CASE NO. 16-5174
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARTHA DONELSON *et al*. on behalf of themselves and on behalf of all similarly situated persons, **Plaintiffs – Appellants,** **vs.** **UNITED STATES OF AMERICA, Through the Department of the Interior and its Agency, the Bureau of Indian Affairs, *et al*.,** **Defendants-Appellees**	**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA THE HONORABLE JAMES H. PAYNE PRESIDING CASE NO. 4:14-CV-00316-JHP-FHM** **ORAL ARGUMENT NOT REQUESTED**

JOINT ANSWER BRIEF OF APPELLEES DEVON ENERGY, L.P., ENCANA OIL & GAS (USA), INC., PERFORMANCE ENERGY RESOURCES, LLC, CEJA CORPORATION, CEP MID-CONTINENT LLC, SULLIVAN & COMPANY, LLC, CARDINAL RIVER ENERGY I LP, REVARD OIL AND GAS PROPERTIES, INC., BLACK LAVA RESOURCES, LLC, B & G OIL COMPANY, ORION EXPLORATION, LLC, NADEL & GUSSMAN, LLC, LAMAMCO DRILLING, INC., SHORT OIL, LLC, WELLCO ENERGY, INC., MARCO OIL CO., LLC, BGI RESOURCES, LLC, THE LINK OIL COMPANY, OSAGE ENERGY RESOURCES, LLC, TOOMEY OIL COMPANY, INC., KAISER-FRANCIS ANADARKO, LLC, HELMER OIL CORP., AND SPYGLASS ENERGY

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[1] Filing on behalf of the Non-Federal Defendants listed on the signature page.

CORPORATE DISCLOSURE STATEMENT

Defendant/Appellee, Devon Energy Production Company, L.P., is a non-governmental entity; it is not a publicly held corporation or other entity. It has the following parent companies: DVN Operating Company, LLC; Devon OEI Operating, LLC; Devon OEI Holdings, LLC; Devon Energy Corporation (Oklahoma); and Devon Energy Corporation. Devon Energy Corporation is a publically traded corporation.

Defendant/Appellee, Wellco Energy, Inc., is a non-governmental corporate party, none of whose stock is owned by corporation.

Defendant/Appellee, B & G Oil Company, is a non-governmental corporate party, none of whose stock is owned by corporation.

Defendant/Appellee, Revard Oil and Gas Properties, Inc., is a non-governmental corporate party, none of whose stock is owned by corporation.

Defendant/Appellees, Helmer Oil Corp., Marco Oil Company, LLC, Osage Energy Resources, LLC, Performance Energy Resources, LLC and Short Oil, LLC, are not publicly held corporations or other publicly held entities. There are no other publicly held corporations or other publicly held entitles that have a direct financial interest in the outcome of the litigation. Helmer Oil Corp., Marco Oil Company, LLC, Osage Energy Resources, LLC, Performance Energy Resources, LLC and Short Oil, LLC are not trade associations.

Defendant/Appellee, Black Lava Resources LLC is a non-governmental entity and is not a publicly held corporation or other publicly held entity. Black Lava's parent entities are Bartholomae Inheritor's Trust; Sub Surface Resources, LLC and Prodigy Oil & Gas, LLC. There is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation. Black Lava is not a trade association.

Defendants/Appellees, Kaiser-Francis Anadarko, L.L.C. and Nadel and Gussman, LLC, are not publicly held corporations or other publicly held entities. Kasier-Francis Anadarko, L.L.C.'s parent is GBK LLC Holdings, L.L.C. and Nadel and Gussman, LLC does not have any parent corporations. There are no other publicly held corporations or other publicly held entitles that have a direct financial interest in the outcome of the litigation. Kaiser-Francis Anadarko, L.L.C. and Nadel and Gussman, LLC are not trade associations.

Defendant/Appellee, CEP Mid-Continent, LLC is not a publicly held corporation or other publicly held entity. CEP's parent is Sanchez Production Partners, L.P. There is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation. CEP is not a trade association.

Defendant/Appellee, Ceja Corporation is not a publicly held corporation or other publicly held entity. Ceja does not have any parent corporations. None of

Ceja's stock is owned by a publicly held corporation or other publicly held entity. There are no other publicly held corporations or other publicly held entitles that have a direct financial interest in the outcome of this litigation. Ceja is not a trade association.

Defendant/Appellee, BGI Resources, LLC is not a publicly held corporation or other publicly held entity. BGI Resources, LLC does not have any parent corporations. None of BGI Resources, LLC's stock is owned by a publicly held corporation or other publicly held entity. There are no other publicly held corporations or other publicly held entitles that have a direct financial interest in the outcome of this litigation. BGI Resources, LLC is not a trade association.

Defendant/Appellee, Orion Exploration, LLC is not a publicly held corporation or other publicly held entity. Orion Exploration, LLC does not have any parent corporations. None of Orion Exploration, LLC's stock is owned by a publicly held corporation or other publicly held entity. There are no other publicly held corporations or other publicly held entitles that have a direct financial interest in the outcome of this litigation. Orion Exploration, LLC is not a trade association.

Defendant/Appellee, Sullivan and Company, LLC is not a publicly held corporation or other publicly held entity. Sullivan and Company, LLC does not have any parent corporations. None of Sullivan and Company, LLC's stock is owned by a publicly held corporation or other publicly held entity. There are no

other publicly held corporations or other publicly held entitles that have a direct financial interest in the outcome of this litigation. Sullivan and Company, LLC is not a trade association.

Defendant/Appellee, Spyglass Energy Group, LLC is a non-governmental entity and is not a publicly held corporation or other publicly held entity. Spyglass Energy Group, LLC's parent entity is Bandolier Energy, LLC. Petroriver Oil Corp, owns 10% of more of the stock of Spyglass Energy Group, LLC. There is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation. Spyglass Energy Group, LLC is not a trade association.

Defendant/Appellee, Cardinal River Energy I LP is not a publicly held corporation or other publicly held entity. Cardinal River Energy I LP does not have any parent corporations. None of Cardinal River Energy I LP's stock is owned by a publicly held corporation or other publicly held entity. There are no other publicly held corporations or other publicly held entitles that have a direct financial interest in the outcome of this litigation. Cardinal River Energy I LP is not a trade association.

Defendant/Appellee, Toomey Oil Co., Inc. is not a publicly held corporation or other publicly held entity. Toomey Oil Co., Inc. does not have any parent corporations. None of Toomey Oil Co., Inc.'s stock is owned by a publicly held

corporation or other publicly held entity. There are no other publicly held corporations or other publicly held entitles that have a direct financial interest in the outcome of this litigation. Toomey Oil Co., Inc. is not a trade association.

Defendant/Appellee, The Link Oil Company is not a publicly held corporation or other publicly held entity. The Link Oil Company does not have any parent corporations. None of The Link Oil Company's is owned by a publicly held corporation or other publicly held entity. There are no other publicly held corporations or other publicly held entitles that have a direct financial interest in the outcome of this litigation. The Link Oil Company is not a trade association.

Defendant/Appellee, Lamamco Drilling, Inc. is not a publicly held corporation or other publicly held entity. Lamamco Drilling, Inc. does not have any parent corporations. None of Lamamco Drilling, Inc.'s is owned by a publicly held corporation or other publicly held entity. There are no other publicly held corporations or other publicly held entitles that have a direct financial interest in the outcome of this litigation. Lamamco Drilling, Inc. is not a trade association.

Defendant/Appellee, Encana Oil & Gas (USA), Inc. is not a publicly held corporation or other publicly held entity. Encana Oil & Gas (USA), Inc.'s parent is Encana Corporation. Encana Corporation owns 10% of more of the stock of Encana Oil & GAS (USA), Inc. There is no other publicly held corporation or

other publicly held entity that has a direct financial interest in the outcome of the litigation. Encana Oil & Gas (USA), Inc. is not a trade association.

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Statement of Related Appeals

There are no prior or related appeals within the meaning of 10th Cir. R. 28.2(C)(1).

Glossary

"APA" – refers to the Administrative Procedure Act
"EIS" – refers to an Environmental Impact Statement.
"FAC" – refers to Plaintiffs' First Amended Complaint [Aplt. App. 55-90].
"Nation" – refers to the Osage Nation, and any relevant constituent entities of the tribe.
"NEPA" – refers to the National Environmental Policy Act.

Appellees Devon Energy, L.P., Encana Oil & Gas (USA), Inc., Performance Energy Resources, LLC, Ceja Corporation, CEP Mid-Continent LLC, Sullivan & Company, LLC, Cardinal River Energy I LP, Revard Oil and Gas Properties, Inc., Black Lava Resources, LLC, B & G Oil Company, Orion Exploration, LLC, Nadel & Gussman, LLC, Lamamco Drilling, Inc., Short Oil, LLC, Wellco Energy, Inc., Marco Oil Co., LLC, BGI Resources, LLC, The Link Oil Company, Osage Energy Resources, LLC, Toomey Oil Company, Inc., Kaiser-Francis Anadarko, LLC, Helmer Oil Corp., and Spyglass Energy Corp., LLC (the "Non-Federal Defendants")[2] submit their Joint Answer Brief and state:

Statement of the issues presented for review:

1. Whether the district court erred in dismissing the claims against the Federal Defendants in the First Amended Complaint pursuant to *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891 (1990), because the First Amended Complaint sought injunctive and declaratory relief to both retroactively and prospectively change each and every approval of each and every lease, concession agreement, and drilling permit issued under the federal oil leasing and extraction program in Osage County, Oklahoma, since 1979.

[2] Linn Energy LLC, Chaparral Energy LLC, and Halcon Resources Corp. are also appellees, but the appeal is abated as to these entities pursuant to this Court's December 30, 2016 and January 18, 2017 Orders.

2. Whether the district court erred in dismissing the claims against the Non-Federal Defendants in the First Amended Complaint because they were, admittedly, contingent upon and derivative of the claims against the Federal Defendants.

3. Whether the district court should have specified that the dismissal was with or without prejudice.

4. Whether the district court should have given Plaintiffs leave to amend their First Amended Complaint, even though the proposed amendment also sought wholesale changes to the entirety of the Federal Defendants' oil leasing and extraction program, and would have been dismissed for the same reason as the First Amended Complaint.

5. Whether this Court may affirm the district court on any basis supported by the record, including failure to exhaust administrative remedies, the statute of limitations, failure to join the Osage Nation as an indispensable party, and/or lack of prudential standing.

6. Whether the district court erred in denying Plaintiffs' leave to conduct discovery outside of the administrative record.

Statement of the Case:

Plaintiffs' First Amended Complaint ("FAC") [Aplt. App. 55-90] sought declaratory judgment, injunctive relief, and tort damages. Plaintiffs' FAC alleged

that the federal government's compliance with the National Environmental Policy Act ("NEPA") was deficient when approving oil and gas activity in Osage County, Oklahoma, from 1979 to the date the FAC was filed. In addition to wholesale prospective modification of the oil leasing and extraction program employed by the United States of America, Department of Interior, and Bureau of Indian Affairs ("BIA") (collectively "the Federal Defendants"), Plaintiffs sought retroactive rescission of decades of oil and gas leases, concession agreements, and drilling permits. [Aplt. App. 88-89].

Plaintiffs further demanded an injunction compelling the BIA to institute a new policy to "expel or otherwise prohibit" private companies from engaging in oil and gas activities in Osage County until such time as the Defendants implement the Plaintiffs' desired NEPA policy. [Aplt. App. 88-89].

Plaintiffs' FAC named many Defendants, but also included bilateral class allegations. On the plaintiff side, Plaintiffs alleged a class that included virtually every surface owner in Osage County with property subject to an oil and gas agreement. [Aplt. App. 83-85]. On the defense side, Plaintiffs alleged a class that included virtually every entity that had conducted oil and gas activity of any kind in Osage County since 1979. [Aplt. App. 85-87]. All named Defendants filed motions to dismiss.

The district court correctly reasoned that this programmatic attack was not proper, and dismissed the FAC as to the Federal Defendants. The court then turned to the claims against the Non-Federal Defendants. The FAC alleged that if the Federal Defendants failed to implement their desired NEPA compliance policies, then such failure would nullify or void each and every oil and gas mining lease, concession agreement, and drilling permit issued in Osage County since 1979. [Aplt. App. 57, 73, 74, 76 – 80, 88]. The FAC further alleged that this made the Non-Federal Defendants trespassers liable for common law tort damages for all oil and gas activity since 1979. [Aplt. App. 56, 58, 65, 79-83, 89].

Plaintiffs admitted that the Non-Federal Defendants were not subject to NEPA's requirements, and that their claims against the Non-Federal Defendants "necessarily depend[ed] upon whether the Superintendent of the Osage Agency violated NEPA in approving the concession agreements, leases and [drilling permits]." [Aplt. App. 226]. The district court reasoned that since the NEPA claims were not justiciable, the derivative claims against the Non-Federal Defendants must also fail. [Aplt. App. 226-27]. The District Court then granted every remaining Motion to Dismiss. [Aplt. App. 228].

During the pendency of the motions to dismiss, Plaintiffs sought leave to conduct discovery outside the administrative record. [Aplt. App. 190]. Plaintiffs did not seek *jurisdictional* discovery, but rather sought class certification

information. The district court referred the matter to a magistrate judge. [Aplt. App. 214]. The magistrate judge reasoned that Plaintiffs' desire to certify a class did not justify departing from the general rule that administrative cases are limited to the administrative record, especially where subject matter jurisdiction was suspect. [Aplt. App. 214]. The magistrate judge denied the request for extra-record discovery. [Aplt. App. 214]. Plaintiffs never filed any objection to the magistrate's decision, but have nevertheless appealed it.

Summary of Argument

The district court correctly determined it lacked subject matter jurisdiction because the FAC is a programmatic attack. In the seminal case of *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871 (1990), the Supreme Court held that disputes over agency programs are barred by sovereign immunity and not permitted under the Administrative Procedure Act ("APA"). The relief Plaintiffs seek must be found in the halls of Congress or the offices of the BIA itself.

The FAC was a *Lujan*-style programmatic attack in everything but name. Plaintiffs demanded the district court strike down agency policy and procedure, and asked for a variety of sanctions to impose new policy and procedure. These sanctions included both retroactive penalties and prospective burdens on both the Federal and Non-Federal Defendants. Plaintiffs sought nothing less than wholesale judicial rewriting of BIA policy.

Plaintiffs concede on appeal that the final agency action they challenge is in fact each and every approval of each and every lease, concession agreement, and drilling permit issued by the Federal Defendants' oil leasing and extraction program in Osage County, Oklahoma, since 1979. [Aplt. Opening Br. p. 19 ("*each* approval by the Superintendent is a final agency action subject to judicial review. . ." (emphasis added)]. There is no substantive difference between challenging a federal program (as in *Lujan*) and challenging each and every action taken pursuant to a federal program (as in this case).

Plaintiffs also complain that they were not permitted to amend the FAC, but the proposed amendment was *also* a programmatic attack and sought the same relief as the FAC. As the district court determined, adding specific examples that constitute final agency action would not enable Plaintiffs to bootstrap a challenge to the entire agency program. [Aplt. App. 227 (citing *Sierra Club v. Peterson*, 228 F.3d 559, 567 (5th Cir. 2000))].

Additionally, this Court may affirm the district court's judgment on any basis supported by the record. Here, the record demonstrates that Plaintiffs' claims were properly dismissed for failure to exhaust administrative remedies, since no administrative compliance is even alleged. The record also demonstrates that Plaintiffs' claims should be dismissed for untimeliness; under the APA, the alleged claims accruing between 1979 and 2008 are untimely on their face. The record also

demonstrates that Plaintiffs' claims should be dismissed for failure to join the Osage Nation as a necessary, indispensable party. Finally, there is a clear lack of prudential standing here; Plaintiffs seek money damages, which is not within the zone of interests protected by NEPA.

Even if this Court found there was some justiciable dispute between the Plaintiffs and the Federal Defendants, it would have no bearing on the Non-Federal Defendants. NEPA imposes duties on the federal government, not on private companies, and it does not create a private right of action. Plaintiffs' efforts to transform NEPA into a new cause of action should not be permitted.

Plaintiffs also complain about three issues that simply do not matter: which rule the Non-Federal Defendants should have been dismissed under (the district court reasoned that *both* Fed. R. Civ. P. 12(b)(1) and 12(b)(6) were appropriate), whether the dismissal was with or without prejudice (the district court made no first-instance determination), and whether they should have been given leave to conduct extra-record discovery (which Plaintiffs do not allege would have any bearing on the district court's subject matter jurisdiction). Even if any or all of these decisions were erroneous (and they were not), the district court still would not have had subject matter jurisdiction over the FAC, and the outcome of the case would not be changed by reversal. For all of these reasons, this Court should affirm the district court's judgment.

Arguments and Authorities

A. The district court correctly determined it lacked subject matter jurisdiction, because the FAC is a programmatic attack against which the Federal Defendants enjoy sovereign immunity.

The district court's Opinion should be affirmed because it correctly found that it lacks subject matter jurisdiction over Plaintiffs' programmatic attack on the federal oil leasing and extraction program in Osage County, Oklahoma. A plaintiff may only sue the federal government (including the Federal Defendants here) to the extent it has waived sovereign immunity. The APA provides a limited waiver of sovereign immunity, permitting judicial review of certain acts or omissions. *City of Albuquerque v. United States Dep't of Interior*, 379 F.3d 901, 906-07 (10th Cir. 2004). To fall within this limited waiver of sovereign immunity, an aggrieved plaintiff must identify a specific, final agency action that was arbitrary, capricious, an abuse of discretion, or otherwise contrary to the law. 5 U.S.C. §§ 702, 704, 706; *see also Lujan*, 497 U.S. at 882.

Plaintiffs do not identify any specific or particular agency action. Instead, the FAC attacks the *entirety* of the BIA oil leasing and extraction program in Osage County since 1979. [Aplt. App. 224]. The FAC challenges an amorphous number of unspecified leases, unspecified assignments, unspecified concession agreements, and unspecified drilling permits. [Aplt. App. 88-89]. Instead of identifying some discrete agency action, Plaintiffs attack *all* of the agency's

actions, for decades. In *Lujan*, the Supreme Court reasoned that programmatic improvements must come "in the offices of the [agency] or the halls of Congress," and not through judicial supervision. *Id.* at 891. To fall within the ambit of the APA, Plaintiffs must identify a particular agency action that caused them harm. *Id*. Plaintiffs failed to do so here, and as a result their claims are barred by sovereign immunity.

Plaintiffs claim that they do not challenge the program, but rather *each and every decision* made pursuant to the program. This is a distinction without difference, the same failed approach taken by the *Lujan* plaintiffs. *See Osage Producers Ass'n v. Jewell*, 191 F. Supp. 3d 1243, 1249 (N.D. Okla. 2016) ("Here, as in [*Lujan*], the court is faced with a generic challenge to an amorphous group of several hundred administrative decisions"). It is also disingenuous, when Plaintiffs seek to certify a class consisting of every owner of real property in Osage County, Oklahoma, whose property has been subject to any lease, concession agreement, or drilling permit approved through the BIA's program. [Aplt. App. 83].

In *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004), the Supreme Court rejected a similar challenge as beyond the scope of APA review. In *Norton*, the plaintiff sued the Department of the Interior, raising generalized challenges to the Department's course of conduct, rather than challenging a specific, discrete agency action. *Id.* at 67. Like the *Norton* plaintiffs, the Plaintiffs

here do not raise APA claims premised on any discrete or specific decision. Instead, the agency's entire approach to decision-making is the basis of the claim. Plaintiffs may want the BIA to adopt a different approach to environmental analysis, but policy-making is not a remedy available under the APA.

Applying the Supreme Court's reasoning from *Lujan* and *Norton*, this Court has held that APA plaintiffs have the "burden of identifying specific federal conduct and explaining how it is 'final agency action' within the meaning of section 551(13)." *Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000); *see also Fanin v. U.S. Dep't of Veterans Affairs*, 572 F.3d 868, 876 (11th Cir. 2009) ("Broad programmatic attacks against agencies are not permissible under the APA."). The FAC failed to identify any particular agency action at issue. Instead, it offered a programmatic challenge to *all* leases, concession agreements, and permits approved within Osage County. [Aplt. App. 88]. Such a programmatic challenge is not permissible, and the district court was right to dismiss it.

The Fifth Circuit rejected a similar programmatic attack in *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 486 (5th Cir. 2014). There, the plaintiffs sought a declaration that the past approvals of leases and permits violated federal law, and to enjoin any future authorizations. *Id.* at 487. Rather than identify a specific agency action, the plaintiffs instead challenged *all*

of the agency's actions (as Plaintiffs do here). *Id.* at 491-92. The Fifth Circuit reasoned that since the claims were structured as a blanket challenge to all of the agency's actions, for all permits and leases, on a significantly large area of land, it was truly a programmatic attack. The Fifth Circuit pierced through the semantic disguise of the pleading, just as the district court did in this case.

The district court was correct to dismiss the FAC as to the Federal Defendants, and its Opinion should be affirmed.

B. Plaintiffs fail to identify any error in the district court's reasoning, and fail to distinguish *Lujan* from the case at hand.

i. Plaintiffs' four complaints about the district court's Opinion fail to demonstrate any error.

On appeal, Plaintiffs identify four "errors" in the district court's opinion. First, Plaintiffs allege that the district court was "confused" when the Federal Defendants "misrepresented" the FAC. [Aplt. Opening Br. p. 22, 27, 34]. To support these allegations, Plaintiffs complain that the district court's Opinion cited background information directly from the FAC. But it is unclear how *Plaintiffs' statements* in the FAC could constitute a misrepresentation *by the Federal Defendants*. Indeed, Plaintiffs cite no record evidence whatsoever to support their *ad hominem* attacks on either federal counsel or the district court.

Moreover, the district court's Opinion did not look solely to background information. The district court also performed a detailed analysis of the relief

requested by the FAC. [Aplt. App. 218, 224-26]. That relief was substantively indistinguishable from the relief sought by the *Lujan*, *Norton*, *Jewell*, and *Alabama-Coushatta Tribe* plaintiffs. Accordingly, the district court had no choice but to find that it lacked subject matter jurisdiction over the FAC.

As their second alleged error, Plaintiffs quibble over the use of the words "specified" and "identifiable" in the district court's Opinion. [Aplt. Opening Br. p. 24-25]. This is mere semantics. Plaintiffs argue that one may still "identify" an agency action that is also "unspecified." On the contrary, the burden is on Plaintiffs to specify the final agency action at issue when seeking judicial review under the APA. *Colo. Farm Bureau Fed'n*, 220 F.3d at 1173. Plaintiffs cannot invoke the APA's waiver of sovereign immunity without this specification.

Third, Plaintiffs complain about the district court's word choice in the opinion and assail the district court for quoting the FAC "out of context." [Aplt. Opening Br. p. 25]. However, the district court's Opinion clearly evaluated the entire FAC, as well as the voluminous briefing it spawned from all parties. The district court had more than adequate context. [Aplt. App. 224-26].

In their fourth allegation of error, Plaintiffs again argue about word choice. [Aplt. Opening Br. p. 26-28]. They insist that they only challenge "certain" approvals by the Superintendent, but a glance at Plaintiffs' Prayer for Relief

reveals they are challenging *all* of them, [Aplt. App. 88-89] and nowhere in the FAC do Plaintiffs specify any discrete or individual acts or omissions at issue.

Plaintiffs also object to the district court calling the FAC "sweeping," [Aplt. Opening Br. p. 26-27] but the very next paragraph of Plaintiffs' Opening Brief states that their claims and remedies as "wide-ranging," and "across-the-board." [Aplt. Opening Br. p. 27]. This "across-the-board" relief should be seen for what it is – a programmatic attack on the way a federal agency conducts business. The district court was therefore correct to dismiss the FAC.

ii. Plaintiffs' efforts to distinguish *Lujan* and its progeny fail to demonstrate any error in the district court's reasoning.

Plaintiffs devote lengthy passages of their Opening Brief to discussions of standing in the *Lujan* case. [Aplt. Opening Br. p. 20-23]. But this is irrelevant; here, the district court's Opinion did not reach standing, instead resting its Opinion on the Federal Defendants' sovereign immunity.

Plaintiffs also evoke meaningless distinctions between this case and *Lujan*. For example, *Lujan* involved a "national wildlife group," while Plaintiffs are landowners. [Aplt. Opening Br. p. 31]. The rule in *Lujan*, however, was not limited to national wildlife groups; ***no*** plaintiff may assert programmatic attacks on federal agencies under the APA. Plaintiffs further complain that the district court should have waited until the summary judgment stage to terminate the suit, but subject matter jurisdiction may be raised *at any time in litigation*, regardless of the

procedural vehicle. *See, e.g.*, *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). These "distinctions" are superficial at best, and do not change the result below.

Finally, Plaintiffs argue that their programmatic attack should be allowed because they do not seek any prospective relief. However, a glance at FAC's Prayer for Relief demonstrates that they are, in fact, seeking prospective relief. [Aplt. App. 88-89]. None of Plaintiffs' arguments warrant reversal.

C. Denial of leave to amend was appropriate because the proposed amendment was futile.

Plaintiffs argue they should have been permitted to file a Second Amended Complaint. [Aplt. Opening Br. p. 41-45]. However, the Second Amended Complaint was not substantially different from the FAC. The Second Amended Complaint sought essentially the same relief as the FAC, [Aplt. App. 350-51] and was still a programmatic attack.

It is well-settled that a district court may deny leave to amend where the amendment would be futile. *Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 859 (10th Cir. 1999). A proposed amendment is futile if the complaint, as amended, would be subject to dismissal. *Id.* Here, the proposed Second Amended Complaint would be dismissed for the same reason the FAC was dismissed – sovereign immunity.

The Second Amended Complaint sought invalidation of the BIA's approvals of leases and drilling permits. Which leases and permits?

Literally all of them.

This is a programmatic attack, of the sort barred by *Lujan*. It is a blanket challenge to agency action across the board. And Plaintiffs cannot evade this rule by pleading a few specific examples of specific leases, because the relief sought is still sweeping judicial oversight of an entire agency program. *See Sierra Club*, 228 F.3d at 567.[3] Accordingly, leave to amend was properly denied.

D. This Court should affirm the district court's Opinion because even if the district court erred in its *Lujan* analysis, the FAC would still be properly dismissed.

This Court may affirm the district court's judgment on any basis supported by the record. *Jordan v. U.S. Dep't of Justice*, 668 F.3d 1188, 1200 (10th Cir. 2011). Here, even if this Court disagreed with the district court's analysis of the APA, it should still affirm the dismissal because of other defects in the FAC.

i. The FAC would be properly dismissed for failure to exhaust administrative remedies.

Plaintiffs' claims would *also* be properly dismissed because Plaintiffs have not exhausted the administrative remedies available to them. Because Plaintiffs do not allege any administrative compliance, dismissal is proper. *United Tribe of*

[3] *See* Aplt. App. 225 ("even if Plaintiffs were to provide examples of specific leases in the pleading that might themselves constitute final agency action, Plaintiffs could not challenge an entire leasing program by identifying specific allegedly-improper final agency actions within that program and using those examples as evidence to support a sweeping argument that the BIA's entire leasing program dating back to 1979 violates NEPA").

Shawnee Indians v. United States, 253 F.3d 543, 550 (10th Cir. 2001). The exhaustion doctrine recognizes that agencies, not courts, ought to have primary responsibility for the programs that Congress has charged them to administer.

In *United Tribe of Shawnee Indians*, 253 F.3d at 551, this Court affirmed an order dismissing a case for lack of subject matter jurisdiction, finding that the plaintiffs failed to exhaust administrative remedies. This Court emphasized that exhaustion provides a useful record for judicial review, particularly in complex and technical cases. *Id.* This Court also recognized the special expertise the Department of the Interior brings to bear in dealing with tribal issues. *Id.*

These same considerations are present here. The BIA has unique expertise, authority, and regulations governing the program. Congress has declared that the Department of the Interior shall regulate the Osage Nation's mineral rights. *See Osage Tribe of Indians of Okla. v. United States*, 72 Fed. Cl. 629, 632 (Fed. Cl. 2006). The Department of the Interior has in turn promulgated regulations to carry out Congress's intent on the Osage reservation. *See* 25 C.F.R. §§ 226.1 - 226.46. Given that all of Plaintiffs' claims are premised on agency decision making, judicial economy would be best served by agency review, allowing a proper record and agency expertise to aid any judicial analysis.

District courts throughout this Circuit have repeatedly barred virtually identical NEPA lawsuits on this basis. *Lenker v. Haugrud,* No. 16-CV-0532-CVE-

PJC, 2017 WL 539599, at *3 (N.D. Okla. Feb. 9, 2017) (unpublished) (rejecting NEPA claim against BIA activity in Osage County for failure to exhaust administrative remedies); *Jewell*, 191 F. Supp. 3d at 1251-55 (same); *see also Begay v. Public Serv. Co. of New Mexico*, 710 F. Supp. 2d 1161 (D.N.M. 2010) (rejecting claim for multi-year, agency-wide breach of trust for failure to exhaust remedies). Since Plaintiffs failed to exhaust their administrative remedies, dismissal would be proper.

ii. The FAC would be properly dismissed as untimely.

On the face of the FAC, the majority of Plaintiffs' claims are untimely. The FAC arises out of the APA, which follows the general six (6) year statute of limitations for claims against the United States. 28 U.S.C. § 2401(a); *Impact Energy Resources, LLC v. Salazar*, 693 F.3d 1239, 1245-46 (10th Cir. 2012). The FAC alleged, *inter alia*, that every lease, concession agreement, assignment, and drilling permit the Osage Agency Superintendent approved since 1979 was void *ab initio*. Under Plaintiffs' reasoning, these claims accrued at the time of approval. The FAC was filed on August 11, 2014. [Aplt. App. 88-89]. In light of the six year statute, any agreement approved before August 11, 2008, cannot be challenged in this action. To the extent Plaintiffs seek to attack any such agreement, or to raise claims premised on the invalidity of approvals executed before August 11, 2008, those claims are facially time-barred.

iii. The FAC would be properly dismissed for failure to join an indispensable party.

The Osage Nation ("Nation") is the lessor of each lease at issue in the FAC. In *Fletcher v. United States*, 116 F.3d 1315, 1333, n. 36 (10th Cir. 1997), this Court observed the Nation was both necessary and indispensable in a case where the relief sought posed a practical threat to the Nation's "obligations to protect the Osage mineral estate." This Court has also "dismissed cases under Rule 19(b) when a tribe cannot be joined to a suit on account of sovereign immunity." *Id.* at n. 36 (citing *Enter. Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890, 893–94 (10th Cir. 1989) (dismissing tribal contract claim); *Tewa Tesuque v. Morton*, 498 F.2d 240, 242–43 (10th Cir. 1974) (dismissing NEPA claim), *cert. denied*, 420 U.S. 962, 95 S. Ct. 1353 (1975); *United Keetoowah Band of Cherokee Indians v. Mankiller*, 2 F.3d 1161, 1993 WL 307937 (10th Cir. Aug. 12, 1993) (unpublished)). The same reasoning applies here. Accordingly, this Court should affirm the district court's order of dismissal under Fed. R. Civ. P. 19 and 12 (b)(7).

a. The Nation is "required" under Rule 19.

These leases exist in a unique historical and statutory context.

> The 1906 Act [Act of June 28, 1906, ch. 3527, 34 Stat. 539], titled "An act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes," provides, by section 2, "[t]hat all lands belonging to the Osage tribe ... shall be divided among the members of said tribe" with minor exceptions for retaining small tracts primarily for administrative and educational facilities. 34 Stat. at 540. Section 3 of the 1906 Act reserved oil, gas, coal and other

> minerals to the Tribe for a period of twenty-five years and provides that "leases for all oil, gas, and other minerals ... may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe." 34 Stat. at 543. This reservation of the mineral interests to the Tribe has been routinely extended over time, and it was made a reservation in perpetuity by the Act of October 21, 1978, Pub. L. No. 95-496, 92 Stat. 1660.

Osage Tribe of Indians of Okla., 72 Fed. Cl. at 632 (footnote omitted). The Nation leases lands and the Secretary of the Interior approves the leases. *Id.* The Nation is a party to each and every oil and gas lease in Osage County — each and every lease Plaintiffs seek to void.

The Nation is "required" under Rule 19 because complete relief cannot be accorded among existing parties to the action in its absence, its absence would potentially subject existing parties to inconsistent judgments or obligations, and its ability to protect its interest relating to the subject of the action will be impaired. Fed.R.Civ.P. 19(a); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir. 2001).

A party to a lease or contract is the quintessential indispensable party. "[N]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable." *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987) (affirming dismissal of suit challenging oil and gas leases on tribal reservation); *see also Citizen Potawatomi Nation*, 248 F.3d at

997-1001 (affirming dismissal of contract claims in case that failed to join tribal parties to the contracts); *Kescoli v. Babbit*, 101 F.3d 1304, 1310 (9th Cir. 1996) (Navajo and Hopi nations were required parties in a suit challenging a mining permit the federal government approved, because the case would affect the tribes' lease agreements with the mining company).

The Nation is also a necessary party pursuant to Rule 19(a)(1)(B)(i) because disposition voiding all of its leases would necessarily impede its ability to protect its rights under the leases. No other Defendant in this case shares the Nation's interest in tribal revenue. *United Keetoowah Band of Cherokee Indians in Oklahoma v. Kempthorne*, 630 F. Supp.2d 1296, 1302-03 (E.D. Okla. 2009).

Neither the United States nor any other party named in this case can adequately represent the Nation or protect its interests, because no other party shares the Nation's economic interest in ensuring the uninterrupted continuation of the development of its mineral resources. *Ctr. for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1227 (D. Colo. 2012); *Enter. Mgmt. Consultants, Inc.*, 883 F.2d at 893-94. In fact, the duties and responsibilities of the Federal Defendants may actually *conflict* with the interests of the Nation. *See, e.g., Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977).

Finally, the Nation also has a discrete interest in its own sovereign immunity; adjudicating the Nation's contract rights without the Nation's consent

"would also effectively abrogate the Tribe's sovereign immunity." *Enter. Mgmt. Consultants*, 883 F.2d at 894. The Nation's right not to be sued without its consent is not one that any other party can protect – not even the BIA. *Id.* For all of these reasons, the Nation is a required party.

b. It is not feasible to join the Nation.

In this case, tribal sovereign immunity renders any effort to join the Nation unfeasible. This Court has acknowledged the Nation's sovereign immunity. *Fletcher*, 116 F.3d at 1324. Congress has not abrogated the Nation's sovereign immunity, nor has the tribe expressed any "unequivocal" waiver. *Id.* at 1324-25. The Nation is immune from suit, and joinder is unfeasible for the purposes of Rule 19. *United Keetoowah Band*, 630 F. Supp. 2d at 1303. The Court must therefore consider whether the case can proceed at all without the Nation.

c. The case cannot proceed in equity and good conscience among the existing parties.

This Court observes and enforces a "strong policy" favoring dismissal of a case when a tribe cannot be joined because of its sovereign immunity. *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999) (citing *Enter. Mgmt. Consultants, Inc.*, 883 F.2d at 894). Rule 19(b) provides four factors to consider when determining whether dismissal is proper. All four factors weigh in favor of dismissal here.

The first factor is the extent to which a judgment rendered in the party's absence might prejudice that party or existing parties. Fed.R.Civ.P. 19(b)(1). The consideration of prejudice under Rule 19(b)(1) "is essentially the same as the inquiry under [Rule 19(a)(1)(B)] into whether the continuation of the action without the absent party will impair the ability of that party to protect its interest." *United Keetoowah Band*, 630 F. Supp. 2d at 1304 (quotation omitted).

A judgment voiding the Nation's contracts in its absence would intrude upon the Nation's sovereign immunity; this factor alone satisfies the Rule 19(b) inquiry. "When, as here, a necessary party under Rule 19(a) is immune from suit, 'there is very little room for balancing of other factors' set out in Rule 19(b), because immunity 'may be viewed as one of those interests compelling by themselves.'" *Enter. Mgmt. Consultants*, 883 F.2d at 894 (quoting *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986)) (internal quotation marks omitted). Under these circumstances, the district court's discretion is narrowed and the nature of the Nation's interests shifts Rule 19(b)'s remaining factors to the periphery. ". . . [T]he dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Wichita & Affiliated Tribes*, 788 F.2d at 777. This factor alone requires dismissal.

Other factors too weigh in favor of dismissal. The second factor is the extent to which prejudice could be lessened or avoided by shaping the relief or judgment.

Plaintiffs seek to void *all* of the Nation's leases. Given this, there is no protective order the district court could insert into a judgment to lessen or avoid prejudice to the Nation. *United Keetoowah Band*, 630 F. Supp. 2d at 1304 (quoting *Citizen Potawatomi Nation*, 248 F.3d at 1001).

The third factor turns on whether a judgment rendered in the necessary party's absence would adequately resolve the dispute. *Davis v. United States*, 343 F.3d 1282, 1292-93 (10th Cir. 2003). Because the Court's judgment in this action would not be binding on the Nation, the Nation could subsequently file a separate lawsuit to assert its interest, potentially resulting in conflicting obligations for all named Defendants (Federal or otherwise). *See Kickapoo Tribe of Okla. v. Lujan*, 728 F. Supp. 791, 796 (D.D.C. 1990); *United States v. City of Las Cruces*, 289 F.3d 1170, 1187 (10th Cir. 2002). These results would be contrary to Rule 19(b)'s policy of avoiding inefficient administration of justice. *Davis*, 343 F.3d at 1292-93.

The fourth factor turns on whether the plaintiffs will have an adequate remedy if the case is dismissed. It is undisputed that Plaintiffs have administrative remedies available to them (remedies they have chosen not to exhaust, *see supra*). This demonstrates that Plaintiffs have an alternative remedy to this lawsuit. Moreover, as the court observed in *United Keetoowah Band*, "[d]ismissal based on tribal sovereign immunity, despite the lack of an available alternative forum 'is less troublesome' than in other cases because 'dismissal turns on the fact that society

has consciously opted to shield Indian tribes from suit.'" 630 F. Supp. 2d at 1304 (quoting *Wichita & Affiliated Tribes*, 788 F.2d at 777).

Plaintiffs may point to dicta in *Manygoats*, 558 F.2d at 556, to argue against dismissal on this basis. The *Manygoats* plaintiffs were individual Indians who challenged the sufficiency of an Environmental Impact Statement ("EIS") that was prepared in connection with a uranium mining deal between the Navajo Nation and the Exxon Corporation. *Id.* at 557. The district court dismissed the plaintiffs' action for failure to join the Navajo Nation, an indispensable party. *Id.* In reversing the district court's dismissal, this Court distinguished *Manygoats* from *Tewa Tesuque*, 498 F.2d at 243, a case in which the Court found that cancellation of an existing leasehold interest would "have the immediate effect of depriving the [tribe] of valuable rights under a contract." Were the *Manygoats* plaintiffs to prevail, the remedy would have been preparation of a new EIS. *See Manygoats*, 558 F.2d at 558-59. The Navajo Nation would neither lose any past or existing revenue nor would any existing leases be cancelled. The exploration and mining agreement would not necessarily be voided. In *Tewa Tesuque*, and in this case, the tribe would face immediate and unavoidable economic harm. The distinct facts of this case present risks of injury to the Nation that were not present in *Manygoats*. Under such circumstances, this Court's holding in *Tewa Tesuque* is controlling and Plaintiffs' claims must be dismissed.

This Court may affirm the district court's judgment on any basis, and it should do so here because Plaintiffs failed to join the Nation, a necessary and indispensable party, and the case cannot proceed in equity and good conscious without the Nation.

iv. The FAC would be properly dismissed for lack of prudential standing.

To bring their NEPA claims, Plaintiffs must demonstrate prudential standing – that their claims fall within the zone of interests protected or regulated by NEPA. *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1230-31 (10th Cir. 2012). As this Court has noted, in order to show an injury in fact for a procedural violation of NEPA, Plaintiffs must show the agency's violation "created an increased risk of actual, threatened, or imminent *environmental harm.*" *Id.* at 1237 (emphasis added by the Court, quotations omitted). The FAC does not allege any specific environmental harm, instead vaguely alluding to unspecified "contamination" of soil, water, and air without identifying what contamination or how it occurred. [Aplt. App. 87].

If Plaintiffs were interested in remedying an environmental harm, they would have identified that harm in the FAC. However, it is readily apparent that the FAC, with its lengthy and complex explanation of actual and punitive damages, as well as disgorgement of profits, is truly a quest for monetary damages. "Economic interests alone are 'clearly not within the zone of interests to be

protected by [NEPA]'" *Central S. Dakota Co-Op Grazing v. Secretary*, 266 F.3d 889, 895 (8th Cir. 2001) (quoting *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411, 416 (8th Cir. 1976)). "[I]f its interests are only economic, the [NEPA plaintiff] is not within the zone of interests of the provision under which it has asserted its claim and thereby lacks prudential standing." *Id.* at 896-97. NEPA, whether applied alone or in combination with the APA, does not provide for the awarding of damages as a remedy. Accordingly, this Court should affirm the district court's opinion on this alternative basis.

E. Plaintiffs' appeal of the issue of prejudice versus without-prejudice dismissal is not ripe for review.

Plaintiffs ask this Court to review whether the district court's Opinion should have specified whether it was with, or without, prejudice. [Aplt. Opening Br. P. 40]. This issue is not properly before this Court. The district court made no determination of this issue, and this Court need not make a first-instance determination. Additionally, as discussed *supra*, amendment (or refiling) would be futile. Accordingly, this is not a basis to reverse the district court.

F. Plaintiffs' appeal of the issue of whether the Non-Federal Defendants were dismissed under Fed.R.Civ.P. 12(b)(6) or 12(b)(1) is moot.

Plaintiffs do not deny that without the predicate NEPA claims against the Federal Defendants, the claims against the remaining Non-Federal Defendants cannot survive. Plaintiffs quibble over whether that dismissal was for lack of

subject matter jurisdiction or for failure to state a claim. [Aplt. Opening Br. p. 38-40]. This distinction is meaningless; as the district court made clear, the Non-Federal Defendants were properly dismissed on *both* bases. [Aplt. App. 226-27]. Regardless of which subsection of Fed. R. Civ. P. 12 that Plaintiffs prefer, the Non-Federal Defendants were still properly dismissed, and Plaintiffs have failed to demonstrate any error.

Even if this Court found there was some justiciable dispute between the Plaintiffs and the Federal Defendants, it would have no bearing on the Non-Federal Defendants. NEPA applies only to "agencies of the federal government," rather than the Nation or any private entity. 42 U.S.C. § 4332. The statute is procedural rather than substantive; it does not mandate any particular results, only that agencies undertake some degree of environmental analysis under certain circumstances. *D.O.T. v. Public Citizen*, 541 U.S. 752, 756-57 (2004). And NEPA does not create any private right of action. *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 739 (10th Cir.2006). Plaintiffs' FAC seeks to transform NEPA into a profit center, bootstrapping economic remedies against Non-Federal Defendants onto a statute that (1) does not offer economic remedies and (2) *only* applies to the Federal Defendants. This is, essentially, rewriting the statute into something Congress never intended. "The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions." *Nev. Land*

Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993). Even if there was a justiciable dispute between the Plaintiffs and the Federal Defendants, the Non-Federal Defendants would still prevail.

Plaintiffs do not deny that without the predicate NEPA claims against the Federal Defendants, the claims against the remaining Non-Federal Defendants cannot survive. This Court should therefore affirm the district court's decision – on either or both Fed. R. Civ. P. 12(b)(1) or 12(b)(6).

G. There was no error in the district court's denial of leave to conduct discovery.

There is no error in the district court's denial of leave to conduct discovery. Over a year after the Motions to Dismiss were fully briefed, Plaintiffs sought to be excused from the general rule that APA judicial review is limited to the administrative record. *See* 5 U.S.C. § 706; *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) [Aplt. App. 190-92]. The only stated basis for this request was that discovery would be relevant to class certification. [Aplt. App. 192]. The district court referred the motion to a magistrate judge, who denied the request. [Aplt. App. 214]. At no point did Fed. R. Civ. P. 26(f)'s mandated pre-discovery conference occur. At no point did Plaintiffs ever file any objection to the magistrate judge's decision.

As a threshold matter, this issue is moot. Even if the magistrate judge had permitted Plaintiffs to conduct extra-record discovery, it would not change the fact

that the district court lacks subject matter jurisdiction over the FAC. Plaintiffs do not claim that they were denied *jurisdictional* discovery. They claim only that the requested-discovery would have helped them certify a class. But the district court could not grant that relief (or any relief) without subject matter jurisdiction.

Furthermore, trial courts have broad discretion to manage discovery. *Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373, 1386 (10th Cir. 1994). Here, the magistrate judge noted that all defendants had motions to dismiss pending. [Aplt. App. 214]. "It is a recognized and appropriate procedure for a court to limit discovery proceedings at the outset to a determination of jurisdictional matters." *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79-80 (1998). Given that the district court's subject matter jurisdiction was challenged, it was within the magistrate judge's broad discretion to bar discovery that went beyond jurisdictional matters.

The magistrate judge also recognized that judicial review under the APA is typically limited to the administrative record. [Aplt. App. 214]. This Court has held that extra-record evidence may not even be *considered* in NEPA cases except in "extremely limited" circumstances. *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004). Plaintiffs failed to identify any such circumstances, either here or below. These discovery matters are moot because the district court lacks subject matter jurisdiction over the FAC. And even if the issue were not moot, Plaintiffs

have failed to demonstrate any abuse of the magistrate judge's broad discretion. This Court should therefore affirm the decision.

Conclusion

The district court correctly determined that Plaintiffs cannot use a federal court as a cudgel to upend federal agency policy. On appeal, Plaintiffs have demonstrated no error in the Court's reasoning, instead concentrating on its word choice or collateral issues. None of this changes the fact that the FAC is a classic programmatic attack barred by *Lujan*. The district court should therefore be affirmed.

STATEMENT AS TO ORAL ARGUMENT

The Non-Federal Defendants do not request oral argument. Oral argument is not needed in the case because the record is clear, the facts and legal arguments are adequately presented in the briefs, no novel legal issues or urgent public concerns are implicated, and the decisional process would not be significantly aided by oral argument.

Dated: March 24, 2017

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/s Jason McVicker
Jason McVicker

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I hereby certify that with respect to the foregoing:

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/s Jason McVicker
Jason McVicker

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2017, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to all persons who have entered their appearance as ECF registrants in this case.

/s Jason McVicker
Jason McVicker