

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

CORA JEAN JECH, et al.,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. 09-cv-818-TCK-TLW
)	
THE UNITED STATES OF AMERICA,)	
et al.,)	
Defendants.)	

REPORT AND RECOMMENDATION

Before the undersigned United States Magistrate Judge for Report and Recommendation is defendants’ Motion to Dismiss. (Dkt. # 15). Plaintiffs filed a response, and defendants filed a reply. (Dkt. ## 19, 22). Two hearings were conducted, one on July 7, 2010 and another on February 8, 2010. (Dkt. ## 36, 55). Also before the undersigned for Report and Recommendation are defendants’ Motion to Limit Review to the Administrative Record (dkt. # 28), defendants’ Motion to Stay (dkt. # 29), and plaintiffs’ Motion to Require Federal Defendants to Supplement Administrative Record (dkt. # 51).

Defendants’ Motion to Dismiss asserts that the Court lacks subject matter jurisdiction, that plaintiffs have failed to join an indispensable party, and that plaintiffs’ complaint involves an intra-tribal dispute which is not appropriate for federal judicial review. (Dkt. # 15). As set forth below, the undersigned finds that the Court lacks subject matter jurisdiction and RECOMMENDS that defendants’ Motion to Dismiss (dkt. # 15) be GRANTED and that the remaining motions (dkt. ## 28, 29, 51) be DENIED as moot.

Factual Background

The Osage Allotment Act and the Reaffirmation Act

Plaintiffs are eight individual members of the Osage Tribe of Indians, as defined in the Osage Allotment Act of June 28, 1906, 34 Stat. 539, as amended (the “1906 Act”). (Dkt. # 2 at 2). Plaintiffs are descendants of the original Osage allottees enrolled under Section 1 of the 1906 Act and are shareholders entitled to receive distributions from the Osage Mineral Estate (“Mineral Estate”), which is held in trust by the United States (“Tribal Trust”). Id. at 4. Tribal Trust distributions, called headrights, are substantial property rights which provide quarterly income distributions to the shareholders. Id. at 5. Because headrights may pass to heirs, devisees, and assigns of the original allottees, some Osage now own no headrights or small fractions of headrights, while others own multiple headrights. Id. Some headright owners are not Osage at all. Id.

Among other provisions, the 1906 Act prescribes the form of the Osage tribal government. Id. at 3. The 1906 Act provides for the election of a Principal Chief, an Assistant Principal Chief, and an eight-member Osage Tribal Council. Id. at 7. According to the 1906 Act, the election of the Osage Tribal Council and the tribal officers is governed by the Commissioner of Indian Affairs. Id. The procedures for the election are codified at 25 C.F.R. Part 90 (“Part 90”). Id. Part 90 provides:

Only members of the Osage Tribe who will be eighteen years of age or over on election day and whose names appear on the quarterly annuity roll at the Osage Agency as of the last quarterly payment immediately preceding the date of election will be entitled to hold office or vote for any tribal officer.

25 C.F.R. § 90.21. Under Part 90, each voter is entitled to cast one weighted ballot based on the value of the voter’s headright interest, as reflected in the last quarterly annuity roll. Id. Part 90

also assigns to the BIA certain responsibilities for the administration of tribal elections. (Dkt. # 16 at 3).

On December 3, 2004, Congress enacted the Reaffirmation of Certain Rights of the Osage Tribe, Pub. L. No. 108-431, 118 Stat. 2609 (2004) (the “Reaffirmation Act”). (Dkt. # 2 at 9). In the Reaffirmation Act, Congress specifically found that “[t]oday only Osage Indians who have a headright share in the mineral estate are ‘members’ of the Osage Tribe.” Reaffirmation Act, Pub. L. No. 108-431, § 1(a)(3), 118 Stat. 2609, 2609 (2004). Accordingly, “Osage Indians without a headright interest cannot vote in Osage government elections and are not eligible to seek elective office in the Osage Tribe as a matter of Federal law.” Id. § 1(a)(4).

However, in Section 1(b)(1) of the Reaffirmation Act, Congress clarified that the term “legal membership,” as used in the 1906 Act, “means the persons eligible for allotments of Osage Reservation lands and a pro rata share of the Osage mineral estate as provided in [the 1906 Act], not membership in the Osage Tribe for all purposes.” Id. at § 1(b)(1). The Reaffirmation Act reaffirmed “the inherent sovereign right of the Osage Tribe to determine its own membership, provided that the rights of any person to Osage mineral estate shares are not diminished thereby.” Id. The Reaffirmation Act also reaffirmed “the inherent sovereign right of the Osage Tribe to determine its own form of government.” Id. at § 1(b)(2).

The Tribe’s Action and the BIA’s Inaction

Plaintiffs claim that the Reaffirmation Act inspired Jim Gray, the Principal Chief at the time of enactment, to launch the Osage Nation Government Reform Project. (Dkt. #2 at 10). Plaintiffs allege that the Government Reform Project ultimately led to a “complete overhaul of the Osage Tribal government as it has existed for the past 100 years.” Id. at 12. As a part of this “overhaul,” on March 11, 2006, the Constitution of the Osage Nation was adopted. Id. Plaintiffs allege that all Osage persons eighteen years or older whose name appeared on the Master List of

Voters and who had acceptable proof of voter identification, irrespective of headright ownership, were eligible to vote on the adoption of the new Osage Constitution. Id. Plaintiffs claim that the Osage Constitution abolishes the Osage Tribal Council and establishes a Minerals Council that has the authority to manage the Osage Mineral Estate but is subject to the decisions of the Principal Chief and the Osage Nation Congress. Id. at 12-14. Furthermore, plaintiffs allege that on June 12, 2006, both the Minerals Council and the Principal Chief were elected by a vote of Osage persons eighteen or older who presented an Osage Membership Card and not by headright owners. Id. at 15. Because the Osage Constitution was ratified by, and the tribal officials were elected by, persons who, at least in part, were not headright owners, plaintiffs claim they have suffered a diminishment in their headright interest in the Mineral Estate. Id. at 17.

In an effort to restore his alleged rights as a headright owner, on December 21, 2006, plaintiff Tillman wrote a letter to the Superintendent of the Osage Agency and Regional Director of the Bureau of Indian Affairs (“BIA”), making the BIA aware of the problems connected with the Osage Nation’s control of the Mineral Estate and demanding that the Department of the Interior (“DOI”) and Secretary of Interior conduct the Osage Tribal Council elections in accordance with the 1906 Act, as amended.¹ Id. at 16. On March 19, 2007, W.P. Ragsdale, the Director of the BIA, responded to Tillman’s letter.² (Dkt. # 19, Ex. C). Director Ragsdale’s

¹ The BIA is a bureau of the DOI. See <http://www.bia.gov/WhoWeAre/index.htm>.

² Plaintiffs also attached a letter from Melissa Currey, Superintendent of the Osage Agency, to Osage Annuitant Diane Simpkins, who is not a party in this case. (Dkt. # 2, Ex. E). In this letter, dated February 21, 2007, Superintendent Currey stated, “[i]t is the position of the Bureau that the [Osage Nation] Constitution . . . upheld the intent and direction of the Congress” Id. The Superintendent further stated that “there is no action to be taken by the Bureau at this time for the concerns outlined in the letter,” and that “the Bureau has upheld its responsibilities pursuant to *Public Law 108-431*.” Id. Not only is Ms. Simpkins not a party to this case, but also plaintiffs failed to submit a copy of her letter to Superintendent Currey, so the undersigned cannot determine what the “concerns outlined in the letter” were. Thus, the context in which Exhibit E was sent is not clear, and the exhibit, even assuming it is relevant to *plaintiffs’* claims, is not

letter affirmed that the Osage Constitution “upheld the intent and direction of the Congress.” Id. Furthermore, the letter stated, “[t]here 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.” Id.

This Lawsuit

Defendants in this case are the DOI, Ken Salazar as Secretary of the Interior, the BIA, and Larry Echohawk as Assistant Secretary-Indian Affairs. (Dkt. # 2 at 1). On December 30, 2009, plaintiffs filed the present action against defendants seeking a declaratory judgment and a mandatory injunction. Id. at 1 & 18-19. Plaintiffs assert that the BIA is responsible for administration of the Osage Tribe elections under 25 C.F.R. Part 90 and that the BIA failed to fulfill that responsibility when it supervised neither the ratification of the Osage Constitution nor the election of the Principal Chief and Minerals Council. Id. at 12, 15. Plaintiffs claim that the BIA’s failure to supervise the ratification of the Osage Constitution and the election of the Principal Chief and Minerals Council resulted in a diminishment in the headright owners’ interests in the Minerals Estate, because non-headright owners now exercise primary control and authority over the Osage Mineral Estate. Id. at 18. Plaintiffs also claim that defendants’ refusal to administer the elections disenfranchised the headright owners in violation of the 1906 Act and the Reaffirmation Act. Id.

Plaintiffs have asked the Court to enter a declaratory judgment of the rights of the parties involved. Id. Specifically, plaintiffs ask the court to declare that: (1) the Reaffirmation Act did not supersede or rescind the 1906 Act, but rather clarified the 1906 Act by differentiating between legal membership in the Osage Tribe and membership in the Osage Tribe for all

helpful to the undersigned. In addition, further assuming that the context of Exhibit E is the same as Mr. Tillman’s letter, the undersigned’s recommendation does not change.

purposes; (2) the provisions of the 1906 Act with respect to the legal members and the Osage Mineral Estate remain in full force and effect; (3) the right to vote for a Tribal Council member, the Chief, and the Assistant Chief were fundamental and inalienable property rights associated with the ownership of a headright; (4) the proportionality between the value of a ballot and the amount of the headright is a fundamental and inalienable property right associated with the ownership of a headright; and (5) the DOI and BIA are required to conduct elections for the Minerals Estate and Tribal Council to manage and control the Minerals Estate pursuant to the 1906 Act and the Code of Federal Regulations. Id. at 18-19. In addition, plaintiffs seek a mandatory injunction requiring defendants to: (1) conduct an election for a Principal Chief, Vice-Chief, and Minerals Council in accordance with 25 C.F.R. Part 90, and (2) take any action necessary to reinstate the Minerals Council and Mineral Estate as separate and independent from the Osage Nation. Id. at 19-20.

Analysis

Defendants seek dismissal of plaintiffs' claims on three grounds: (1) that the Court lacks subject matter jurisdiction, because plaintiffs failed to exhaust their administrative remedies; (2) that dismissal is required under Rule 19 of the Federal Rules of Civil Procedure, because plaintiffs have failed to join the Osage Nation as an indispensable party; and (3) that plaintiffs' complaint involves an intra-tribal dispute, which is not appropriate for federal judicial review. (Dkt. # 15). Because the undersigned finds that defendants' first argument is clearly dispositive, the other two issues are not addressed.

Subject Matter Jurisdiction

Defendants argue that plaintiffs' claims should be dismissed under Fed. R. Civ. P. 12(b)(1), because the Court lacks subject matter jurisdiction. (Dkt. # 16 at 2). Federal courts are courts of limited jurisdiction, and parties invoking federal jurisdiction bear the burden of

presenting “evidence sufficient to establish the court’s subject matter jurisdiction by a preponderance of the evidence.” United States ex rel. Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1160 n.5 (10th Cir. 1999). Accordingly, plaintiffs in this case bear the burden of establishing subject matter jurisdiction. However, in a case involving claims against the federal government, plaintiffs have the added burden of showing that defendants have waived their sovereign immunity from suit. “[I]t is axiomatic that the United States may not be sued without its consent and the existence of consent is a prerequisite for jurisdiction.” United States v. Mitchell, 463 U.S. 206, 212 (1983). See also Amalgamated Sugar Co. v. Bergland, 664 F.2d 818, 823 (10th Cir. 1981) (“It has long been established that the United States may not be sued without its consent.”). In this case, it is undisputed that defendants are federal agencies and officers of those agencies. (Dkt. # 2 at 2-3). Therefore, to establish subject matter jurisdiction, plaintiffs must prove that defendants have consented to being sued. Normandy Apartments, Ltd. V. U.S. Dept. of Housing and Urban Development, et. al., 554 F.3d 1290, 1295 (10th Cir. 2009) (“The defense of sovereign immunity is jurisdictional in nature, depriving courts of subject-matter jurisdiction where applicable.”)

Plaintiffs seek to meet their burden by relying on three federal statutes: 28 U.S.C. § 2201 (2010), 25 U.S.C. § 345 (2006), and 5 U.S.C. § 702 (2006). (Dkt. # 2 at 3, 18). Specifically, plaintiffs assert that 28 U.S.C. § 2201 provides for the relief they request and that 5 U.S.C. § 702 and 25 U.S.C. § 345 act as waivers of defendants’ sovereign immunity. Id. Defendants argue that none of these statutes allows for jurisdiction in this case. (Dkt. # 16 at 2).

28 U.S.C. § 2201 – The Declaratory Judgments Act

Plaintiffs argue that they are entitled to seek a judicial declaration of their rights pursuant to the Declaratory Judgments Act, 28 U.S.C. § 2201. (Dkt. # 2 at 18). In pertinent part, Section

2201(a) states:

In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Id. However, as defendants point out, Section 2201 does not create an independent basis for jurisdiction. Amalgamated Sugar Co., 664 F.2d at 822 (“It is settled that 28 U.S.C. § 2201 does not itself confer jurisdiction on a federal court where none otherwise exists. That statute . . . does not extend subject matter jurisdiction to cases in which the court has no independent basis for jurisdiction.”); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950) (“[In adopting the Declaratory Judgment Act,] Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction.”); Monks v. Hetherington, 573 F.2d 1164, 1167 (10th Cir. 1978) (“[T]he declaratory judgment act does not confer jurisdiction.”). The Declaratory Judgments Act merely creates a remedy in cases otherwise within the court’s jurisdiction. Amalgamated Sugar Co., 664 F.2d at 822. Accordingly, Section 2201 does not confer jurisdiction on this Court and cannot be the basis of the remedy sought by plaintiffs, unless plaintiffs also establish that either 5 U.S.C. § 702 or 25 U.S.C. § 345 provides an independent basis for jurisdiction.

25 U.S.C. § 345

Plaintiffs next assert that 25 U.S.C. § 345 confers subject matter jurisdiction in this case.

(Dkt. # 2 at 3). Section 345 provides:

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States;

and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant) . . .

Id. The Supreme Court has interpreted Section 345 to grant federal courts jurisdiction in “two types of cases: (i) proceedings ‘involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty,’ and (ii) proceedings ‘in relation to’ the claimed right of a person of Indian descent to land that was once allotted.” United States v. Mottaz, 476 U.S. 834, 845 (1986) (quoting Section 345). However, the Court further stated that “[t]he structure of § 345 strongly suggests . . . that § 345 itself waives the Government’s immunity only with respect to the former class of cases: those seeking an original allotment.” Id. at 845-46. See also Affiliated Ute Citizens v. United States, 406 U.S. 128, 142 (1972) (“Allotment is a term of art in Indian law. It means a selection of specific land awarded to an individual allottee from a common holding. . . . Section 345 authorized, and provides governmental consent for only actions for allotment.”) (citations omitted); Harkins v. United States, 375 F.2d 239, 241 (10th Cir. 1967) (finding that “Section 345 gives no general consent of the United States to be sued even in connection with its administration of allotments”).

Plaintiffs do not seek an original allotment. The Osage lands and the minerals which are the subject of this dispute have already been allotted. As plaintiffs state in their complaint, “the 1906 Act, among other things, . . . allotted Osage lands (§ 2) [and reserved] mineral rights to the Osage Tribe in the allotted lands (§ 3) . . .” (Dkt. # 2 at 3). Plaintiffs’ claims arise out of “the interests and rights of the Indian[s] in [their] allotments or patents” after they have acquired them. Mottaz, 476 U.S. at 845. Therefore, plaintiffs’ claims relate to the administration of their allotments. As a result, Section 345 does not confer subject matter jurisdiction in this case.

5 U.S.C. § 702 – The Administrative Procedures Act

Finally, plaintiffs assert that jurisdiction exists under the Administrative Procedures Act,

5 U.S.C. § 702 (the “APA”). (Dkt. # 2 at 3). The APA provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. Another District Court Judge from the Northern District of Oklahoma recently quoted the Tenth Circuit in holding that the APA “provides a ‘general waiver of sovereign immunity in all civil actions seeking equitable relief on the basis of legal wrongs for which government agencies are accountable.’” Gilmore v. Salazar, No. 10-CV-0257-CVE-PJC, 2010 WL 3749408, at *5 (N.D. Okla. Sept. 21, 2010) (quoting United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 549 (10th Cir. 2001)). Nonetheless, the APA also provides that “[n]othing herein [] affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground . . .” 5 U.S.C. § 702. Thus, although Section 702 states that an action in federal court seeking relief other than money damages shall not be dismissed because the United States is a party, the statute also makes clear that other statutory qualifications or limitations on judicial review apply. Id. Such a qualification is found in 5 U.S.C. § 704, which states, “[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.” In United Tribe of Shawnee Indians, the Tenth Circuit interpreted Section 704 to make “agency action [] reviewable in two instances: when it is ‘made reviewable by statute’ and when it constitutes ‘final agency action for which there is no other adequate

remedy in court.” 253 F.3d at 549. Since the BIA’s actions are not “made reviewable by statute,” plaintiffs must establish that their claims fall under the “final agency action” provision of Section 704.³

“Agency action is not final until a party has exhausted all available administrative remedies prescribed by statute or an agency rule.” Gilmore, 2010 WL 3749408 at *6. “If exhaustion of administrative remedies is required by statute or agency rule, a federal court may not assert jurisdiction over a case until the party seeking judicial review has exhausted his administrative remedies.” Id. (citing White Mountain Apache Tribe v. Hodel, 840 F.2d 675 (9th Cir. 1988)). Courts apply the doctrine of exhaustion of administrative remedies because doing so:

[A]ffords administrative agencies an opportunity to correct their own errors prior to judicial intervention, thus mooting many issues before they reach the courts. The exhaustion requirement also serves to maximize efficient administrative process by preventing repeated judicial interruption. Additional reasons for the exhaustion doctrine include respect for “notions of administrative autonomy” and an interest in preserving the effectiveness of agency operations, which could be threatened by “frequent and deliberate flouting of administrative processes.”

Gilmore, 2010 WL 3749408 at *6 (citing St. Regis Paper Co. v. Marshall, 591 F.2d 612 (10th Cir. 1979)). “Exhaustion serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.” Shawnee Indians, 253 F.3d at 550 (quoting McCarthy v. Madigan, 503 U.S. 140, 145 (1992) (internal quotation marks omitted)).

Here, defendants claim that judicial review under the APA is not appropriate, because plaintiffs have not exhausted their administrative remedies as required by Section 704. (Dkt. # 16 at 10-13). Plaintiffs do not dispute that they have not exhausted their administrative remedies. (Dkt. # 19 at 9). Instead, plaintiffs claim that exhaustion is not required in this case

³ As discussed supra at 8-10, plaintiffs attempt to rely on 25 U.S.C. § 345 fails, because this case does not involve an original allotment. Plaintiffs offer no other statute under which the BIA’s action are reviewable.

because: (1) plaintiffs seek review of a final agency decision under the APA; (2) plaintiffs' claim involves pure questions of federal law; and (3) exhaustion would be futile. Id.

As to the first argument, plaintiffs cite Vann v. Kempthorne, 467 F.Supp.2d 56 (D.D.C. 2006). In Vann, the district court held that final agency action "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. (rev'd and remanded on other grounds). Plaintiffs claim that the BIA's decision in this case is "unequivocally final," because plaintiffs "have suffered and continue to suffer irreparable harm as a result of the BIA's unwavering position." (Dkt. # 19 at 11). Thus, plaintiffs argue that exhaustion is not necessary in this case, because "[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]." (Dkt. # 19 at 11) (citing Darby v. Cisneros, 509 U.S. 137, 154, 113 S.Ct. 2539, 2548) (1993). However, the context of the Supreme Court's statement in Darby is important, since the Court was considering whether or not courts could impose "additional exhaustion requirements beyond those provided by Congress or the agency" in a situation where all administrative appeals mandated by the applicable agency had been exhausted. Id. The Court framed the issue as follows:

The last sentence of § 10(c) refers explicitly to "any form of reconsideration" and "an appeal to superior agency authority." Congress clearly was concerned with making the exhaustion requirement unambiguous so that aggrieved parties would know precisely what administrative steps were required before judicial review would be available. If courts were able to impose additional exhaustion requirements beyond those provided by Congress or the agency, the last sentence of § 10(c) would make no sense. To adopt respondents' reading would transform § 10(c) from a provision designed to "remove obstacles to judicial review of agency action," Bowen v. Massachusetts, 487 U.S., at 904, 108 S.Ct., at 2737, quoting Shaughnessy v. Pedreiro, 349 U.S. 48, 51, 75 S.Ct. 591, 593, 99 L.Ed. 868 (1955), into a trap for unwary litigants. Section 10(c) explicitly requires exhaustion of all intra-agency appeals mandated either by statute or by agency

rule; it would be inconsistent with the plain language of § 10(c) for courts to require litigants to exhaust optional appeals as well.

Id. at 146-47, 2544-45. Thus, the Court, in Darby, reaffirmed its view that a litigant must exhaust “all intra-agency appeals mandated either by statute or by agency rule” before filing a lawsuit in federal court. Id. The Tenth Circuit’s interpretation of the APA is no different: “if an agency decision is subject to appeal within the agency, a party must appeal the decision to the highest authority within the agency before judicial review is possible.” Coosewoon v. Meridian Oil Co., 25 F.3d 920, 924 (10th Cir. 1994) (interpreting 25 U.S.C. § 2.6(a)).

Here, the DOI has “instituted an administrative procedure [for the BIA] by which a party may challenge the Secretary’s inaction concerning a particular issue.” Coosewoon, 25 F.3d at 925. Specifically, 25 C.F.R. § 2.8(a) provides as follows:

- (a) A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, can make the official’s inaction the subject of appeal, as follows:
- (1) Request in writing that the official take the action originally asked of him/her;
 - (2) Describe the interest adversely affected by the official’s inaction, including a description of the loss, impairment or impediment of such interest caused by the official’s inaction;
 - (3) State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part.

Id. The regulations further provide that the official receiving the appellate “request must either make a decision on the merits of the initial request within 10 days from receipt of the request for a decision or establish a reasonable later date by which the decision shall be made, not to exceed 60 days from the date of request.” 25 C.F.R. § 2.8(b). If the official neither makes a final decision, nor sets a date on which the decision shall be made, the official’s inaction is then appealable as set forth in the regulations. Id.

The DOI's regulations also address the issue of finality, which is a separate consideration from that of exhaustion:

No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department [of Interior], shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704, unless when an appeal is filed, the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately.

25 C.F.R. § 2.6. Thus, the DOI's regulations establish a procedure for appealing a BIA decision and inform the public as to when a BIA decision is considered "final."⁴

Here, plaintiffs failed to follow the DOI's regulations. In December, 2004, one plaintiff wrote to "the BIA Superintendent[,] Melissa Currey[,] and BIA Regional Director, Jeanette Hanna, to advise them that the 2006 Election" did not comply with federal law. (Dkt. # 19 at 6). In the letter, this plaintiff argued that "the office of the superintendent is not providing the oversight and support required by Federal law" and made an "urgent request that [the BIA] take immediate steps to rectify the unlawful situation currently existing, as a result of [the BIA's] failure to hold elections as required by Federal law." (Dkt. 19, Ex. A). The letter also "urgently request[ed]" that the BIA officials "uphold [their] duty, as trustee, in the management of all matters concerning the Osage Mineral Estate including elections, leasing, royalty revenues, and the claims of the annuitants" *Id.* Plaintiffs do not claim to have taken any other steps in the administrative process.

Although the letter to the BIA officials satisfied the requirements listed in 25 C.F.R. § 2.8(a)(1)-(2), it failed to satisfy the requirements of Section 2.8(a)(3), which requires that the request "[s]tate that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which

⁴ Plaintiffs do not challenge these regulations.

action will be taken, an appeal shall be filed in accordance with this part.”⁵ Furthermore, even if the letter satisfied the requirements of Section 2.8(a)(3), the agency’s response, or lack thereof, would still not represent a final decision, since 25 C.F.R. § 2.6(a) provides that any decision which is subject to appeal to a superior authority is not final. Instead, the agency’s alleged inaction would have provided plaintiffs with the right to seek further review from the next agency official identified in the regulations. “[P]laintiffs should have made a formal request for the Agency to consider their request for BIA action and, if that was unsuccessful, should have pursued an administrative remedy with a higher-level official at the BIA.” Gilmore, 2010 WL 3749408 at *10.

Because the decision at issue was “subject to appeal to a superior authority,” and because plaintiffs failed to pursue that appeal, the decision is not a final decision and plaintiffs have not exhausted their administrative remedies. Thus, the BIA’s decision is not eligible for judicial review. 25 C.F.R. § 2.6.

Nonetheless, plaintiffs argue that the BIA’s decision “not to conduct the 2006 Election” was a final agency decision, because it was not made “inoperative pending appeal.” (Dkt. # 19 at 10). In support of this argument, plaintiffs cite Oregon Natural Desert Assoc. v. Green, 953 F. Supp. 1133, 1141 (D.Or. 1997). In Green, the district court relied on Darby v. Cisneros for the proposition that “in the event an agency rule requires appeal before [judicial] review, the agency rule must also provide that the administrative action is made inoperative pending that review.”

⁵ On Jan. 19, 2011, plaintiffs also filed a Motion to Require Federal Defendants to Supplement Administrative Record, attaching as exhibits several more letters. (Dkt. # 51.) These exhibits include letters attached to previous filings and two new letters from persons who are not parties to this case (Dkt. # 51, Ex. 1.) As with the letter to Diane Simpkins, discussed *supra* n.1, plaintiffs have not attached the letters which were sent to the BIA. Furthermore, defendants assert, and plaintiffs agree, that these newly attached letters do not satisfy the requirements of 25 C.F.R. Part 2.

Id. (citing Darby, 509 U.S. at 154).⁶ Plaintiffs argue that because “the BIA’s decision not to conduct the 2006 Election became final when it did not in fact conduct the 2006 Election,” the decision was not made “inoperative.” (Dkt. # 19 at 10.) Accordingly, plaintiffs contend that exhaustion of their administrative remedies is not required here. Plaintiffs’ argument is misplaced. In Green, the plaintiffs “appealed the River Plan to the Interior Board of Land Appeals . . . and that appeal [was] pending.” ONDA, 953 F.Supp. at 1141. Here, plaintiffs have made no appeal at all, so there is no appeal pending. Thus, even assuming that the BIA’s decision, as characterized by plaintiffs, was a final agency decision, plaintiffs’ decision not to appeal deprived the BIA of any opportunity to make its decision “inoperative.” Requiring an agency decision to be made inoperative even when no appeal has been made would be nonsensical.

Moreover, the agency “action” in this case is very different from the “action” contemplated by the court in Green. In Green, plaintiffs sought to enjoin the Bureau of Land Management from implementing a river management plan that would permit specific activities in the Donner and Blitzen River system. 953 F. Supp. at 1137. The plaintiffs sought to forestall “further implementation of the activities authorized in the river management plan.” Id. Here, plaintiffs are not seeking to enjoin the BIA from engaging in certain activities. Rather, plaintiffs seek to require affirmative action from the BIA, wanting the BIA to “[c]onduct an election for a Principal Chief, Vice-Chief and Minerals Council.” (Dkt. 2 at 19.) Further, plaintiffs do not explain how the BIA’s action in “refusing to administer the election for ratification of the Osage

⁶ Although Darby discusses the requirement that agency decisions be made inoperative on appeal, that issue was not at question in the case. Instead, Darby considered “whether federal courts have the authority to require that a plaintiff exhaust administrative remedies before seeking judicial review under the [APA], where neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review.” Darby, 509 U.S. at 138.

Nation Constitution, refusing to conduct the election of the Tribal Council and otherwise refusing to acknowledge the Mineral Estate . . .” could be made inoperative. (Dkt. 2 at 18.).

Finally, plaintiffs argue that “the pure statutory nature of the[ir] claim coupled by the undisputed nature of the facts in the case” render any administrative appeal either unnecessary or futile. *Id.* at 13. Plaintiffs also argue that exhaustion would be futile, because “the agency has repeatedly stated its position and shown no signs of a willingness to reconsider.” *Id.* The Tenth Circuit has recognized that exhaustion may not be required when administrative remedies would be futile. *Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 724 (10th Cir. 1996). However, the Tenth Circuit explained that “[a]dministrative remedies are generally futile or inadequate when plaintiffs allege structural or systemic failure and seek systemwide reforms.” *Id.* at 725 (citing *Assoc. for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040 (10th Cir. 1993) (internal quotations omitted)). Alternatively, administrative remedies may be futile when there has been “a preannounced decision by the final administrative decision-maker” or there is “objective and undisputed evidence of administrative bias which would render pursuit of an administrative remedy futile.” *White Mountain Apache Tribe*, 840 F.2d at 677-78.

In this case, plaintiffs’ do not assert the presence of any “systemic failure.” Neither do plaintiffs challenge the DOI’s regulations regarding administrative appeals. Rather, plaintiffs merely claim that the BIA has failed to perform a duty required by a federal regulation. (Dkt. # 2 at 18). Further, there has been no “preannounced decision by the final administrative decision-maker,” and there is no “undisputed evidence of administrative bias.” Although plaintiffs cite to letters from the Director of the BIA and the Superintendent of the Osage Agency⁷ to show that the department had an existing position, plaintiffs have not shown that “[t]he Secretary of the

⁷ As discussed *supra* n.1, the letter from the Superintendent of the Osage Agency is not addressed to a plaintiff in this case. Furthermore, plaintiffs failed to submit a copy of the letter to which the Superintendent is responding, so the precise context of the letter is not clear.

Interior has [] made a definitive statement concerning the [] decisions at issue.” Begay v. Pub. Serv. Co. of N.M., 710 F.Supp.2d 1161, 1205 (D. N.M. 2010) (quoting White Mountain Apache Tribe, 840 F.2d at 678). “Thus, [plaintiffs] ha[ve] not demonstrated that administrative remedies in this case are futile.” Id.

Moreover, contrary to plaintiffs’ position, exhaustion of administrative remedies is required in cases involving “questions of statutory interpretation.” Olsen & Co. v. Sec. & Exch. Comm’n, 546 F. Supp. 272, 273 (D. Utah 1982) (citing Aircraft and Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 772-73 (1947)). In fact, the Tenth Circuit has recognized that “[a]gency review . . . prior to judicial consideration is desirable even where pure questions of law are concerned, in order to provide the court with the benefit of the agency’s considered interpretation of its enabling authority” and to “preserve[] the opportunity for the agency to correct an ill-conceived regulation and moot the issue without judicial interference.” St. Regis Paper Co. v. Marshall, 591 F.2d 612, 614 (10th Cir. 1979). Accordingly, the fact that this case may involve statutory interpretation does not create an exception to the exhaustion requirement.

Recommendation

The undersigned RECOMMENDS that defendants’ Motion to Dismiss (dkt. # 15) be GRANTED and that all remaining motions (dkt. ## 28, 29, 51) be DENIED as moot.

Objection

In accordance with 28 U.S.C. 636(b) and Fed. R. Civ. P. 72(b)(2), a party may file specific written objections to this report and recommendation. Such specific written objections must be filed with the Clerk of the District Court for the Northern District of Oklahoma by March 14, 2011.

If specific written objections are timely filed, Fed. R. Civ. P. 72(b)(3) directs the district judge to:

determine *de novo* any part of the magistrate judge’s disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

See also 28 U.S.C. 636(b)(1).

The Tenth Circuit has adopted a “firm waiver rule” which “provides that the failure to make timely objections to the magistrate’s findings or recommendations waives appellate review of factual and legal questions.” United States v. One Parcel of Real Property, 73 F.3d 1057, 1059 (10th Cir. 1996) (quoting Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991)). Only a timely specific objection will preserve an issue for *de novo* review by the district court or for appellate review.

SUBMITTED this 28th day of February, 2011.



T. Lane Wilson
United States Magistrate Judge