

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JULIA CAVAZOS, et al.,

Plaintiffs,

V.

No.: 1:18-cv-0891-CKK

**RYAN ZINKE, in his official capacity as
Secretary of the Interior, et al.,**

Defendants.

**) DEFENDANTS' MEMORANDUM
) IN SUPPORT OF MOTION TO
) DISMISS**

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Table of Acronyms

APA	Administrative Procedure Act
BIA	Bureau of Indian Affairs

I. INTRODUCTION

Plaintiffs bring this lawsuit challenging Defendants' alleged failure to respond to disenrollment actions by the Saginaw Chippewa Indian Tribe of Michigan. Plaintiffs assert that they "contacted Bureau of Indian Affairs ("BIA") officials and urged them to take action to force the Tribe to cease immediately its illegal disenrollment proceedings," and that they filed a Petition with the BIA urging the Agency to address the disenrollment proceedings, but that Defendants took no action. ECF No. 1 ¶¶ 61, 62 (hereinafter "Compl."). In the face of that alleged inaction, Plaintiffs filed this lawsuit.

Plaintiffs, however, cannot challenge the Defendants' alleged inaction in federal court because they failed to exhaust their administrative remedies by appealing the alleged inaction pursuant to BIA regulations. 25 C.F.R. Part 2. Those regulations expressly require administrative appeal of agency inaction to superior authority within the Department of the Interior ("Department"), 25 C.F.R. § 2.8, before a decision "shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. [§] 704." *See* 25 C.F.R. § 2.6(a); *see also* 25 C.F.R. §§ 2.8, 2.9, 2.10. Because Plaintiffs have not challenged a final agency action as defined in 25 C.F.R. § 2.6(a) and Administrative Procedure Act ("APA") Section 704, Plaintiffs' claims do not fall within the APA's limited waiver of sovereign immunity. This Court should therefore dismiss Plaintiffs' claims for lack of subject matter jurisdiction. Alternatively, Plaintiffs' claims are not ripe for review, or Plaintiffs have failed to state a claim because the Complaint does not identify a final agency action that is subject to review under APA Section 704.

II. BACKGROUND

A. Factual Background

Plaintiffs assert that they have been “stripped of their tribal membership (*i.e.*, ‘disenrolled’) by their Tribe, the Saginaw Chippewa Indian Tribe of Michigan.” Compl. ¶ 1. They claim that this was done in violation of the Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act, Pub. L. No. 99-346, 100 Stat. 674 (1986) (“Judgment Funds Act”). *Id.* ¶ 3. They further allege that “[b]ecause of the Tribe’s ongoing violations of the Judgment Funds Act, in 2015, Plaintiffs’ counsel contacted Bureau of Indian Affairs (‘BIA’) officials and urged them to take action to force the Tribe to cease immediately its illegal disenrollment proceedings,” but that “BIA took no action as result of these communications.” *Id.* ¶¶ 61, 62. “To force a response from BIA, on October 19, 2016, Plaintiffs filed a formal Petition with the Department of the Interior asking agency officials, including those in the BIA, to perform their duty as mandated by the Judgment Funds Act.”¹ *Id.* ¶ 63. In the Petition, Plaintiffs argued that the Department of the Interior must “take action promptly to force the Tribe to cease and desist from unlawfully disenrolling Tribe members who were entitled to Tribal membership under the Judgment Funds Act” and “compel the Tribe to comply with the dictates of the Judgment Funds Act by re-enrolling those members who were wrongfully disenrolled by the Tribe.” *Id.* Plaintiffs assert that “[s]ince filing the Petition, Plaintiffs have repeatedly communicated with Department of the Interior officials, including Defendants, urging them to take the measures laid out in the Petition, or, at the very least, to respond to the Petition.” *Id.* ¶ 64.

¹ While Plaintiffs’ Complaint should be dismissed on jurisdictional grounds, Defendants disagree with Plaintiffs that the Judgment Fund Act requires the Department to take the particular actions that Plaintiffs assert.

Plaintiffs do not assert that they ever sought to administratively appeal the alleged inaction by the Department of the Interior officials. They do not claim that they followed the procedure laid out in 25 C.F.R. §§ 2.8-2.10 for administratively appealing inaction of a BIA official.

Plaintiffs filed this lawsuit on April 16, 2018, claiming that “Defendants have unlawfully withheld and unreasonably delayed carrying out their duties under the Judgment Funds Act.” *Id.* ¶ 73. They ask this Court to enter declaratory and injunctive relief to “remedy Defendants’ failure to comply with the requirements of the Judgment Funds Act” and to “compel[] Defendants to respond to Plaintiffs’ [October 2016] Petition forthwith.” *Id.* ¶¶ 75, 81, 88.

B. Statutory and Regulatory Background

The APA allows challenges to “agency action.” 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . , is entitled to judicial review thereof.”). “[A]gency action” has a particular meaning that is set forth in 5 U.S.C. § 551(13)—*see* 5 U.S.C. § 701(b)(2) (“For the purpose of this [judicial review] chapter . . . ‘agency action’ ha[s] the meaning[] given . . . by section 551 of this title”)—which defines the term as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act,” 5 U.S.C. § 551(13). Thus, a plaintiff must “direct [its] attack against some particular ‘agency action’ that causes it harm.” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990). Further, the action must be a “final agency action.” 5 U.S.C. § 704; *Karst Env’tl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007). Simply put, a final agency action is one that marks the “consummation of the agency’s decisionmaking process” and from which “rights or obligations have been determined, or from which legal consequences will flow” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal citations

and quotations omitted); *see Karst Env'tl. Educ.*, 475 F.3d at 1295; *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004).

Section 702 of the APA provides a waiver of federal sovereign immunity for a person suffering legal wrong because of agency action. 5 U.S.C. § 702 (“An action in a court of the United States ... stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed ... on the ground that it is against the United States.”). Section 704 specifies the type of “agency action” subject to judicial review: “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.” 5 U.S.C. § 704. Section 704 further provides that “agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, *unless the agency otherwise requires by rule[,] and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.*” 5 U.S.C. § 704 (emphasis added).

BIA regulations make clear the steps that must be followed before an agency action is final for purposes of an APA challenge. 25 C.F.R. Part 2. The regulations specify that “[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. [§] 704.” 25 C.F.R. § 2.6(a). Moreover, the regulations specify the procedure for seeking appeal from *inaction* of an official. First, the person whose interests are affected by the failure of an official to act, must:

- (1) Request in writing that the official take the action originally asked of him/her;
- (2) Describe the interest adversely affected by the official's inaction, including a description of the loss, impairment or impediment of such interest caused by the official's inaction;
- (3) State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part.

25 C.F.R. § 2.8(a). An official receiving such a request must either make a decision on the merits of the initial request within 10 days from receipt or establish a reasonable later date by which the decision shall be made, not to exceed 60 days from the date of request. Second, any decision, and any failure to make a decision under the relevant time frame, by the initial official "shall be appealable" to the next official in the process established by 25 C.F.R. Part 2. 25 C.F.R. § 2.8(b).

After having given the agency official advance notice that an appeal may be taken if the inaction continues, the regulations require that an appeal actually be filed before the administrative remedies are exhausted. The regulations state that "[a]n appellant must file a written notice of appeal in the office of the official whose decision is being appealed," 25 C.F.R. § 2.9(a), and specify the format, content, timing, and service for the administrative appeal documents. 25 C.F.R. §§ 2.9-2.21. The appellant must, *inter alia*, file a "statement of reasons," which must be "accompanied by or otherwise incorporate all supporting documents." 25 C.F.R. § 2.10(a).

A claim in federal court challenging agency inaction can only be brought after completing this administrative appeals process, as the decision is otherwise not final for purposes of judicial review under 5 U.S.C. § 704. 25 C.F.R. § 2.6(a).

C. Standard of Review

Dismissal of a claim under Federal Rule of Civil Procedure 12(b)(1) is appropriate where the allegations in the complaint are insufficient to establish the court's jurisdiction.² Subject matter jurisdiction is a threshold issue, which should be addressed prior to any consideration of the merits because "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quotation and citation omitted). The plaintiff bears the burden of establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (It is "to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." (citations omitted)); *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007); *El Paso Nat. Gas Co. v. United States*, 605 F. Supp. 2d 224, 227 (D.D.C. 2009) ("When evaluating subject matter jurisdiction, plaintiffs bear the burden of proof." (citation omitted)), *aff'd*, 632 F.3d 1272 (D.C. Cir. 2011). Where a plaintiff fails to establish subject matter jurisdiction, the claims must be dismissed. *See San Juan Audubon Soc'y v. Veneman*, 153 F. Supp. 2d 1, 4 (D.D.C. 2001). When the United States is the defendant, "a plaintiff must overcome the defense of sovereign immunity in order to establish the jurisdiction necessary to survive a Rule 12(b)(1) motion to dismiss." *Jackson v. Bush*, 448 F. Supp. 2d 198, 200 (D.D.C. 2006) (citing *Tri State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003)).

Dismissal under Rule 12(b)(6) is appropriate where a complaint fails to state a cause of

² Because "there is some uncertainty as to whether a failure to exhaust administrative remedies is properly brought in a Rule 12(b)(1) motion, as a jurisdictional defect, or in a Rule 12(b)(6) motion for failure to state a claim," the United States brings this motion under both provisions. *Ly v. U.S. Postal Serv.*, 775 F. Supp. 2d 9, 12 (D.D.C. 2011) (quoting *Hall v. Sebelius*, 689 F. Supp. 2d 10, 21 (D.D.C. 2009), collecting cases, and noting that "courts in this circuit tend to treat failure to exhaust as a failure to state a claim rather than as a jurisdictional deficiency").

action. *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm’n*, 324 F.3d 726, 731 (D.C. Cir. 2003) (where APA cause of action is lacking, Rule 12(b)(6), not Rule 12(b)(1), governs dismissal). In deciding a motion to dismiss under Rule 12(b)(6), the factual allegations in the complaint are taken as true. *English v. Dist. of Columbia*, 717 F.3d 968, 971 (D.C. Cir. 2013). While the Court must assume the veracity of any “well-pleaded factual allegations,” legal conclusions and conclusory allegations “are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

III. ARGUMENT

A. Plaintiffs Have Not Exhausted Their Administrative Remedies

According to the allegations included in their complaint, Plaintiffs have not followed the administrative process required by BIA regulations 2.8-2.10 and have not pursued an appeal or obtained a final agency decision. *See* Compl. ¶ 64. Plaintiffs allege that “[s]ince filing the Petition, Plaintiffs have repeatedly communicated with Department of the Interior officials, including Defendants, urging them to take the measures laid out in the Petition, or, at the very least, to respond to the Petition.” *Id.* They further allege that “Defendants have taken no action on the Petition, and no action to enforce the clear-cut requirements of the Judgment Funds Act.” *Id.* Plaintiffs claim that “Defendants have unlawfully withheld and unreasonably delayed carrying out their duties” and ask this Court to “[r]equir[e] Defendants to respond, without further delay, to the October 2016 Petition.” *Id.* at ¶ 73, Prayer for Relief ¶ G.

Pleading “inaction” by BIA does not satisfy the exhaustion requirement or justify Plaintiffs’ failure to exercise the remedies available to them under BIA regulations 2.8-2.10. Mere requests for action or the filing of a petition for action do not satisfy the exhaustion requirement. *See Davis v. United States*, 199 F. Supp. 2d 1164, 1180 (W.D. Okla. 2002)

(“Although plaintiffs allege they [filed documents requesting action] and the BIA failed to act, there remain administrative procedures that must be followed.”), *aff’d*, 343 F.3d 1282 (10th Cir. 2003); *Allen v. United States*, 871 F. Supp. 2d 982, 993 (N.D. Cal. 2012) (“Instead of choosing to follow the BIA’s administrative appeals process, plaintiffs instead chose to phone several higher-level officials within the BIA at various times to inquire regarding the status of petitioners’ request, or to request a reconsideration of Acting Director Risling’s decision. Such informal communications ... do not comprise an appeal” for purposes of 25 C.F.R. § 2.8); *Aguayo v. Salazar*, No. 12cv00551-WQH-KSC, 2012 U.S. Dist. LEXIS 44151, at *21 (S.D. Cal. Mar. 29, 2012) (plaintiff cannot “bypass the requirement to properly exhaust administrative procedures by filing a single demand for immediate action with the highest agency authority”).

Plaintiffs’ actions do not satisfy the requirements of the BIA regulations 2.8-2.10 for administrative exhaustion of alleged BIA inaction. There are two key steps that they failed to take: first, they failed to notify a BIA official that, if the BIA failed to act within a specified time, they would appeal that inaction; second, they failed to actually appeal the alleged inaction to one of the senior officials tasked with deciding an appeal.³ In failing to take those two key steps, Plaintiffs deprived the Agency of the required opportunities to analyze and address the alleged inaction administratively, before facing federal court action. In furtherance of those two key steps, there are a number of specific actions that Plaintiffs failed to take, but that are required for administrative exhaustion, as outlined in the following chart:

³ Those officials are identified in 25 C.F.R. § 2.4.

Regulatory Requirement	Satisfied By Plaintiffs?
Make the “original” request for action (25 C.F.R. § 2.8(a))	Yes.
Request in writing that the official take the action originally asked of him/her (25 C.F.R. § 2.8(a)(1))	No, for at least some claims. ⁴
Describe the interest adversely affected by the official’s inaction, including a description of the loss, impairment or impediment of such interest caused by the official’s inaction (25 C.F.R. § 2.8(a)(2))	No, for at least some claims. ⁵
State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part (25 C.F.R. § 2.8(a)(3))	No.
File a written notice of appeal (25 C.F.R. § 2.9(a))	No.
File a notice of appeal bearing the labeling and providing the other information required by 25 C.F.R. § 2.9(c)	No.
Provide a statement of the decision being appealed that is sufficient to permit identification of the decision (25 C.F.R. § 2.9(c)(4))	No.
Provide a copy of the appellant’s request for a decision or action under § 2.8 with a written statement that the official failed to make a decision or take any action or to establish a date by which a decision would be made upon the request (25 C.F.R. § 2.9(c)(5))	No.
File a statement of reasons for the appeal that explains why the decision being appealed is in error (25 C.F.R. §§ 2.2, 2.10(a))	No.
Provide all supporting documents for the appeal (25 C.F.R. § 2.10(a))	No.
Serve the appeal documents on all other interested parties known to the person making the appeal (25 C.F.R. § 2.12)	No.

⁴ Plaintiffs may argue that the filing of the Petition satisfies this requirement. However, Plaintiffs assert that “Defendants’ failure to respond to Plaintiffs’ October 2016 Petition constitutes agency action ‘unreasonably delayed,’ and not concluded in a ‘reasonable time.’” Compl. Prayer for Relief ¶ F. Thus, for at least the claims that are based on alleged failure to respond to the Petition, plaintiffs must provide a follow-up written request that addresses the Petition.

⁵ Again, for at least the claims that are based on alleged failure to respond to the Petition, plaintiffs must provide a follow-up written request that specifically addresses the Petition and that describes the interest adversely affected by BIA’s inaction on the Petition.

Plaintiffs' actions clearly did not satisfy the requirements necessary to have exhausted their administrative remedies.

B. This Court Should Dismiss Plaintiffs' Claims Since Plaintiffs Have Failed to Exhaust Their Administrative Remedies

Instead of complying with the BIA regulations and exhausting the administrative process, Plaintiffs have attempted to opt out of the process entirely by proceeding directly to Federal court. *See, e.g.*, Compl. ¶ 88. In light of this failure, the Court should dismiss Plaintiffs' claims for one of several reasons: either 1) the Court lacks jurisdiction because there is no waiver of sovereign immunity under the APA absent administrative exhaustion, or 2) Plaintiffs' claims are not ripe as they have not exhausted administrative remedies, or 3) Plaintiffs have failed to state a claim because they have not identified a final agency action. Regardless of how the Court analyzes the issue, the case law makes clear that Plaintiffs may not proceed with their claims since they have failed to exhaust the appeal process laid out in the BIA's regulations. *See Mdewakanton Sioux Indians of Minn. v. Zinke*, 264 F. Supp. 3d 116, 127 (D.D.C. 2017) (agreeing with "the determination of many courts in other jurisdictions that a failure to exhaust the appeal process of 25 C.F.R. § 2.8 prevents Plaintiffs from pursuing an APA claim" and citing *Jech v. Dep't of Interior*, 483 F. App'x. 555, 560 (10th Cir. 2012)); *Villegas v. United States*, 963 F. Supp. 2d 1145, 1157 (E.D. Wash. 2013); *Miranda v. Salazar*, No. 12-2216, 2013 WL 3367311, at *5-6 (C.D. Cal. July 3, 2013); *Casanova v. Norton*, No. 05-1273, 2006 WL 2683514, at *2 (D. Ariz. Sept. 18, 2006)).⁶

⁶ *See also Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 925 (10th Cir. 1994) (plaintiffs must exhaust administrative remedies pursuant to 25 C.F.R. § 2.8 before seeking judicial review of agency inaction); *Ass'n of Flight Attendants-CWA, AFL-CIO v. Chao*, 493 F.3d 155, 158 (D.C. Cir. 2007) (affirming dismissal because plaintiffs had not exhausted their administrative remedies); *Gilmore v. Weatherford*, 694 F.3d 1160, 1169-70 (10th Cir. 2012) (court lacks jurisdiction over claims based on the plaintiffs' failure to exhaust administrative remedies under

Exhaustion is “not some arbitrary hurdle” to make it difficult to sue. *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1237 (10th Cir. 2005). Rather, “[i]t serves ‘the twin purposes of protecting administrative agency authority and promoting judicial efficiency.’” *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992); *see also Woodford v. Ngo*, 548 U.S. 81, 89 (2006).

“Exhaustion gives an agency ‘an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court,’ and it discourages ‘disregard of [the agency’s] procedures.’” *Woodford*, 548 U.S. at 89 (quoting *McCarthy*, 503 U.S. at 145). It promotes efficiency because “[c]laims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court.” *Id.* The exhaustion requirement also allows the agency to give a definitive answer and reasoned explanation for its decision and to develop an administrative record for its final decision. *Id.*

The administrative exhaustion required by the BIA rules also allow other interested parties—which here could include Saginaw Chippewa Indian Tribe of Michigan—to participate in the process and provide input into the Agency’s decision. *See* 25 C.F.R. § 2.12 (requiring service of appeals documents on “all other interested parties”), 25 C.F.R. § 2.11 (allowing “[a]ny interested party wishing to participate in an appeal” to file documents).

25 C.F.R. §§ 2.8, 2.9); *Magiera v. Norton*, 108 F. App’x 542, 544 (9th Cir. 2004) (no waiver of sovereign immunity because “Plaintiffs had not complied with the procedures outlined for exhaustion under regulations governing the BIA” (footnote omitted)); *Davis v. United States*, 199 F. Supp. 2d 1164, 1179 (W.D. Okla. 2002) (action is not ripe for court review if plaintiff has failed to exhaust the regulations’ administrative procedures); *Allen v. United States*, 871 F. Supp. 2d 982, 994 (N.D. Cal. 2012) (court lacks jurisdiction since plaintiffs failed to appeal agency inaction); *Osage Producers Ass’n v. Jewell*, 191 F. Supp. 3d 1243, 1255 n.13 (N.D. Okla. 2016) (dismissal for failure to exhaust remedies under 25 C.F.R. § 2.8 is required “[w]hether classified as jurisdictional or not”).

By failing to exhaust their administrative remedies, Plaintiffs have deprived this Court of crucial information to hear this case. Had Plaintiffs pursued an administrative appeal of the failure to respond to the petition, this Court would be better informed regarding the legal and factual issues at play and the Department's position on those issues. There would necessarily be a statement of reasons for the appeal (to which the Department would have responded) and all supporting documents relating to the appeal, which Plaintiffs would have needed to file pursuant to 25 C.F.R. §§ 2.2 and 2.10. In addition, the Saginaw Chippewa Indian Tribe of Michigan and other potentially interested parties would have had the opportunity to provide written input into the administrative appeal. 25 C.F.R. § 2.11. But, because none of the Plaintiffs pursued an administrative appeal, the agency had no opportunity to reach a definitive decision and, in light of specific issues raised in an appeal or the input provided by interested parties, provide a thorough explanation for the decision. Because of Plaintiffs' failure to exhaust administrative remedies, the Court has none of this information available for review.

Plaintiffs should not be allowed to sidestep the BIA regulatory appeals process, as they have attempted to do by filing this lawsuit. This Court should dismiss their claims.

1. This Court lacks subject matter jurisdiction, as there is no waiver of sovereign immunity absent administrative exhaustion

Because Plaintiffs failed to exhaust administrative remedies pursuant to BIA regulations, there is no final agency action subject to review under the APA and this Court should dismiss the claims for lack of subject matter jurisdiction. Federal court jurisdiction is limited, present only where authorized by statute or the Constitution. *See Kokkonen*, 511 U.S. at 377; *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1059 (9th Cir. 1991). And "[t]he United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535,

538 (1980) (internal marks and citation omitted). Thus Plaintiffs must identify a valid waiver of sovereign immunity in order to bring suit, which they have failed to do.

The only potential waiver of sovereign immunity alleged by Plaintiffs here is the APA;⁷ but the APA contains only a limited waiver of sovereign immunity that is inapplicable to this lawsuit. *See* 5 U.S.C. § 702; *NetworkIP, LLC v. FCC*, 548 F.3d 116, 121 (D.C. Cir. 2008); *Gallo Cattle Co. v. U.S. Dep’t of Agric.*, 159 F.3d 1194, 1198–99 (9th Cir. 1998). Section 702 of the APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. But Section 704, which is captioned “actions reviewable,” imposes limitations on which agency actions are subject to judicial review. It provides that agency actions are subject to judicial review only in two instances: when agency action is “made reviewable by statute” or when it constitutes “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. No other statute provides for judicial review of the claim presented here. Accordingly, the action challenged by Plaintiffs is reviewable only if it constitutes “final agency action for which there is no other adequate remedy in a court.” *Id.*

With regard to the meaning of “final agency action,” Section 704 specifies that agency action is not “final” for purposes of Section 704 if the agency “requires by rule[,] and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.” 5 U.S.C. §

⁷ The Judgment Funds Act does not provide a waiver of sovereign immunity upon which Plaintiffs may rely. Moreover, the federal question statute does not afford jurisdiction by itself, but rather requires an independent source of substantive law. *See, e.g., Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 807–08 (1986) (claim “arising under” federal question statute, 28 U.S.C. § 1331 must be grounded in independent source of federal law); *Wash. Consulting Grp., Inc. v. Raytheon Tech. Servs. Co.*, 760 F. Supp. 2d 94, 106-07 (D.D.C. 2011) (finding no federal question).

704. In other words, agency action is not final for purposes of Section 704 until “an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule.”

Darby v. Cisneros, 509 U.S. 137, 146 (1993).

BIA regulations provide that “[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704.” 25 C.F.R. § 2.6(a); *Timbisha Shoshone Tribe v. Salazar*, 697 F. Supp. 2d 1181, 1188 (E.D. Cal. 2010) (denying TRO, noting “[b]efore Plaintiffs can challenge BIA decisions in federal court, ‘BIA regulations require the exhaustion of administrative remedies.’”) (quoting *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988)). And, in order for agency inaction to become the subject of appeal, a party must first satisfy the requirements of 25 C.F.R. § 2.8, which include providing notice that an appeal will be filed if action is not taken within 10 days, and then the actual appeal needs to be filed in compliance with 25 C.F.R. §§ 2.9-2.10. Absent the completion of those steps, there is no final agency action to challenge under APA Section 704 and therefore no waiver of sovereign immunity under APA Section 702. *See Davis*, 199 F. Supp. 2d at 1179 (dismissing plaintiff’s claims because they failed to exhaust administrative procedures pursuant to 25 C.F.R. Part 2).

Because Plaintiffs failed to exhaust their administrative remedies, there is no waiver of sovereign immunity under the APA and this Court should dismiss Plaintiffs’ claims for lack of subject matter jurisdiction. *See Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (under doctrine of exhaustion, a suit filed before exhausting available administrative remedies is premature and should be dismissed); *Stock W. Corp. v. Lujan*, 982 F.2d 1389, 1393-94 (9th Cir. 1993) (“On three occasions, we have upheld the dismissal of lawsuits challenging BIA decisions under the [APA] on the ground that the plaintiff failed to take the required administrative appeal. In doing so, we have

noted the jurisdictional nature of the administrative appeal requirement.” (citations omitted)); *Gilmore v. Weatherford*, 694 F.3d 1160, 1169-70 (10th Cir. 2012) (lack of jurisdiction for failure to exhaust administrative remedies under 25 C.F.R. §§ 2.8, 2.9); *Magiera v. Norton*, 108 F. App’x 542, 544 (9th Cir. 2004) (no waiver of sovereign immunity because of failure to exhaust under BIA regulations).

2. Because Plaintiffs have failed to exhaust administrative remedies, their claims are not ripe

In addition, this Court lacks jurisdiction because there is no ripe claim. Ripeness is a jurisdictional prerequisite. *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 732-737 (1998). Where a claim is brought pursuant to the general “final agency action” provision in Section 704 of the APA, there is no ripe case or controversy absent some final agency action that is subject to judicial review. A failure to comply with the established BIA administrative procedures for appealing inaction of an official means that there is no final agency action and that the claims are therefore not ripe for judicial review. *See Davis*, 199 F. Supp. 2d at 1179 (action is not ripe for court review if plaintiff has failed to exhaust the regulations’ administrative procedures); *see, e.g., HRI, Inc. v. EPA*, 198 F.3d 1224, 1237 (10th Cir. 2000) (challenge to EPA action not ripe for review where agency had not completed its decision-making process and had not developed an administrative record).

3. Plaintiffs have failed to state a claim because they have not challenged a final agency action

Finally, dismissal of Plaintiffs’ claims under Rule 12(b)(6) for failure to state a claim is likewise warranted. The Complaint does not identify any final agency action that is subject to review under Section 704 of the APA because a BIA decision, even BIA inaction, is final only when it is not subject to review by a superior authority. 25 C.F.R. §§ 2.6, 2.8. Dismissal is

therefore warranted. *See Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 924-925 (10th Cir. 1994) (dismissing claims challenging BIA inaction for failure to state a claim where plaintiffs had not exhausted administrative remedies).

CONCLUSION

This Court should dismiss all claims asserted against the Federal Defendants. Plaintiffs have failed to exhaust their administrative remedies under BIA regulations 25 C.F.R. §§ 2.8-2.10 for challenging BIA's alleged inaction. Thus there is no final agency action under APA Section 704 and hence there has been no waiver of sovereign immunity. In addition, Plaintiffs' claims are unripe. For those two reasons, Plaintiffs' claims against the Federal Defendants must be dismissed for lack of subject matter jurisdiction. Finally, Plaintiffs' claims should be dismissed for failure to state a claim as the Complaint does not identify any final agency action that is subject to review under Section 704 of the APA.

Respectfully submitted this 17th day of August, 2018.

JEFFREY H. WOOD
Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

/s/ Ragu-Jara Gregg
RAGU-JARA "JUGE" GREGG (DC Bar No.
495645)
Trial Attorney
Natural Resources Section
601 D St. NW, 3rd Floor
Washington, D.C. 20004
Tel: (202) 514-3473
Fax: (202) 305-0506
ragu-jara.gregg@usdoj.gov

Attorneys for Defendants