UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NELLIE RAMOS et al., Plaintiffs, v. BUREAU OF INDIAN AFFAIRS, et al., Defendants,	C.A. No. 1:13-CV-10065-RBC **RESPONSE IN OPPOSITION TO FEDERAL DEFENDANTS MOTION TO DISMISS**

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INTRODUCTION

Plaintiffs Nellie Ramos, Curtis Hendricks, George Bingham, Paul Mills, Nathaniel J. Tobey, Lawrence Tobey, Jr., Patricia Oakley, Francis Fermino, and Leigh Potter, hereby submit this Memorandum of Points and Authorities in Opposition to Federal Defendants Motion to Dismiss.

Plaintiffs are duly enrolled members of the Mashpee Wampanoag Tribe who have sought over the course of four years to engage the Federal Defendants to investigate substantial violations of tribal law in the absence of any meaningful alternative Tribal forum. As a result of Federal Defendants unreasonable delay in responding to Plaintiffs numerous requests, Plaintiffs reluctantly instituted the present lawsuit. Plaintiffs seek an injunction compelling the BIA to conduct an investigation into the clear violations of Tribal Law during the conduct of the January 2009 Election.

Plaintiffs oppose the Federal Defendants Motion to Dismiss and address each issue in the order it was presented. Contrary to Federal Defendants claims, Plaintiffs complaint is limited to the context of an investigation and an existing challenge to the subsequent election is currently pending in Tribal Court. Therefore, Plaintiffs cause of action is redressible. Plaintiffs further state a claim sufficient under the APA to require judicial review where Plaintiffs are owed a duty of response and have exhausted their procedural remedies. Finally, the Mashpee Wampanoag Tribe is not an indispensable party to this suit. For these reasons, the Motion to Dismiss should be denied.

II. PLAINTIFFS ACTION IS REDRESSIBLE

Federal Defendants seek to avoid their federal responsibilities by portraying Plaintiffs' cause of action as solely an intra-tribal matter. It is clear that Article III of the Constitution requires that

a live case or controversy exist at all times during the course of the case, not just when it is filed. *Burke v. Barnes*, 479 U.S. 361, 363 (1987); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). It is also clear that in order to survive a motion to dismiss, the parties must have a "legally cognizable interest in the outcome." *Cruz v. Farquharson*, 252 F.3d 530 (1st Cir. 2001).

Here Plaintiffs' cause of action contains a live case and controversy that is redressible because this dispute is not about the results of an election, rather it is whether Defendants are obligated to honor their fiduciary duties to Plaintiffs and investigate allegations of misconduct where Plaintiffs have no other recourse. Defendants misconstrue Plaintiffs claim as a challenge to the results of the 2009 election. Def. Motion to Dismiss at 4. While Plaintiffs allege misconduct in the election and made their original request to Defendants asking that they intervene and conduct a new election, Plaintiffs actual claim for relief alleged in the amended and original complaint is solely for, and remains only, an investigation into the conduct of the 2009 election. Compl. ¶ 45. As such, this claim should stand regardless of the sufficiency of the subsequent election, because the Plaintiffs interest in the outcome of this case has not changed regarding the harm that has occurred, namely the failure of Defendants to investigate the allegations raised in the complaint.

Furthermore, were the court to find this to be an election dispute issue, by framing Plaintiffs complaint as a mere "challenge of the results and conduct of a … election", defendants fail to acknowledge the significance of the harm that resulted from the actual misconduct alleged during the 2009 election. Plaintiffs allegations focus on specific acts of misconduct during the 2009 election, including numerous violations of tribal law that have far reaching implications for all subsequent elections of the Tribe. Compl. ¶ 16-20. Significantly, a challenge of the conduct and results of the subsequent election is currently pending in Tribal Court. Affidavit of Service in

Case # CV-13-001 (Exhibit A). *See Smith v. Acting Pac. Reg'l Dir.*, 42 IBIA 224, 225 (2006) (citing four factors that defeat a finding of mootness).

For these reasons, Plaintiffs claims cannot be dismissed because a live controversy exists, and a challenge of the subsequent election on which Defendants mootness argument rests is currently pending in Tribal Court.

III. PLAINTIFFS' ACTION DEMONSTRATES A WAIVER UNDER APA

1. Federal Defendants Owe a Duty to Respond to Plaintiffs Written Requests

"[T]he APA does not afford an implied grant of subject matter jurisdiction permitting federal review of agency action." *Califano v. Sanders*, 430 U.S. 99, 107 (1977). However, "while the APA does not provide an independent source of subject matter jurisdiction, it does provide a federal right of action where subject matter jurisdiction exists under 28 U.S.C. § 1331." *Conservation Law Foundation v. Busey*, 79 F.3d 1250 (C.A.1. 1995) (citing *Califano*, 430 U.S. at 104-07).

It has been noted that the primary purpose behind the APA is to "provid[e] a broad spectrum of judicial review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). Because this case involves the issue of a federal agency's "action", it is a matter properly before this court.

Agency inaction may properly be considered an "action" for purposes of judicial review. 5 U.S.C. § 706. In reviewing agency action, Federal courts must exercise their "narrowly defined duty of holding agencies to certain minimal standards of rationality." *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (C.A.D.C. 1976).

Plaintiffs assert that Federal Defendants continually ignored and failed to respond to their requests notifying them of ongoing violations of Tribal law. Compl. ¶ 36. The court must focus

on the Federal Defendants decision not to respond, in deciding whether that meets a minimal standard of rationality. The Federal Defendants cite a case involving unfavorable election results to support their claim that the BIA is under no obligation to respond. *See Rosales v. United States*, 477 F.Supp. 2d 119 (D.D.C 2007). At the same time, Federal Defendants acknowledge a fiduciary responsibility, not only to Tribes, but to their members. Def. Motion to Dismiss, pg. 14. Unlike *Rosales*, Plaintiffs have made numerous attempts over several years to get the attention of BIA officials. The obvious disregard for plaintiffs concerns should clearly fail even a minimal standard of rationality.

2. Plaintiffs Have Exhausted Their Administrative Remedies

The BIA regulations provide for review of final agency action. 25 C.F.R. § 2.6. BIA regulations specifically require appeal to a superior authority within the department. Plaintiffs have satisfied this requirement, which is evidence by their numerous communications with Defendants. Compl. ¶ 28-36. Defendants suggest that this is insufficient, but at no time did they ever inform Plaintiffs of what procedures they should take. In fact, Federal Defendants limited their assistance to a request for clarification. Compl. ¶ 29.

In order to find a failure to exhaust administrative procedures, this court would be required to go far beyond what is shown by the factual record. In similar cases, courts have found a failure to exhaust administrative remedies only when there was a complete failure to abide by the administrative procedures. *Gilmore v. Salazar*, 748 F. Supp.2d 1299, (N.D.Okla. 2010). Contrary to *Gilmore*, and the Federal Defendants assertions, Plaintiffs here have engaged administration officials on every level, and in a consistent manner, in order to have their grievances heard. Compl. ¶ 28-31.

In any event, assuming the court find exhaustion is required, Plaintiffs assert that such a requirement is rendered futile because of the obvious disregard for Plaintiffs claims that indicates a clear decision not to act on Plaintiffs claims.

Separately, Federal Defendant's claim of exhaustion may be precluded where agency expertise is not implicated. *Gilmore*, 748 F.Supp.2d at 1167 (citing *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). Unlike the court in *Gilmore*, the decision here is a simple one, the decision to order an investigation. Such an order implicates none of the special expertise of the BIA, such as the issuance of CDIB cards, or acknowledgement of a tribe. *Davis v. U.S.*, 199 F.Supp.2d 1164, 1180 (W.D.Okla. 2002); *Robinson v. Salazar*, 838 F.Supp.2d 1006 (E.D.Cal. 2012). Furthermore, the present action offers none of the conflicting interests that merit a full development of the administrative record, such as determining Indian Title, the status of trust lands, the legality of conveyances, and determination of applicable law. *Id.* at 1168. Rather, deference to the BIA's expertise in this circumstance is unwarranted and unnecessary.

IV. THE TRIBE IS NOT AN INDISPENSABLE PARTY AND NEED NOT BE JOINED

In evaluating Rule 19, Federal Defendants appropriately focus on the harm to the non-party. *Jimenez v. Rodriguez-Pagan*, 597 F.3d 18, 25 (1st Cir. 2010). However, in asserting that the Tribe must be joined, Federal Defendants continue to misconstrue the intended relief being sought. Where property of the Tribe is involved, clearly the Tribe is a necessary party. *See Smith v. Babbitt*, 875 F.Supp 1353 (D. Minn. 1995) (trust distributions); *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000) (land agreement). The Tribe here has only a limited interest in the action, namely, the privacy of its records, and any resolution of the claims for relief would not substantially impair the Tribe's ability to protect that interest. The Federal Defendants raise a

parade of horrible's in order to characterize the harm as one resulting in "two different Tribal governments" and "undermin[ing] the authority of the Tribe", with the ultimate result being "this Court's frequent intervention in tribal political matters." Def. Motion to Dismiss, at 12.

Assuming that the Tribe is a necessary party, the Court should find the Tribe will not be prejudiced by any judgment rendered in its absence, based on all four factors of Rule 19(b). Plaintiffs' request for an investigation into election misconduct does not implicate the sovereignty of the Tribe, such as to matters of defining membership or conducting its elections, anymore than a proper investigation by the Tribe, as originally sought, would have. Compl. ¶ 25-26. Additionally, under the second factor, the Court could shape the relief to minimize the effect on the Tribe's interest in confidentiality. An investigation into the conduct of the election would be adequate if all that were required were substantiating evidence of the results, or acknowledgement that Tribal records were being kept in accordance with Tribal law, neither of which alter how the Tribe determines its membership or conducts its elections, since those procedures have already been established by the Tribe. Contrary to Federal Defendants assertions, Plaintiffs have no wish to alter the established procedures for elections and membership, only their enforcement.

Furthermore, it is enlightening that the Tribe has failed to follow its own mandatory procedures for resolving these issues, which underlies the entire purpose of this complaint. Compl. ¶ 22-23. The result of requiring the joinder of the Tribe would eliminate any possible remedy to Plaintiffs under the fourth consideration of Rule 19(b). Thus, the harm to Plaintiffs substantially outweighs that caused by ordering an investigation. As such, the Tribe should not be considered a necessary or indispensable party.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court DENY Federal Defendants Motion to Dismiss.

April 17, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which is transmitted to opposing counsel listed below:

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