UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARQUITA CARATTINI, et al. Plaintiffs, v. **KEN SALAZAR**, Secretary of the Interior **LARRY ECHO HAWK**,[1/] Assistant Secretary of the Interior — Indian Affairs **UNITED STATES DEPARTMENT OF THE INTERIOR**, Defendants.	Civil Action No. 5:09-cv-00489-D **DEFENDANTS' MOTION TO AFFIRM OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY JUDGMENT**

The defendants move this Court to deny the plaintiffs' motion for summary judgment and affirm the agency decision at issue in this case. 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 did have jurisdiction over the plaintiffs' claims, the plaintiffs have failed to carry their burden under the Administrative Procedure Act of demonstrating that the defendants' decision was arbitrary and capricious. In the alternative, the defendants cross-move for summary judgment to be entered on behalf of the defendants for the reasons listed above.

[1/]Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Larry Echo Hawk is substituted as defendant for George Skibine.

July 17, 2009

Respectfully submitted,
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MARQUITA CARATTINI, et al. Plaintiffs, v. **KEN SALAZAR**, Secretary of the Interior **LARRY ECHO HAWK**,[1/] Assistant Secretary of the Interior — Indian Affairs **UNITED STATES DEPARTMENT OF THE INTERIOR**, Defendants.	Civil Action No. 5:09-cv-00489-D **DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO AFFIRM**

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INTRODUCTION

The defendants in this case — Ken Salazar, Larry Echo Hawk, and the United States Department of the Interior ("DOI") — offer this 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 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 Letter was arbitrary and capricious, and therefore should be overturned under the Administrative Procedure Act ("APA"). As discussed below, adjudication of the plaintiffs' claims would require this Court to consider issues of tribal law that are beyond its jurisdiction. However, even if this Court could hear the claim, the defendants' decision is fully supported under the administrative record, and the plaintiffs have failed to carry their burden under the APA. 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.

STATEMENT OF UNDISPUTED MATERIAL FACTS[2/]

1. The Apache Tribe of Oklahoma is governed by a Constitution and a Tribal Council consisting of all tribal members over 18 years of age. Officers of the Tribal Council are the Chairman, Vice-Chairman, and Secretary-Treasurer. Tribal Constitution, Administrative R. Doc. ("AR") 1.

2. The day-to-day governance of the Tribe is delegated to the five-person Apache Business Committee ("ABC," or "Committee") consisting of the three officers of the Tribal Council and two other members elected by the Tribe. Tribal Constitution, AR 1.

[2/]The defendants have moved to affirm the decision of the agency, and only alternatively for summary judgment given the Tenth Circuit's criticism of the use of summary judgment in record review cases. *Citizens For Alternatives To Radioactive Dumping v. U.S. Dep't. of Energy,* 485 F.3d 1091, 1095 n. 3 (10th Cir. 2007); *Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 823–24 (10th Cir. 2000) (finding that the use of summary judgment procedures in an APA review case was consistent with Tenth Circuit precedent where "the parties' use of, and the district court's acceptance of, the summary judgment procedures resulted in no harm to either party."). The Tenth Circuit has held that the use of summary judgment procedures by the district court "is inconsistent with the standards for judicial review of agency action under the [Administrative Procedure Act]" with review limited to the administrative record." *Olenhouse v. Commodity Credit Corp.,* 42 F.3d 1560, 1579-80 (10th Cir.1994). Defendants do not believe that statements of material fact not in dispute comfortably fit into a motion to affirm. *American States Ins. Co. v. Dastar Corp*. 318 F.3d 881, 890 at n.10 (9th Cir. 2003) ("As the case involved a review of the administrative record, there were no material facts to be decided, and the court's legal determinations effectively ended the case."). Where judicial review under the APA is generally limited to the administrative record, "there are no material facts in dispute." *Maine v. Norton*, 257 F. Supp. 2d 357, 363 (D. Me. 2003). In reviewing agency action, the court must "ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." Olenhouse, 42 F.3d at 1574 (footnote omitted). While we have no particular dispute with plaintiffs' statement of material facts, any factual finding in the record by the agency based upon substantial evidence must be sustained. To the extent there is any variance between plaintiffs' statement and the record, the administrative record controls.

3. ABC elections were held in May of 2008. Alonzo Chalepah was elected Chairman, Mary Rivera Vice Chairman, Marquita Carattini Secretary/Treasurer, and both Ronald Ahtone and Richard Banderas were elected as Committee members. Election Results, AR 23.

4. After a contentious Tribal Council meeting in June of 2008, discord grew between Chairman Chalepah and Vice Chairman Rivera on one side (the "Chalepah Group"), and Secretary-Treasurer Carattini and members Banderas and Ahtone (the "Carattini Group") on the other side. Chalepah Letter, AR 31.

5. In June, 2008, the Chalepah Group purported to remove Ahtone by asserting that he was not eligible for enrollment in the Tribe. Meeting Minutes, AR 34; Resolution, AR 35.

6. In July and August of 2008, Chairman Chalepah called a series of special meetings of the Committee. The Plaintiffs did not attend these meetings. *See* Meeting Minutes, AR 34, 39, 42, 47–49.

7. The Tribe's Constitution provides that a Committee member shall lose his membership on the Committee if he misses three meetings in a row without excuse. Tribal Constitution, AR 1.

8. On August 14, 2008, Chalepah notified Carattini and Banderas that they were no longer on the Committee because they missed three consecutive meetings. Letters to Carattini and Banderas, AR 55–57.

9. The Tribe then held a special election to elect replacements. Special Election Results, AR 104.

10. After a series of decisions by the Superintendent of BIA's Anadarko Agency and the Director of the Southern Plains Region, on January 29, 2009, George Skibine, Deputy Assistant Secretary for Policy and Economic Development, exercising the authority of the Assistant Secretary-Indian Affairs as delegated to him, issued a decision letter holding that the ABC is made up of four members of the Chalepah group and Ahtone, of the Carattini group. Decision Letter, AR 144.

11. The January 29 decision found Carattini and Banderas to have been legitimately removed from their positions on the ABC for missing three meetings of the Committee in a row, without excuse. Mr. Skibine's decision was final agency action. *Id.*

12. The plaintiffs filed their complaint in this case on March 2, 2009, claiming the agency's action violated the APA. Plaintiffs' Complaint ("Pls.' Compl."), dkt. 1.

STANDARD OF REVIEW

Federal courts lack plenary jurisdiction, and ensuring that they have subject matter jurisdiction over the cases they hear "is not a mere nicety of legal metaphysics" — it is part of "the central principle of a free society that courts have finite bounds of authority." *U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988). The Supreme Court presumes that federal courts lack jurisdiction unless the contrary appears

affirmatively from the record. *United States Dep't. of Energy v. Ohio*, 503 U.S. 607, 614 (1992). A court must dismiss a case over which it lacks subject matter jurisdiction. *Id.* Furthermore, the plaintiff carries the burden of affirmatively demonstrating subject matter jurisdiction. *Port City Props. v. Union Pac. R. Co.*, 518 F.3d 1186, 1189 (10th Cir. 2008).

Subject matter jurisdiction does not exist unless the plaintiff has standing to bring suit. *Bennett v. Spear*, 520 U.S. 154, 163 (1997). A plaintiff has standing if she can demonstrate that she "has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Id.* at 162. (internal quotations omitted).

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). This standard is a narrow one whereby "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The court should not determine whether it would have decided an issue differently; instead, it is to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* Generally, a decision is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it

could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *United Keetoowah Band of Cherokee Indians of Okla. v. U.S. Dep't of Housing and Urban Dev.*, 567 F.3d 1235, 1239 (10th Cir. 2009). The court's review is to be limited to the administrative record. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1579–80 (10th Cir. 1994).

ARGUMENT

I. The District Court is Without Jurisdiction to Resolve Tribal Law Issues Necessary to Resolve the Counts of the Plaintiffs' Complaint and to Grant the Relief Requested.

The plaintiffs have failed to carry their burden of demonstrating that this Court has subject matter jurisdiction to grant relief that would adjudicate issues of tribal law. Plaintiffs' prayer for relief, at paragraphs 1–3, directly request an adjudication that the BIA actions were "contrary to the laws of the Apache Tribe of Oklahoma," and prayer for relief paragraph 4 directly requests an adjudication that the special election "was not consistent with the laws and Constitution of the Apache Tribe of Oklahoma." *See* Pls. Compl. at pp. 14–15. Prayer for relief paragraph 6 likewise appears to rely on the premise that, under the tribal law, Carattini and Banderas are in fact "duly elected members of the ABC." This Court does not have jurisdiction to resolve issues of tribal law. Any relief dependent upon tribal law adjudication is outside the jurisdiction of the

Court.[3/] This Court also lacks jurisdiction to determine the makeup of the Tribe's governing body.

"Jurisdiction to resolve internal tribal disputes [and] interpret tribal constitutions and laws . . . lies with Indian tribes and not in the district courts." *Wopsock v. Natchees*, No. Civ. 204CV00675TS, 2005 WL 1503425 at *1 (D. Utah June 21, 2005), *aff'd Wopsock v. Natchees*, 279 Fed.Appx. 679 (10th Cir. 2008) (quoting *Smith v. Babbitt.*, 100 F.3d 556, 559 (8th Cir. 1996)). "[S]ubstantial doubt exists that federal courts can intervene under any circumstance to determine the rights of the contestants in a tribal election dispute." *Wopsock*, 2005 WL 1503425 at *2 (quoting *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983)).

The district court in *Sac & Fox Tribe v. BIA*, 321 F. Supp.2d 1055 (N. D. Iowa 2004), faced a similar problem when relief a competing election board had requested with respect to BIA actions involving an a leadership dispute required the resolution of tribal law issues. The court agreed that it had jurisdiction to review BIA actions; however, its

[3/] Relief and standing are also problematic because the Tribe is not a party to this action. It is ultimately the Tribe that is required to reinstate the plaintiffs to their elected positions, if at all. It is the Tribe that removed the plaintiffs under tribal law. For plaintiffs to have standing, the injury must be redressable by the court, and because the Tribe is not a party to the action, and it is speculative that any adjudication of tribal law in the absence of the tribe would be implemented by the tribe, especially given that the determinations of tribal law in its absence would not be binding on the tribe. *See Davis v. United States*, 199 F. Supp. 2d 1164, 1177 (W.D. Okla. 2002), aff'd, 343 F.3d 1282 (10th Cir. 2003). Moreover, the plaintiffs' primary requested remedy is an order restoring them to the ABC, or a declaration that their removal by their peers was improper. *See* Pls.' Compl. ¶¶ 48, 51, 57. However, this Court lacks jurisdiction to restore the plaintiffs to the ABC, certainly in the absence of the Tribe. *See Wopsock*, 2005 WL 1503425, at *1. Indeed, any action taken by the BIA in compliance with the Court's decision could be separately challenged in a new action by the Tribe and its present governing body.

ability to resolve the dispute was limited to pure APA claims that did not require resolution of tribal law issues.

> Despite the Election Board's efforts to characterize this action as one based on federal question jurisdiction, the court finds that the relief requested in Counts II and III necessarily requires an interpretation of the Tribe's Constitution. The court is without jurisdiction to resolve intra-tribal disputes requiring interpretation of a tribal constitution. *See Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir.1996) (holding federal courts do not have jurisdiction over intra-tribal disputes); *Runs After*, 766 F.2d at 352 (affirming district court's holding that "resolution of . . . disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court").

Sac & Fox Tribe v. BIA, 321 F. Supp.2d 1055, 1063 (N.D. Iowa 2005). "The court shall therefore dismiss the Election Board's claims contained in Counts II and III of the Complaint." *Id.*

"A dispute over the meaning of tribal law does not 'arise under the Constitution, laws, or treaties of the United States,' as required by 28 U.S.C. §§ 1331 and 1362. This is the essential point of opinions holding that a federal court has no jurisdiction over an intra-tribal dispute." *Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1143 (10th Cir. 2004). "[A]n internal controversy among Indians over tribal governments" is "a subject not within the jurisdiction of the court as a federal question." *Motah v. United States*, 402 F.2d 1, 2 (10th Cir. 1968). "The court is 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), *aff'd* 439 F.3d 832 (8th Cir. 2006). "[T]he district court overstepped the boundaries of its jurisdiction in interpreting the tribal

constitution and bylaws and addressing the merits of the election dispute," in which BIA had recognized various tribal leadership bodies for purposes of government-to-government consultation. *Goodface*, 708 F.3d at 338–39. "[R]esolution of . . . disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court." *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1983).

The plaintiffs present their claim as an APA challenge to the DOI actions. But embedded in Counts I, II, III, and necessary for the plaintiffs to prevail in those counts, is their contention that the DOI decision was "contrary to the laws of the Apache Tribe of Oklahoma." Pls. Compl., ¶ 48, 51, 57. Count IV seeks a determination that the Special election "was not consistent with the Constitution of the Apache Tribe of Oklahoma." Pls.' Compl., ¶ 62. The plaintiffs' claim places this Court in the same conundrum faced by the district court in *Sac & Fox Tribe*. There, the court originally dismissed all the claims that were dependent on interpretation of the tribal laws and constitutions. *Sac & Fox Tribe v. BIA*, 321 F.Supp.2d 1055, 1063 (N.D. Iowa 2004). The district court originally kept one count alive, an APA claim that the BIA acted arbitrarily and capriciously, but later dismissed that count as well because adjudication of the claim would have required the court to determine whether, under tribal law, the plaintiffs had authority to present the claim on behalf of the governing body. *Sac & Fox Tribe*, 360 F.Supp. 2d at 993.

Here we have no such independent "arbitrary and capricious" APA claim. The only claim that is not obviously a matter of tribal law is Count V, which asserts that the plaintiffs were not adequately consulted prior to DOI's Decision.[4/] But that Count is dependent on the plaintiffs being the actual "ABC Majority." Just as with the APA claim in *Sac and Fox*, Count V requires the Court to determine whether or not the proper governing body is before the Court and whether the three individuals could represent the government in bringing a claim challenging lack of consultation with the tribal government. Assuming, *arguendo*, that the duty to consult is an enforceable obligation, that obligation runs to the Tribe, not individuals. Determining the plaintiffs' legitimacy and authority to bring the suit on behalf of the Tribe is dependent on tribal law and the Constitution. This analogous conundrum required the court in *Sac and Fox* to dismiss the entire action as outside its jurisdiction. *Sac & Fox Tribe*, 360 F.Supp. 2d at 993. The Complaint as pled places all the Counts and relief sought outside the Court's jurisdiction.[5/]

[4/]Count VI is merely requests injunctive relief on the basis of legal theories expounded in Counts I–V.

[5/]Plaintiffs cannot federalize a tribal leadership dispute merely by seeking a federal agency's involvement. In *Meskwaki Casino Litigation*, a dissident tribal leadership group asked the National Indian Gaming Commission to enjoin a rival leadership group's operation of the tribe's casino under the Indian Gaming Regulatory Act ("IGRA"). 340 F.3d 749, 764 (8th Cir. 2003). In the resulting litigation, the dissident group also sought remedies, including an order ejecting the rival leadership group from the casino as trespassers, that extended beyond IGRA's allowed remedies. The Eighth Circuit found that those remedies would require the district court to "first resolve the intra-tribal dispute and determine" which group was "the rightful governing body of the tribe." *Id.* That determination — which group was "the rightful governing body of the tribe" — was beyond the court's subject matter jurisdiction, despite federal involvement. *Id.* Similarly, in a subsequent case stemming from the same facts, the court still lacked subject matter

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

To prevail in this suit, the plaintiffs must demonstrate that DOI's decisions were arbitrary and capricious. The plaintiffs challenge two specific DOI decisions: DOI's recognition of Carattini and Banderas's removal and DOI's acceptance of the subsequent special election's results. The plaintiffs have failed to demonstrate that either of those decisions was arbitrary and capricious, and therefore their claims fail.

A. DOI's recognition of Carattini and Banderas's removal was not arbitrary and capricious.

DOI recognized the plaintiffs' removal after concluding they had missed at least three consecutive meetings of the ABC, which automatically triggers loss of office under Article XIII of the Tribe's constitution. Decision Letter, AR 144, p. 5; Constitution of the Apache Tribe of Oklahoma ("Apache Constitution"), AR 1, art. XIII**.** The plaintiffs argue that DOI's decision was arbitrary and capricious because it was not supported by the administrative record. *See* Brief in Support of Plaintiffs' Motion for Summary Judgment ("Pls.' Br."), Part I. The plaintiffs challenge the decision on three grounds: (1) They argue that DOI erred in concluding they had missed three consecutive meetings; (2) that even if they missed three meetings, their absence was excused; and (3) that the record does not reflect sufficient notice of the meetings to satisfy their due process rights. As discussed below, all of those arguments fail.

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jurisdiction even though the plaintiffs sought to establish jurisdiction under the APA. *Sac & Fox Tribe*, 439 F.3d at 835.

1. The record supports DOI's conclusion that Carattini and Banderas missed three consecutive meetings.

If any elected officer of the Tribe misses three consecutive regular or special meetings "without excuse," the officer automatically loses her office. Apache Constitution, AR 1, art. XIII. In this case, DOI concluded that Carattini and Banderas had missed at least three consecutive meetings of the ABC, and therefore were no longer ABC members. Decision Letter, AR 144, p. 5. DOI found that Carattini and Banderas had missed consecutive meetings held on July 8, 10, 30, 31, and August 1, 2008. *Id.* The record supports DOI's conclusion that the plaintiffs missed each of the meetings:

- July 8 meeting: Carattini and Banderas "showed up" but "did not stay" for the meeting. 7/8/2008 Meeting Minutes, AR 34, p. 1. They voluntarily left after Ahtone was separately forced to leave. *Id.* Carattini and Banderas left before the roll call was completed and took no part in subsequent business. On the meeting minutes they were marked as "absent." *Id.*
- July 10 meeting: Carattini and Banderas were marked as absent. 7/10/2008 Meeting Minutes, AR 39, p. 1.
- July 14 meeting: DOI did not address this meeting in its Decision Letter. However, the meeting's minutes clearly state that Carattini and Banderas were absent. Meeting Minutes, AR 42, p. 1.
- July 30 meeting: The meeting's minutes do not reflect Carattini or Banderas's presence or absence. 7/30/2008 Meeting Minutes, AR 47, p. 1. However, the

minutes do specifically identify the presence of Leonard Chalepah, Mary Rivera, and Alonzo Chalepah as comprising a quorum. *Id.* Additionally, the minutes from the following meeting note that Carattini and Banderas "have not come in for meetings," suggesting they were consistently absent from preceding meetings. 7/31/2008 Meeting Minutes, AR 48, p.1.

- July 31 meeting: Carattini and Banderas are specifically noted as having failed to "come in for meetings," and are not identified as present. 7/31/2008 Meeting Minutes, AR 48, p. 1.
- August 1 meeting: The meeting's minutes do not reflect Carattini or Banderas's presence or absence. 7/30/2008 Meeting Minutes, AR 47, p. 1. However, the minutes do specifically identify the presence of Leonard Chalepah, Mary Rivera, and Alonzo Chalepah as comprising a quorum. 8/1/2008 Meeting Minutes, AR 49, p. 1.

With the exception of the July 8 meeting, from which the plaintiffs departed after the roll call began, Carattini and Banderas do not contest their absence from these meetings. However, they contend that the meetings were not "meetings" under the Tribal Constitution. Pls.' Br. 19–21. The plaintiffs claim "there is no meeting to miss" unless the meeting is attended by a quorum of members. *Id.*

That assertion contradicts the plain language of the Tribal Constitution. The Tribal Constitution does not explicitly define "meeting." However, the Tribal Constitution does specify two circumstances in which meetings occur: (1) Automatically on the third

Saturday of every month, unless a quorum selects a different day and (2) whenever the chairman calls a meeting, either at his discretion or at the written request of three ABC members. Tribal Constitution, AR 1, art. VI, §§ 3–4.

Neither of those provisions state that a quorum is necessary for a meeting to occur. However, the Tribal Constitution does state that quorum is necessary "to transact business *at any meeting*." Tribal Constitution, AR 1, art. XV (emphasis added). However, the constitution does not state that a quorum is necessary for a meeting to be held. Accordingly, missing three consecutive meetings results in loss of office regardless of whether a quorum was present at any of those meetings. DOI properly determined that Carattini and Banderas missed at least three consecutive meetings and, therefore, were no longer members of the ABC.

2. The plaintiffs did not excuse their own absences.

The ABC may excuse the absences of Tribal officers, preventing the officers from forfeiting their offices. Tribal Constitution, AR 1, art. XIII. The provision allowing ABC excuse is stated in the negative: "Any person holding elective office who without an excuse *from the business committee*" misses excessive meetings forfeits her office. *Id.* (*emphasis added).*

The plaintiffs argue that Carattini and Banderas did not lose their offices because the three plaintiffs, representing a quorum of the ABC at the relevant time, excused their own absences. Pls.' Br. 21–22. The plaintiffs' argument fails because, as plaintiffs themselves note, an excuse could only be granted by the ABC. AR 1, Const. Art. XIII.

Excusing elected officials' absences is an enumerated power of the ABC, and thus is "business" under the Tribal Constitution. But the plaintiffs never assert that they, as a quorum of the ABC, held a valid meeting and granted a blanket excuse to themselves to miss future ABC meetings called by the Chairman. Thus, even if the record supported the plaintiffs' contention that they had granted themselves a blanket excuse to miss meetings, the plaintiffs never contend that such an excuse was granted as matter of "business" conducted at a meeting of the ABC. Therefore the requirement that the ABC grant an excuse, set out in the Tribe's Constitution, was unmet, and the plaintiffs' argument fails.

3. The record supports DOI's finding that sufficient notice was provided to plaintiffs.

DOI's Decision Letter concluded that Carattini and Banderas were given adequate notice of upcoming ABC meetings, "such that neither can claim to have missed any of the meetings due to lack of knowledge as to the time and place they were to be held." Decision Letter, AR 144, p. 5. The plaintiffs assert that DOI erred in that conclusion. Pls.' Br. 16–19. They claim that, for three of the meetings, "no written notice was given . . . and thus the meetings could not be deemed missed." *Id.* at 17. They then conclude that the lack of service fails to satisfy "even a basic 'due process requirement.'" *Id.* The plaintiffs' argument assumes that written notice was required, that a lack of written notice would nullify any absence, and that some "due process requirement" supports these

requirements. However, because the plaintiffs have failed to identify a valid basis for those requirements, their argument fails.

The only legal support the plaintiffs cite is *Seminole Nation of Okla. v. Norton*, 223 F. Supp. 2d 122, 129 (D.D.C. 2002), which itself relied on *Milam v. United States Dep't of the Interior*, 10 ILR 3013 (D.D.C. 1982) (attached as Appendix A). In *Milam*, a Seminole Nation Council meeting was deemed to be invalid because of failure of adequate notice. 10 ILR at 3016. The Seminole Nation Constitution required notice ten days in advance of all Council meetings, and that notice was not given to the plaintiffs in *Milam*. *Id.*

This case is materially different from *Milam*. The Apache Tribe of Oklahoma's Constitution does not set any specific notice requirement for Apache Business Committee meetings. *See* Tribal Constitution, AR 1. The Tribal Constitution does, however, set a ten-day notice requirement for meetings of the Apache Tribal Council. Tribal Constitution, AR 1, art. VI, § 2. That the Tribal Constitution explicitly sets a notice requirement for Council meetings, but sets no notice requirement for Business Committee meetings, must be accorded legal significance. DOI properly concluded that the Tribal Constitution does not articulate a particular standard for notice of an upcoming Business Committee meeting. Similarly, although the plaintiffs have phrased this as a "basic due process" requirement, they have cited no basis for the supposed due process right. The Tribal Constitution includes a Bill of Rights, but it contains no due process guarantee. *See* Tribal Constitution, AR 1, art. X.

Whatever the minimal requirements for notice may be, the record fully supports Interior's conclusion that plaintiffs received adequate notice[6/] The record contains the following information regarding six meetings of the ABC held in July and August, 2008:

- July 8 meeting: Carattini and Banderas "showed up" for the meeting, but left before the roll was completed or any business could be transacted. 7/8/2008 Meeting Minutes, AR 34, p. 1. Therefore, they unambiguously had notice of — and absented themselves from — the meeting.
- July 10 meeting: The record contains an official meeting notice sent to both Carattini and Banderas. Official Meeting Notice, AR 38.
- July 30 meeting: The record does not contain a copy of a written meeting notice. However, as discussed below, the record contains an affidavit from Mary Rivera that supports the conclusion that Carattini and Banderas were notified of this meeting.
- July 31 meeting: As with the July 30 meeting, the record does not contain a copy of a written notice, but the Rivera affidavit supports the conclusion that Carattini and Banderas were notified of this meeting.

[6/] It is significant that plaintiffs never asserted that they did not receive adequate notice until after DOI issued its Decision in January, 2009. The administrative record does contain evidence supporting a finding that notice was provided, and does not contain any evidence or argument that notice was not provided.

- August 1 meeting: As with the two preceding meetings, the record does not contain a copy of a written notice, but the Rivera affidavit supports the conclusion that Carattini and Banderas were notified of this meeting.

Furthermore, the plaintiffs' assertions regarding the alleged inadequacy of the notice provided to them are plainly immaterial. In a crucial distinction between these plaintiffs and the plaintiffs in *Milam*, the plaintiffs in this case have never alleged that they were unaware of the meetings called by the Chairman. They merely argue that the record does not contain adequate evidence of written notice. The record, combined with the plaintiffs' Complaint, makes it abundantly clear that the plaintiffs knew about the called meetings, and their absence was knowing and intentional.

Finally, the plaintiffs' own arguments demonstrate that any failure of notice would have been harmless error. The plaintiffs argue they excused themselves from all meetings that might occur until Ahtone was restored to the counsel. Pls.' Br. 21–24. As discussed above, their argument about excuse fails. *See* Part II.A.2, *supra*. However, the plaintiffs' argument demonstrates that Carattini and Banderas did not intend to attend any of the meetings they missed. Notice, or lack of notice, was irrelevant: Carattini and Banderas would not attend regardless. DOI described this as a boycott, to which the plaintiffs object. Decision Letter, AR 144, p. 5; Pls.' Br., p. 25. Regardless of how Carattini and Banderas describe their intent, the effect is that they would not attend any meetings. The only material fact is that Carattini and Banderas knowingly and intentionally missed at

least three consecutive meetings of the ABC and therefore automatically lost their offices. They have failed to demonstrate that DOI's decision was not supported by the record.

4. DOI did not breach whatever duty it had to consult with the plaintiffs.

The plaintiffs allege DOI was required under "DOI internal regulations" to consult with them prior to issuing its Decision Letter. Pls.' Compl. ¶¶ 63–66; Pls.' Br., pp. 26–28. The plaintiffs cite only one regulation, Executive Order 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). However, that Executive Order provides no legally-enforceable rights. But Executive Orders are never enforceable when the Order's own terms preclude a right to judicial review. *City of Albuquerque v. U.S. Dep't of the Interior*, 379 F.3d 901, 913-14 (10th Cir. 2004). In this case, Executive Order 13175 explicitly precludes any judicial review: "This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person." Executive Order 13175, 65 Fed. Reg. at 67,252. Consequently, Executive Order 13175 provides no enforceable right to consultation and cannot support the plaintiffs' consultation argument.

The only other authority the plaintiffs cite is *Tarbell v. Dep't of Interior*, 307 F. Supp. 2d 409 (N.D.N.Y. 2004). *Tarbell* held DOI had failed to comply with a previous district court order and ordered DOI to comply with that order's terms. *Id.* at 423–26; (citing the court order in *Ransom v. Babbitt*, 63 F. Supp. 2d 141 (D.D.C. 1999)). In

describing appropriate compliance with that order, the *Tarbell* court stated that "one naturally would envision a process which affords all interested parties a meaningful opportunity to offer support for their respective contentions." 307 F.Supp.2d at 423. The plaintiffs interpret that to mean that DOI is required to consult with them more fully than it did, though they fail to explain how much consultation was allegedly necessary. Pls.' Br., pp. 26–28.

Tarbell does not help the plaintiffs here. The *Tarbell* court, in ruling against the BIA, did not base its decision on a failure to consult with the interested parties, but on "the BIA's stark failure to conduct a meaningful review" of the administrative record and facts in the case, subsequent to an earlier court's ruling. 307 F. Supp. 2d at 430. *Tarbell* does not mandate any particular level of consultation with interested parties.

DOI provided plaintiffs with "meaningful opportunity to offer support for their respective contentions," as encouraged in *Tarbell.* The plaintiffs and DOI officials traded numerous letters stemming from this dispute before DOI issued its Decision. *See* AR 72, 75, 79, 80, 83, 95, 106–07, 128–29, 139, 143. Furthermore, the Decision itself assesses many of Carattini and Banderas's arguments, such as their argument that a quorum was necessary for a valid meeting. Decision, AR 144, p. 5. In light of the careful analysis of the administrative record in the instant matter, as well as of materials submitted to the agency prior to the issuance of its decision letter, there can be no support for a claim that

DOI violated the ruling in *Tarbell.*[7/] Thus, plaintiffs' claim that DOI breached a requirement to consult with them is unfounded in law and unsupport by the facts.

B. DOI's acceptance of the special election was not arbitrary and capricious.

In October, 2008, the Apache Election Board held a special election to fill the seats Carattini and Banderas vacated. Special Election Results, AR 104. DOI's Decision Letter accepted the results of that special election. Decision Letter, AR 144, pp. 6–7. The plaintiffs argue that DOI's acceptance of the special election results was arbitrary and capricious because the special election allegedly did not comply with the Tribal Constitution. Pls.' Compl., Count IV; Pls.' Br., p. 26. Specifically, the plaintiffs claim that the special election was invalid because (a) a special election can only be called by the ABC and (b) the ABC lacked a quorum when the election was called, and therefore it was conducted unlawfully. Pls.' Br., p. 26.

The plaintiffs claim "[t]here is no provision in the Apache Constitution or the Apache Election Regulations [AR Doc. 4] for a special election unless the ABC calls for one." *Id.* While factually accurate, the plaintiffs' statement is entirely misleading. The constitution and election regulations say nothing at all about how a special election is to be called. There is no provision at all in the Apache Constitution or the Apache Election Regulations that specifies who — the Apache Business Committee, Apache Election

[7/] Plainly, as an order of a district court in another circuit, *Tarbell* is instructive for, but not binding on, the Western District of Oklahoma.

Board, Apache Council, or other — is tasked with calling a special election. *See* Tribal Constitution, AR 1, art. VII; Election Regulations, AR 4, art. XV. The Tribal Constitution and Election Regulations do specify when a special election shall be called and how it shall be conducted, but they are silent about who will call it. *See id.* If DOI had attempted to question the process used to call the special election, without any basis in the Tribal Constitution or regulations to do so, it would have been exactly the kind of unwarranted intrusion into sovereign tribal matters that the federal government must avoid. Therefore, the plaintiffs' argument that the special election was unlawful because it was not called at a valid meeting of the ABC fails. Because the plaintiffs make no other argument about why the DOI's recognition of the special election results was arbitrary and capricious, this claim fails.

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 July 17, 2009.

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CERTIFICATE OF SERVICE

I certify that a copy of this document was served on July 17, 2009, by Electronic Case Filing, on the following counsel:

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