Case No. 13-4095

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EDSON GARDNER, et al.,

Plaintiffs/Appellants,

v.

SALLY JEWELL, Secretary of the United States Department of the Interior,

Defendant/Appellee.

On Appeal from the United States District Court
For the District of Utah, Central Division
The Honorable Bruce S. Jenkins, District Judge

BRIEF FOR SECRETARY SALLY JEWELL

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ORAL ARGUMENT IS NOT REQUESTED

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STATEMENT OF PRIOR AND RELATED APPEALS

There are no prior or related appeals.

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EDSON GARDNER, et al. Plaintiffs/Appellants, vs. SALLY JEWELL, Secretary of the United States Department of Interior, Defendant/Appellee.	No. 13-4095 BRIEF FOR SECRETARY SALLY JEWELL

STATEMENT OF THE ISSUE

The Administrative Procedure Act grants district courts jurisdiction to review final agency action. Appellants sought judicial review in district court of a Bureau of Indian Affairs ("BIA") order even though Appellants' administrative appeal of that same order was pending before Department of the Interior officials. Did the district court correctly dismiss Appellants' amended complaint for lack of subject matter jurisdiction?

STATEMENT OF THE CASE

Appellants filed this action in district court challenging a February 9, 2011 BIA order even though Appellants' administrative appeal of the same order was pending before officials within the Department of the Interior. The district court

dismissed the action for want of subject matter jurisdiction. Appellants timely appealed the dismissal.

STATEMENT OF FACTS

I. LETTERS TO BIA

In January and February of 2011, Appellants sent several letters to the BIA Superintendent for the Uintah and Ourah Agency ("Superintendent") requesting that the BIA: (1) issue corporate charters to Appellants as a tribe, and (2) approve an amendment to the Ute Tribal Constitution. (Am. Compl., dated May 3, 2012, Doc. No. 9 at 13 of 29).[1] On February 9, 2011, the Superintendent responded to these letters by stating that he was unable to fulfill any of the Appellants' requests because: (1) those requesting relief from BIA were not a federally recognized tribe and (2) the request to amend the Ute Tribal Constitution had not been formally made by the Ute Business Committee, which is the entity that the Secretary of Interior ("the Secretary") recognizes as having authority to request such a change. *Id*. at 13-14 of 29 (hereinafter "the Order"). On April 20, 2011, the Superintendent issued another letter that was identical to the Order except that it

[1] The citation format to the appellate record follows 10th Cir. R. 28.1(B) except that the page numbers for each document correspond to those assigned by the district court's CM/ECF system. Using the district court's CM/ECF-assigned pagination is more precise due to inconsistencies within each document's internal pagination throughout the appellate record.

also included a statement about Appellants' right to appeal the decision and instructions on how to do so. *Id.* at 15-17 of 29.

II. APPEAL TO THE DEPARTMENT OF INTERIOR

On March 11, 2011, Appellants filed notices of appeal with the Interior Board of Indian Appeals ("IBIA") seeking review of the Order. *Id.* at 18 of 29. The IBIA summarily dismissed the appeals for lack of jurisdiction on March 30, 2011. *Id.* The IBIA held that Appellants first had to appeal the Order to the "appropriate regional director" before the IBIA could review the matter. *Id.* at 19 of 29. The IBIA then referred the appeal to the Western Regional Director ("Regional Director") of the BIA for further administrative review. (Notice of Filing of Western Regional Director Ruling and Plaintiffs Supplemental, dated Sept. 17, 2012, Doc. No. 24 at 6 of 14).

On October 31, 2011, the Regional Director affirmed the Order. *Id.* Appellants then appealed the Regional Director's decision to the IBIA, which the IBIA took under advisement. (Am. Compl., dated May 3, 2012, Doc. No. 9 at 21 n.3 of 29). As of the date of this filing, the IBIA has not decided the appeal.

III. THE DISTRICT COURT ACTION

On August 8, 2011, while their appeal was still pending before the Regional Director, Appellants filed a petition for writ of habeas corpus in the district court seeking judicial review of the Order. (Motion for Habeas Corpus & Motion for

United States Serve (sic) Respondent, dated Aug. 5, 2011, Doc. No. 1-3 at 1, 2, and 7 of 7). On April 25, 2012, the district court dismissed Appellants' petition without prejudice for want of jurisdiction but granted them leave to file an amended pleading within 20 days.[2] (Minute Entry, dated April 25, 2012, Doc. No. 8; Order, dated May 7, 2012, Doc. No. 11).

On May 4, 2012, Appellants filed an Amended Complaint, which was served upon the Secretary. (Am. Compl., dated May 3, 2012, Doc. No. 9; Certificate on Return of Service on Summons, dated June 4, 2012, Doc. No. 15 at 3 of 6). The Secretary moved to dismiss the Amended Complaint for want of subject matter jurisdiction and for failure to state a claim for relief. (Motion to Dismiss for Lack of Jurisdiction, dated July 26, 2012, Doc. No. 16).

After oral argument on the Secretary's motion, the district court determined that Appellants had not sought judicial review of a final agency action, and, therefore, their case was not ripe. (Memorandum Decision & Order, dated March 27, 2013, at 6 of 7). Consequently, the district court ordered, among other things, that Appellants had twenty days to "submit proof in writing of the final disposition of their most recent appeal to the Interior Board of Indian Appeals (case no. IBIA 12-044)" or else their action would be dismissed. *Id.* On June 19, 2013, the

[2] The Secretary of the Interior did not appear during the hearing on the Amended Complaint because Appellants had not yet served the United States Attorney under Fed. R. Civ. P. 4(i) (Certificate on Return of Service on Summons, dated June 4, 2012, Doc. No. 15 at 3 of 6).

district court dismissed Appellants' action because they had failed to provide any proof that the IBIA had fully and finally decided their appeal. (Order of Dismissal, dated June 19, 2013, Doc. No. 33). A Notice of Appeal to this Court timely followed. (Notice of Appeal, dated June 24, 2013, Doc. No. 34).

SUMMARY OF THE ARGUMENT

The district court properly dismissed this action for lack of subject matter jurisdiction. Specifically, the Administrative Procedure Act ("APA") confers subject matter jurisdiction upon federal courts to judicially review "final agency action." To constitute "final agency action," an agency decision must represent the culmination of agency decisionmaking and must establish legal rights and obligations. The Order meets neither requirement. First, the Order is not the culmination of agency decisionmaking because Appellants' challenge thereto is still pending before the IBIA. Second, the Order does not establish legal rights and obligations. Because the Order is not final agency action, the district court lacked subject matter jurisdiction and properly dismissed this action.

STANDARD OF REVIEW

This Court reviews *de novo* district court orders dismissing an action for want of subject matter jurisdiction. *Sac & Fox Nation v. Cuomo*, 193 F.3d 1162, 1165 (10th Cir. 1999).

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THIS ACTION FOR WANT OF SUBJECT MATTER JURISDICTION.

The district court lacked subject matter jurisdiction to judicially review the Order under the APA because Appellants cannot show "final agency action." The APA provides a limited waiver of sovereign immunity for courts to judicially review "final agency action." 5 U.S.C. § 704 (2006); *Chem. Weapons Working Grp. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1494 (10th Cir. 1997). The Supreme Court has enunciated two requirements for agency action to be considered "final":

> First, the action must mark the "consummation of the agency's decisionmaking process,"–it must not be of a merely tentative or interlocutory nature. And second, the action must be 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). As shown in order below, Appellants cannot show: (1) that the Secretary has consummated the agency's decisionmaking process as to the Order, or (2) that Appellants' "rights and obligations have been determined" from which "legal consequences will flow." *Id.* Thus, the Order is not "final agency action," and the APA's waiver of sovereign immunity does not apply.

A. The Secretary Has Not Consummated the Department of the Interior's Decisionmaking Process Regarding the February 9, 2011 Order.

The Order is not final agency action because it does not represent the consummation of the Department of the Interior's decisionmaking process. To the contrary, Appellants' administrative appeal is still pending before the IBIA. Subject to exceptions not at issue here, the Department of the Interior's regulations provide that "[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. § 704. . . ." 25 C.F.R. § 2.6(a) (2011). Where, as here, a party administratively appeals an agency's decision, that decision is not final for purposes of the APA's waiver of sovereign immunity. *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1407-08 (9th Cir. 1996) ("We hold that exercise of an optional appeal to a Department ALJ renders the initial Administrator's decision nonfinal for purposes of judicial review under the APA.").

Appellants' challenge to the Order is not the consummation of the Department of Interior's decisionmaking process because Appellants voluntarily appealed the Order to both the Regional Director and to the IBIA. The IBIA—which decides matters as "fully and finally as might the Secretary,"—still has the matter under advisement. 43 C.F.R. § 4.1 (2011). By Appellants' own

choice, the Order is not the consummation of the agency's decisionmaking process, which precludes a finding of "final agency action."

B. The Department Has Not Made a Decision From Which Legal Consequences Flow.

The Order did not impose any legal burdens or consequences on Appellants. Indeed, the Order does not change the legal status quo for Appellants: it neither imposes new burdens upon them nor deprives them of a right they once enjoyed. Thus, the Order does not meet the second requirement of "final agency action," and the district court lacked subject matter jurisdiction over Appellants' claim.[3]

CONCLUSION

As shown above, this Court should affirm the district court's dismissal of this action because it lacked subject matter jurisdiction.[4]

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[3] Relatedly, review of the Order is not ripe under Article III of the United States Constitution. "'Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Morgan v. McCotter*, 365 F.3d 882, 887 (10th Cir. 2004). Judicially reviewing the Order before the IBIA has a chance to do so will entangle this Court in an abstract disagreement because the IBIA may alter the Superintendent's decision. Also, the Order does not "create a direct and immediate dilemma for the parties." Therefore, this matter is not ripe for review under Article III.

[4] Appellants' district court filings have not been models of clarity. To the extent any of Appellants' district court filings seek to amend their Amended Complaint to plead an action to compel the Secretary to recognize them as an Indian Tribe, such an amendment would be futile because, as the district court pointed out, Appellants' own filings recognize that the Secretary has primary jurisdiction to determine whether federal recognition of tribal status should be granted. (Order of Dismissal,

RESPECTFULLY SUBMITTED this 19th day of August, 2013.

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dated June 19, 2013, Doc. No. 33 at 2 of 3); *see also Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 58-61 (2d Cir. 1994) (dismissing complaint for tribal recognition because Secretary had primary jurisdiction over such determinations); *Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1038-39 (E.D. Cal. 2012); *N.J. Sand Hill Band of Lenape & Cherokee Indians v. Corzine, CIV.A.09-683* (*KSH*), 2010 WL 2674565, at *14 (D.N.J. June 30, 2010); *United States v. 43.47 Acres of Land in Litchfield*, 45 F. Supp. 2d 187, 191-92 (D. Conn. 1999).

CERTIFICATE OF COMPLIANCE

My brief was prepared in a proportionally spaced typeface and contains 1,880 words. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office, and that two written copies and an electronic copy via the ECF system of the foregoing BRIEF FOR THE UNITED STATES were mailed, postage prepaid to all parties named below, this 19th day of August, 2013.

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CERTIFICATION OF DIGITAL SUBMISSIONS

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office, and that

(1) All required privacy redactions have been made and, with the exception of any redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the clerk; and

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