11-5064

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CORA JEAN JECH, et al.,

Plaintiffs-Appellants,

v.

THE UNITED STATES, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Oklahoma

The Honorable Terence C. Kern
District Judge

District Court Case No. 09-CV-00818- TCK-TLW

APPELLANTS' OPENING BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Counsel does not request oral argument.

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PRIOR OR RELATED APPEALS

None.

The Appellants, Cora Jean Jech, Charles Tillman, Dudley Whitehorn, Joe Hall, Joanna Barbara, R.E. Yarbrough, Cody Tucker and John Johnson (collectively "Plaintiffs"), for their opening brief state:

STATEMENT OF JURISDICTION

The Plaintiffs initiated this case against the United States of America, Department of Interior ("DOI"), Ken Salazar, Bureau of Indian Affairs ("BIA") and Larry Echohawk (collectively "Federal Defendants") in the United States District Court for the Northern District of Oklahoma, asserting jurisdiction under the Administrative Procedures Act, 5 U.S.C. § 702. (Aplt. App. at 15).[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this is an appeal from the District Court's final order entered March 31, 2011, affirming and adopting the Report and Recommendation of the Magistrate granting Defendants' Motion to Dismiss and dismissing all of the Plaintiffs' claims. (Aplt. App. at 384) (*Attachment 2*); Aplt. App. at 385 (*Attachment 3*). Plaintiffs timely filed their notice of appeal on April 28, 2011. (Aplt. App. at 13).

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT ERRED IN DETERMINING THAT THE BIA'S REFUSAL TO CONDUCT AN ELECTION FOR THE GOVERNING BODY OF THE OSAGE MINERALS ESTATE UNDER THE OSAGE ALLOTMENT ACT OF JUNE 28, 1906, 34 Stat. 539, AS AMENDED AND TITLE 25 PART 90 OF THE CODE OF FEDERAL REGULATIONS WAS NOT A FINAL AGENCY DECISION.

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[1] All citations to Appellant's Appendix will be in the form "(Aplt. App. at __)" indicating the exhibit letter and page number of the document in Appellants' Appendix. Where the document is also attached to Appellants' Opening Brief, the citation format will be "(Aplt. App. at __) (*Attachment* __)".

II. THE DISTRICT COURT ERRED IN DETERMINING THAT THE PLAINTIFFS WERE REQUIRED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES.

STATEMENT OF THE CASE

Plaintiffs are individual legal members of the Osage Tribe of Indians ("Osage Tribe") as defined by the Osage Allotment Act of June 28, 1906, 34 Stat. 539, *as amended* (the "1906 Act").[2] (Aplt. App. at 16) (*Attachment 4*). Plaintiffs initiated this lawsuit against the Federal Defendants under the Administrative Procedures Act, 5 U.S.C. § 700, *et. seq.* ("APA"), seeking a mandatory injunction requiring the BIA to conduct elections for the Chief, Vice-Chief and eight-member tribal council prescribed by the 1906 Act to govern the Osage Tribe ("Tribal Council") and to recognize such Tribal Council as the independent governing body of the Osage Mineral Estate. (Aplt. App. at 20-21).

The Federal Defendants filed their Motion to Dismiss claiming the District Court lacked jurisdiction because: (1) Plaintiffs failed to exhaust their administrative remedies; (2) Plaintiffs failed to join a necessary and indispensible party; and (3) Plaintiffs' claims involved an intra-tribal dispute. (Aplt. App. at 74).

Plaintiffs responded that the exhaustion of administrative remedies was not required because (1) the BIA's decision was final under the APA; (2) Plaintiffs' request involved pure questions of law; and (3) exhaustion of administrative remedies would be futile. (Aplt. App. at 108, 120-125). In addition, Plaintiffs denied that the Osage Nation

[2] 1906 Act, *as amended by* Act of March 2, 1929, §§ 5, 7, 45 Stat. 1478; Pub. L. No.85-192, 71 Stat. 471 (1957); Pub. L. 95-496 §§ 1, 5, 7 and 8, 92 Stat. 1660 (1978), *as amended by* Pub. L. No. 98-605, 98 Stat. 3163 (1984) (technical corrections).

was a necessary and indispensible party and further denied this dispute was simply an intra-tribal dispute. (Aplt. App. at 125-137).

Federal Defendants also filed a Motion to Limit Review to the Administrative Record (Aplt. App. at 235) and subsequently, on or about December 9, 2010, produced the administrative record (Aplt. App. at 246). Plaintiffs filed their Response to Motion to Limit Review to the Administrative Record (Aplt. App. at 274) and their Motion to Require Federal Defendants to Supplement Administrative Record (Aplt. App. at 252).

The Magistrate conducted a hearing on whether Plaintiffs were required to exhaust their administrative remedies.[3] (Aplt. App. 386-435). The Magistrate issued his Report and Recommendation on February 28, 2011, determining that the District Court lacked subject matter jurisdiction because Plaintiffs failed to exhaust their administrative remedies and deemed all other issues moot as a result. (Aplt. App. at 316-334). (*Attachment 1*).

Plaintiffs filed their Objection to Report and Recommendation on March 14, 2011, objecting to the Magistrate's decision. (Aplt. App. at 335). By Order dated March 31, 2011, the District Court affirmed and adopted the Magistrate's Report and Recommendation (Aplt. App. at 384) (*Attachment 2*) and subsequently entered a Judgment of Dismissal (Aplt. App. at 385) (*Attachment 3*).

Plaintiffs initiated the instant appeal to the District Court's Order and Judgment of Dismissal.

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[3] The Magistrate had previously conducted a hearing on Federal Defendants' Motion to Dismiss on the issue of failure to join a necessary and indispensible party, but never decided that issue because his ruling on the exhaustion issue was dispositive.

STATEMENT OF THE FACTS

Plaintiffs are legal members of the Osage Tribe because they own "headrights", which are vested private property interests that entitle the owner to a pro rata share in the revenues from the Osage Mineral Estate (defined below). (Aplt. App. at 113). Additionally, the "headright" entitles the Shareholders to vote in tribal matters in proportion to their respective "headright" pro rata share. (Aplt. App. at 114).

1. History of the Osage Tribe

By way of brief history, the Osage Tribe was created by the 1906 Act. (Aplt. App. at 113-114). The 1906 Act, among other things, required the creation of a final tribal roll of the members entitled to receive distributions (§ 1); reserved mineral rights to the Osage Tribe in the allotted lands (§ 3); set aside a trust fund for the sale of lands and income from the Osage Mineral Estate (§ 3); and prescribed a form of tribal government (§ 9). Section 1 of the 1906 Act limited the enrollment of members in the Osage Tribe to persons on the roll at the time of the 1906 Act and their children born before July 1, 1907 ("Alotted Members"). (Aplt. App. at 113-114) (*Attachment 4*). The reservation of the mineral rights to the Osage Tribe for the allotted lands under the 1906 Act § 3 is commonly referred to as the "Mineral Estate". (Aplt. App. at 114)

The roll created by the 1906 Act is the "permanent basis for per capita distributions of tribal income and property" and it "converted the right to receive tribal property distributions into a restricted tenancy in common in the persons on the 1906 roll." *Cohen's Handbook of Federal Indian Law*, (Nell Jessup Newton, ed., LexisNexis Mathew Bender 2005 ed.) (hereinafter "*Cohen*"), § 4.07(1)(d) (*Attachment 8*); (Aplt.

App. at 114). The right to receive mineral revenue distributions from production of the Osage Mineral Estate is a "headright." *Taylor v. Tayrien*, 51 F.2d 884, 886-887 (10th Cir. 1931); (Aplt. App. at 114).

The 1906 Act, as subsequently amended, provided the headrights would pass to the heirs, devisees and assigns of the Allotted Members. *See Cohen*, § 407(1)(d) (*Attachment 8*); (Aplt. App. at 114). Consequently, some Osage do not own headrights ("Non-Headright Osage"), others may own a fractionalized interest in a headright, while others may own multiple headrights. *Id*. In fact, some headrights are owned by non-Osage. *Id*. A headright is a substantial private property right because it provides Mineral Estate production revenues for quarterly distribution to the individual members of the Osage Tribe. *Id.* Persons who own headrights are commonly referred to as "Shareholders."

2. <u>Osage Tribal Government</u>

The 1906 Act prescribed a form of tribal government, which included a Principal Chief, Assistant Principal Chief and eight (8) member Osage Tribal Council ("Tribal Council") and that such government would be selected by an election of the Osage Tribe (i.e. Shareholders). 1906 Act, § 9 (*Attachment 4*). Congress imposed upon the Secretary of Interior the duty of general supervision over the affairs of the Osage Tribe. 1906 Act, *generally* (*Attachment 4*). The Tribal Council was vested with the power to administer the Mineral Estate under the 1906 Act. *Logan v. Andrus*, 640 F.2d 269, 271 (10th Cir. 1981).

The 1906 Act's provisions for elections of tribal officials and the Tribal Council were amended in 1978 to require elections every four years "in a manner prescribed by

the Secretary of the Interior." 1906 Act, *as amended* by Pub. L. 95-496 (1978) (*Attachment 5*). Elections for the Osage Tribe are governed by Title 25 C.F.R. Part 90 – Election of Officers of the Osage Tribe ("the CFRs"). (*Attachment 6*). Only Shareholders are permitted to vote in elections for the government of the Osage Tribe under the 1906 Act. *See Logan*, 640 F.2d at 271.

The BIA is charged with the responsibility of administering and supervising the elections of the Osage Tribe. *See* 25 CFR Part 90, *generally* (*Attachment 6*); (Aplt. App. at 115-116). The CFRs provide voting eligibility requirements for members of the Osage Tribe which, among other things, provide that only headright owners over the age of 18 and whose names appear on quarterly annuity roll at the Osage Agency were permitted to vote in elections or qualified to hold any tribal office (CFR § 90.21); and each ballot cast had "exactly the same value as the voter's headright interest shown on the last quarterly annuity roll" (CFR § 90.21). (Aplt. App. at 115-116); CFRs (*Attachment 6*). Thus, each headright owner was entitled to a vote that was directly proportional to his headright interest, much like shareholders in a corporation. CFR § 90.21 (*Attachment 6*).

3. <u>Reaffirmation Act</u>

Historically, in addition to governing the Minerals Estate, the Principal Chief, Assistant Principal Chief and eight-member Tribal Council handled all tribal matters. *See Logan*, 640 F.2d at 271. However, despite the fact that numerous persons were considered Osage and entitled to federal benefits, only those with headrights were considered legal tribal members who could vote for the governing body of the Osage Tribe. *Id*. (Aplt. App. at 116-117). To rectify this apparent dichotomy, Congress passed

the Reaffirmation of Certain Rights of the Osage Tribe, Pub. L. 108-431, 118 Stat. 2609 ("Reaffirmation Act"). Reaffirmation Act (*Attachment 7*).

The Reaffirmation Act clarified that legal membership in the Osage Tribe means "those persons eligible for allotments of Osage Reservation lands and pro rata share of the Osage mineral estate as provided in the [1906] Act, but not membership in the Osage Tribe for all purposes." Reaffirmation Act (*Attachment 7*). The Reaffirmation Act specifically reaffirms the inherent sovereign right of the Osage Tribe to determine its own membership and form of government, "provided that the rights of any person to the Osage mineral estate shares are not diminished thereby." *Id*. The Reaffirmation Act did not purport to repeal, modify or supersede the 1906 Act, as amended, or CFRs; rather, its intent was to clarify the right of all Osage people to be considered tribal members and self-govern tribal affairs ***outside*** the Minerals Estate. (Aplt. App. at 117).

4. <u>2006 & 2010 Elections</u>

Thereafter, a new form of tribal government was proposed by the Osage Reform Commission to the 31st Tribal Council of the Osage Tribe. (Aplt. App. at 117). The new government was ratified[4] by a majority vote of a minority number of the total Osage people, both Shareholders and Non-Headright Osage, and subsequently became the Osage Nation which is governed by the Osage Nation Constitution. (Aplt. App. at 37, 38, 55, 61). The new Osage Nation Constitution inexplicably addressed the Minerals Estate,

[4] There remains some question whether the ratification of the new Osage Constitution was properly certified by the BIA in an election wherein at least thirty percent (30%) of the tribal members entitled to vote cast their ballot in accordance with 25 CFR § 81.23, but that is not an issue in this appeal.

which it reserved to the Osage Nation (not the Osage Tribe, as prescribed in the 1906 Act), and established a minerals council as an agency within the Osage Nation (the "Agency") to manage the Minerals Estate. (Aplt. App. at 56-57). However, the Agency's authority is subject to the decisions of the Chief of the Osage Nation and the laws enacted by the Osage Nation's Congress, rather than the Secretary of Interior as provided in the 1906 Act. (Aplt. App. at 56-57). While the Agency members are elected by the Shareholders, the Chief, Assistant Chief and members of Congress of the Osage Nation are elected by both Shareholders and Non-Headright Osage. (Aplt. App. at 55). Thus, under the Osage Nation Constitution, the Minerals Estate is no longer controlled solely by the Tribal Council for the benefit of the Shareholders, but a majority of the Osage Nation, both Shareholders and Non-Headright Osage alike, which is directly contrary to the Reaffirmation Act. (Aplt. App. at 118).

In the June 2006 election, the BIA did not administer an election for the Principal Chief, Assistant Principal Chief and Tribal Council and recognize the same as the independent governing body of the Minerals Estate. (Aplt. App. at 118). Instead, the Osage Nation conducted elections for its Chief, Assistant Chief, Congress and members of the Agency[5] ("2006 Election."). (Aplt. App. at 29).

5. <u>Letters to the BIA and the BIA's Response</u>

Prior to the 2006 Election and in the months and years after, concerned Shareholders called upon the BIA to conduct an election for the governing body of the

[5] The members of the Agency were elected solely by Shareholders as provided in the Osage Nation Constitution.

Minerals Estate in accordance with the 1906 Act and CFRs, which the BIA repeatedly refused to do. Specifically the Shareholders expressed their concern in the following correspondence:

A. Letter from Osage Shareholders Association (of which Plaintiffs are all members) to BIA Superintendant, Melissa Currey, and copied BIA Area Director, Jeanette Hannah and Acting Deputy Secretary of the Interior, Jim Cason, dated March 20, 2006, "to inform [the BIA] of [the Shareholders] strong opposition to the Osage Tribe's proposal to delegate authority for the upcoming June [2006] elections to the Osage Governmental Reform Commission (OGCR), and to reiterate our continuing objection to the newly ratified Osage Constitution." The Osage Shareholders Association went on to explain their position that the Osage Nation Constitution was contrary to the 1906 Act because it did not provide a principal chief, vice-chief and eight member council independent of the Osage Nation and pointed out that "[w]e are not sure whether the Chief and the Vice Chief of the Mineral Estate can be jettisoned from our governmental structure (and these labels appropriated for the use of the new government) without a change to the governing federal law." (Aplt. App. at 356-357).

B. Letter from Charles Tillman (Appellant and past Chief of the Osage Tribe) to BIA Superintendant Melissa Currey and BIA Regional Director Jeannette Hanna, dated December 21, 2006, explaining in detail to the BIA

that the 2006 Election "failed to comply with Federal law" and specifically pointing to the fact that:

1. No principal chief or assistant principal chief was elected by the headright owners to govern the management of the mineral estate, along with 8 council members;

2. The actions and activities of a council elected by the headright owners cannot be subject to a "veto" power of a principal chief, who was not elected by said annuitants. (Aplt. App. at 358-360).

C. As well as numerous other letters from concerned Shareholders expressing similar concerns and complaining that the June 2006 election violated the 1906 Act, specifically: (i) letter from John R. Davis, to BIA Superintendant Melissa Currey, dated January 12, 2007 (Aplt. App. at 361); (ii) letter from John Raymond Dennison to Senator James M. Inhofe, Members of the Indian Affairs Committee, Senator John McCain and BIA Superintendant Melissa Currey dated January 17, 2007 (Aplt. App. at 362); (iii) letter from Judith Soudan to the Department of Interior, Bureau of Indian Affairs, Osage Agency, attn: Melissa Currey dated October of 2007 (Aplt. App. at 364); and (iv) letter from Brenda Brunger to the Department of Interior, Bureau of Indian Affairs, Osage Agency, attn: Melissa Currey dated October of 2007 (Aplt. App. at 365-366).

The Federal Defendants responded to these letters repeatedly refusing to take action and reaffirming its settled position that the Reaffirmation Act permitted the Osage Nation Constitution to control the Mineral Estate, specifically:

A. Letter from BIA Director William Ragsdale in response to Appellant Charles Tillman's letter (identified above), dated March 19, 2007, and stating that:

> The [Reaffirmation Act] included a provision "that the rights of any person to Osage mineral estate shares are not diminished thereby." The Osage Constitution, adopted by the vote of the Osage people as determined by the previous elected tribal leadership and council, upheld the intent and direction of the Congress in this regard. There is no need for the BIA to take any further or new action at this time to protect the Osage mineral estate for those Osages that share in it, which is your concern as a headright holder. (Aplt. App. at 347-348)

B. Letter from BIA Superintendant Melissa Currey to Osage Annuitant, dated February 21, 2007, which recited virtually the same language as Mr. Ragsdale's letter to Mr. Tillman, and again noted "[a]s such, there is no action to be taken by the Bureau at this time for the concerns outlined in the letter." (Aplt. App. at 349-350).

C. Most importantly, a letter from Carl J. Altman, Assistant Secretary – Indian Affairs to Jenny Miller, dated January 28, 2008, the highest ranking official in which he explains that the Reaffirmation Act enabled the Osage Tribe to determine their form of tribal government and redefine its membership. He goes on to state that the BIA provided technical assistance in the 2006 Election and that "[t]he Osage Constitution, adopted by a vote of the Osage people, upholds the intent and direction of the Congress in this regard." The Assistant Secretary – Indian Affairs concludes by stating "[t]he BIA

will take no further actions in this issue since it is an internal tribal matter that is best addressed the [sic] proper tribal forum . . . Furthermore, we have fulfilled obligations established by the [Reaffirmation Act]". (Aplt. App. at 351).

D. Letter from BIA Regional Director to Jenny Miller, dated February 28, 2008, which references numerous letters from Ms. Miller to the BIA as well as the letter from the Assistant Secretary- Indian Affairs, identified above, to reinforce its position. The Regional Director explains that the BIA's position has not changed

> [a]nd as clearly stated in the January 28, 2008 correspondence to you from the Assistant Secretary – Indian Affairs, the [BIA] 'will take no further actions in this issue since it is an internal tribal matter . . . ' and the [BIA] has fulfilled its responsibilities under the [Reaffirmation Act]. (Aplt. App. at 352-353).

In addition, the Regional Director notes

> [a]s to your request for a meeting on the contents of your correspondence, a meeting would not change the Bureau's position that the matters which you provide comments are ones which are better raised within the Tribal government itself. (Aplt. App. at 352-353).

E. Letter from BIA Acting Director to Chairman of the Agency (Minerals Council under the Osage Nation) John Mashunkashey, dated February 12, 2010, denying the Agency's request that the BIA conduct an election in accordance with the CFRs and noting "[t]he Department's

existing position regarding the intent of the [Reaffirmation Act] eliminates the BIA's authority under the [CFRs]". (Aplt. App. at 354-355).

In response to the Federal Defendants repeated reaffirmations that it would take no action to conduct an election for the Tribal Council to govern the Mineral Estate under the 1906 Act and CFRs and recognize such Tribal Council as the independent governing body of the Osage Mineral Estate, Plaintiffs initiated this action under the APA seeking a mandatory injunction that the BIA follow the 1906 Act and CFRs. (Aplt. App. at 15 -73).

SUMMARY OF THE ARGUMENT

The sole issue on appeal is whether the District Court has subject matter jurisdiction to review the BIA's decision not to administer elections for the governing body of the Mineral Estate consisting of a Principal Chief, Assistant Principal Chief and eight-member Tribal Council in accordance with the 1906 Act and CFRs. The District Court has the authority to review final agency decisions under the APA and the BIA's decision is a final agency decision. 5 U.S.C. § 704.

The Plaintiffs do not dispute that they did not exhaust administrative remedies, rather, they dispute that exhaustion was required because they are appealing a final agency action by the BIA or, alternatively, exhaustion would be futile. In the instant case, the BIA (1) did not in fact administer the 2006 and, since the Complaint was filed, the 2010 Elections for the Principal Chief, Assistant Principal Chief and Tribal Council of the Mineral Estate; and (2) unwaveringly repeated its position that the Reaffirmation Act rendered the CFRs moot and absolved the BIA of any responsibility for the elections for the governing body of the Mineral Estate.

Indeed, the Assistant Secretary of Indian Affairs, the highest ranking official in the BIA, stated that the BIA would not take any action in regard to administering elections for the governing body of the Osage Mineral Estate. (Aplt. App. at 351). Given the above facts, the BIA's decision is necessarily final because letters from an agency may be final decisions where such letters reflect settled agency positions from which legal consequences flow. *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 48-49 (D.C. Cir. 2000); *Seminole Nation of Oklahoma v. Norton*, 223 F.Supp.2d 122, 141 (D.D.C. 2002). In addition, decisions by the Assistant Secretary of Indian Affairs are final under the DOI's own regulations. *See* 25 C.F.R. § 2.6. Finally, due to the unique circumstances in this case that the BIA has not fulfilled its obligations through two election cycles, the BIA's decision is final under the APA because it "marks the consummation of the agency's decisionmaking process" is an action "by which rights or obligations have been determined or from which legal consequences will flow." *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d at 48-49.

Alternatively, exhaustion would be futile. The Tenth Circuit recognizes that exhaustion may be futile where (1) an agency lacks the authority or ability to resolve the claim; (2) the issue is purely a matter of statutory interpretation; and (3) the court would not benefit from the development of a full administrative record. *See Forest Guardians v. U.S. Forest Serv*., 579 F.3d 1114, 1122 (10th Cir. 2009).

In this action, Plaintiffs seek a declaratory judgment regarding the rights and obligations of the BIA and the Shareholders since the passage of the Reaffirmation Act. It is a matter of pure statutory interpretation regarding agency authority and the facts are

largely undisputed. Moreover, the BIA has repeatedly reinforced its position on this matter by both its actions and words. As such, this is the epitome of a case where exhaustion of administrative remedies would be futile.

Therefore the District Court has subject matter jurisdiction to review the BIA's decision not to administer the 2006 and 2010 Elections for a Tribal Council in accordance with the 1906 Act and CFRs because it is a final agency decision or, alternatively, exhaustion of administrative remedies would be futile.

ARGUMENT

The Magistrate's Report and Recommendation ("Recommendation") adopted by the District Court found that the Plaintiffs failed to exhaust their administrative remedies as provided in 25 C.F.R. Part 2 and, thus, the District Court lacked subject matter jurisdiction over Plaintiffs' APA claims. (Aplt. App. at 316-334). Plaintiffs do not dispute that they did not follow the appeal procedures outlined in 25 C.F.R. Part 2; rather, Plaintiffs dispute that they were required to initiate that process because (1) Plaintiffs seek review of a final agency decision under the APA; and (3) exhaustion in the instant case would be futile. Therefore, the District Court has subject matter jurisdiction because Plaintiffs claims are proper under the APA.

1. Standard of Review

The Court reviews a district court's dismissal under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction *de novo*. *Holt v. U.S.*, 46 F.3d 1000, 1003 (10th Cir. 1995). A jurisdictional challenge may take two forms, first a facial attack that questions the sufficiency of the complaint or, alternatively, a party may challenge the facts upon

which subject matter jurisdiction depends. *Id*. at 1002-03. In the latter case, the District Court has discretion to consider and weigh facts related to jurisdiction. *Id*. The Court should accept "the district court's findings of jurisdictional facts unless they are clearly erroneous." *Montoya v. Chao*, 296 F.3d 952, 954-55 (10th Cir. 2002).

In the instant case, the District Court considered facts outside the Complaint to determine whether the BIA made a final agency decision and whether the Plaintiffs exhausted their administrative remedies. Specifically, the District Court considered the actions of the BIA in refusing to conduct the 2006 and 2010 Elections and the letters to and from the BIA regarding the BIA's refusal to conduct the 2006 and 2010 Election. (Aplt. App. at 390-91, 405, 407-08). However, the BIA's action/inaction and the facts and content of the letters are undisputed.[6] It is also undisputed that Plaintiffs did not proceed with an administrative appeal as provided in 25 C.F.R. Part 2. Therefore, the issue for the Court to determine is whether, as a matter of law, the letters and actions of the BIA constitute a reviewable agency decision under the APA.

2. <u>Plaintiffs Seek Review of a Final Agency Decision</u>[7]

The APA permits review of "final" agency decisions. 5 U.S.C. § 704. An agency decision is final when rendered unless a statute or agency rule requires (1) an appeal to a

[6] While the Federal Defendants' mischaracterize the relief Plaintiffs' seek, the Federal Defendants have not disputed the facts as presented by Plaintiffs. (Aplt. App. at 83-86, 368-69).

[7] Appellants raised the issue that the BIA's actions in not conducting an election and letters from the BIA to concerned Shareholders constitute final agency action in the proceedings below. (Aplt. App. at 120-23, 335-345, 405-406).

superior agency authority before an initial decision becomes final; ***and*** (2) that the initial decision is "inoperative" pending appeal. 5 U.S.C. § 704.

The APA requires the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Plaintiffs specifically challenge the BIA's decision to declare the Mineral Estate election procedures under the CFRs, moot and its refusal to conduct an election pursuant to the 1906 Act and CFRs for the Principal Chief, Assistant Principal Chief and eight (8) member Tribal Council to govern the Mineral Estate.

The Federal Defendants' decision in that regard is final because (i) the BIA pronounced its settled agency position through a series of letters to respond to the concerns of Shareholders, including Appellant Charles Tillman, and the Osage Shareholder's Association, of which all Plaintiffs are members; and (ii) due to the unique circumstances of the Osage Tribe and this case, the BIA's decision was final when rendered because it would not be made inoperative pending appeal and it was a decision from which legal consequences flow.

A. The Letters from the BIA to Shareholders are Final Agency Decisions

The Recommendation wholly rejects the cases recognizing that letters from agency officials may be final agency decisions subject to judicial review.

In *Seminole Nation*, 223 F.Supp.2d 122, 141 (D.D.C. 2002), the district court held that a letter explaining the Secretary of Interior's decision not to recognize a tribal

government was a final agency action noting that "a guidance document reflecting a settled agency position and having legal consequences for those subject to regulation may constitute final agency action for the purpose of judicial review." *Id.* at 142 (quotations omitted). The *Seminole Nation* Court relied on *Barrick Goldstrike Mines, Inc.*, 215 F.3d 45 (D.C. Cir. 2000) which held that "[t]hat the issuance of a guideline or guidance may constitute final agency action has been settled in this circuit for many years," and listed numerous cases where letters stating agency positions constitute final agency action. *Id*. at 48. The D.C. Circuit further recognized that a series of letters, as opposed to a single letter, may constitute final agency action. *Id*. at 48 – 49.

In the instant case, the Federal Defendants denied several requests by concerned Shareholders for an election for the governing body of the Minerals Estate and declared the CFRs moot in a definitive and unwavering manner. Specifically: (i) letter dated January 28, 2008 from the Assistant Secretary of Indian Affairs stating "[t]he BIA will take no further actions in this issue since it is an internal tribal matter . . . " (Aplt. App. at 351); (ii) letter dated February 28, 2008 from the Regional Director of the BIA – "the position of the Bureau of Indian Affairs has not changed [since your last letter] . . . a meeting [with you] would not change the Bureaus position . . . " (Aplt. App. at 352-53); (iii) letter dated March 19, 2007 from the Director of the BIA "[t]here is no need for the BIA to take any further or new action at this time to protect the Osage mineral estate" (Aplt. App. at 347-48); (iv) letter dated February 12, 2010 from the Director of the BIA - "[t]he Department's existing position regarding the intent of the 2004 Act eliminates the

BIA's authority under the Part 90 regulations [CFRs]" (Aplt. App. at 354-55) (collectively the "BIA Letters to Shareholders").

Notably, one letter was from the Assistant Secretary of Indian Affairs, the highest ranking official charged with the responsibility of Indian affairs in the DOI, aside from the Secretary of the DOI and Deputy Secretary of the DOI, and the highest ranking official of the BIA. (Aplt. App. at 351). Decisions by the Assistant Secretary of Indian Affairs are final under 25 C.F.R. § 2.6, which states "Finality of decisions":

> (c) Decisions made by the Assistant Secretary – Indian Affairs shall be final for the Department and effective immediately unless the Assistant Secretary – Indian Affairs provides otherwise in the decision. 25 C.F.R. § 2.6.

The DOI's treatment of decisions from the Assistant Secretary of Indian Affairs as final under its own regulations, coupled with the repeated and unwavering pronouncements of the BIA's settled position in the BIA Letters to Shareholders, leave no room to doubt the finality of the BIA's decision.

Tellingly, despite repeatedly receiving letters expressing objections to the governance of the Mineral Estate, neither the BIA, nor the DOI *ever* advised a concerned Shareholder (who were not represented by counsel at the time), of their right to appeal the Federal Defendants' decision in the BIA Letters.

B. The BIA's Decision not to Conduct the 2006 & 2010 Elections were Final When Rendered

The Magistrate found that exhaustion is required because 25 C.F.R. § 2.6 provides that the Federal Defendants' decisions are not final if they are subject to further agency review. While that may be true in most instances, the Federal Defendants' decision in the

instant case does not meet the requirements to delay finality under the APA. The Federal Defendants apply the concepts of exhaustion and finality interchangeably; however, "exhaustion refers to the steps which the litigant must take whereas finality refers to the conclusion of activity by the agency." *Bethlehem Steel Corp. v. EPA*, 669 F.2d 903, 908 (3rd Cir. 1982). It is recognized that "a guidance document reflecting a settled agency position and having legal consequences for those subject to regulation may constitute final agency action for judicial review." *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000). In such cases, courts require that the action "mark the consummation of the agency's decisionmaking process" and that it is an action "by which rights or obligations have been determined or from which legal consequences will flow." *Id*. (internal citations and quotations omitted).

The Tenth Circuit has recognized that the 1906 Act "set up the machinery for the administration of the Osage mineral estate and described and declared ***the rights vested in the individuals.***" *Logan v. Andrus*, 640 F.2d 269, 270 (10th Cir. 1981) (emphasis added). The *Logan* Court further noted that part of this "machinery for the administration" included the election of a Principal Chief, Assistant Principal Chief and eight-member Tribal Council ***elected solely by headright owners*** to govern the Mineral Estate. *Id*. It has also long been recognized that property interests granted by the United States to individual Indians once vested, may not be abrogated by statute. *Choate v. Trap*, 224 U.S. 665, 674 (1912); *see also Marrow v. U.S.*, 243 F. 854 (8th Cir. 1917) ("There is no question that the government may, in its dealings with Indians, create property rights which, once vested, even it cannot alter.").

Since the passage of the Reaffirmation Act, the BIA has absolved itself of responsibility for the administration of the Mineral Estate and permitted the Osage Nation to conduct two separate elections affecting the Mineral Estate with only minor technical assistance from the BIA. (Aplt. App. at 351, 407). The Osage Nation conducted an election for an eight-member Agency within the Osage Nation to manage the Mineral Estate in June of 2006 and June of 2010. (Aplt. App. at 29, 407) This Agency is subject to the control of a Chief, Assistant Chief and Osage Nation Congress that are elected by both Shareholders and Non-Headright Osage. (Aplt. App. at 56-57).

The basic facts reveal the 2006 and 2010 Elections represent a significant departure from the prior form of governance of the Mineral Estate because: (1) the Mineral Estate no longer has a Principal Chief and Assistant Principal Chief elected solely by Shareholders; and (2) the Mineral Estate is subject to the control of a Chief, Assistant Chief and Osage Nation Congress elected, in part, by Non-Headright Osage. *See* Logan, 640 F.2d at 271 (noting that "[t]he right to vote under the 1906 Act was limited to owners of headrights" and that persons that do not have headrights cannot vote for the Osage government as it existed at the time). As explained above, the loss of control of the Mineral Estate is an individual property right that was diminished when the Plaintiffs were not afforded the election process proscribed by the 1906 Act and the CFRs.[8] The BIA's failure to administer the 2006 and 2010 Elections for the Mineral Estate necessarily represents the consummation of the BIA's decisionmaking process and

[8] Plaintiffs agree that the Reaffirmation Act permits the Osage Nation to self-govern in any manner it chooses for all matters outside the Minerals Estate.

is a decision by which rights and obligations are determined and from which legal consequences flow.

Relying on *Barrick*, *supra*, the District Court in *Vann v. Kempthorne*, 467 F.Supp.2d 56 (D.C.C. 2006) ("*Vann I*") found that the Secretary of Interior's decision to recognize the Cherokee leaders elected in an election was a final agency action. *Vann I*, 467 F.Supp.2d at 71 (D.C.C. 2006) (rev'd and remand on other grounds)(internal quotations omitted)(emphasis added). In so holding the Vann I court noted the decision "*need not be the last administrative action contemplated by the statutory scheme. Rather an agency action is final where rights or obligations have been determined or from which legal consequences will flow*." *Id*. As explained above, the Court in *Seminole Nation*, found that a decision not to recognize a tribal council was a final decision. *Seminole Nation*, 223 F.Supp. at 142.

Similarly, the BIA's recognition of the Agency as the governing body of the Mineral Estate and the BIA's refusal to conduct an election under the 1906 Act and CFRs finally determines the rights of the Shareholders with respect to the governance of the Mineral Estate. Federal Defendants' claim the BIA has not finally determined its role in administering the Mineral Estate after recognizing a new government for the past five years during which time the new government conducted two separate elections is simply nonsensical.

C. The BIA's Decision was not Made Inoperative Pending Appeal

In *Darby v. Cisneros*, 509 U.S. 137 (1993) the Supreme Court considered whether an opportunity for further agency review precluded judicial review and determined that

"[c]ourts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become "final" under [the APA]." *Id*. at 154. With respect to finality, the Supreme Court noted that to prevent a decision from becoming final, the agency rule must require (1) an appeal to a superior agency authority before an initial decision becomes final; ***and*** (2) that the initial decision is "inoperative" pending appeal. *Id*. at 152.

In *Oregon Natural Desert Ass'n v. Green*, 953 F.Supp.1133 (D. Or. 1997), the Court determined that the DOI's regulations were inadequate where they required exhaustion but did not render the particular decision inoperative pending appeal. *Id*. at 1141-42. The District Court noted that making the decision inoperative was "unequivocal" and went on to state that the party challenging the action "was not required to *proceed* with its appeal to the IBLA prior to seeking review of [the decision]." *Id*. (emphasis added). The Magistrate reasoned that because Plaintiffs did not initiate an appeal, the requirement that the Federal Defendants' decision remain inoperative pending appeal did not apply, however that is directly contrary to the holding in *Oregon Natural Desert* which stated just the opposite that the party challenging the decision need not "*proceed*" with an appeal if the decision would be effective during the appeal. *Id*.

The Magistrate further reasoned that Plaintiffs did not propose a manner in which the decision could be inoperative pending appeal. (Aplt. App. at 331). Plaintiffs urge the Court that this reasoning proves their point. If the decision cannot be inoperative pending appeal, then it must be a final decision under *Darby, supra, or Oregon Natural Desert, supra*. Plaintiffs further respectfully disagree that the APA requires unrepresented

individuals to bear the burden of telling a federal agency how to make their decision inoperative pending appeal and no such requirement appears in either *Darby, supra,* or *Oregon Natural Desert, supra*. While both the Magistrate and Federal Defendants argue that the cases cited above are distinguishable, the rule of law stated in those cases is quite straight-forward and applicable to a variety of circumstances, including this case. *Darby, supra,* and *Oregon National Desert, supra, and Vann I* stand for the proposition that an opportunity for additional agency review is insufficient where the agency decision is already final under the APA.

Moreover, it is not as if the BIA was unaware of the concerns and objections to the governance of the Mineral Estate. The BIA had numerous letters from concerned Shareholders prior to both the 2006 and 2010 Elections, yet took no action. The letters from Shareholders included, among others, the following: (i) letter from the Osage Shareholders' Association, March 20, 2006 (of which all Plaintiffs are members) (Aplt. App. at 356-57); and (ii) letter from Charles Tillman, dated December 21, 2006) (Aplt. App. at 358-60) (additional letters were identified in Summary of Facts, *supra*). As the BIA was aware of the potential violations of federal law prior to the 2006 and 2010 Election yet took no action or suggest further agency review, its decision was not interlocutory, rather it was a considered final decision.

The BIA's decision was final when it did not, in fact, conduct the 2006 and 2010 Elections and did not purport to make its decision inoperative pending appeal. Therefore, under *Darby, supra,* and *Oregon National Desert, supra, and Barrick, supra,* exhaustion of administrative remedies that do not affect the finality of the decision are not required.

3. **Alternatively, Agency Review Would be Futile**[9]

In the event the Court finds that the BIA's decision was not final under the APA, this is the epitome of a case where exhaustion would be futile. Repeatedly, courts note that the exhaustion requirement serves various functions, namely, (i) it is recognition of agency autonomy; (ii) it develops a factual background; and (iii) it permits the agencies to apply any special expertise they may have and enables the agencies to correct their own errors. *See Bethlehem Steel Corp*., 669 F.2d at 907. The pivotal issue in this case is the interpretation of the Reaffirmation Act; specifically, whether such act overrules or supersedes the 1906 Act with respect to the governance of the Mineral Estate. As such, the exhaustion requirement would not tend to serve its purpose in this case.

The Tenth Circuit recognizes that exhaustion may be futile where (1) an agency lacks the authority or ability to resolve the claim; (2) the issue is purely a matter of statutory interpretation; and (3) the court would not benefit from the development of a full administrative record. *See Forest Guardians v. U.S. Forest Serv*., 579 F.3d 1114, 1122 (10th Cir. 2009).

In *Becker v. Federal Election Commission*, 112 F.Supp.2d 172, 176 (D.Mass. 2000), the court considered whether the exhaustion requirement applied under the APA on a claim that the Federal Election Commission exceeded its authority and noted that "courts are equipped to settle issues of law in cases involving challenges to an agencies power." *Id*. The court went on to hold that as the challenge in that case "involves a

[9] Plaintiffs raised the issue that exhaustion of administrative remedies would be futile at Aplt. App. at 123-125, 342-44.

question of law involving the agency's power, exhaustion is not required." *Id.* Similarly, as explained above, the issues in this case involve pure questions of law regarding the Federal Defendants' power to recognize the Osage Nation as the governing body of the Minerals Estate and exhaustion would be futile.

The Magistrate recognized that futility exception to the exhaustion requirement and noted it may be futile when there is a pronounced decision by a final decision maker. (Aplt. App. at 332). As noted above, the Assistant Secretary of Indian Affairs in the DOI, the highest ranking official with respect to Indian Affairs aside from the Secretary and Deputy secretary of the DOI and the highest ranking official in the BIA, wrote a letter in which he stated "the BIA will take no further action on this issue," the issue being the failure of the Federal Defendants to conduct an election in accordance with the 1906 Act and CFRs as made clear from the context of the letter. (Aplt. App. at 351). Moreover, this Court notes that where the agency has repeatedly stated its position and shown no signs of a willingness to reconsider, exhaustion would be futile. *See Qwest Communications Intern, Inc. v. FCC*, 398 F.3d 1222, 1231 n. 4 (10th Cir. 2005). As evident from the numerous BIA Letters to Shareholders cited above, Federal Defendants' position in this matter is unwavering and pronounced by a high level, perhaps even final, decision makers on this issue and exhaustion would be futile.

The foregoing makes clear that even if the APA requires exhaustion, it is futile to require the Plaintiffs to present pure questions of law to an agency that unwaveringly pronounced its position on this matter numerous times from officials throughout the

organizational hierarchy, beginning with the superintendent of the Osage Agency through the Assistant Secretary of Indian Affairs.

CONCLUSION

The Federal Defendants' claim that the BIA's decision not to administer the 2006 and 2010 Elections and not to conduct future elections for a Principal Chief, Assistant Principal Chief and Tribal Council under the 1906 Act and CFRs is nonsensical. Everyone in the BIA from the Assistant Secretary of Indian Affairs to the Superintendant of the Osage Agency has confirmed the BIA's settled position in this matter. The BIA simply seeks to delay further the inevitable result of judicial review of its interpretation and application of the Reaffirmation Act.

Based on the authority cited above, the BIA's decision is either final because it represents the culmination of the agency decisionmaking process from which obligations and legal consequences flow; or agency review would be futile in this case because by words and actions the BIA has repeatedly affirmed its position on its obligations since the Reaffirmation Act.

In either event, judicial review is appropriate under the APA and the District Court has subject matter jurisdiction to consider the merits of Plaintiffs' claims. As such, Plaintiffs respectfully requests that the Court reverse the District Court's Order and find that the District Court has subject matter jurisdiction under the APA to consider Plaintiffs' claims.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Counsel does not request oral argument.

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I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF,** as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Trend Micro OfficeScan Client for Windows version 10.5.1083, Virus Definition File Dated: October 14, 2011, and according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By s/Tracy L. Costa
Tracy L. Costa, Legal Assistant

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2011, I electronically transmitted **APPELLANTS' OPENING BRIEF** to the following:

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I further certify that on the 14th day of October, 2011, I served a true and correct copy of **APPELLANTS' OPENING BRIEF** by first class mail, with proper postage fully prepaid thereon, on the following, who is not a registered participant of the ECF System:

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