IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAWNEE NATION OF OKLAHOMA, WALTER R. ECHO-HAWK, *et al.*, Plaintiffs; v. **RYAN ZINKE,** in his official capacity as Secretary of the United States Department of the Interior, the **UNITED STATES BUREAU OF INDIAN AFFAIRS,** and the **UNITED STATES BUREAU OF LAND MANAGEMENT,** Defendants.	Case No. 16-cv-697-JHP-TLW

FEDERAL RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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I. INTRODUCTION

Plaintiffs' Response in Opposition to Federal Respondents' Motion to Dismiss[1] (ECF No. 20) fails to save Plaintiffs' claims. Plaintiffs misconstrue Federal Respondents' sovereign immunity arguments and fail to address the fundamental issue: when relying on an APA cause of action, there is no applicable waiver of sovereign immunity if Plaintiffs cannot identify a final agency action. Similarly, Plaintiffs' arguments on exhaustion of administrative remedies miss the mark. The Tenth Circuit, other Circuits, and the Northern District of Oklahoma have been clear that the exhaustion requirement under the applicable BIA regulations is jurisdictional and cannot be waived for equitable reasons. Moreover, Plaintiffs' Fourth cause of action is barred because Plaintiffs have failed to identify any support for their argument that AIARMA effectively amends and supersedes all other BIA statutes and regulations governing oil and gas leasing. Finally, Plaintiffs make no attempt to save their defective claims for breach of trust They fail to identify a specific statute giving rise to a fiduciary duty and fail to rebut any of the well-settled law that statutes of general applicability do not give rise to a breach of trust claim. All of Plaintiffs' claims challenging the approvals of the seventeen Pawnee leases must be dismissed for lack of jurisdiction, including those portions of First, Fourth, Fifth and Sixth causes of action in Plaintiffs' First Amended Complaint. In addition, Plaintiffs' Fourth and Sixth causes of action must be dismissed for failure to state a claim.

II. ARGUMENT

A. Sovereign Immunity Has Not Been Waived for Claims Relating to the Pawnee Leases.

As the Tenth Circuit unequivocally stated just last month, "[t]he APA contains a limited waiver of sovereign immunity, allowing for judicial review of '[a]gency action made reviewable

[1] Citations to Plaintiffs' Response brief are referenced as "Br. at __."

by statute and final agency action for which there is no other adequate remedy in a court.'" *Kansas ex rel. Schmidt v. Zinke*, -- F.3d --, No. 16-3015, 2017 WL 2766292, at *2 (10th Cir. June 27, 2017) (affirming district court's dismissal of APA claim for lack of jurisdiction because there was no final agency action). Where a party attempts to bring a cause of action under the APA, "the limited waiver of sovereign immunity found in the APA is inapplicable . . .because there is no final agency action that is reviewable under the APA." *Stone v. Dep't of Hous. & Urban Dev.*, 859 F. Supp. 2d 59, 64 (D.D.C. 2012). Where a plaintiff fails to direct its challenge to final agency action, "its suit falls outside of § 702's limited waiver of sovereign immunity." *Osage Producers Ass'n v. Jewell*, 191 F. Supp. 3d 1243, 1249–50 (N.D. Okla. 2016); *see also Cheyenne-Arapaho Gaming Comm'n v. Nat'l Indian Gaming Comm'n*, 214 F. Supp. 2d 1155, 1169 (N.D. Okla. 2002).

Nothing in Plaintiffs' Response calls into question this fundamental precept of administrative law. Rather, Plaintiffs' Response addresses an altogether different question: whether the APA waiver of sovereign immunity is "limited to cases challenging final agency action." Br. at 11 – 15. Federal Defendants did not argue that the APA's waiver of sovereign immunity is limited to cases challenging final agency action. As the cases cited by Plaintiffs illustrate, numerous courts have held that the APA waives sovereign immunity for numerous claims apart from challenges to final agency action. Br. at 12 -13. However, where, as here, a plaintiff brings a cause of action challenging agency action under the APA, the waiver of sovereign immunity is inapplicable if there is no final agency action.

The cases cited by Plaintiffs do not address the issue of the waiver of sovereign immunity in the context of an APA claim. With only one exception[2], each of the cases cited by Plaintiffs address the applicability of the APA waiver of sovereign immunity to *non-APA claims*. For example, in *Michigan v. U.S. Army Corps of Engineers*, the Seventh Circuit held that the APA waived sovereign immunity for common law tort claims for declaratory and injunctive relief. 667 F.3d 765, 776 (7th Cir. 2011). Similarly, in *Muniz-Muniz v. U.S. Border Patrol*, the plaintiffs brought *Bivens* claims and claims under 42 U.S.C. §§ 1983, 1985, and 1986. 741 F.3d 668, 670-74 (6th Cir. 2013). Finally, in *Hanson v. Wyatt*, the Tenth Circuit did not even address APA claims, as the United States was not even a party to the suit. 552 F.3d 1148, 1154-55 (10th Cir. 2008). Accordingly, the *Hanson* footnote cited by Plaintiffs (Br. at 13) is dicta in a concurrence in a case that does not even address claims brought under the APA, and is therefore of no precedential value for the question at issue in this case.[3]

[2] The sole exception to Plaintiffs' reliance on non-APA cases is *Trudeau v. Federal Trade Commission*, 456 F.3d 178 (D.C. Cir. 2006). In that case, the D.C. Circuit analyzed the applicability of the APA waiver to non-statutory claims, constitutional claims, and an APA claim. *Id*. at 187. The Court held that in the context of an APA claim, the APA requirement of final agency action is not jurisdictional and therefore does not implicate the waiver of sovereign immunity. *Id*. at 189 ("although the absence of final agency action would not cost federal courts their jurisdiction . . . it would cost Trudeau his APA cause of action.").

[3] While *Michigan*, *Muniz*, and *Hanson* are the primary cases Plaintiffs rely on, their remaining authorities fare no better. *Treasurer of New Jersey v. U.S. Department of Treasury* addressed the applicability of the APA waiver to claims under various states' unclaimed property acts, and ultimately upheld the jurisdiction based on the states' Tenth Amendment claims. 684 F.3d 396-404 (3d Cir. 2012). *See also Gilmore v. Weatherford*, 694 F.3d 1160, 1166 n.1 (10th Cir. 2012) (addressing common law claims against agency inaction); *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1233 (addressing claims under the 8th Amendment of the Constitution); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549-50 (10th Cir. 2001) (Noting that "UTSI contends it is not proceeding directly under the APA and that its claims are therefore not affected by the lack of a final orders.").

The Tenth Circuit has held that the APA final agency action requirement is jurisdictional. *McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1253 (10th Cir. 2010).[4] Thus, in the context of an APA cause of action, the waiver of sovereign immunity only applies to final agency actions. Because Plaintiffs failed to exhaust administrative remedies (as described in Sec. II.B., below), the APA waiver is inapplicable. Thus, Plaintiffs' First cause of action must be dismissed.

B. All of Plaintiffs' Claims Regarding the Pawnee Leases Are Barred for Failure to Exhaust Administrative Remedies.

Exhaustion of administrative remedies is a necessary jurisdictional prerequisite to judicial review. *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1295-96 (10th Cir. 2003). "A party must exhaust administrative remedies when a statute or agency rule dictates that exhaustion is required." *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 924 (10th Cir. 1994). Plaintiffs did not plead that they have exhausted administrative remedies, and in their Response concede that they have not exhausted administrative remedies. Nevertheless, Plaintiffs argue that exhaustion is not required or that exhaustion should be excused by the Court. Br. at 15-25. Plaintiffs are wrong on both counts.

1. Exhaustion is required under the relevant BIA regulations.

A party is required to exhaust administrative remedies "when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby v. Cisneros*, 509 U.S. 137, 154 (1993). Plaintiffs concede that the second *Darby* prong is met. Br. at 15.

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[4] *See also Kansas ex rel. Schmidt*, No. 16-3015, 2017 WL 2766292, at *2 (affirming district court's dismissal of APA claim for lack of jurisdiction because there was no final agency action); *Miami Tribe of Okla. v. United States*, 198 F. App'x 686, 691 (10th Cir. 2006) ("The Tribe's action prematurely challenges the DOI Opinion Letter in its attempt to enforce the Joint Stipulation. We lack jurisdiction to hear this challenge of intermediate agency action."); *Cherry v. U.S. Dep't of Agric.*, 13 F. App'x 886, 890 (10th Cir. 2001) ("the finality of an agency action is jurisdictional").

Plaintiffs argue that the BIA regulations do not satisfy the first prong of *Darby* because they provide that a party "may appeal" a decision. *Id*.[5] Use of the term "may" in 25 C.F.R. § 211.58 regarding appeal is not dispositive. The optional "may" refers to the ability of an aggrieved party to appeal—a party is not required to appeal simply because it is aggrieved by agency action. *See Gilmore v. Weatherford*, 694 F.3d 1160, 1169 (10th Cir. 2012). The regulation states that "[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department shall be considered final so as to constitute Departmental action subject to judicial review . . . ." 25 C.F.R. § 2.6(a). A decision must therefore be administratively appealed before it can be considered final for purposes of judicial review, satisfying the first prong of *Darby*. *Coosewoon*, 25 F.3d at 924.[6]

2. Plaintiffs' admitted failure to exhaust administrative remedies is a jurisdictional defect and cannot be excused.

Plaintiffs' entire argument that the BIA's exhaustion requirement should be excused rests on a single, faulty premise: that the BIA exhaustion requirement is not created by statute, and the

[5] Plaintiffs' citation to *Dine Citizens Against Ruining our Environment v. Klein*, 676 F. Supp. 2d 1198 (D. Colo. 2009) is inapposite. In that case, the court held that the "statutory and regulatory language falls well short of expressly requiring an administrative appeal as a prerequisite to judicial review as required by APA § 10(c) and *Darby*." *Dine*, 676 F. Supp. 2d at 1208. Here, the BIA's regulatory language could not be clearer that appeal is a prerequisite to judicial review. *See* 25 C.F.R. § 2.6(a). Indeed, the Tenth Circuit has explicitly so held, and that holding is binding on this Court. *Coosewoon*, 25 F.3d at 924.

[6] Plaintiffs' attempt to escape *Coosewoon* fails. Br. at 16 n.9. While *Coosewoon* addressed a failure to act claim under the APA, there is nothing about a failure to act that requires a different analysis of whether the BIA regulations require exhaustion as a prerequisite to judicial review. The regulations provide procedures by which: 1) agency actions become final for judicial review purposes (25 C.F.R. § 2.6) and 2) failures to act become final for judicial review purposes (25 C.F.R. § 2.8). In both cases, exhaustion is required before judicial review is available. *Osage Producers Ass'n*, 191 F. Supp. 3d at 1252 (holding that 25 C.F.R. § 2.6 "requires exhaustion of these procedures as a prerequisite to APA review.").

Court therefore has discretion to waive the requirement. Br. at 16. Whether futility or other exceptions are applicable to an administrative exhaustion requirement depends on whether that requirement is statutorily or judicially imposed. *Osage Producers Ass'n*, 191 F. Supp. 3d at 1253. The APA, in 5 U.S.C. § 704 requires exhaustion whenever an agency regulation requires exhaustion, which creates a statutory exhaustion requirement. *Id.* (citing *Darby*, 509 U.S. at 147 and *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975)). "When 'Congress specifically mandates, exhaustion is required,' and "may not be dispensed with merely by a judicial conclusion of futility.'" *Id*. (internal citations omitted).

It appears that nearly every decision that has directly considered the issue—with one non-binding exception[7]—has held that § 2.6(a)'s exhaustion requirement is jurisdictional.[8] The Northern District of Oklahoma specifically affirmed the jurisdictional nature of the exhaustion

[7] The lone exception appears to be *In Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 33–34 (1st Cir. 2007), where the First Circuit found that "exhaustion is not a jurisdictional bar" to a case challenging a BIA action under the Indian Long-Term Leasing Act ("ITLA"). Although the panel opinion cited the Part 2 regulations, it limited its analysis to the ITLA, finding that Congress did not insert "sweeping and direct" language in that statute sufficient to establish a jurisdictional exhaustion requirement. *Id*. at 33. The court appears to have neglected the "sweeping and direct" language in the Part 2 regulations requiring exhaustion, language that has led every other court that has expressly considered the issue to conclude that exhaustion of administrative remedies is a jurisdictional prerequisite to judicial review of BIA actions. The First Circuit's analysis was rooted in the ITLA, which is not at issue in this case. Furthermore, this analysis is inconsistent with *Weinberger* and other cases that have found jurisdictional requirements in agency regulations.

[8] Many courts have concluded that exhaustion under the Interior Department's regulations is a prerequisite to judicial review of BIA decisions. *Coosewoon*, 25 F.3d at 924–25 ("Under Department of Interior regulations, if an agency decision is subject to appeal within the agency, a party must appeal the decision to the highest authority within the agency before judicial review is available."); *Stock W. Corp v. Lujan*, 982 F.2d 1389, 1393–94 (9th Cir. 1993) ("On three occasions . . . we have noted the jurisdictional nature of the administrative appeal requirement." (citations omitted)); *Davis v. United States*, 199 F. Supp. 2d 1164, 1179 (W.D. Okla. 2002) ("[E]xhaustion of the appeal procedures [under 25 C.F.R. § 2.6(a)] is a jurisdictional prerequisite to judicial review."), *aff'd sub nom. Davis ex rel. Davis v. United States*, 343 F.3d 1282 (10th Cir. 2003).

requirement in *Gilmore v. Salazar*, 748 F. Supp. 2d 1299, 1306, aff'd, 694 F.3d 1160, 1166 (10th Cir. 2012) (also noting the difference in non-APA cases where exhaustion is a matter of judicial discretion).[9] The BIA's exhaustion requirement is a jurisdictional prerequisite to judicial review. It cannot be waived by the Court, and it cannot be excused for equitable reasons as Plaintiffs suggest.[10] Thus, Plaintiffs' First, Fourth, Fifth and Sixth causes of action alleging violations of the APA relating to BIA's approval of the seventeen Pawnee leases must be dismissed.

C. Plaintiffs Cannot Escape the Fact That the AIARMA Does Not Supersede All Existing BIA Statutes and Regulations Governing Oil and Gas Development.

Nothing in Plaintiffs' Response lends support for Plaintiffs' newly-minted claim that approvals of oil and gas leases under BIA's longstanding specific statutes and regulations governing oil and gas leasing violate the AIARMA. Plaintiffs have not identified a single case that supports their expansive reading of the AIARMA (which was passed in 1993) or a single

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[9] None of the cases cited by Plaintiffs reach a contrary conclusion. First, *Cody Labs, Inc. v. Sebelius*, addressed FDA exhaustion regulations and did not analyze whether they created a jurisdictional exhaustion requirement. 446 F. App'x 964, 969 (10th Cir. 2011). Similarly, *Herr v. Forest Serv.*, is a non-binding Sixth Circuit case addressing Forest Service exhaustion regulations. 803 F.3d 809 (6th Cir. 2015). Finally, Plaintiffs' reliance on *Gilmore*, 748 F. Supp. 2d 1299, ignores the Tenth Circuit's holding *in the appeal of that case* that the exhaustion requirement was being analyzed for claim under the common law—not APA claims. *Gilmore*, 694 F.3d at 1167 (recognizing that "in cases not governed by the APA, the doctrine of exhaustion applies as a matter of judicial discretion" and concluding that the court properly exercised its discretion to require exhaustion). If the claims had been brought under the APA, the Court would have no discretion, as the exhaustion requirement would be jurisdictional. *See Osage Producers Ass'n*, 191 F. Supp. 3d at 1255 ("taken together, 5 U.S.C. § 704 and 25 C.F.R. §§ 2.6(a), 2.8, and 226.69 require exhaustion of the petitioner's claims to compel agency action and that the court cannot excuse these required procedures on futility grounds.").

[10] Aside from the fact that exhaustion is jurisdictional and cannot be waived by the Court, Plaintiffs would not be prejudiced by the exhaustion requirement if, as they allege, they received no notice of the decisions they are challenging. Br. at 21; ECF No. 20-4 and 20-5 (declarations asserting that notice was not provided). Assuming Plaintiffs' allegations are true, the BIA regulations are clear that the time to appeal "shall not begin until notice has been given." 25 C.F.R. § 2.7(b). Accordingly, if Plaintiffs are correct, they still have the opportunity to file an appeal and give the agency the opportunity to address Plaintiffs' issues as contemplated by the BIA regulations.

case that has even raised a similar claim challenging oil and gas leases, permits or other approvals under the statute.

Instead, Plaintiffs distract from the plain language of the statute by stringing together unrelated quotes from the legislative history. Plaintiffs point to nothing that contradicts the plain language of the statute or supports their brand new cause of action. If Plaintiffs' reading of AIARMA were correct, i.e. that the defined term "land management activities" literally refers to *all* land management activities without any connection whatsoever to agriculture (Br. at 6-7), it would modify every title of the C.F.R. that applies to Indian lands. *See, e.g.*, 25 U.S.C. § 396; 25 C.F.R. pt. 212; 43 C.F.R. pt. 3160 (governing oil and gas leasing and operations). Indeed, Plaintiffs' reading would treat the AIARMA as an implied repeal of BIA's and BLM's statutory and regulatory regime for oil and gas leasing and operations—a result that is highly disfavored. *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) ("[a]n implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute."). There is nothing in the legislative history that remotely supports such an expansive reading of the statute.

Plaintiffs' citation to the legislative history regarding the Department of Justice specific comments on the definition of land management activities (Br. at 7), is similarly misplaced. Nothing in that discussion addresses oil and gas leasing activities. The definition of "land management activities" even as it is limited to agricultural management activities is indeed still a "sweeping" definition covering a wide range of activities. But the point is that all of those activities are related to agricultural management. 25 U.S.C. § 3703(12). Similarly, the legislative history discussion related to the "radical departure from existing law" (Br. at 8) highlights that the legislation is related to the management of "agricultural resources." There is

no mention in the legislative history cited by Plaintiffs that Congress intended to upend the comprehensive and detailed statutory scheme governing oil and gas leasing on Indian lands.

The ARMP cannot save Plaintiffs' Fourth cause of action. The ARMP by its terms "delineates certain goals and objectives" but "does not authorize or prescribe any surface disturbing activities." ECF No. 20-1 at 6. The plan is "administrative in nature, since it neither prescribes nor authorizes any particular action." *Id*. The scope of the ARMP is also necessarily limited by the scope of the AIARMA and the governing regulations under which it was adopted. Section 3712(a) provides an exception to conducting land management activities in accordance with the ARMP, "where such compliance would be contrary to the trust responsibility of the United States." 25 U.S.C. § 3712(a). Similarly, the statute's language regarding compliance with certain tribal laws and ordinances applies only "unless otherwise prohibited by Federal law." 25 U.S.C. § 3712(b). Thus, the AIARMA applies to land management activities as they are defined in the statute and as limited by other federal laws and regulations. It does not apply to all activities that happen to take place on or near agricultural land and it does not apply where, as here, the activities are already governed by conflicting statutes and regulations. In short, the Court should decline Plaintiffs' invitation to define a new cause of action, especially one that is so far removed from the clearly defined purposes of the AIARMA itself. Plaintiffs Fourth cause of action fails to state a viable claim and must be dismissed in its entirety.

D. To the Extent Plaintiffs' Sixth Cause of Action Alleges a Breach of Trust Duty, It Must Also be Dismissed In Its Entirety.

Plaintiffs do not even attempt to identify a specific trust duty that forms the basis for their Sixth cause of action. Br. at 9-10. They simply reiterate the basic allegation in their complaint: "by violating NEPA, Executive Order 11988, NHPA, and the AIARMA," Federal Respondents "did not meet their trust responsibilities." Br. at 10 (citing Am. Compl. ¶ 93). Plaintiffs do not

contest that it is well-settled law that the Tribe "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (citation omitted).

Plaintiffs do cite to a single case finding a breach of trust premised on a violation of the NHPA, NEPA, Executive Order 11988, or the AIARMA. This is because those types of generally applicable statutes do not give rise to the "specific fiduciary duties" required to sustain a breach of trust claim. *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). "Unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Id.* Plaintiffs ignore this requirement and assume they can bootstrap ordinary NEPA or NHPA violations into a breach of trust claim. The premise for Plaintiffs' Sixth cause of action is contradicted by binding Supreme Court precedent, and it must therefore be dismissed for failure to state a claim.

III. CONCLUSION

Therefore, Federal Respondents respectfully request that all claims related to the Pawnee leases in the Amended Complaint be dismissed under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction and that the Fourth and Sixth causes of action be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

Respectfully submitted this 14th day of July, 2017.

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