § 702] authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." Where no other statute provides a private right of action, the "agency action" complained of must be "*final* agency action."

SUWA, 542 U.S. at 61-62 (citing 5 U.S.C. §§ 702, 704) (emphasis in original). Therefore, if no statute clearly provides the right of action—and Plaintiff has not identified a statute that does[2]—the APA's waiver of sovereign immunity is limited, and under § 702 there must be a final agency action before Plaintiff can commence suit. Here, it is undisputable that there is no final agency action for Plaintiff to contest. Accordingly, she has no cause of action under APA § 702.

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remedy for any action sounding in tort. *See United States v. Smith*, 499 U.S. 160, 165-66 (1991) (FTCA's administrative-exhaustion requirement is jurisdictional).

[2] "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("[P]rivate rights of action to enforce federal law must be created by Congress.") (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979))).

Assertions of a broad APA waiver, like those Plaintiff makes here, have been routinely rejected. The Ninth Circuit has held that "the APA's waiver of sovereign immunity contains several limitations [including . . .] § 704, which provides that only '[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review.'" *Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) (quoting 5 U.S.C. § 704); *accord Nippon Miniature Bearing Corp. v. Weise*, 230 F.3d 1131, 1137, 1139 (9th Cir. 2000) (claim must challenge "final agency action" in order to fall within "the ambit of the APA's waiver of sovereign immunity.").

One Ninth Circuit case, however, held that § 702 is "an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable." *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989). The Ninth Circuit has not resolved this split. *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) (declining to resolve split); *EEOC v. Peabody W. Coal Co.*, 610 F.3d 1070, 1086 (9th Cir. 2010) (same); *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006) (same). *See also Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1027-28 (E.D. Cal. 2012) (reconciling the Ninth Circuit's opinions in *Gallo Cattle* and *Presbyterian Church*, noting that *Presbyterian Church* was limited to the

availability of a sovereign immunity waiver to bring constitutional claims); *Navajo Nation v. U.S. Dep't of the Interior*, --- F. Supp. 2d ---, No. CV-03-00507, 2014 WL 3610948, *9 (D. Ariz. July 22, 2014) (same).

Presbyterian Church was an exceptional case, and the facts in that case are distinguishable from the circumstances here. The plaintiffs in *Presbyterian Church* alleged egregious violations of their First and Fourth Amendment rights when employees of various federal agencies surreptitiously recorded church services. The court found that sovereign immunity was waived for the constitutional challenges raised in the case even though the challenges were not to "agency action" as that term is used in the APA. *Presbyterian Church*, 870 F.2d at 524-26. Therefore, the application of *Presbyterian Church* is a narrow one, limited to the kind of constitutional claims or *ultra vires* involved in that case. As other courts have found, the most appropriate interpretation of § 702—and the interpretation supported by precedent—requires that § 702 be read in conjunction with § 704's final agency action limit. Therefore, because Plaintiff has made no such allegations, the United States has not waived its sovereign immunity and Plaintiff's claims must be dismissed.

C. The ILCA Provides No Waiver of Sovereign Immunity for Plaintiff's Claims.

The ILCA does not provide a waiver of sovereign immunity. The ILCA provides that the Secretary of the Interior "may acquire, *at the discretion of the*

Secretary" fractional interests in trust land that will thereafter be held by the United States in trust for the local tribe. 25 U.S.C. § 2212(a)(1) (emphasis added). The ILCA does not place any obligation upon, or otherwise require, the Secretary to acquire any particular fractional interest, and does not impose any fiduciary duty to acquire a fractional interest solely because the owner desires to sell such interest. *See* 25 U.S.C. § 2212(a). Although Plaintiff would like Defendants to require the Tribe to buyout her fractional interest, the ILCA does not mandate that the Tribe do so, nor does it mandate that the Secretary compel the Tribe to do so.

Plaintiff argues that the Supreme Court's decision in *Match-E-Be-Nash-She-Wish v. Patchak* ("*Patchak*"), 132 S. Ct. 2199 (2012) provides that there is a waiver of Defendants' sovereign immunity under the ILCA. *Patchak* does not stand for this proposition. In *Patchak*, the Secretary of the Interior took a parcel of land into trust for a tribe seeking to construct a casino. An owner of property close to the land sued to divest the government of title to the land, alleging that the transfer violated § 465 of the Indian Reorganization Act of 1934 ("IRA"). The Secretary argued that she had sovereign immunity from the suit by virtue of the Quiet Title Act ("QTA"), 86 Stat. 1176 or, alternatively, that the plaintiff did not have prudential standing, namely that the interest he asserted was not "arguably within the zone of interests to be protected or regulated by the statute" that he says was violated. *Patchak*, 132 S. Ct. at 2202 (quotations omitted). The Court found

that the sovereign immunity provision of the QTA did not apply to bar the suit and that the plaintiff had prudential standing. Therefore, the plaintiff could proceed to assert an APA claim for the Secretary's action in taking land into trust pursuant to IRA § 465. *Id.*

Patchak was a case solely concerned with the sovereign immunity implications of the QTA and standing to bring an APA suit challenging final agency action under the IRA. It has no relevance to Plaintiff's challenge to Defendants' discretionary duties under the ILCA.

D. Alternatively, Defendants Are Entitled to Summary Judgment in Their Favor under the Doctrines of Waiver and Release.

Plaintiff alleges that the *Cobell* settlement does not apply to her case and has no relevance because of the need to appraise land, and determine and locate owners. ECF No. 24 at 22. But the purpose of the *Cobell* settlement was to resolve all "known and unknown claims" that fall within the Land Administration Claims (which includes Plaintiff's claims in this lawsuit) definition in existence as of the record date. *Cobell* Class Action Settlement Agreement ¶ A.21. The *Cobell* settlement is not dependent on the work needed as to a particular parcel of land. What is relevant to this case is that all of Plaintiff's Allotment claims existed as of September 30, 2009, and are claims encompassed by the Settlement Agreement. *See Villegas v. United States*, 963 F. Supp. 2d 1145, 1152-53 (E.D. Wash. 2013).

Thus, Defendants are entitled to judgment in their favor as a matter of law on Plaintiff's Amended Complaint by operation of the doctrines of waiver and release.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss all of Plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), or 56.

Respectfully submitted this 4th day of February, 2015.

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In compliance with Local Rule 7.1(d)(2)(E), the number of words in the brief, excluding the caption, certificate of service, and certificate of compliance is 2674. The word count was obtained from Microsoft Word, the word-processing program used to prepare the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2015, a copy of the foregoing document was served on the following persons by the following means:

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