UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARQUITA CARATTINI, *et al.* Plaintiffs, v. **KEN SALAZAR**, *et al*. Defendants.	Civil Action No. 5:09-cv-00489-D **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO AFFIRM**

INTRODUCTION

The defendants in this case — Ken Salazar, Larry Echo Hawk, and the United States Department of the Interior ("DOI") — offer this Reply memorandum in support of their motion to affirm the agency action at issue in this case. The plaintiffs in this case — Marquita Carattini, Richard Banderas, and Ron Ahtone — challenge a DOI Decision Letter (the "Decision") that recognized Carattini and Banderas's removal from the Apache Business Committee ("ABC") of the Apache Tribe of Oklahoma (the "Tribe"), while declining to recognize Ahtone's removal on separate grounds, in addition to recognizing the results of a subsequent special election. The plaintiffs allege the Decision was arbitrary and capricious, and therefore should be overturned under the Administrative Procedure Act ("APA").

In their Motion to Affirm, the defendants argued that adjudication of the plaintiffs' claims would require this Court to consider issues of tribal law that are beyond its jurisdiction. Furthermore, even if this Court could hear the claim, the defendants' Decision was fully supported by the administrative record, and the plaintiffs have failed to carry their burden under

the APA of demonstrating that the Decision was arbitrary and capricious. The plaintiffs' Response memorandum attempts to rebut both of those points but, as discussed below, fails to do so. Therefore, the plaintiffs' Motion for Summary Judgment should be denied and the agency action should be affirmed or, in the alternative, summary judgment should be entered on behalf of the defendants.

ARGUMENT

I. The District Court Is Without Jurisdiction to Resolve this Intra-Tribal Dispute.

Federal courts are "without jurisdiction to resolve intra-tribal disputes requiring interpretation of a tribal constitution." *Sac & Fox Tribe v. BIA*, 360 F. Supp. 2d 986, 993 (N.D. Iowa 2005) ("*Sac & Fox 2005*"); *see also* Defendants' Memorandum in Support of Defendants' Motion to Affirm ("Defs.' Br."), pp. 6–10. The plaintiffs claim that they "are not asking this Court to resolve an intra-tribal dispute," and therefore their claim is not jurisdictionally barred. Plaintiffs' Response to Defendants' Motion to Affirm and Cross-Motion for Summary Judgment ("Pls.' Response"), p. 9.

The plaintiffs' contention is directly refuted by Plaintiffs' Complaint ("Pls.' Compl."), which asks this Court to issue a declaratory judgment that "Carattini and Banderas are restored to their rightful positions on the ABC." Pls.' Compl. Prayer for Relief. The plaintiffs claim that DOI's Decision was "contrary to the laws of the Apache Tribe of Oklahoma" and that the special election held to replace Carattini and Banderas was "not conducted consistent with the laws and Constitution of the Apache Tribe of Oklahoma." *Id*. The plaintiffs concede that "[s]hould the Court grant Plaintiffs' request, then Plaintiffs would be restored to their rightful positions on the ABC," redressing their alleged injury. Pls.' Response, p. 8.

The plaintiffs's requested relief, and the basis for that relief, unambiguously request this Court to resolve an intra-tribal dispute. The plaintiffs' alleged injury stems entirely from that intra-tribal dispute, and their alleged injury cannot be redressed except through resolution of that intra-tribal dispute by returning them to their former positions on the ABC. Furthermore, the plaintiffs have unambiguously claimed they were injured because DOI's Decision was allegedly inconsistent with the laws and Constitution of the Apache Tribe of Oklahoma. Thus, this Court cannot determine whether DOI's actions were arbitrary and capricious without interpreting the laws and Constitution of the Apache Tribe of Oklahoma. Consequently, this case consists entirely of an intra-tribal dispute that requires interpretation of tribal laws or constitutional provisions, despite the plaintiffs' argument to the contrary, and this Court lacks jurisdiction to award the plaintiffs their requested relief. Furthermore, this Court cannot even evaluate the plaintiffs' standing without resolving an intra-tribal dispute requiring interpretation of a tribal constitution.[1/]

[1/]While the defendants did not specifically move for summary judgment on standing grounds, defendants noted that standing in this case is problematic. *See* Defs.' Br., p. 7, n. 3. The plaintiffs address this issue at length, attempting to establish their own standing. Pls.' Response, pp. 3–8. However, the plaintiffs have failed to fully address the fundamental standing question presented in this case: Whether reversal of DOI's decision would redress any injury the plaintiffs suffered. The plaintiffs lack standing unless "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc*., 528 U.S. 161, 180–81 (2000) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The plaintiffs must demonstrate that their requested relief — reversal of DOI's Decision — would redress their underlying alleged injury. The plaintiffs' asserted injury is the loss of political office. The conferral of that office is in the hands of the Tribe. The Tribe is not a party to this litigation, and is not bound by any determination of the court because it is not a party. The defendants have no power to reinstate the plaintiff in office. It is wholly speculative as to what the Tribe would do if DOI's actions were determined to be arbitrary and capricious. It would be anticipated that the Tribe would resist any attempt to of plaintiffs to seat themselves as members of the ABC — especially if the premise of an arbitrary and capricious determination were premised on tribal law and constitutional interpretations with which the Tribe did not agree. Indeed, a tribe might initiate a separate action against the defendants, possibly in a separate

As *Sac & Fox 2005* held, federal courts lack jurisdiction to resolve that type of dispute, even for the limited purpose of evaluating plaintiffs' standing. 360 F. Supp. 2d at 993–94 (holding that the plaintiff, a dissident tribal election board, lacked standing to bring its claims because adjudication of its claims would require the court to determine whether the plaintiff election board was the proper plaintiff to bring its claims against DOI under the APA). This Court cannot resolve the plaintiffs' claims without first resolving the underlying intra-tribal dispute, resolution of which will require interpretation of the Tribal Constitution. That analysis falls outside the Court's jurisdiction.

The plaintiffs also attempt to distinguish the cases that establish federal courts lack jurisdiction over intra-tribal disputes. The plaintiffs note that, in *Wopsock v. Natchees*, No. Civ. 204CV00675TS, 2005 WL 1503425 (D. Utah June 21, 2005), the court dismissed the case due to failure to exhaust administrative remedies. Pls.' Response, p. 11. However, the plaintiffs ignore *Wopsock*'s holding that "[j]urisdiction to resolve internal tribal disputes [and] interpret tribal constitutions and laws . . . lies with Indian tribes and not in the district courts," clearly holding that district courts lack jurisdiction to resolve intra-tribal disputes. *Wopsock*, 2005 WL 1503425 at *1.

The plaintiffs also note that, in *Sac & Fox Tribe v. BIA*, 321 F. Supp. 2d 1055 (N.D. Iowa 2004) ("*Sac & Fox 2004*"), the district court initially found in 2004 it had jurisdiction to consider the plaintiff's APA claim against DOI. Pls.' Response, pp 11-12. The plaintiffs attempt to distinguish the district court's 2005 dismissal of the *Sac & Fox* plaintiffs' case due to failure of

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forum (such as the District of Columbia, where venue would also be proper) challenging any action taken by DOI on the basis of a decision in this case. Given the absence of the Tribe in this action, it is sheer speculation that the plaintiffs' requested relief could redress their claimed injury.

standing, asserting that it was "not on a determination that the court did not have jurisdiction underAPA to consider the Election Board's claim." *Id*. at 12. However, jurisdiction is precisely why the district court dismissed the *Sac & Fox* plaintiffs' case in 2005: Determination of their standing would have required the district court to resolve the underlying intra-tribal dispute based on interpretation of the tribal constitution, over which the court was "without jurisdiction." *Sac & Fox 2005*, 360 F. Supp. 2d at 993. The court clearly recognized, clarifying its earlier 2004 ruling, that its jurisdiction to address BIA actions ends if it would require the court to interpret the tribe's constitution or resolve tribal law matters.

The plaintiffs point out that *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983), recognized that tribal remedies were available in that case, asserting that "[t]here is no assertion by any party in this litigation that any other remedies are available." Pls.' Response, p. 12. The plaintiffs seem to imply that this Court has jurisdiction over this case because "[t]here is no assertion by any party to this litigation that any other remedies are available." *Id*. However, the plaintiffs do not explain how the lack of another forum would confer on this Court jurisdiction to interpret the Tribal Constitution and other tribal law to resolve an intra-tribal dispute over which it otherwise lacks jurisdiction. *See Bullcreek*, 426 F. Supp. 2d at 1233. (finding no legal basis to establish the court's "ability to intervene in intra-tribal disputes when no [tribal courts] exist within the tribe").[2/]

[2/]Furthermore, as suggested in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1980), the Tribe itself has sovereign power to resolve intra-tribal disputes, whether by appointing a tribal court, or by exercising that power through a general council of all members of the tribe. *Id.* at 66, n. 49; *see also Bullcreek v. U.S. Dep't of the Interior*, 426 F. Supp. 2d 1221, 1233 (D. Utah 2006) (holding that there "is a General Council and Executive Committee that is in place to determine the interests of the Band," and therefore it is immaterial whether no tribal court is empowered to resolve the dispute). In this case, the Tribal Council is the supreme governing body of the Apache Tribe of Oklahoma, and can exercise the tribe's sovereign power to resolve intra-tribal

Furthermore, the underlying rationale for striking the agency action in *Goodface* was distinct from this case: In *Goodface*, DOI had recognized multiple tribal councils, which effectively created "a hiatus in tribal government which jeopardized the continuation of necessary day-to-day services on the reservation." 708 F.2d at 338–39. It was this unique action of the BIA, not dependent on tribal law or the tribe's constitution that was held to be arbitrary and capricious. There is no equivalent hiatus here, and thus no basis under *Goodface* for this Court to involve itself. Here, the challenge to the review of the BIA action necessitates resolution of tribal law issues. Ultimately, the plaintiffs fail to come to grips with *Goodface*'s broader implications as it applies to the case at hand: "It is essential that the parties seek a tribal remedy, for as previously noted, substantial doubt exists that federal courts can intervene **under any circumstances** to determine the rights of the contestants in a tribal election dispute." 708 F.2d at 339 (emphasis added).

Finally, plaintiffs fail to effectively counter *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985). They note that the case was dismissed for the failure to exhaust administrative remedies. Pls.' Response, pp. 12–13. But plaintiffs fail to acknowledge the alternative holding of the court in *Runs After*'s that "[r]esolution of . . . disputes involving question of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court." 766 F.2d at 352. Here, the plaintiffs are unable to separate the attempt to review agency under the APA from the necessity to interpret tribal law and the Tribe's constitution.

These cases all stand for a clear proposition: Federal courts lack jurisdiction to resolve intra-tribal disputes that require interpretation of tribal law. Each of the cases clearly states that

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disputes, as in *Bullcreek*. *See* Tribal Constitution, AR 1, art. III

proposition. None of the plaintiffs' attempts to distinguish these cases refutes that clear proposition. In this case, resolution of the plaintiffs' claims would necessarily require this Court to resolve an intra-tribal dispute by interpreting tribal law. Therefore, this Court lacks jurisdiction over the plaintiffs' claims.

II. The Plaintiffs have Failed to Establish any Violation of the APA.

When reviewing a challenge under the APA, the court must uphold the agency's action unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 823 (10th Cir. 2008). In this case, in their Response to the Defendants' Motion to Affirm, the plaintiffs challenge three elements of DOI's Decision: DOI's determination that Carattini and Banderas missed at least three consecutive meetings of the ABC; DOI's determination that the plaintiffs' absences were not excused; and DOI's determination that adequate notice was provided for the meetings that Carattini and Banderas missed. As described below, the plaintiffs have failed to carry their burden of establishing that any of those determinations were arbitrary and capricious.

1. The plaintiffs have failed to establish that DOI's conclusion that Carattini and Banderas missed three consecutive meetings was arbitrary and capricious.

DOI concluded that Carattini and Banderas missed at least three consecutive meetings of the ABC and therefore automatically lost their offices under the Constitution of the Apache Tribe of Oklahoma. *See* Defs.' Br., pp. 12–14; Tribal Constitution, AR 1, art. XIII; Decision Letter, AR 144, p.5. The plaintiffs assert that conclusion was arbitrary and capricious as to

several of the meetings the plaintiffs missed. Each of the other meetings discussed in the plaintiffs' Response is addressed briefly in reply here:

- July 8 meeting: The plaintiffs claim that "[a]s Defendants' assert, a meeting does not require a quorum to transact business." Pls.' Response, p. 15. That characterization is inaccurate: The defendants have repeatedly asserted that a quorum is required for the ABC to transact business. *See* Defs.' Br., p. 14 ("However, the Tribal Constitution does state that quorum is necessary 'to transact business *at any meeting*.'") (quoting Tribal Constitution, AR 1, art. XV). Regardless, the significance of that assertion in determining whether this meeting was missed is not clear. The relevant question under the Tribal Constitution is whether the committee member "misses" a meeting. Tribal Constitution, AR 1, art. XIII. In the case of the July 8 meeting, Carattini and Banderas missed the entirety of the meeting, with the exception of the beginning of the roll call. 7/8/2008 Meeting Minutes, AR 34, p.1. In any meaningful sense of the word, Carattini and Banderas were "missing" from the meeting, and it was not arbitrary and capricious for DOI to reach that conclusion.
- July 14 — The plaintiffs claim this missed meeting cannot form a basis for DOI's Decision because DOI did not address the meeting in its Decision Letter; the plaintiffs do not assert that they were present at the meeting. Pls.' Response, p. 15. However, the plaintiffs' conclusion misapplies the arbitrary and capricious standard. An agency action is not arbitrary and capricious if the reasoned basis for the agency's action was "supported by the facts in the record." *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004). In this case, the reasoned basis on which DOI based its action was its recognition that Carattini and Banderas "had automatically

lost their offices pursuant to the constitutional provision of Article XIII" by missing at least three consecutive ABC meetings. Decision Letter, AR 144, p. 5. The record fully supported the conclusion that Carattini and Banderas missed the meeting on July 14. 7/14/2008 Meeting Minutes, AR 42, p. 1. It is immaterial that DOI's Decision does not specifically note that absence, which is fully supported by the record. Regardless, even if this missed meeting could not form part of the basis for DOI's Decision, the missed meetings on July 8, July 10, July 30, July 31, and August 1 conclusively establish that the plaintiffs missed at least three consecutive meetings.

- July 30, July 31, and August 1 meetings: These meetings minutes reflect the presence of other ABC members, but do not show that Carattini and Banderas were present. Pls.' Response, pp. 15–16. The plaintiffs do not claim that Carattini and Banderas were present at these meetings. *See* Pls.' Response, *passim*; Defs.' Br., p. 3, Undisputed Material Fact 6. Furthermore, an affidavit in the record avers that Carattini and Banderas missed all the meetings between June 21, 2008, and August 1, 2008. Rivera Affidavit, AR 113, p.1. All the evidence in the record suggests that Carattini and Banderas missed these meetings, and it was not arbitrary and capricious for DOI to reach that conclusion. The plaintiffs assert that Carattini and Banderas were not marked as present "because the Chairman and Vice-Chairman no longer considered them part of the ABC." Pls.' Response, p. 15. This argument is wholly unsupported by any direct evidence in the record. To adopt the plaintiffs' assertion would itself have been arbitrary and capricious.

As discussed above, there is adequate evidence in the record to establish that Carattini and Banderas missed each of the meetings identified in DOI's Decision. The plaintiffs have failed to carry their burden of establishing that it was arbitrary and capricious for DOI to

conclude that Carattini and Banderas missed at least three consecutive meetings, forfeiting their offices.

2. DOI's conclusion that the plaintiffs' absences were unexcused was not arbitrary and capricious.

The Tribal Constitution allows the ABC to excuse the absences of elected officials, and thus to prevent them from automatically losing office. Tribal Constitution, AR 1, art. XIII. As discussed in Defendants' Brief, granting that excuse is an enumerated power of the ABC, and must be "transacted" as business at a meeting, with a quorum present. Defs.' Br., pp. 14–15. No evidence in the record suggests that the ABC excused any of the absences of Carattini or Banderas.

In their response, the plaintiffs state: "If Defendants want to 'suppose' something from the record, it is that the quorum of the ABC [by which they mean themselves] in their last official act . . . declared to the Chairman and Vice-Chairman that they would not participate in any meeting called by the Chairman in which Plaintiff Ahtone was not recognized as a member of the ABC." Pls.' Response, pp. 17–18. However, acting on such a supposition without any support in the record would have been more arbitrary and capricious than any action objected to by plaintiffs. The plaintiffs have failed to carry their burden of establishing that it was arbitrary and capricious for DOI to conclude that Carattini and Banderas's absences from the meetings were not excused by the Committee.

3. DOI's conclusion that sufficient notice was provided to the plaintiffs was not arbitrary and capricious.

The plaintiffs claim that DOI arbitrarily and capriciously concluded that Carattini and Banderas were given adequate notice of the upcoming meetings that they missed. The plaintiffs have cited to no source of law to establish this supposed notice requirement, and thus have given

this Court no standard to apply. The Tribal Constitution certainly contains no notice requirement for ABC meetings, although it does contain a notice requirement for special meetings of the larger Tribal Council. Tribal Constitution, AR 1, art. VI, § 2.

Carattini and Banderas attempt to tie their own situation to the analysis DOI applied to their co-plaintiff, Ahtone. Pls.' Response, pp. 18–19. DOI determined that Ahtone did not forfeit office due to missed meetings. Decision Letter, AR 144, p. 5. There were two bases for this determination: Nothing in the record suggested that Ahtone was given any notice of any of the meetings he missed, and there was no assertion by any relevant party that Ahtone had forfeited office due to missed meetings. *Id*. Consequently, DOI declined to *sua sponte* determine that Ahtone had forfeited office. *Id*.

Ahtone's situation is materially different from Carattini and Banderas's. No evidence in the record suggests Ahtone had any notice at all of the meetings he missed. In contrast, there is plentiful evidence that Carattini and Banderas were notified of all the meetings they missed. *See* Defs.' Br., pp. 17–18. Furthermore, whereas this entire case is premised on the Committee Chairman's assertion that Carattini and Banderas were removed from office for missing three or more meetings of the Committee, no relevant party had asserted that Ahtone had forfeited office due to absence. Thus the question was never presented to DOI, which would have had to act *sua sponte* to assert Ahtone's removal due to absence. Such sua sponte action would indeed have been arbitrary and capricious.

In conclusion, the plaintiffs have failed to support their assertion that notice was insufficient. The record establishes that Carattini and Banderas received some notice of all the meetings they missed. The plaintiffs cite no law establishing any minimal notice requirement, and they do not allege that they were not notified of the meetings. The plaintiffs have failed to

establish that DOI was arbitrary and capricious in its conclusion that adequate notice was given to Carattini and Banderas.

CONCLUSION

As discussed above, the plaintiffs' claims would require this Court to interpret matters of tribal law, and therefore present no case or controversy that can be heard in this Court. However, even if this Court did have jurisdiction over the plaintiffs' claims, the plaintiffs have failed to carry their burden under the APA of demonstrating that DOI's decisions were arbitrary and capricious. Therefore, the plaintiffs' Motion for Summary Judgment should be denied and the agency action should be affirmed or, in the alternative, summary judgment should be entered on behalf of the defendants.

Respectfully submitted August 20, 2009.

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CERTIFICATE OF SERVICE

I certify that a copy of this document was served on August 20, 2009, by Electronic Case Filing, on the following counsel:

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