IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN VANN, RONALD MOON, HATTIE CULLERS, CHARLENE WHITE, and RALPH THREAT, Plaintiffs, v. GALE A. NORTON, Secretary of the United States Department of the Interior, UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants.	)	Case No. 1:03CV01711 (HHK) Judge: Henry H. Kennedy Deck Type: Civil Rights (non-employment) Date Stamp: 08/11/03

DEFENDANTS' RESPONSE TO
LIMITED INTERVENOR CHEROKEE NATION'S MOTION TO DISMISS

I. INTRODUCTION

Defendants Gale A. Norton, Secretary of the United States Department of the Interior, and the United States Department of the Interior (hereinafter collectively referred to as "Defendants"), hereby submit their response to Limited Intervenor Cherokee Nation's Motion to Dismiss. As set forth more fully below, Defendants agree with the Cherokee Nation that Plaintiffs' Complaint should be dismissed. Defendants, however, contend that before this Court reaches the Cherokee Nation's indispensable party defense, Plaintiffs must first exhaust their tribal remedies concerning their challenges to the election of Chad Smith as Chief of the Cherokee Nation. Defendants agree with the Cherokee Nation that Plaintiffs' claims concerning the Cherokee Nation's proposed constitutional amendment should be dismissed because they are not ripe and there is no final agency action upon which to base judicial review. Resolution of these jurisdictional issues, however, makes it unnecessary to resolve the jurisprudential defense

of indispensability presented by the Tribe.

II. STANDARD OF REVIEW

Taking as true the factual allegations contained therein, a complaint must be dismissed pursuant to Federal Rule of Civil Procedure 12 (b)(1) for lack of subject matter jurisdiction if the action: (1) does not arise under the federal Constitution, law, or treaties, or fall within one of the other enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or controversy within the meaning of that section; or (3) the cause is not one described by any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962). Because federal courts "are courts of limited jurisdiction . . . the exercise of federal jurisdiction is proper only when prescribed by Congress." *Marshall v. Gibson's Prods.*, 584 F.2d 668, 672 (5th Cir. 1978). *See also Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Here, this Court lacks jurisdiction over Plaintiffs' claims because Plaintiffs have failed to exhaust their tribal remedies concerning their challenge to the election of the Cherokee Nation's Chief, and because Plaintiffs' claims concerning the proposed constitutional amendment are not ripe and lack a final agency action. Accordingly, dismissal of all of Plaintiffs' claims is appropriate.[1/]

III. ARGUMENT

A. This Court Should Not Reach the Cherokee Nation's Indispensable Party Argument Because Plaintiffs Have Failed to Exhaust Their Tribal Remedies.

The Cherokee Nation's Motion to Dismiss is largely based on its indispensable party argument. Because Plaintiffs' claims challenging the election of Chad Smith as Chief of the

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[1/] Although not contesting the facts contained in Plaintiffs' Complaint, Defendants wish to clarify that the Department of the Interior has not yet taken action on the proposed constitutional amendment at issue in this litigation.

Cherokee Nation involve an interpretation of tribal law, Plaintiffs are required to, as a threshold matter, first exhaust their tribal remedies regarding those claims. The Cherokee Nation's indispensable party argument should only be considered if the Plaintiffs once again seek judicial review of their claims in this Court after first exhausting their tribal remedies.[2/]

Plaintiffs' claims concerning the election of Chad Smith as the Chief of the Cherokee Nation are couched in terms of "BIA's decision to recognize the illegal Election." *See* Complaint, ¶ 3. Upon closer scrutiny, however, Plaintiffs' claims in this regard are more accurately characterized as a challenge to their ability to vote in tribal elections. In evaluating this charge, this Court must engage in an interpretation of tribal law; specifically, it must determine what is meant by the definition of "membership" as set forth in Title 11, section 12 of the Cherokee Nation Code Annotated, and how that term is understood within the context of the Cherokee Nation's Election laws found in Title 26 of the Cherokee Nation Code Annotated. *See e.g.*, 26 CNCA §§ 2-A(14), 21-23. This is because, at bottom, the Plaintiffs are alleging that they are not able to participate in tribal elections — a process set forth by tribal law.

As explained in *Wheeler v. U.S. Department of the Interior*, 811 F.2d 549, 553 (10th Cir. 1987), "the Cherokee Nation has a system for interpreting tribal law, and, when a tribal forum is

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[2/] It is possible that, after Plaintiffs' tribal remedies are exhausted, the Cherokee Nation may have an argument that it is a necessary and indispensable party to any similar litigation brought before this Court. It is also possible, however, that after tribal remedies have been exhausted, the Cherokee Nation may not be deemed to be an indispensable party. Such was the case for the Tribal Governing Board of the Lac Courte Oreilles Banc of Lake Superior Chippewa Indians, in *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999), *cert. denied*, 531 U.S. 811 (2000). In that case, the Plaintiffs challenged the decision of federal officials to overturn the results of a tribal election in which amendments to the tribe's constitution had been approved. Although the tribe argued that it was a necessary and indispensable party, the Seventh Circuit determined that relief could be given in the absence of the tribe's participation in the lawsuit.

available, courts have specifically held that the aggrieved party must seek relief in that forum." *Id.* (citations omitted). "The issue is not whether the [P]laintiffs' claims would be successful in the[] tribal forum[], but only whether [a] tribal forum[] exist[s] that could potentially resolve the [P]laintiffs' claims." *Lewis v. Norton*, __ F.3d __, 2005 WL 2209921, *3 (9th Cir. Sept. 13, 2005) (citations omitted). Here, it cannot be reasonably disputed that, pursuant to Articles II, III, and VII of the Cherokee Nation Constitution, there is an available tribal forum to consider Plaintiffs' claims. Accordingly, because Plaintiffs' claims concerning the election of the Chief of the Cherokee Nation involve the interpretation of tribal law, Plaintiffs "must seek their remedy through th[at] available tribal forum." *Wheeler v. Swimmer*, 835 F.2d 259, 262 (10th Cir. 1987). Allowing the tribal court to interpret the relevant tribal law will allow it "to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985). Moreover, because tribal remedies are available, "the exhaustion of tribal remedies is [not merely] a prerequisite to federal jurisdiction," if existent, tribal remedies "are exclusive." *Ordinance 59 Ass'n v. U.S. Department of the Interior*, 163 F.3d 1150, 1158 (10th Cir. 1998).[3/] For these reasons, while Defendant agrees with the Cherokee Nation that dismissal of Plaintiffs' Complaint is appropriate, Defendants contend that, as a threshold matter, Plaintiffs' Complaint should be dismissed to allow the tribal forum to interpret its own law. Dismissal "is the prudent course of action in order

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[3/] Plaintiffs have not alleged that they have actually sought a tribal remedy prior to seeking judicial review by this Court. Even if they allege futility, however, they must actually seek a tribal remedy first. *See Ordinance 59 Ass'n v. U.S. Department of the Interior*, 164 F.3d at 1158.

to facilitate and encourage swift resort to Tribal Court remedies." *Warn v. Eastern Band of Cherokee Indians,* 858 F. Supp. 524, 528 (W.D.N.C. 1994) (citing *National Farmers Union Insurance Companies v. Crow Tribe of Indians,* 471 U.S. at 857).

B. Plaintiffs' Claims Are Not Ripe.

Plaintiffs' claims also do not meet the jurisdictional ripeness requirements under Article III of the United States Constitution. *See Reno v. Catholic Social Services,* 509 U.S. 43, 57 n.18 (1993) ("We have noted that the ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction."). The ripeness doctrine exists:

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732-33 (1998) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967)). The ripeness doctrine also has been expressed as applying to issues that a court does not need to decide now because it may never need to. *See Wilderness Society v. Alcock,* 83 F.3d 386, 390 (11th Cir. 1996); and *National Treasury Employees Union v. United States,* 101 F. 3d 1423, 1431 (D.C. Cir. 1996). As the D.C. Circuit noted when determining that a challenge to the yet unavailable veto power created by the Line Item Veto Act was not ripe for judicial review, "[n]ot only does this rationale protect the expenditure of judicial resources, but it comports with our theoretical role as the governmental branch of last resort . . . . Article III courts should not make decisions unless they have to." *National Treasury Employees Union,* 101 F. 3d at 1431.

The ripeness doctrine is applicable here because the Department has yet to make a

decision as to whether to approve or disapprove the proposed constitutional amendment challenged by Plaintiffs in this action. Without knowing the outcome of the Department's decision-making process, it is possible that Plaintiffs' claims concerning the proposed constitutional amendment may eventually be moot. Awaiting a final agency decision is consistent with the prudential consideration that a court should not intervene prematurely in the decision-making process until a final decision is made and administrative remedies are exhausted.

C. Plaintiff has Failed to Identify Any Final Agency Action Supporting Review under the Administrative Procedure Act.

There is no waiver of sovereign immunity for Plaintiffs' challenge concerning the proposed constitutional amendment under the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.* ("APA"), and Plaintiff has not identified any final agency action upon which its claim may be based. The APA only provides for review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court . . . ." 5 U.S.C. § 704. Because no statute provides for judicial review of Defendants' eventual decision concerning the proposed constitutional amendment independent of the APA, Plaintiffs must establish "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see Defenders of Wildlife v. Lujan*, 497 U.S. 871, 882 (1990).

The Supreme Court has defined final agency action as that which "marks the consummation of the agency's decisionmaking process" and "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). These conditions are not met in this case because the Department has not yet completed the decision-making process applicable to the proposed constitutional amendment. Until a decision has been reached, there is no "final agency action"

under the APA.

IV. CONCLUSION

Based on the foregoing and for good cause shown, Defendants respectfully request that the Cherokee Nation's Motion to Dismiss be granted and Plaintiffs' Complaint be dismissed without prejudice.

Dated: September 30, 2005

Respectfully submitted,

/s/

CAROLINE M. BLANCO
D.C. Bar No. 430118
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 305-0248
Fax: (202) 305-0267
E-mail: caroline.blanco@usdoj.gov

Of Counsel:

JANE SMITH, Attorney
SCOTT KEEP, Assistant Solicitor
Branch of Tribal Government & Alaska
Division of Indian Affairs
Office of the Solicitor, Mail Stop 6456
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
Telephone: (202) 208-6526
Fax: (202) 219-1791

Attorneys for Defendants

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Plaintiffs,	)	
v.	)	Case No. 1:03CV01711 (HHK)
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2005, a true and correct copy of the foregoing **DEFENDANTS' RESPONSE TO LIMITED INTERVENOR CHEROKEE NATION'S MOTION TO DISMISS** was served on the following counsel of record via first-class United States mail, postage prepaid, at the following addresses:

JONATHAN T. VELIE
VELIE & VELIE
210 East Main Street, Suite 222
Norman, OK 73069

/s/
Caroline M. Blanco