IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

NULANKEYUTMONEN NKIHTAQMIKON, et al.,	)	
Plaintiffs,	)	Civil No. 05-cv-00168-JAW Civil No. 06-cv-00050-JAW
ROBERT K. IMPSON, Acting Regional Director, Eastern Region, Bureau of Indian Affairs, et al.,	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' RENEWED MOTION TO DISMISS

In Defendants' Renewed Motion to Dismiss, Defendants Robert K. Impson, Acting Regional Director, Eastern Region, Bureau of Indian Affairs, et al. ("Defendants"), explained that Plaintiffs Nulankeyutmonen Nkihtaqmikon, et al.'s, ("Plaintiffs") National Environmental Policy Act ("NEPA"), the Indian Long-Term Leasing Act, National Historic Preservation Act ("NHPA"), Endangered Species Act ("ESA"), and Administrative Procedures Act ("APA") claims should be dismissed for failure to exhaust administrative remedies. As Defendants set forth in their Motion, approval of the ground lease at issue should have been appealed to the Interior Board of Indian Appeals ("IBIA"), pursuant to 25 C.F.R. 2.4(e). In addition, no exception exists which would excuse Plaintiffs from exhausting their administrative remedies. As Defendants further explained in their Motion, Plaintiffs' notice of appeal to the IBIA would be timely. Moreover, if Plaintiffs bring an administrative appeal, adjudication by the IBIA would not prejudice Plaintiffs' interests or present any imminent risk of the construction of the LNG facility. Consequently, Defendants' Renewed Motion to Dismiss should be granted.

I. Exhaustion of Administrative Remedies is Required.

As Defendants explained in their Renewed Motion to Dismiss, Plaintiffs were required to exhaust

the applicable administrative remedies before seeking judicial review of their claims. In regard to suits brought pursuant to the APA, the Supreme Court has stated that such actions "'explicitly require[] exhaustion of all intra-agency appeals mandated either by statute or by agency rule.'" *Volvo GM Heavy Truck Corporation v. United States Department of Labor*, 118 F.3d 205, 209 (4th Cir. 1997) (quoting *Darby v. Caseros*, 509 U.S. 137 (1993)). In this case, exhaustion is mandated by the Department of the Interior's ("Department") regulations governing Bureau of Indian Affairs ("BIA") decisions. 25 C.F.R. 2.6(a); *see also* 25 C.F.R. 162.113 (lease approvals are subject to administrative appeal).

Plaintiffs' Response asserts that "BIA's regulation is inadequate to require exhaustion." Pls.' Resp., 6-7. Courts, however, routinely uphold dismissal of lawsuits challenging BIA decisions on the ground that the plaintiff failed to take the required administrative remedies. *See*, *e.g.*, *Klaudt v. Department of Interior*, 990 F.2d 409, 411-12 (8th Cir. 1993) (citing 25 C.F.R. § 2.6 and holding that "federal regulations provide that administrative procedures must be followed before seeking relief in the court system").[1/] Moreover, Plaintiffs seem to have lost sight of the fact that the First Circuit analyzed the relevant regulations and found that "[a]lthough exhaustion is not a jurisdictional issue, it is mandatory, . . . subject to certain exceptions, ..." *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 33-34 (1st Cir. 2007) (citations omitted).

In addition, Plaintiffs' citation to *Center for Biological Diversity v. Dept. of Interior* does not offer much support for their argument. 255 F. Supp. 2d 1030 (D. Ariz. 2003). In that case, the plaintiffs had filed an administrative appeal and requested a stay of the decision at issue, which the Interior Board of Land Appeals ("IBLA") failed to rule upon within the required time period. *Id*. at 1033. The court ruled that the

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[1/] *See also Joint Bd. of Control v. United States*, 862 F.2d 195, 199-201 (9th Cir. 1988); *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 924-25 (10th Cir. 2004); *Blackbear v. Norton*, 93 Fed. Appx. 192, 193-94 (10th Cir. 2004); *James v. United States Department of Health and Human Resources*, 824 F.2d 1132, 1136-1137 (D.C. Cir. 1987).

parties had exhausted their administrative remedies, however, nevertheless the court stayed the action pending the final ruling on the parties' administrative appeal. *Id*. at 1036-38. In doing so, the court noted that "the IBLA retains specific expertise to inform the [c]ourt's final judgment. The IBLA's expertise will be helpful even upon reviewing the evidence in the record, because the IBLA may draw reasonable inferences from the evidence." *Id*. at 1037 (internal quotation omitted).

Plaintiffs also suggest that "the traditional exhaustion doctrine is inapplicable" to this case. Pls.' Resp., 8. Plaintiffs' suggestion misses the mark. There are express provisions for administrative remedies that apply to Plaintiffs' claims in the regulations promulgated by the Department, "which automatically triggers a non-jurisdictional exhaustion inquiry."[2/] *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1248 (D.C. Cir. 2004).[3/] Accordingly, Plaintiffs were certainly required to exhaust the applicable administrative remedies before seeking judicial review of their claims.

II. No Exception to the Exhaustion Doctrine Applies to Plaintiffs' Claims.

Upon considering Plaintiffs' appeal, the First Circuit cited *White Mountain Apache Tribe v. Hodel*, which found that "[t]here are exceptional circumstances where exhaustion may not be required." *Nulankeyutmonen Nkihtaqmikon*, 503 F.3d at 33 (citing *White Mountain Apache Tribe,* 840 F.2d 675, 677 (9th Cir.1988)). Plaintiffs' Response, however, fails to establish that an exception to the exhaustion

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[2/] Defendants acknowledge that the First Circuit concluded that "exhaustion is not a jurisdictional bar in this case." *Nulankeyutmonen Nkihtaqmikon*, 503 F.3d at 33. Other courts have analyzed the Department's regulations and reached an opposite conclusion. *See e.g.*, *Joint Bd of Control*, 862 F.2d at 199 (quoting *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir.1988)). *See also Stock West Corp. v. Lujan*, 982 F.2d 1389, 1394 (9th Cir. 1993).

[3/] In, *Avocados Plus Inc.,* the court explains that "non-jurisdictional exhaustion serves three functions: giving agencies the opportunity to correct their own errors, affording parties and courts the benefits of agencies' expertise, [and] compiling a record adequate for judicial review[.]" 370 F.3d at 1247 (citing *Marine Mammal Conservancy, Inc. v. Dep't of Agric*., 134 F.3d 409 (D.C. Cir. 1998); *McCarthy v. Madigan*, 503 U.S. 140, 145-46 (1992)) (internal quotations omitted).

requirement should be applied to this case.

Plaintiffs contend that they should be excused from exhausting their administrative remedies, because they were not provided with notice regarding their opportunity to appeal the ground lease decision. Plaintiffs are correct that in *Ezratty v. Com. of Puerto Rico*, the First Circuit acknowledged that if an agency violates a law's procedural requirements, it "normally . . . would refuse to return the case to the agency." 648 F.2d 770, 775 (1st Cir. 1981). In *Ezratty*, the agency refused to provide a hearing to plaintiffs and "was unwilling to provide any further department proceedings to exhaust." *Id*. Nevertheless, the First Circuit concluded that "[c]onsiderations related to agency expertise, accuracy and judicial economy suggest that exhaustion is still appropriate despite the agency's initial failure to provide an appropriate internal remedy." *Id*. at 778. Here, Plaintiffs do not contend that the Department refused to provide them an administrative hearing; rather, their argument is based upon lack of notice. The Department's regulations expressly provide for such situations stating that "[f]ailure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given . . . ." 25 C.F.R. 2.7(b). Accordingly, Plaintiffs' notice of appeal to the IBIA would be timely and considerations such as "agency expertise, accuracy and judicial economy" indicate that such an appeal is appropriate.

Plaintiffs also claim that requiring exhaustion of administrative remedies would cause them "severe harm." Pls.' Resp., 13-15.[4] In support of this assertion, Plaintiffs contend that "[i]n the absence of a stay, the time required for an administrative appeal would allow these processes to move so far along that the LNG facility would be a *fait accompli* before the legality of BIA's Lease approval is ever considered by a

[4] In support of their argument, Plaintiffs state that they "have an interest in preserving their right to access the Split Rock site for cultural, spiritual, and recreational uses." Pls.' Resp., 14. Notably, Plaintiffs do not claim that they cannot, at this time, access the Split Rock site.

court." *Id*. at 15. Plaintiffs' assertion is simply inaccurate. As noted in Defendants' Motion, construction of the LNG facility is contingent upon a final decision by FERC to authorize the facility, after it completes its environmental review process. Defs.' Mot. at 7-8. Plaintiffs have ample opportunity to participate in the NEPA process in relation to the LNG facility and then challenge any future decision made by FERC. In addition, the Department's regulations provide Plaintiffs with the ability to seek a stay of the ground lease approval, while the administrative proceedings are pending. 43 C.F.R. § 4.21. Thus, Plaintiffs cannot show that they will experience irreparable harm if they are not permitted to "secure immediate judicial consideration" of their claims. *Portela-Gonzalea v. Secretary of the Navy*, 109 F.3d 74, 77 (1st Cir. 1997).[5/]

Plaintiffs also argue that "exhaustion is often excused in NEPA cases because of the distinct purposes of the NEPA statute." Pls.' Resp. at 10 (citing *Park County Resource Council, Inc. v. U.S. Dept. Of Agric*., 817 F.2d 609, 620 (10th Cir. 1987), *overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970, 917 (10th Cir. 1992)). Other courts, however, have examined this issue and required the exhaustion of administrative remedies before they will consider NEPA claims. *See e.g., Kleissler v. U.S. Forest Service*, 183 F.3d 196, 200-02 (3d Cir. 1999); *Silverton Snowmobile Club v. U.S. Forest Service*, 433 F.3d 772, 785 (10th Cir. 2006) (plaintiffs did not raise their claim of failure to issue an Environmental Impact Statement ["EIS"] in the administrative proceedings. "They have accordingly waived it."). In support of their argument, Plaintiffs claim that "whether the NEPA statute required BIA to prepare an EIS prior to issuing a Lease approval decision is outside the realm of BIA's mission and expertise . . . ." Pls.' Resp., 16. An agency's decision, however, "not [to] prepare an EIS is a factual

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[5/] Plaintiffs' citation to *Chemehuvi Indian Tribe v. Bure*, 45 IBIA 81 (2007), also fails to establish that they will be irreparably harmed. In *Chemehuvi Indian Tribe*, the IBIA concluded that the parties' appeal was untimely, in part, because the decision at issue "contained accurate and complete appeal rights, including notice that an appeal must be filed with the Board within 30 days of receipt of the decision." *Id*. at 83. Here, Defendants have not made a similar assertion.

determination which implicates agency expertise." *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004).

Moreover, Plaintiffs' argument ignores the fact that the IBIA regularly considers NEPA claims; and, in doing so, applies its expertise to the very areas of Plaintiffs' concern. *See, e.g.*, *Neighbors for Rational Development, Inc. v. Albuquerque Area Director, Bureau of Indian Affairs*, 33 IBIA 36 (1998) (examination by the IBIA of the BIA's NEPA compliance in conjunction with a ground lease approval); *County of Colusa v. BIA*, 38 IBIA 274 (2003) (reviewing BIA's NEPA compliance in connection with a lease between the Cortina Indian Rancheria and a waste management company); *see also John Santana v. BIA*, IBIA 97-127-A (1999).[6]

Plaintiffs also suggest that the exhaustion requirement should be waived, because their NHPA and Leasing Act claims "involve purely legal issues." Pls.' Resp. at 16. It is important to note, however, that "[t]he legal issues exception is extremely narrow and should only be invoked if the issues involved are ones in which the agency has no expertise or which call for factual determinations." *Ace Property and Casualty Insurance Company, v. Federal Crop Insurance Corporation*, 440 F.3d 992, 1001 (8th Cir. 2006) (citation omitted). Here, Plaintiffs' claims include allegations regarding the ground lease agreement's effects on tribal resources, the interests of the Tribe and Indian Township, the actions of the Tribal Council, and the alleged religious and cultural significance of the Split Rock site. *See*, *e.g.*, Pls.' Second Am. Compl., ¶¶ 117-119, 124. There is no question that "BIA has special expertise and extensive experience in dealing with Indian affairs." *Runs After v. United States,* 766 F.2d 347, 352 (8th Cir. 1985); *see also Shenandoah v. United States*, 159 F.3d 708, 713 (2d Cir. 1998). Thus, the BIA should be afforded the opportunity to apply

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[6] Plaintiffs' argument that BIA's alleged violations "strongly suggest that BIA was trying to evade its obligations" fails to acknowledge that the IBIA is an impartial agency tribunal. Pls.' Resp., 16. There is nothing to suggest that the IBIA will not fairly and independently evaluate Plaintiffs' claims regarding the BIA's actions.

its expertise and experience to evaluate Plaintiffs' claims prior to further judicial action.

Plaintiffs' contention that "requiring exhaustion would result in a waste of resources" also misses the mark. Plaintiffs' argument fails to acknowledge that if IBIA determines that the lease approval was defective, the matter can be remanded to the agency for further action in accordance with the decision. In such an event, no further proceedings would be necessary. Moreover, in *Portela-Gonzalea*, the First Circuit rejected the argument that "a perceived waste of resources, in and of itself, can justify excusing nonexhaustion of administrative remedies." 109 F.3d at 79. The First Circuit explained "[o]nce an aggrieved party has brought suit, forcing [the party] to retreat to any unused administrative appeal potentially wastes resources. The Supreme Court has disavowed such a resupinate approach." *Id*. "Following this train of thought, the Court has concluded that, by and large, concerns regarding efficiency militate in favor of, rather than against, strict application of the exhaustion doctrine." *Id*.

Because no exception to the exhaustion doctrine applies to Plaintiffs' claims, Defendants respectfully request that Defendants' Renewed Motion to Dismiss be granted.

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Respectfully submitted,

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