FILED: January 30, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1110
(1:15-cv-00675-GBL-MSN)

NATIONAL COUNCIL FOR ADOPTION; BUILDING ARIZONA FAMILIES, on behalf of itself and its birth-parent clients,

Plaintiffs - Appellants,

and

D.V., Birth Parent; N.L., Birth Parent; T.W., baby boy, by and through his guardian ad litem Philip (Jay) McCarthy, Jr.,

Plaintiffs,

v.

SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior; KEVIN WASHBURN, in his official capacity as Assistant Secretary of Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants - Appellees.

O R D E R

Upon consideration of appellant's unopposed motions to vacate judgment

and remand this case to the district court, the court grants the motion, vacates the district court's judgment, and remands this case to the district court with instructions to dismiss the case as moot.

The clerk shall forward a copy of this order, accompanied by a copy of the joint motion to vacate judgment and remand to the district court.

Entered at the direction of Judge Motz with the concurrence of Judge Wilkinson and Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL COUNCIL FOR ADOPTION, on behalf of itself and its adoption agency members, and BUILDING ARIZONA FAMILIES, on behalf of itself and its birth-parent clients, *Plaintiffs-Appellants*, v. KEVIN HAUGRUD, in his official capacity as Acting Secretary of the United States Department of the Interior, MICHAEL S. BLACK, in his official capacity as Acting Assistant Secretary of Indian Affairs, BUREAU OF INDIAN AFFAIRS, and the UNITED STATES DEPARTMENT OF THE INTERIOR, *Defendants-Appellees*.	No. 16-1110

UNOPPOSED SUGGESTION OF MOOTNESS AND MOTION TO VACATE THE JUDGMENT OF THE DISTRICT COURT

Lori Alvino McGill
WILKINSON WALSH + ESKOVITZ
1900 M Street, N.W., Suite 800
Washington, D.C. 20036
Telephone: (202) 847-4000

Matthew D. McGill
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500

Counsel for Appellants

Pursuant to Federal Rule of Appellate Procedure 27 and Local Rule 27(f), plaintiffs National Council for Adoption ("NCFA") and Building Arizona Families ("BAF") (collectively, "plaintiffs") respectfully move this Court to vacate the judgment of the United States District Court for the Eastern District of Virginia on the grounds that the case is moot. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950). Defendants Kevin Haugrud, Michael S. Black, the Bureau of Indian Affairs ("BIA"), and the United States Department of the Interior ("Department") (collectively "defendants") have reviewed this motion and do not oppose it or the relief requested herein.

I. The Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901–1963, establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902. On February 25, 2015, the BIA, through the Department, published "Guidelines for State Courts and Agencies in Indian Child Custody Proceedings." 80 Fed. Reg. 10,146 (Feb. 25, 2015) ("2015 Guidelines").

Plaintiffs filed suit in the Eastern District of Virginia challenging the 2015 Guidelines as violating the Administrative Procedure Act

("APA"), the Equal Protection Clause, the Due Process Clause, the Indian Commerce Clause, and the Tenth Amendment. NCFA moved for summary judgment on its APA claims on July 30, 2015, Dkt. No. 20,[1] and on September 11, 2015, defendants cross-moved for dismissal for lack of subject-matter jurisdiction and for judgment on the pleadings, Dkt. Nos. 50, 51.

The district court denied NCFA's motion for summary judgment on its APA claims on September 29, 2015, Dkt. No. 61 (EXHIBIT A), issuing an opinion on October 20, 2015, Dkt. No. 66 (EXHIBIT B). On December 9, 2015, the district court granted defendants' motion to dismiss and for judgment on the pleadings, Dkt. Nos. 69 (EXHIBIT C), 70 (EXHIBIT D). Plaintiffs timely appealed the district court's decision to this Court on February 3, 2016.[2]

On December 30, 2016, while this appeal was pending, the BIA, through the Department, published revised "Guidelines for Implementing the Indian Child Welfare Act." 81 Fed. Reg. 96,476 (Dec.

---

[1] Docket citations refer to No. 15-cv-675 (E.D. Va.).

[2] Plaintiffs' opening brief in this appeal is currently due January 31, 2017; defendants' response brief is due March 14, 2017; and any reply is due fourteen days from service of the response brief.

30, 2016) ("2016 Guidelines"), https://www.bia.gov/cs/groups/public/documents/text/idc2-056831.pdf. In enacting the 2016 Guidelines, defendants expressly "replace[d] … the 2015 version[] of the Department's guidelines." *Id.* Thus, as of December 30, 2016, the object of this litigation has ceased to exist.

II. An actual controversy must exist at all stages of appellate review. *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21 (1994). "Where it appears upon appeal that the controversy has become entirely moot, it is the *duty* of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." *Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979) (internal quotation marks omitted); *see Munsingwear*, 340 U.S. at 39–40. Thus, "[t]he customary practice when a case is rendered moot on appeal" in this Court is "to vacate the moot aspects of the lower court's judgment." *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 161 (4th Cir. 2010); *see also Mellen v. Bunting*, 327 F.3d 355, 364 (4th Cir. 2003) ("If a claim becomes moot after the entry of a district court's final judgment and prior to the completion of appellate review, we generally vacate the judgment and remand for dismissal.").

This procedure is required where, among other circumstances, "mootness results from unilateral action of the party who prevailed below." *Bancorp*, 513 U.S. at 25; *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 72 (1997) (vacatur is required where "unilateral action of the party who prevailed in the lower court" has denied the appealing party the opportunity to seek review) (internal quotation marks omitted). As this Court has explained, "[u]nder *Bancorp*, the 'principal' consideration in determining whether" vacatur is warranted is whether "appellate review of the adverse ruling was prevented by 'the vagaries of circumstance' or the 'unilateral action of the party who prevailed below.'" *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 117 (4th Cir. 2000) (quoting *Bancorp*, 513 U.S. at 24–25).

Defendants' withdrawal of the 2015 Guidelines has rendered plaintiffs' challenge to the 2015 Guidelines effectively moot, and this appeal nonjusticiable. Accordingly, this Court should vacate the judgment of the district court. *See Munsingwear*, 340 U.S. at 39–40; *Bancorp*, 513 U.S. at 23–26.

CONCLUSION

This Court should vacate the judgment of the district court and remand the case with instructions that it be dismissed as moot.

Dated: January 24, 2017

Respectfully submitted,

/s/ Matthew D. McGill

Lori Alvino McGill
WILKINSON WALSH + ESKOVITZ
1900 M Street, N.W., Suite 800
Washington, D.C. 20036
Telephone: (202) 847-4000

Matthew D. McGill
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This motion complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 750 words, excluding the parts exempted by Rule 32(f).

2. This motion complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point New Century Schoolbook font.

Dated: January 24, 2017

/s/ Matthew D. McGill

Matthew D. McGill
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2017, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I further certify that on January 24, 2017, an electronic copy of the foregoing document was served electronically by the Notice of Docket Activity on counsel for all parties.

/s/ Matthew D. McGill
Matthew D. McGill
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NATIONAL COUNCIL FOR ADOPTION, BUILDING ARIZONA FAMILIES on behalf of itself and its birth-parent clients, birth parents D.V. and N.L., and baby boy T.W. by and through his guardian ad litem PHILIP (JAY) MCCARTHY, JR., Plaintiffs, v. SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, KEVIN WASHBURN, in his official capacity as Assistant Secretary of Indian Affairs, BUREAU OF INDIAN AFFAIRS, and the UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants.	Case No. 1:15-cv-00675

ORDER

THIS MATTER is before the court on Plaintiffs National Council for Adoption, Building Arizona Families, on behalf of itself and its birth-parent clients, birth parents D.V. and J.L., and baby boy T.W. by and through his guardian ad litem Philip (Jay) McCarthy, Jr.'s ("Plaintiffs") Motion for Summary Judgment on the Administrative Procedure Act ("APA") Claim (Doc. 20). This case concerns Plaintiffs' claim that Defendants violated the notice-and-comment requirements of the APA by issuing the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10, 146 (Feb. 25, 2015) ("2015 Guidelines"). Defendants argue that the 2015 Guidelines are not non-binding, interpretive rules which are not subject to the APA's notice-and-comment requirements. Oral argument on Plaintiffs' motion was heard on September 25, 2015. For reasons to be stated in a forthcoming Memorandum Opinion and

Order, the Court **DENIES** Plaintiffs' Motion for Partial Summary Judgment because (1) Plaintiffs lack standing to challenge the 2015 Guidelines, (2) the 2015 Guidelines are not a "final agency action" within the meaning of the APA because they do not create legal rights and obligations, and (3) the 2015 Guidelines are non-binding interpretive rules not subject to APA notice-and-comment procedures.

IT IS SO ORDERED.

ENTERED this 29th day of September, 2015.

Alexandria, Virginia
9/29/2015

/s/
Gerald Bruce Lee
United States District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NATIONAL COUNCIL FOR ADOPTION, BUILDING ARIZONA FAMILIES on behalf of itself and its birth-parent clients, birth parents D.V. and N.L., and baby boy T.W. by and through his guardian ad litem PHILIP (JAY) MCCARTHY, JR.,

Plaintiffs,

v.

SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, KEVIN WASHBURN, in his official capacity as Assistant Secretary of Indian Affairs, BUREAU OF INDIAN AFFAIRS, and the UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Case No. 1:15-cv-00675-GBL

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the court on Plaintiffs' National Council for Adoption, Building Arizona Families, on behalf of itself and its birth-parent clients, birth parents D.V. and J.L., and baby boy T.W. by and through his guardian ad litem Philip (Jay) McCarthy, Jr.'s ("Plaintiffs") Motion for Summary Judgment on the Administrative Procedure Act ("APA") Claim[1] (Doc. 20). This case concerns Plaintiffs' claim that Defendants violated the notice-and-comment requirements of the APA by issuing the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10, 146 (Feb. 25, 2015) ("2015 Guidelines"). Defendants argue that the 2015 Guidelines are non-binding, interpretive rules which are not

[1] *See* Count I of the Complaint (Doc. 1).

subject to the APA's notice-and-comment requirements. Plaintiffs' urge the Court to vacate the 2015 Guidelines and invalidate the 2015 Guidelines as a matter of law.

The issue before the Court is whether the 2015 Guidelines are invalid because they were issued in violation of the notice-and-comment requirements of the APA.

The Court DENIES Plaintiffs' Motion for Summary Judgment for three reasons. First, this court does not have subject matter jurisdiction over the APA claim because Plaintiffs lack standing to challenge the 2015 Guidelines. Second, the 2015 Guidelines are not a "final agency action" within the meaning of the APA because they do not create legal rights and obligations. Third, the 2015 Guidelines are non-binding interpretive rules and are therefore not subject to APA notice-and-comment procedures.

I. BACKGROUND

This case arises from Plaintiffs' contention that Defendants Sally Jewell, in her official capacity as Secretary of the United States Department of the Interior, Kevin Washburn, in his official capacity as Assistant Secretary of Indian Affairs, the Bureau of Indian Affairs, and the Department of the Interior, violated the Administrative Procedure Act ("APA") 5 U.S.C. §§ 551-706. Plaintiffs allege that the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings that were developed by the Bureau of Indian Affairs ("BIA") and issued by the Department of the Interior ("DOI") on February 25, 2015, 80 Fed. Reg. 10,146 (Feb. 25, 2015) are invalid because they were issued in derogation of the notice-and-comment requirements of the APA, 5 U.S.C. § 553.

Plaintiff National Council for Adoption ("NCFA") is a non-profit, national adoption policy organization with its headquarters and principal place of business in Alexandria, Virginia (Doc. 1-5, 10:1-6). Plaintiff Building Arizona Families is a non-profit adoption agency

headquartered in, and licensed by, the State of Arizona (Doc. 1-5, 11:1-6). Building Arizona Families is suing on its own behalf, and on behalf of its birth-parent clients who are frustrated by the 2015 Guidelines that seek to implement the Indian Child Welfare Act ("ICWA")'s hierarchy of placement preferences regarding birth-parent client's decisions to place their children, classified as "Indian children," into adoptive homes. *Id.* Plaintiffs D.V. and N.L. are birth parents of a child who is an "Indian child" under ICWA because D.V., the child's father, is an enrolled member of the Pascua Yaqui Tribe located in Arizona and both parents, D.V. and N.L. are residents of Arizona and do not reside on an Indian reservation (Doc. 1-5, 12:1-8). D.V. and N.L. selected an adoptive placement that is not within ICWA's placement preferences. Plaintiff Phillip (Jay) McCarthy, Jr. is a resident of Arizona and is the court-appointed guardian ad litem from baby boy T.W., who is an "Indian Child" pursuant to the ICWA, because he is an enrolled member of the Navajo Nation (Doc. 1-6, 13:1-7). T.W.'s foster parents are not a preferred placement under the ICWA or the 2015 Guidelines. *Id.*

Defendant Sally Jewell is the Secretary of the United States Department of the Interior (Doc. 1-6, 14:1-2). Defendant Kevin Washburn is the Assistant Secretary for Indian Affairs at the Bureau of Indian Affairs within the United States Department of the Interior (Doc. 1-6, 15:1-3). Defendant Bureau of Indian Affairs is a federal agency within the Department of the Interior. (1-6, 16:1-2). Defendant Department of the Interior is a federal executive department of the United States (Doc. 1-6, 17:1-2).

Congress enacted the Indian Child Welfare Act ("ICWA") to address "'the consequences to Indian Children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.'" *Adoptive Couple v.*

Baby Girl, 133 S. Ct. 2552, 2557 (2013) (quoting *Miss Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). The ICWA applies to "child custody proceedings" (defined as foster-care placements, terminations of parental rights, and preadoptive and adoptive placements) involving an "Indian child," which is defined as "unmarried persons who is under age 18 and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe." 25 U.S.C. §§ 1903(1), (4). On November 29, 1979, the Bureau of Indian Affairs ("BIA") issued guidelines representing the BIA's interpretation of ICWA and providing procedures designed to "help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters." 44 Fed. Reg. 67, 584 (1979). The BIA made it clear in the introduction of the guidelines that they were meant to be simply guidelines, and that they were not binding and were distinguishable from any binding agency regulations. *Id.* The guidelines stated, "When . . . the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by congress, those rules or guidelines are not, by themselves, binding." *Id.*

On February 25, 2015, the BIA updated its guidelines, but did not include the same language in the 1979 introduction which stated that the guidelines were not binding. Instead, the BIA explained that the 2015 Guidelines "promote compliance with ICWA's stated goals and provisions by providing a framework for State courts and child welfare agencies to follow." 80 Fed. Reg. 10, 146-147. In preparing the updated version, the BIA invited comments from federally recognized Indian tribes, state-court representatives, and organizations concerned with tribal children, child welfare, and adoption. *Id.*

Soon after issuing the 2015 Guidelines, the BIA initiated a notice-and-comment rulemaking on March 20, 2015 to promulgate formal regulations to implement the ICWA (Doc.

48, 7). The BIA stated that the formal rulemaking was being proposed for the express purpose of issuing regulations that would "incorporate many of the changes made to the recently revised guidelines . . . establishing the Department's interpretation of the ICWA as a binding interpretation to ensure consistency in implementation of ICWA across all states." Proposed Rule: Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14,880, 14,881 (Mar. 20, 2015); (Doc. 48, 2). Plaintiffs, National Council for Adoption and Philip (Jay) McCarthy, Jr., submitted comments on the proposed regulations (Doc. 48, 20). Nonetheless, Plaintiffs allege that the 2015 Guidelines are legislative guidelines which make them binding and that as binding "legislative rules," the BIA should have followed the APA's note-and-comment procedures before issuing them.

On May 27, 2015, Plaintiffs' filed a Complaint seeking a judgment that the 2015 Guidelines violate the APA and the United States Constitution, an order setting aside the 2015 Guidelines, and injunctive relief ordering Defendants to withdraw the 2015 Guidelines (Doc. 1-6, 9:1-5). Plaintiffs also sought a declaratory judgment that the child custody provisions of the ICWA, 25 U.S.C. §§ 1911-1923, violate the United States Constitution and accordingly cannot be applied to them. *Id.* On July 30, 2015 Plaintiffs filed a Motion for Summary Judgment on APA Claim and a Memorandum in Support of Plaintiffs' Motion for Summary Judgment (Doc. 20-21). On September 1, 2015, Defendants filed Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment (Doc. 48.). On September 14, 2015, Plaintiff's filed its Reply in Support of Plaintiff National Council for Adoption's Motion for Summary Judgment on APA Claim (Doc. 54.). Plaintiff's Motion for Summary Judgment is now properly before the Court.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56, the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the non-moving party. *Boitnott v. Corning, Inc.*, 669 F.3d 172, 175 (4th Cir. 2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir. 2003) (citations omitted). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008) (quoting *Anderson*, 477 U.S. at 247–48).

A "material fact" is a fact that might affect the outcome of a party's case. *Anderson*, 477 U.S. at 248; *JKC Holding Co. v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). Whether a fact is considered to be "material" is determined by the substantive law, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248; *Hooven-Lewis v. Caldera*, 249 F.3d 259, 265 (4th Cir. 2001).

A "genuine" issue concerning a "material" fact arises when the evidence is sufficient to allow a reasonable jury to return a verdict in the nonmoving party's favor. *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 635 (4th Cir. 2005) (quoting *Anderson*, 477 U.S. at 248). Rule 56(e) requires the nonmoving party to go beyond the pleadings and by its

own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

II. ANALYSIS

This Court DENIES Plaintiffs' Motion for Partial Summary Judgment because (1) Plaintiffs lack standing to challenge the 2015 Guidelines, (2) the 2015 Guidelines are not a "final agency action" within the meaning of the APA because they do not create legal rights and obligations, and (3) the 2015 Guidelines are non-binding interpretive rules not subject to APA notice-and-comment procedures.

A. Plaintiffs lack standing to challenge the 2015 Guidelines

The Court DENIES Plaintiffs' Motion for Summary Judgment because Plantiffs fail to demonstrate (1) a cognizable injury in fact, and (2) a causal connection between the claimed injury and Defendants' issuance of the 2015 Guidelines. Absent a showing of standing by Plaintiffs, this Court lacks subject matter jurisdiction over Plaintiffs' claim. *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990).

Standing exists where (1) Plaintiffs have suffered an injury in fact, (2) there is a causal connection between the injury and the condition complained of, and (3) it is likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992); *see also South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers*, 789 F.3d 475, 482 (4th Cir. 2015). Plaintiffs argue that National Council for Adoption has both individual and associational standing because Plaintiffs have been concretely harmed by the 2015 Guidelines. (Doc. 54, 11). However, Plaintiffs fail to demonstrate at least two necessary requirements for standing.

First, Plaintiffs do not demonstrate a cognizable injury in fact. To establish injury in fact, Plaintiffs must show that their "expenditures perceptibly impair the organization's ability to advance its mission." *Equal Rights Ctr. v. Equity Residential*, 798 F. Supp. 2d 707, 720 (D. Md. 2011). Plaintiffs assert that National Council for Adoption and its member adoption agencies have been "forced to divert a significant portion of its limited resources" to educate its members about the 2015 Guidelines and that diverting significant resources toward educating its members and helping members comply with the 2015 Guidelines are contrary to Plaintiffs mission of securing safe, permanent homes for children who need them (Doc. 21, 8); (Doc. 54, 2). Despite Plaintiffs' claims, the 2015 Guidelines impose no duty on Plaintiffs to divert resources to comply with the 2015 Guidelines. Plaintiffs have, instead, voluntarily abided by the 2015 Guidelines. The voluntary decision by a private adoption agency to abide by the 2015 Guidelines does not give rise to injury (Doc. 48, 16) (citing to *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997). Therefore, the voluntary expenditures by Plaintiffs to educate its members did not impair the organization's ability to advance its mission. *See Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012) ("educating members, responding to member inquiries, or undertaking litigation in response to legislation" are "merely abstract concerns" not suitable for adjudication).

Plaintiffs even acknowledge they were not bound by the 2015 Guidelines when Plaintiffs submitted comments as part of Defendants' rulemaking to make parts of the 2015 Guidelines legislative rules, a process initiated soon after the BIA issued the 2015 Guidelines (Doc. 48, 17). After issuing the 2015 Guidelines, Defendants followed the APA's notice-and-comment rulemaking procedure to "incorporate many of the changes made to the recently revised guidelines . . . [with the purpose of] establishing the Department's interpretation of ICWA as binding interpretation to ensure consistency in implementation of ICWA across all States."

Proposed Rule: Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14,880, 14,881 (Mar. 20, 2015). Plaintiffs commented on Defendants proposed rules and stated that they "are deeply concerned that the BIA is attempting to elevate these 2015 Guidelines to federal regulatory status."[2] This comment evinces an understanding that the 2015 Guidelines are not binding regulations. Therefore, Plaintiffs cannot assert injury in fact for voluntary compliance with guidelines they acknowledged had no binding effect and no enforcement mechanism.

Second, Plaintiffs have not established a causal connection between injury and issuance of the 2015 Guidelines. The causation requirement is "designed to ensure that the injury complained of is not the result of the independent action of some third party not before the court." *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 324 (4th Cir. 2002). Plaintiffs cannot demonstrate that there is a direct link between Defendants issuing the 2015 Guidelines and Plaintiffs being injured by expending resources as a result of the 2015 Guidelines. This is because the interpretations contained in the 2015 Guidelines can only be implemented by the independent action of a third-party: state courts. *See Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997) (stating that there is no standing when a plaintiff's alleged injury was caused by the decision of a third-party). The 2015 Guidelines are merely interpretive in nature and impose no obligation unless and until a state court requires compliance with their provisions (Doc. 48, 19). It is not enough for an agency to encourage a third party to act in a particular way if the agency is not actually directing the party or mandating a specific result. *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976). Therefore, Plaintiffs have

[2] National Council for Adoption et al., Comment on the Bureau of Indian Affairs (BIA) Proposed Rule: Regulations for State Courts and Agencies in Indian Child Custody Proceedings (May 22, 2015), http://www.regulations.gov/#!documentDetail;D=BIA-2015-0001-0514.

failed to establish a causal connection between Defendants issuing the 2015 Guidelines and Plaintiffs being injured by the issuance because the 2015 Guidelines do not mandate state court compliance.

Accordingly, Plaintiffs cannot establish standing because (1) Plaintiffs have not demonstrated that they suffered a cognizable injury in fact, and (2) Plaintiffs have not established a causal connection between the injury and the Defendants' actions. For these reasons, the Court DENIES Plaintiffs' Motion for Summary Judgment.

B. The 2015 Guidelines are not a "final agency action" within the meaning of the APA

The Court also DENIES Plaintiffs' Motion for Summary Judgment because the 2015 Guidelines do not constitute "final agency action" within the meaning of the APA.

The APA authorizes judicial review of an agency action "only when a statute makes the action reviewable or the action was a 'final agency action for which there is no other adequate remedy.'" *Wollman v. Geren*, 603 F. Supp. 2d 879, 883 (E.D. Va. 2009) (quoting 5 U.S.C. § 704). If the agency action at issue is not "final" under the APA, a court lacks subject matter jurisdiction over the issue and dismissal is proper. *Id.* at 883; *see also Invention Submission Corp. v. Rogan*, 357 F.3d 452, 460 (4th Cir. 2004). The burden to prove agency action was "final" rests with the Plaintiffs. *Shipbuilders Council of Am., Inc. v. DHS*, 481 F. Supp. 2d 550, 555 (E.D. Va. 2007). The Supreme Court and the Fourth Circuit have recognized that in order for agency action to be final it must (1) mark "the consummation of the agency's decision making process," and (2) determine rights, obligations, or legal consequences. *Bennett v. Spear*, 520 U.S. 154, 178 (1997); *COMSAT Corp. v. National Sci. Found.*, 190 F.3d 269, 274 (4th Cir. 1999). Moreover, the Fourth Circuit has held that "agency action which carries no 'direct or

appreciable legal consequences' is not reviewable under the APA." *Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S.E.P.A.*, 313 F.3D 852, 859 (4th Cir. 2002).

Here, Plaintiffs have not carried their burden of demonstrating that the 2015 Guidelines create rights, obligations, or legal consequences. Plaintiffs assert that the mandatory language contained in the guidelines, such as Defendants use of the word "must" 101 times, creates an obligation for state courts and agencies to comply with the 2015 Guidelines (Doc. 21, 12). This argument is unpersuasive because nothing in the 2015 Guidelines creates legal consequences for state courts, state agencies, or any other party that chooses not to adhere to the 2015 Guidelines. State courts accorded the 1979 Guidelines with some deference but did not interpret them as binding. *See e.g.*, *People ex re. M.H.*, 691 N.W.2d 622, 625 (D.C. 2005) (noting that the "guidelines do not have binding legislative effect"); *People ex rel. S.R.M.*, 153 P.3d 438 (Colo. Ct. App. 2006) (observing that the 1979 guidelines are persuasive but not binding authority). Similarly, state courts applying the 2015 Guidelines have held that they are entitled to some deference but have rejected the notion that the guidelines are binding authority. *See Ogala Sioux Tribe v. Van Hunnik*, No. CIV. 13-5020-JLV, 2015 WL 1466067, at *14 (D.S.D. Mar. 30, 2015 ("The DOI Guidelines are not binding on the court but are an administrative interpretation of the ICWA entitled to great weight."); *In the Matter of M.K.T.*, Case No. 113, 110, 6-9 (Okla. Civ. App. May 1, 2015) (considering but rejecting the 2015 Guidelines recommendations because "[t]he BIA Guidelines are not binding and are instructive only"); *State ex rel. Children, Youth & Families Dep't v. Casey J.*, No. 33,409, 2015 WL 3879548, at *4 (N.M. Ct. App. June 22, 2015) (choosing to apply *both* the 1979 Guidelines and the 2015 Guidelines to reach its position concerning good cause to deviate from the ICWA's placement preferences); *Payton S. v. State*, 349 162, 173 (Alaska 2015) (noting the 2015 update of the 1979 Guidelines and stating that the

court has used them for "guidance in determining whether a proposed witness meets the heightened ICWA expert requirements").

Moreover, mere agency influence over third parties is not sufficient to create rights, obligations, or legal consequences for purposes of judicial review under the APA. *See Flue Cured-Tobacco Coop. Stabilization Corp. v. U.S.E.P.A.*, 313 F.3D 852, 860 (4th Cir. 2002) ("Even when agency action significantly impacts the choices available to the final decisionmaker, this distinction does not transform the challenged action into reviewable agency action under the APA"). The court in *Flue-Cured Tobacco* explained:

> [A]s a practical matter and of considerable importance, if we were to adopt the position that agency actions producing only pressures on third parties were reviewable under the APA, then almost any agency policy or publication issued by the government would be subject to judicial review. We do not think that Congress intended to create private rights of actions to challenge the inevitable objectionable impressions created whenever controversial research by a federal agency is published. Such policy statements are properly challenged through the political process and not the courts.

313 F.3d at 861. Here, the 2015 Guidelines serve as advisory guidelines to state courts, and even if they deemed persuasive and followed by certain courts, the state courts remain the final decision makers with regard to application of the ICWA because the 2015 Guidelines are not binding rules that compel those courts' decisions. Furthermore, voluntary compliance with the 2015 Guidelines does not make them a reviewable "final agency action." *See Ctr. for Auto Safety v. N.H.T.S.A.*, 452 F.3d 798, 811 (D.C. Cir. 2006) (holding that "de facto compliance is not enough to establish that the guidelines have legal consequences").

For these reasons, Plaintiff has failed to demonstrate that the 2015 Guidelines are a "final agency action" within the meaning of the APA and Plaintiffs' Motion for Summary Judgment on these grounds is DENIED.

C. The 2015 Guidelines are non-binding interpretive rules not subject to APA notice-and-comment procedures

This Court DENIES Plaintiffs' Motion for Summary Judgment because the 2015 Guidelines are non-binding interpretive rules not subject to APA notice-and-comment procedures. Plaintiffs argue that the 2015 Guidelines are, at minimum, the functional equivalent of binding legislative rules that are subject to the APA's notice-and-comment requirement. Defendants counter that for the same reasons the 2015 Guidelines are not a "final agency action"—because they do not impose legal obligations—the guidelines are "interpretive rules" or statements of policy that are not subject to APA notice-and-comment procedures.

Under Title 5, Section 553 of the U.S. Code, public notice of rulemaking must be published in the Federal Register and there must be an opportunity for the general public to comment on the proposed rule. 5 U.S.C. § 553(b-(c). However, the provision exempts "interpretive rules" and "general statements of policy." *Id.* § 553 (b)(A). Interpretive rules "simply state what the administrative agency thinks a statute means, and only remind affected parties of the existing duties." *Id.* at 1340-41. Legislative rules, in contrast, "create new rights and have the force and effect of law." *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1340 (4th Cir. 1995); *see also Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 207 (4th Cir. 1989).

In determining whether rules are legislative or interpretive the Fourth Circuit considers several factors, each of which militate toward the conclusion that the 2015 Guidelines are not legislative rules.

First, the Fourth Circuit has made clear that an agency's "own conduct . . . is highly relevant." *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 765 (4th Cir. 2012). An agency's attempt to comply with the APA's notice-and-comment requirement "support[s] the conclusion that those procedures were applicable") (internal quotations omitted). *North Carolina Growers' Ass'n, Inc.*, 702 F.3d at 765. In the present case, Defendants' conduct tends to demonstrate that the 2015 Guidelines are non-binding interpretive rules. Defendants did not initiate the notice-and-comment process to make the 2015 Guidelines themselves binding, nor did Defendants seek to enforce provisions of the 2015 Guidelines (Doc. 48, 26). However, less than one month after issuing the 2015 Guidelines, Defendants initiated a notice-and-comment procedure to transform parts of the 2015 Guidelines into legislative rules, which would be unnecessary if Defendants intended the 2015 Guidelines themselves to have binding or legislative effect (Doc. 48, 26).

The Fourth Circuit also looks to how the agency itself characterizes the document at issue. *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 105-106 (4th Cir. 2011); *see also West Virginia v.Thompson*, 475 F.3d 204, 211 n.2 (4th Cir. 2007). Defendants have not characterized the 2015 Guidelines in a way that would indicate they are binding legislative rules. Rather, Defendants' characterization of the 2015 Guidelines suggests they were not meant to be legislative, but rather, interpretive rules. The 2015 Guidelines have the stated purpose of serving to "promote compliance with ICWA's stated goals and provisions by providing a framework for State courts and child welfare agencies to follow." 80 Fed. Reg. 10, 146-74. The Fourth Circuit has recognized that an agency action is not legislative where it made clear that it is not meant to be legislative. *See West Virginia v.Thompson*, 475 F.3d 204, 211 n.2 (4th Cir. 2007) (manual provision not legislative where it made clear "that it does not bind the states to any mandatory

requirements beyond those in the Medicaid statute"). Plaintiffs argue that Defendants' usage of the word "must" 101 times and "may not" ten times demonstrates that Defendants characterized the 2015 Guidelines as having a binding effect. However, mandatory language does not transform a set of interpretive rules into compulsory legislative rules. *See Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993) ("Nor is there much explanatory power in any distinction that looks to the use of mandatory as opposed to permissive language."). Mandatory language is not dispositive of this issue because even interpretive rules can use mandatory language when interpreting part of a statutory command. *Id.* Here, the use of mandatory language does not dictate whether the 2015 Guidelines are interpretive or legislative rules, because that language is used in the context of a document that is itself presented merely as "guidance" to "promote compliance" with the ICWA. 80 Fed. Reg. 10,146.

Additionally, the Fourth Circuit looks to the actual or intended effect of the rule. *Chen Zou Chai v. Carroll*, 48 F.3d 1331, 1341 ("A rule is a general statement of policy if it does not establish a binding norm and leaves agency officials free to exercise their discretion."); *see also Jerri's Ceramic Arts, Inc.*, 874 F.2d at 208 (rule was legislative where it "has the clear intent . . . of providing the Commission with power to enforce violations of a new rule"). The 2015 Guidelines do not have an actual or intended effect of being legislative rules and state courts are free to exercise their discretion and depart from interpretations contained in the 2015 Guidelines. As mentioned previously, Defendants did not attempt to comply with the APA's notice-and-comment procedures when issuing the 2015 Guidelines, nor have the Defendants attempted to compel agencies to comply with the 2015 Guidelines. *Jerri's Ceramic Arts, Inc.*, 874 F.2d at 208 (rule was legislative where it "has the clear intent . . . of providing the Commission with power to enforce violations of a new rule"). Here, Defendants actions allowed state courts and

agencies to adopt their own interpretation of ICWA and simply issued the 2015 Guidelines as non-binding "guidance." 80 Fed. Reg. at 10, 146 (stating that the 2015 Guidelines "provide guidance to State courts and child welfare agencies implementing [ICWA]."); *see M.K.T.*, Case No. 113, 110, at 7-8 (rejecting the 2015 Guidelines interpretation of "good cause").

Finally, the Fourth Circuit takes into consideration an agency's change of a "long-standing position" in determining whether guidelines are binding legislative rules. *Jerri's Ceramic Arts,* 874 F.2d at 208. Plaintiffs argue that the 2015 Guidelines' mark departure from prior policy that indicates a change from non-binding to binding guidelines; Defendants' counter that the changes to the Guidelines in the 2015 update are merely the result of the BIA's intention to take a position on interpretive disagreements that have arisen among state courts in the many years that have passed since enactment of ICWA and issuance of the 1979 Guidelines. Regardless, neither the Fourth Circuit nor the APA require notice and comment before an agency can update or change its interpretation of a statute. In evaluating a change of policy, the court's inquiry must focus on whether the change was one that created new legal obligations on state courts or agencies and therefore do require notice-and-comment procedures. Here, despite any changes from the 1979 Guidelines, the 2015 Guidelines do not create new legal rights, duties, or obligations binding state courts and thus, they are not legislative rules.

Analysis of these factors supports the conclusion that the 2015 Guidelines are not legislative rules but rather that they are non-binding interpretive rules not subject to APA notice-and-comment procedures. Accordingly, Plaintiffs' claim that the 2015 Guidelines have been issued in derogation of the APA's notice-and-comment procedure fails, and Plaintiffs' Motion for Summary Judgment is DENIED.

III. CONCLUSION

The Court denies Plaintiffs' Motion for Summary Judgment on the APA claim for three reasons. First, Plaintiffs lack standing to challenge the 2015 Guidelines because they cannot demonstrate the requisite injury in fact or causation elements. Second, the 2015 Guidelines are not a "final agency action" within the meaning of the APA because they do not create legal rights and obligations. Finally, the 2015 Guidelines are non-binding interpretive rules not subject to APA notice-and-comment procedures. For the foregoing reasons, it is hereby

ORDERED that Plaintiffs' Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

ENTERED this 20th day of October, 2015.

Alexandria, Virginia
10 /___ / 2015

/s/
Gerald Bruce Lee
United States District Judge

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NATIONAL COUNCIL FOR ADOPTION, BUILDING ARIZONA FAMILIES on behalf of itself and its birth-parent clients, birth parents D.V. and N.L., and baby boy T.W. by and through his guardian ad litem PHILIP (JAY) MCCARTHY, JR.,

Plaintiffs,

v.

SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, KEVIN WASHBURN, in his official capacity as Assistant Secretary of Indian Affairs, BUREAU OF INDIAN AFFAIRS, and the UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Case No. 1:15-cv-675-GBL-MSN

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction and for Judgment on the Pleadings (Docs. 50, 51). Defendants' motion asserts that the Court lacks subject-matter jurisdiction to hear Plaintiffs' claims and that the Complaint must be dismissed because Plaintiffs have not stated a claim for which relief can be granted because the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10, 146 (Feb. 25, 2015) ("2015 Guidelines") are a non-binding and non-final agency action (Doc. 52). Although the case initially involved multiple plaintiffs, all Plaintiffs except Building Arizona Families ("BAF") and National Council for Adoption ("NCFA") voluntarily dismissed their claims (Doc. 65). Because NCFA failed to oppose

Defendants' Motion to Dismiss, it has waived defense of its claims. (Doc. 64). Thus, only BAF's claims remain before the Court.

The issue is whether the Court has subject-matter jurisdiction over Plaintiff BAF's claims and whether Plaintiff BAF states a claim for relief.

The Court GRANTS Defendants' Motion to Dismiss For Lack of Subject-Matter Jurisdiction and for Judgment on the Pleadings for four reasons. First, and most importantly, Plaintiffs' claims are precluded by the October 20, 2015 Memorandum Opinion and Order ("Memorandum Opinion") denying Plaintiffs' motion for partial summary judgement (Doc. 66), in which the Court held that (1) Plaintiffs lack standing to challenge the Guidelines, (2) the Guidelines are not justiciable as a "final agency action" because they do not create legal rights and obligations, and (3) the Guidelines are non-binding interpretive rules.[1] Second, BAF has not demonstrated any authority to support its equal protection, due process, or Indian Commerce Clause claims. Third, the 2015 Guidelines do not commandeer state entities. Fourth, Plaintiff BAF has failed to plead a *Bivens* action. Accordingly, Plaintiffs' claims fail for lack of subject matter jurisdiction and are dismissed as a matter of law.

I. BACKGROUND

This matter arises from Defendants, Sally Jewell, in her official capacity as Secretary of the United States Department of the Interior, Kevin Washburn, in his official capacity as Assistant Secretary of Indian Affairs, the Bureau of Indian Affairs, and the Department of the Interior's Motion to Dismiss Plaintiffs' claims for lack of subject-matter jurisdiction (Doc. 50).

[1] Plaintiffs stipulated to dismissal of Counts II, III, and IV. (Doc. 65). In light of the Court's ruling in the October 15, 2015 Memorandum Opinion and Order, and the additional analysis herein, each of Plaintiffs' remaining claims (I, V, VI, VII, and VIII) are also dismissed.

Defendants assert that Plaintiffs cannot state a valid claim because the 2015 Guidelines in issue are non-binding and non-final (Doc. 52).

Plaintiff NCFA is a non-profit, national adoption policy organization with its headquarters and principal place of business in Alexandria, Virginia (Doc. 1). Plaintiff Building Arizona Families is a non-profit adoption agency headquartered in, and licensed by, the State of Arizona. *Id.* Plaintiff BAF is suing on its own behalf, and on behalf of its birth-parent clients who are frustrated by the 2015 Guidelines that seek to implement the Indian Child Welfare Act ("ICWA")'s hierarchy of placement preferences regarding birth-parent client's decisions to place their children, classified as "Indian children," into adoptive homes. *Id.* Plaintiffs D.V. and N.L. are birth parents of a child who is an "Indian child" under ICWA because D.V., the child's father, is an enrolled member of the Pascua Yaqui Tribe located in Arizona and both parents, D.V. and N.L. are residents of Arizona and do not reside on an Indian reservation. *Id.* D.V. and N.L. selected an adoptive placement that is not within ICWA's placement preferences. *Id.* Plaintiff Phillip (Jay) McCarthy, Jr. is a resident of Arizona and is the court-appointed guardian ad litem from baby boy T.W., who is an "Indian Child" pursuant to the ICWA, because he is an enrolled member of the Navajo Nation. *Id.* T.W.'s foster parents are not a preferred placement under the ICWA or the 2015 Guidelines. *Id.*

Defendant Sally Jewell is the Secretary of the United States Department of the Interior. *Id.* Defendant Kevin Washburn is the Assistant Secretary for Indian Affairs at the Bureau of Indian Affairs within the United States Department of the Interior. *Id.* Defendant Bureau of Indian Affairs is a federal agency within the Department of the Interior. *Id.* Defendant Department of the Interior is a federal executive department of the United States. *Id.*

Congress enacted the Indian Child Welfare Act ("ICWA") to address "'the consequences to Indian Children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.'" *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013) (quoting *Miss Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). The ICWA applies to "child custody proceedings" (defined as foster-care placements, terminations of parental rights, and pre-adoptive and adoptive placements) involving an "Indian child," which is defined as "any unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe." 25 U.S.C. §§ 1903(1), (4). On February 25, 2015, the BIA updated the 1979 Guidelines, 44 Fed. Reg. 67, 584 (1979), with the 2015 Guidelines in order to "promote compliance with ICWA's stated goals and provisions by providing a framework for State courts and child welfare agencies to follow." 80 Fed. Reg. 10, 146-147.

On May 27, 2015, Plaintiffs filed a Complaint consisting of eight counts (Doc. 1). In Count I, all Plaintiffs allege that the 2015 Guidelines violated the APA. *Id.* Count II alleges that the 2015 Guidelines violated Plaintiff T.W.'s right to due process. *Id.* Count III alleges that the 2015 Guidelines violated Plaintiff T.W.'s right to equal protection of the laws. *Id.* Count IV alleges that Plaintiff T.W. was entitled to declaratory judgment because applying ICWA's placement preferences through the 2015 Guidelines would violate T.W.'s rights under the due process and equal protection components of the Fifth Amendment. *Id.* Count V alleges that the 2015 Guidelines violated birth parents of Indian children D.V., N.L., the unspecified birth parents represented by BAF, and Phillip (Jay) McCarthy, representing T.W.'s rights to due process. *Id.* Count VI alleges that the 2015 Guidelines violated the birth parents' right to equal

protection of the laws. *Id.* Count VII alleges that the birth parent Plaintiffs were entitled to declaratory judgment because the ICWA exceeds the legislative authority of Congress under Article I of the Constitution. *Id.* Finally, Count VIII alleges that the 2015 Guidelines violate the 10th Amendment by impermissibly commandeering the regulatory licensing apparatuses. *Id.*

On July 30, 2015 all Plaintiffs filed a Motion for Summary Judgment on Count I involving the APA claim (Docs. 20, 21). Plaintiffs' Motion for Summary Judgment argued that the 2015 Guidelines are legislative guidelines which make them binding and that as binding "legislative rules," the BIA was required to adhere to the APA's notice-and-comment procedures before issuing them. *Id.* Plaintiffs sought a judgment that the 2015 Guidelines violate the APA and the United States Constitution, an order setting aside the 2015 Guidelines, and injunctive relief ordering Defendants to withdraw the 2015 Guidelines (Doc. 1). Plaintiffs also sought a declaratory judgment that the child custody provisions of the ICWA, 25 U.S.C. §§ 1911-1923, violate the United States Constitution and accordingly cannot be applied to them. *Id.*

While Plaintiffs' Motion for Summary Judgment was pending, Defendants filed this Motion to Dismiss on September 11, 2015, alleging that Plaintiffs cannot establish a controversy because the 2015 Guidelines are non-binding, that all Plaintiffs have failed to state any claim for relief, and that NCFA and BAF are not injured have not alleged facts sufficient to show they are suitable advocates for third-party plaintiffs (Docs. 50, 51, 52). While Defendants' Motion to Dismiss was pending, the Court issued a Memorandum Opinion Denying Plaintiffs' Motion for Summary Judgment (Doc. 66), holding that (1) Plaintiffs lack standing to challenge the Guidelines, (2) the Guidelines are not justiciable as a "final agency action" because they do not create legal rights and obligations, and (3) the Guidelines are non-binding interpretive rules.

On October 16, 2015, Plaintiffs voluntarily dismissed the claims of all Plaintiffs except BAF and NCFA (Doc. 65). On the same day, NCFA failed to oppose Defendants Motion, thereby waiving any defense of its claims (Doc. 64). In Plaintiff BAF's Opposition to Defendants' Motion to Dismiss, BAF argues that it has standing to challenge the 2015 Guidelines and that it has stated a claim on behalf of its birth-parent clients. *Id.* In their Reply, Defendants argue that the Court's Memorandum Order precludes Plaintiffs' claims, and that Plaintiff BAF's Opposition does not salvage Plaintiffs' substantive claims, which still fail to state any grounds for relief; accordingly, Defendants urge the Court to dismiss Plaintiffs' remaining claims (Doc. 67). Defendants' Motion to Dismiss is now properly before the Court.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) allows a defendant to move for dismissal when the court lacks jurisdiction over the subject matter of the action. FED. R. CIV. P. 12(b)(1). In considering a 12(b)(1) motion to dismiss, the burden is on the plaintiff to prove that federal subject matter jurisdiction is proper. *See United States v. Hays,* 515 U.S. 737, 743 (1995) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)); *Adams v. Bain,* 697 F.2d 1213, 1219 (4th Cir. 1982). A defendant may attack the complaint on its face when the complaint "fails to allege facts upon which subject matter jurisdiction may be based." *Adams*, 697 F.2d at 1219. In such a case, all facts as alleged by the plaintiff are assumed to be true. *Id.*

Federal Rule of Civil Procedure 12(b)(6) enables a defendant to move for dismissal by challenging the sufficiency of the plaintiff's complaint. FED R. CIV. P. 12(b)(6). A Rule 12(b)(6) motion should be granted where the plaintiff has failed to "state a plausible claim for relief" under Rule 8(a). *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012) (internal quotation marks omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). To be facially

plausible, a claim must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 554 (4th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678). To survive a Rule 12(b)(6) motion, a complaint must contain sufficient factual allegations, which if taken as true, "raise a right to relief above the speculative level" and "nudg[e] [the] claims across the line from conceivable to plausible." *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 543 (4th Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)).

The requirement for plausibility does not mandate a showing of probability but merely that there is more than a possibility of the defendant's unlawful acts. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678). As a result, a complaint must contain more than "naked assertions" and "unadorned conclusory allegations" and requires some "factual enhancement" in order to be sufficient. *Id.* (citing *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 557). In addition to the complaint, the court will also examine "documents incorporated into the complaint by reference," as well as those matters properly subject to judicial notice. *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557 (4th Cir. 2013) (citations omitted); *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 176 (4th Cir. 2009) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

The Court reviewing a Rule 12(b)(6) Motion to Dismiss must separate factual allegations from legal conclusions. *Burnette v. Fahey*, 687 F.3d 171, 180 (4th Cir. 2012). In considering a Rule 12(b)(6) motion, a court must give all reasonable inferences to the plaintiff and accept all factual allegations as true. *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011) (citations omitted). Though a court must accept the truthfulness of all factual

allegations, it does not have to accept the veracity of bare legal conclusions. *Burnette*, 687 F.3d at 180 (citing *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 391 (4th Cir. 2011)).

A court must grant a Rule 12(b)(6) motion where a complaint fails to provide sufficient nonconclusory factual allegations to allow the court to draw the reasonable inference of the defendant's liability. *Giacomelli*, 588 F.3d at 196–97 (citing *Iqbal*, 556 U.S. at 678–79; *Gooden v. Howard Cnty., Md.*, 954 F.2d 960, 969–70 (4th Cir. 1992) (en banc)).

II. ANALYSIS

This Court GRANTS Defendants' Motion to Dismiss For Lack of Subject-Matter Jurisdiction and for Judgment on the Pleadings because: (1) Plaintiffs' claims are precluded by this Court's October 20, 2015 Memorandum Opinion in which the Court held that Plaintiffs lack standing to challenge the Guidelines, that the Guidelines are not justiciable as a "final agency action," and that the Guidelines are non-binding interpretive rules; (2) BAF has not demonstrated any authority to support its equal protection, due process, or Indian Commerce Clause claims; (3) the 2015 Guidelines do not commandeer state entities; and (4) BAF has failed to plead a *Bivens* action.

A. This Court Has Determined that Plaintiffs' challenges to the 2015 Guidelines Are Not Justiciable

The Court GRANTS Defendants' Motion to Dismiss because this Court has already determined that the 2015 Guidelines are not justiciable as a "final agency action" (Doc. 66). This determination prevents Plaintiff BAF's claims from succeeding because (1) Plaintiff BAF's claims are no longer plausible and (2) the law of the case doctrine restricts this Court to its previously determined legal decisions on Plaintiffs' Motion for Summary Judgment.

First, in order to survive a 12(b)(6) motion, BAF must state a claim that is sufficiently "plausible on its face." *Iqbal*, 556 U.S. at 678. Second, the law of the case doctrine "restricts a

court to legal decisions it has made on the same issues in the same case." *DietGoal Innovations LLC v. Wegmans Food Mkts., Inc.*, 993 F. Supp. 2d 594, 600 (E.D. Va. 2013) (quoting *MacDonald v. Moose*, 710 F.3d 154, 161 (4th Cir. 2013); *Walker v. S.W.I.F.T. SCRL*, 517 F. Supp. 2d 801, 807 E.D. Va. 2007). *See also Sejman v. Warner-Lambert Co., Inc.*, 845 F.2d 66, 69 (4th Cir. 1988) (stating that the law of the case doctrine should be followed when applicable unless "the prior decision was clearly erroneous and would work manifest injustice").

First, Plaintiffs' claim is not sufficiently plausible on its face. In Plaintiff BAF's Opposition to Defendants' Motion to Dismiss and for Judgment on the Pleadings, Plaintiff alleges that BAF may challenge the 2015 Guidelines because they are still a final agency action subject to judicial review under the APA, even as interpretive rules (Doc. 64). Plaintiff raised many of the same claims in its Motion for Summary Judgment (Doc. at 20-21). However, Plaintiffs' assertions have already been denied by this Court (Doc. 66). Specifically, this Court denied Plaintiffs' Motion for Summary Judgment on the grounds that the Court lacks subject-matter jurisdiction over Plaintiffs' APA claim involving the 2015 Guidelines since Plaintiffs lack standing to challenge the 2015 Guidelines. The Court ruled both that Plaintiffs do not allege a cognizable injury in fact and that Plaintiffs have not established a causal connection between the injury alleged and the issuance of the 2015 Guidelines because the Guidelines can only be implemented by the action of state courts. (Doc. 66 at 8-9). Further, the Court held that the 2015 Guidelines are not a "final agency action" within the meaning of the APA because they do not create legal rights and obligations. *Id.* at 10-12. Finally, the Court determined that the 2015 Guidelines are non-binding interpretive rules. *Id.* at 13-16.

Second, the law of the case doctrine restricts this Court to its previously determined legal decisions in its ruling on Plaintiffs' Motion for Summary Judgment. *See MacDonald*, 710 F.3d

at 161. Defendants, recognizing that this Court's denial of Plaintiffs' Motion for Summary Judgment has already settled Plaintiff BAF's challenges to the 2015 Guidelines request that this Court formally extend its holding on the Plaintiff's Motion for Summary Judgment to the present action (Doc. 67).

For the reasons explained in this Court's Memorandum Opinion and Order on Plaintiffs' Motion for Summary Judgment, BAF has not demonstrated that the 2015 Guidelines are a final agency action for jurisdiction under the APA or that they are contrary to law (Doc. 66). As a result, Plaintiffs' Count I must be dismissed because this Court found no subject-matter jurisdiction. *Id.* Counts V, VI, VII, and VIII must also be dismissed because they either target or challenge the 2015 Guidelines. *Id.*

In sum, this Court has already determined that the 2015 Guidelines are not justiciable as a final agency action and thus, Plaintiff BAF's claim fails because it is are not plausible on its face. For these reasons, the Court GRANTS Defendants' Motion to Dismiss.

B. BAF Has Not Demonstrated Any Authority to Support its Equal Protection, Due Process, or Indian Commerce Clause Claims

The Court also GRANTS Defendants' Motion to Dismiss because Plaintiffs have stipulated to the dismissal of Counts II, III, and IV when they voluntarily dismissed the claims of all Plaintiffs except BAF and NCFA (Doc. 65). Counts II, III, and IV specifically refer to Plaintiffs other than BAF, the sole remaining Plaintiff in this case, which precludes BAF from asserting these claims regarding equal protection, due process, and the Indian Commerce Clause. Even if Plaintiff BAF could bring forth these claims, they all fail because Plaintiff BAF has not demonstrated authority to support its claims that the 2015 Guidelines violate (1) equal protection, (2) due process, or (3) the Indian Commerce Clause.

First, Plaintiff BAF argues that the 2015 Guidelines, even if they are determined to be non-binding rules, violate Plaintiffs' right to equal protection of the law (Doc. 1). Specifically, Plaintiffs allege that applying the 2015 Guidelines imposes burdens on Plaintiff T.W.'s ability to maintain familial bonds with his current foster parents solely because he is defined as an "Indian child." *Id.* Plaintiffs also allege that the 2015 Guidelines induces state courts to violate Birth Parent Plaintiffs' rights to equal protection under the laws by imposing burdens on their ability to direct the custody and upbringing of their "Indian children." *Id.* Plaintiffs later explain that the 2015 Guidelines are a violation to the equal protection clause because they apply to children "whose only connection to the tribe is biological" (Doc. 64).

Defendants, however, have properly asserted that Plaintiff BAF's equal protection claims fail because the 2015 Guidelines are not race-based, but are instead, based on one's political membership in a federally recognized Indian tribe, which does not cease when that member leaves of the reservation (Doc. 51). *See* 25 U.S.C. § 1903(4) (defining an "Indian child" as children who are themselves members of an Indian tribe, or who are eligible for membership and have a biological parent who is a member of an Indian tribe). *See also Morton v. Mancari*, 417 U.S. 535, n. 24 (1974) (stating that "the preference is political rather than racial in nature" when referring to the classification of "Indians"). Therefore, Plaintiff BAF's claim that the 2015 Guidelines violate the right to equal protection because the definition of "Indian children" is race-based fails since the definition is political in nature.

Second, Plaintiff BAF argues that the 2015 Guidelines violate the Due Process Clause because it unduly burdens and violates a parent's due process rights to direct the upbringing of their child (Doc. 64). BAF concedes that the Fourth Circuit has not recognized a constitutional right of birth parents to direct their child's adoptive placement. *Id.* However, BAF seeks this

Court to rule that such a right exists on the basis of the Supreme Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, the court recognized birth parents' rights to withdraw their children from public school on the basis of religion. The Court in *Yoder* determined that "when the interest of parenthood are combined with a free exercise claim," "more than . . . a reasonable relation to some purpose within the competency of the State" is required to sustain the validity of state regulation under the First Amendment. *Id.* at 233-34. The Court further established that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations." *Id.* at 215.

Yoder is distinguishable from the present case. Unlike in *Yoder*, Plaintiff BAF did not assert a free exercise claim for religion. Furthermore, Plaintiff BAF has failed to provide the nexus between a parent's right to place their child for adoption and any claim to free exercise in order to properly assert such a claim. In contrast to *Yoder*, Defendants argue that this Court consider the *Michael* case. *See Michael H. v. Gerald D.*, 491 U.S. 110, 128 (1989) (holding the interests of a biological parent in something as consequential as custody may be outweighed completely by the state's interests). Defendants further contend that the birth parents' interests are not threatened since the 2015 Guidelines are non-binding guidance (Doc. 67). Plaintiff BAF has not persuaded this Court to consider *Yoder* as controlling in the present case and fails to establish why this court should set a new precedent for due process claims related to parents' rights on the basis of *Yoder*.

Additionally, Plaintiff BAF attempts to defend its due process claims through its assertion that any burden that the 2015 Guidelines might impose on the as-of-yet unrecognized right of birth parents to direct placement could not be narrowly tailored to keep Indian children

with their community because "most of BAF's clients' children have not yet been born." (Doc. 64). Plaintiff BAF broadly returns to *Yoder* to suggest that where a fundamental right is burdened by a statute, the statute must always yield. *Id.* Again, Plaintiff has failed to establish how *Yoder* is comparable to the present case. Furthermore, Defendants have argued that this assertion is in complete contradiction to the Supreme Court's Decision in *Roe v. Wade*. *See Roe v. Wade*, 410 U.S. 113, 155 (1973) (stating that "[R]egulation limiting [certain fundamental] rights may be justified only by a 'compelling state interest' and . . . must be narrowly drawn to express only the legitimate state interests at stake.") (internal citations omitted). Therefore, Plaintiff BAF's due process claims fail because Plaintiff BAF demonstrated adequate support for the claims.

Third, Plaintiff BAF argues that the ICWA exceeds Congress' authority under the Indian Commerce Clause ("ICC") (Doc. 64). However, BAF only cites to cases referring to the Interstate Commerce Clause, which the Supreme Court has distinguished. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (explaining that "the extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause"). Furthermore, Plaintiff BAF's claim ignores the fact that federal legislative authority for the ICWA stems from "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government . . ." *United States v. Lara*, 541 U.S. 193, 201 (2004). The power has also been derived through the federal government's assumption of a trust obligation toward Indian tribes. *Morton v. Mancari*, 417 U.S. 535, 522 (1974) (stating that federal legislative authority also comes from the President's treaty power which "has often been the source of the Government's power to deal

with Indian tribes"). Thus, Plaintiff BAF's claims regarding the Indian Commerce Clause fail to cite to any authority to support its arguments.

Plaintiffs' claims fail because BAF has not demonstrated authority to support its claims that the 2015 Guidelines violate (1) equal protection, (2) due process, or (3) the Indian Commerce Clause. Accordingly, this Court GRANTS Defendants' Motion to Dismiss.

C. The 2015 Guidelines Do Not Commandeer State Entities

This Court GRANTS Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction because the 2015 Guidelines do not commandeer state entities.

Plaintiff argues that the 2015 Guidelines violate the Tenth Amendment to the United States Constitution by impermissibly commandeering state courts and state licensed agencies (Doc. 64). The Supreme Court has held that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). Plaintiff argues that although the 2015 Guidelines are characterized as recommendations, on its face, they commandeer state courts and agencies (Doc. 64). The Court decided this issue in its denial of Plaintiffs' Motion for Summary Judgment, holding that "the 2015 Guidelines do not mandate state court compliance." (*See* Doc. 66 at 10).

Regardless, even if the 2015 Guidelines were legislative rules, rather than interpretive guidelines that do not mandate the state court compliance, the 2015 Guidelines still would not commandeer state entities to comply with its regulations. As stated in part B, *supra*, Congress passed the ICWA pursuant to congressional authority expressly granted in the Constitution. Just as Congress may pass laws enforceable in state courts, Congress may direct state judges to

enforce those laws. *New York v. United States*, 505 U.S. 144, 178 (1992). Where a state court is applying the rights and protections provided for by ICWA the federal government can act to prevent state "rules of practice and procedure" from "dig[ging] into substantive federal rights." *Brown v. Western Ry.*, 338 U.S. 294, 296 (1949). Since the 2015 Guidelines would be within Congress' authority to enforce, there is no suggestion that the 2015 Guidelines commandeer state entitles to comply with its regulations.

Accordingly, Plaintiff fails to state a claim that the 2015 Guidelines commandeer state entities. For these reasons, this Court GRANTS Defendants' Motion to Dismiss.

D. BAF Failed to Plead a *Bivens* Action

This Court GRANTS Defendants' Motion to Dismiss because Plaintiff has failed to plead a *Bivens* Action. Specifically, this claim fails because Plaintiff has not applied the *Bivens* elements to the present case and there is no indication that the 2015 Guidelines are unconstitutional.

A *Bivens* action may be brought forth when a government agent's inducement of another to violate constitutional rights itself violates those rights. *See Dodds v. Richardson*, 614 F.3d 1185, 1196-97 (10th Cir. 2010); *see also Weise v. Jenkins*, 796 F. Supp. 2d 188, 197 (D.D.C. 2011) (stating that "Governmental officials may also be held personally liable in damages for constitutional infringements resulting from their establishment of unconstitutional policies"). To succeed on a policy making theory, a plaintiff must demonstrate that the official against whom the liability is asserted has the power—vested either formally or as a practical matter—to formulate policy, and has exercised that policymaking authority to generate improper practices. *Id.* To establish a claim for policymaking liability under *Bivens*, a plaintiff must show that the

official (1) established a policy (2) that was unconstitutional and (3) caused the plaintiff to be injured. *Id.*

In its Opposition, BAF argues that it "stated a valid *Bivens* claim against the individual Defendants, who have publicly urged the violation of birth parents' constitutional rights through publication of the 2015 Guidelines" (Doc. 64). However, Plaintiff BAF merely set forth the rule of applying a *Bivens* action, without applying the rule to the present case. *Id.* Defendants argue that Plaintiff BAF's attempt to plead a *Bivens* action is insufficient because BAF only attempts to incorporate the standards governing when a government official possesses the requisite personal involvement to be liable under *Bivens* and BAF's claim fails because it can only be brought for money damages.

The Court in *Bivens* stated that "an individual injured by a federal agent's alleged violation of the Fourth Amendment may bring an action for damages against the agent." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 395-96 (1971). However, the Plaintiff BAF here, in addition to its failure to apply the *Bivens* elements to the present case, has failed to demonstrate a "valid" *Bivens* complaint because Plaintiff did not bring an action for monetary action, but instead is only seeking equitable relief. Even if this were not the case, Plaintiff still fails to meet the first requirement of *Bivens* because Plaintiff did not sue any Defendant in their individual capacity, only their official capacity. Furthermore, the second element fails because there is no evidence that the 2015 Guidelines are unconstitutional. Lastly, the third element could not be applicable without establishing the first two elements.

Analysis of these factors supports the conclusion that Plaintiff's claims fail to state a claim upon which relief can be granted. Accordingly, Defendants' Motion to Dismiss is GRANTED.

III. CONCLUSION

The Court GRANTS Defendants' Motion to Dismiss For Lack of Subject-Matter Jurisdiction and for Judgment on the Pleadings for four reasons. First, Plaintiffs' claims are precluded by this Court's October 20, 2015 Memorandum Opinion and Order ("Memorandum Opinion") denying Plaintiffs' motion for partial summary judgement (Doc. 66), in which the Court held that (1) Plaintiffs lack standing to challenge the Guidelines, (2) the Guidelines are not justiciable as a "final agency action" because they do not create legal rights and obligations, and (3) the Guidelines are non-binding interpretive rules. Second, BAF has not demonstrated any authority to support its equal protection, due process, or Indian Commerce Clause claims. Third, the 2015 Guidelines do not commandeer state entities. Fourth, Plaintiff BAF has failed to plead a *Bivens* action. For the foregoing reasons, it is hereby

ORDERED that Defendants' Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

ENTERED this 9th day of December, 2015.

Alexandria, Virginia
12/9/2015

/s/
Gerald Bruce Lee
United States District Judge

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NATIONAL COUNCIL FOR ADOPTION, BUILDING ARIZONA FAMILIES on behalf of itself and its birth-parent clients, birth parents D.V. and N.L., and baby boy T.W. by and through his guardian ad litem PHILIP (JAY) MCCARTHY, JR.,

Plaintiffs,

v.

SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, KEVIN WASHBURN, in his official capacity as Assistant Secretary of Indian Affairs, BUREAU OF INDIAN AFFAIRS, and the UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Case No. 1:15-cv-675-GBL-MSN

FINAL JUDGMENT

THIS MATTER is before the Court on Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction and for Judgment on the Pleadings (Docs. 50, 51). For the reasons stated in the Memorandum Opinion and Order dated December 9, 2015 (Doc. 69), it is hereby

ORDERED that JUDGMENT is ENTERED in favor of Defendants Sally Jewell, in her official capacity as Secretary of the United States Department of the Interior, Kevin Washburn, in his official capacity as Assistant Secretary of Indian Affairs, the Bureau of Indian Affairs, and the Department of the Interior and against Plaintiffs National Council for Adoption, Building Arizona Families on behalf of itself and its birth-parent clients, birth parents D.V. and

N.L., and baby boy T.W. by and through his guardian ad litem Philip (Jay) McCarthy, Jr., pursuant to Rule 58 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

ENTERED this 9th day of December, 2015.

Alexandria, Virginia
12/9/2015

/s/
Gerald Bruce Lee
United States District Judge