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' REPLY IN SUPPORT OF MOTION TO DISMISS**
Defendants.	)	
	)	

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I. INTRODUCTION

This Court should dismiss Plaintiffs' lawsuit because Plaintiffs failed to exhaust their administrative remedies through their failure to appeal the alleged inaction pursuant to Bureau of Indian Affairs (BIA) regulations. 25 C.F.R. Part 2. Instead of complying with BIA regulations that require exhaustion of the administrative process, Plaintiffs instead attempted to unilaterally opt out of the required process by proceeding directly to federal court. They may not do so. Given Plaintiffs' failure to complete the administrative process, there has been no "final agency action" as defined in the BIA regulations and as required for suit under the Administrative Procedure Act (APA). Accordingly, and in keeping with a wealth of case law that Plaintiffs have failed to address, Plaintiffs claims must be dismissed.[1]

Plaintiffs' arguments against administrative exhaustion are unavailing. The BIA regulations do, in fact, apply to this dispute. Those regulations are mandatory, not optional, and, read in conjunction with the APA, unambiguously require administrative exhaustion before a party can challenge agency inaction in court. Finally, there is no basis to conclude that completing the administrative exhaustion process would prove futile. To the contrary, it would allow the agency to seek input from other interested parties, to develop and articulate its position (possibly obviating the need for judicial review), and to develop an administrative record for

[1] "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." *Ly v. U.S. Postal Serv.*, 775 F. Supp. 2d 9, 12 (D.D.C. 2011) (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" (quoting *Hall v. Sebelius*, 689 F. Supp. 2d 10, 21 (D.D.C. 2009))). Regardless of whether the Court analyzes the issue under Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6), the result is the same. Plaintiffs must exhaust their administrative remedies before seeking federal court review and they have failed to do so.

judicial review.

II. ARGUMENT

A. The Case Law Makes Clear That Plaintiffs Must Exhaust Administrative Remedies

In responding to Defendants' Motion to Dismiss, Plaintiffs have completely failed to grapple with the wealth of authority presented in Defendants' Motion to Dismiss that specifically examines the application of Section 2 of BIA regulations to agency inaction. Plaintiffs have not pointed to a single case where a court has allowed a plaintiff to bypass BIA's Section 2 administrative appeals process. Instead, Plaintiffs selectively cite cases that are readily distinguishable. In particular, Plaintiffs repeatedly cite cases where there are no comparable regulations that require exhaustion and where the agency has staked out a clear, repeated, and unequivocal position on the legal issue that is the subject of the lawsuit.[2] *See Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1485 (D.C. Cir. 1983); *Atl. Richfield Co. v. U.S. Dep't of Energy*, 769 F.2d 771, 782 (D.C. Cir. 1984); *Keating v. FERC*, 569 F.3d 427, 432 (D.C. Cir. 2009). Those cases are inapplicable to the situation here where there are regulations that expressly require administrative exhaustion in order to bring an APA challenge and where the Agency has not yet provided its position on the merits of the dispute.

There are a number of cases that specifically analyze the requirements imposed by the BIA regulations at issue here and what steps must be taken for a party to bring a federal court claim under the APA. That case law makes clear that Plaintiffs must exhaust their administrative

[2] Plaintiffs also cite a number of cases where the courts required administrative exhaustion, even though the BIA regulations were not at issue in the cases. *See, e.g.*, *Ass'n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 159-60 (D.C. Cir. 2007); *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 111 (D.C. Cir. 1986).

remedies under BIA's regulations or they are foreclosed from bringing a challenge before this Court. *See Mdewakanton Sioux Indians of Minn. v. Zinke*, 264 F. Supp. 3d 116, 127 (D.D.C. 2017); *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. EDCV 12-02216-VAP (SPx), 2013 WL 3367311, at *5-6 (C.D. Cal. July 3, 2013); *Casanova v. Norton*, No. CV 05-1273-PHX-ROS, 2006 WL 2683514, at *2 (D. Ariz. Sept. 18, 2006); *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 925 (10th Cir. 1994); *Gilmore v. Weatherford*, 694 F.3d 1160, 1169-70 (10th Cir. 2012); *Magiera v. Norton*, 108 F. App'x 542, 544 (9th Cir. 2004) (mem.); *Davis v. United States*, 199 F. Supp. 2d 1164, 1179 (W.D. Okla. 2002) *aff'd*, 343 F.3d 1282 (10th Cir. 2003); *Allen v. United States*, 871 F. Supp. 2d 982, 994 (N.D. Cal. 2012); *Osage Producers Ass'n v. Jewell*, 191 F. Supp. 3d 1243, 1255 n.13 (N.D. Okla. 2016).

The Tenth Circuit, for example, has faced and rejected arguments that were very similar to those put forward by Plaintiffs here. *See Jech*, 483 F. App'x at 555. In that case, the plaintiffs challenged BIA's failure to act in response to a change in a tribal constitution that altered who would be allowed to vote in particular tribal elections. Plaintiffs argued that BIA was required to step in and conduct the tribal elections. *Id.* at 556. Plaintiffs pointed to "several letters, all refusing the demands by [a] plaintiff . . . and others to conduct the election" and argued that "plaintiffs were not required to exhaust administrative remedies because exhaustion would have been futile." *Id.* at 560. The Tenth Circuit flatly rejected that argument, explaining:

> The futility exception may apply where (1) the agency "lacked the authority or the ability to resolve [the dispute]," (2) the case presents "purely a question of statutory interpretation," or (3) "the court would not benefit from allowing the [agency] to develop a full administrative record on the issue." Considering these criteria, we conclude that exhaustion would not be futile. . . . Plaintiffs focus on the second criterion, arguing that the pivotal issue concerns the purely legal question of the

> [the interpretation of two pieces of legislation]. . . . But we determine that the third criterion prevails. Exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." We conclude that requiring plaintiffs to exhaust their claims would further these purposes and so would not be futile.

Jech, 483 F. App'x at 555 (citations omitted). As the D.C. Circuit has explained, "the exhaustion rule does not contain an escape hatch for litigants who steer clear of established agency procedures altogether. To the contrary, exhaustion is especially important where allowing the litigants to proceed in federal court would deprive the agency of any opportunity to exercise its discretion or apply its expertise." *Ass'n of Flight Attendants-CWA*, 493 F.3d at 159. Just as the Tenth Circuit, D.C. Circuit, and other courts have rejected the types of arguments that Plaintiffs raise here, this Court should do the same.

B. The BIA Regulations Apply to this Dispute

Plaintiffs bold assertion that "no regulations apply to this dispute," Pls. Mem. Opp'n to Defs.' Mot. to Dismiss 4, ECF No. 12 ("Pls. Opp'n"), is simply wrong. The BIA regulations set out in Section 2 apply and should have been followed by Plaintiffs. While it is true that Defendants have not promulgated regulations specific to the Judgment Funds Act, such specificity is not necessary in the face of BIA's regulations of general applicability. Section 2 makes clear that it "applies to all appeals from decisions made by officials of the Bureau of Indian Affairs by persons who may be adversely affected by such decisions." 25 C.F.R. § 2.3(a). In fact, the only way that the regulations in Section 2 would not apply would be if there were regulations or statutory language specific to the Judgment Funds Act, which Plaintiffs admit do

not exist.[3] Pls. Opp'n 4-5. Thus, Section 2's requirement of administrative exhaustion applies to Plaintiffs claims.

Moreover, Plaintiffs' assertion that Section 2 does not apply because Defendants have "fail[ed] to identify any official subordinate to the Secretary with decision-making responsibility under the [Judgment Funds Act]," Pls. Opp'n 5, is also unfounded. It is the Plaintiffs themselves who have sought redress from officials subordinate to the Secretary as well as BIA, an Interior sub-agency. In particular, Plaintiffs' Complaint makes clear that they sought action from BIA. The Complaint explains how, in their effort to address alleged "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," and how, in a subsequent effort "[t]o 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." Compl. ¶¶ 61-63, ECF No. 1. The petition that Plaintiffs filed is squarely directed at BIA, as the "Requested Relief" section asks BIA – and only BIA – to take a series of actions. *See* Ex. 1 at 45-46.[4] Most notably, Plaintiffs have named the BIA Director and the Acting Assistant

[3] The only way that Plaintiffs would not be subject to the Section 2 blanket regulation would be if some "other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision." 25 C.F.R. § 2.3(b). But there is no other such legislation or regulation.

[4] Defendants submit this exhibit because "in deciding a 12(b)(1) motion, it is well established in this Circuit that a court is not limited to the allegations in the complaint but may consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case." *Bennett v. Ridge*, 321 F. Supp. 2d 49, 52 (D.D.C. 2004); *aff'd*, 425 F.3d 999 (D.C. Cir. 2005); *Haase v. Sessions*, 835 F.2d 902, 905-06 (D.C. Cir. 1987) (holding that a court's

Secretary—Indian Affairs as parties to this lawsuit, in addition to the Secretary. The BIA regulations apply to this dispute, as they specifically contemplate appeal of BIA action or inaction up through the chain of command, including to the Assistant Secretary—Indian Affairs. *See, e.g.*, 25 C.F.R. § 2.4 (identifying various officials, including BIA officials and the Assistant Secretary—Indian Affairs, who can decide appeals).[5] Thus, Plaintiffs are wrong to claim that BIA regulations do not apply to this suit. Plaintiffs are also wrong in asserting that the regulations are discretionary.

C. The BIA Regulations and the APA Require Administrative Exhaustion to Bring Suit

Plaintiffs misconstrue the BIA regulations in an attempt to argue that the administrative appeals process is discretionary. Plaintiffs point to the language of Section 2.8(a) that explains how a party "can make the official's inaction the subject of appeal" and claim that the language of the regulation is "permissive" and "requires nothing." Pls. Opp'n 8. Their argument seems to hinge on the regulations' use of the word "can." However, Plaintiffs' argument misses the point, as the Tenth Circuit has explained while rejecting the exact argument that Plaintiffs attempt to make:

> Plaintiffs also contend that these regulations are not mandatory by their own terms because they state that an aggrieved individual "*can* make the official's inaction the subject of appeal." § 2.8(a) (emphasis added). By using the optional "can," rather than "shall," plaintiffs suggest that the regulations are rendered optional. But the

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consideration of materials outside the pleadings in deciding a Federal Rule of Civil Procedure 12(b)(1) motion does not require that the court treat the motion as one for summary judgment).

[5] If Plaintiffs suggestion is that only the Secretary of the Interior has decision-making authority with regard to issues related to the Judgment Act Fund, that is also incorrect (and inconsistent with Plaintiffs' actions heretofore). The Secretary has delegated to the Assistant Secretary—Indian Affairs "all of the authority of the Secretary" (with limited, irrelevant exceptions), as reflected in the Department of Interior's Departmental Manual. Ex. 2.

> optional "can" applies to the ability of an aggrieved individual to appeal — an individual is not compelled to appeal simply because she is aggrieved by agency inaction. Proper exhaustion, however, requires that a litigant "complete the administrative review process" before seeking judicial review.

Gilmore, 694 F.3d at 1169-70 (citation omitted).[6] Moreover, since the "can" language is included only in the regulatory provision addressing agency inaction, Plaintiffs' interpretation of the regulation is illogical, in that it would make administrative exhaustion optional for cases of agency inaction, but still required for cases of agency action.

The BIA regulations spell out that the only path to federal court review of an agency action[7] leads first through the administrative appeals process. Until an individual has pursued the BIA appeal process to the point where there is no further "appeal to a superior authority in the Department," 25 C.F.R. § 2.6, there is no final agency action subject to APA review. Interior "decisions are [therefore] not final for purposes of § 704 review if they are subject to appeal to a higher authority within the department." *W. Shoshone Bus. Council For & on Behalf of W. Shoshone Tribe of Duck Valley Reservation v. Babbitt*, 1 F.3d 1052, 1055 n.3 (10th Cir. 1993); *Coosewoon*, 25 F.3d at 924 (requiring administrative exhaustion in light of and pursuant to the BIA regulations); *Mdewakanton Sioux Indians of Minn.*, 264 F. Supp. 3d at 127 (same).

If Plaintiffs wish to seek eventual court review of agency inaction, they "can" (put differently, they "have the ability to") make that inaction the subject of an appeal. The

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[6] Plaintiffs' attempt to distinguish *Gilmore* is unavailing. Pls. Opp'n 6 n.2. There, plaintiffs were challenging the agency's failure to act and were seeking to compel particular agency action, just as Plaintiffs are here. In addition, the particular facts of that case do not impact the Tenth Circuit's interpretation of the plain language of the BIA regulation. Moreover, the language is not ambiguous, so the Indian canon of construction is not relevant.

[7] The "action" that Plaintiffs are challenging in this case is the BIA's failure to act – the BIA's inaction.

regulations explain the way – the only way – that a party may make agency "inaction the subject of appeal" – 25 C.F.R. § 2.8(a). Thus, there is no ambiguity under BIA's regulations regarding whether Plaintiffs were required to have exhausted their administrative remedies before seeking court review; Plaintiffs were required to have done so.

Even if there was ambiguity in the language of the BIA regulations, Courts have consistently required parties to exhaust administrative remedies pursuant to those regulatiosn, as discussed above in Section II.A. Plaintiffs have failed to point to a single case involving BIA's regulations where a court has excused a party from exhausting the administrative remedies laid out in those regulations. This is true even for the cases where, as here, parties have claimed that administrative exhaustion would prove futile.

D. Administrative Exhaustion Is Not Futile

Plaintiffs have also failed to demonstrate that seeking administrative review would be futile. Even where an agency has previously taken a position that is contrary to the plaintiff's interests, which the agency had not done here, Courts have repeatedly found the futility exception to the exhaustion requirement not satisfied. *Mdewakanton Sioux Indians of Minn.*, 264 F. Supp. 3d at 129 (rejecting the futility argument in light of the BIA regulations); *Jech*, 483 F. App'x at 555 (same); *Villegas*, 963 F. Supp. 2d at 1157 (same); *Gilmore*, 694 F.3d at 1169-70 (same); *Allen*, 871 F. Supp. 2d at 993-94 (same). Far from being a useless exercise, requiring exhaustion of administrative remedies would well-serve the purposes that underlie the requirement by allowing the agency to develop (or even change) its position (possibly obviating the need for judicial review) and to develop an administrative record for judicial review. This is particularly true here, where the arguments Plaintiffs' raise are questions of first impression and where the agency has not yet articulated a position on the facts or relevant legal analysis, much

less sought input from other interested parties. The Court would clearly benefit from requiring administrative exhaustion.[8]

The Plaintiffs carry the heavy burden of demonstrating that the administrative appeals process, in this case, would be futile and they have not met that burden. *See* Exhaustion of the Administrative Process, 33 Charles A. Wright & Charles H. Koch, Wright, Federal Practice and Procedure of Judicial Review § 8398 (1st ed.) ("The presumption in favor of exhaustion must be emphasized however and hence courts are very skeptical of exception claims and such claims only rarely succeed. The burden rests with the party claiming an exception."). Plaintiffs' primary argument supporting their claim of futility is that Defendants have failed to act in the face of several requests to do so by Plaintiffs over the course of a three year period. Pls. Opp'n 9-10. In support of their claim of futility, Plaintiffs also mischaracterize a general denial included in the footnote of Defendants' Motion to Dismiss and incorrectly claim there is no need for further factual development. *Id.* at 9-11. None of these arguments is sufficient to demonstrate futility.

First, the Court should reject Plaintiffs claim that BIA's failure to act in response to Plaintiffs' inquiries justifies a finding of futility. The BIA regulations specifically contemplate

[8] The cases that Plaintiffs cite in support of their argument are readily distinguishable. In particular, those cases were ones where the agency had clearly staked out an unequivocal position on the legal issue that was the subject of the lawsuit. *See Athlone Indus., Inc.*, 707 F.2d at 1485 (commission had staked out its position by filing a complaint premised on the position, defended the position before multiple courts, and issued a unanimous ruling supporting the position); *Atl. Richfield Co.*, 769 F.2d at 782 (agency had "structured its regulatory processes on the premise that it has power [that plaintiff was challenging]. It has rejected [the plaintiff's] attempts to emasculate that power, and has successfully defended the power before the Federal Energy Regulatory Commission"); *Keating*, 569 F.3d at 432 (agency had issued an administrative order that "considered the merits of [the plaintiff's] objections . . . addressed those objections, and pronounced them 'without merit'").

agency inaction and provide a clear administrative process for prodding the agency to act. 25 C.F.R. § 2.8(a). If Plaintiffs had followed the steps required by 25 C.F.R. § 2.8(a), the official receiving Plaintiffs' request would have been required to either make a decision on the merits within ten days (extendable to up to sixty days) from the date of request. 25 C.F.R. § 2.8(b). Once that official issued a decision (or failed to do so within the required time), the decision would be appealable. *Id.* Plaintiffs could then have appealed and the BIA regulations also set out clear procedures and deadlines for superior officials who receive an appeal. 25 C.F.R. §§ 2.19, 2.20. Plaintiffs followed none of these steps. Thus, Plaintiffs should not be excused from the obligation to exhaust administrative remedies simply because Plaintiffs chose to initiate the mandatory agency decision making process.

In the same vein, the Court should reject Plaintiffs repeated assertion that this Court can ignore the administrative exhaustion requirements because "Defendants … have failed to respond to Plaintiffs for nearly three years." Pls.Opp'n 1, 6, 9, 13. It is, in fact, Plaintiffs who have had three years to initiate the appeals process detailed in the BIA regulations and have failed to do. The BIA regulations provide straightforward steps explaining how a party can attempt to compel agency action. Only after completing those steps may a party seek federal court review of agency inaction. For whatever reason, Plaintiffs chose not to avail themselves of those procedures. The fact that they have failed, over the course of several years, to take the steps necessary to give this court jurisdiction over this dispute cannot justify ignoring the requirement of administrative exhaustion. Put differently; this Court should not assert jurisdiction over this case simply because Plaintiffs have delayed in taking the steps necessary to give it jurisdiction or because they claim that delay has caused them harm. *See Ass'n of Flight Attendants-CWA*, 493 F.3d at 159 (Rejecting the argument that administrative exhaustion is futile

because the agency "refused" to act for more than thirty years, noting that, "having largely disregarded agency procedures the [plaintiffs] are in no position to complain of agency delay.").

In addition, the Court should ignore Plaintiffs' attempt to take a general denial included in a footnote of Defendants' Motion to Dismiss and twist it into an "unequivocal" statement that Defendants "have no intention of granting Plaintiffs the relief they seek." Pls. Opp'n 1, 6. Defendants said no such thing. Instead, the footnote is a placeholder noting disagreement with Plaintiffs' legal assertions regarding the breadth and scope of the actions the Judgment Fund Act allegedly requires Defendants to take. *See, e.g., W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1241 (D.C. Cir. 2018) (affirming dismissal of Plaintiffs' demand to compel agency action upon finding that the relevant statute did not require such action). Specifically, the footnote says, in its entirety, that "[w]hile 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." Defs.' Mem. in Supp. of Mot. to Dismiss 2 n.1, ECF No. 10 ("Defs.' Mot."). While that statement reflects the Defendants position that they are not required to take each of the actions that Plaintiffs claim are mandated by the Judgment Fund Act, it does not state whether Defendants will or will not decide to take action to address Plaintiffs' concerns should Plaintiffs seek administrative review. The Judgment Fund Act or other statutes may provide Defendants the *discretionary* authority to take certain actions, even if the Defendants are *not required* to do so. Thus, the footnote provides no support for Plaintiffs' futility argument.

Finally, the Court should reject Plaintiffs' incorrect assertion that there is no "dispute as to the facts such that the Court would benefit from the fuller development of them at the agency level," since "Defendants do not contest the well-pleaded factual allegations in Plaintiffs'

Complaint." Pls. Opp'n 10. That is both untrue and inconsistent with the procedural posture of the case. Since this case is at the motion to dismiss stage, the factual allegations in the complaint are taken as true for the limited purpose of deciding the motion. *See, e.g.*, *English v. Dist. of Columbia*, 717 F.3d 968, 971 (D.C. Cir. 2013). That Defendants did not challenge the facts that Plaintiffs alleged in the Complaint does not mean that the Defendants agree with Plaintiffs' facts. Moreover, and most importantly, it does not mean that working through the administrative exhaustion processes would have produced no additional facts that could benefit the Court. As Defendants noted, Defs.' Mot. 12, that process would have involved at least the following steps, which would have generated additional information useful to the Court:

- Plaintiffs would have provided a statement of reasons for the appeal;
- Plaintiffs would have provided all supporting documents relating to the appeal;
- Defendants would have conducted their own factual and legal research and provided a response to Plaintiffs; and
- All potentially interested parties could have provided written input into the administrative appeal. Perhaps most notably, the Saginaw Chippewa Indian Tribe of Michigan, whose actions Plaintiffs are ultimately attempting to challenge, would have had an opportunity to provide relevant facts and analysis.

Thus, had Plaintiffs exhausted their administrative remedies, the Court would have at its disposal not only the documents underlying Plaintiffs' allegations, but also the facts that Defendants and all other interested parties – including the Tribe – produced or disputed. In addition to providing additional factual development, the Defendants and other interested parties would have had a chance to identify and analyze the sources of law relevant to the case. The Court now has none of this factual or legal information available for review.

Thus, requiring plaintiffs to exhaust their claims would not be an exercise in futility. It would ensure "that the agency has an opportunity to exercise its discretion and expertise on the

matter and to make a factual record to support its decision." *Hidalgo v. FBI*, 344 F. 3d 1256, 1258 (D.C. Cir. 2003) (quoting *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990)).

III. 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 nothing for this Court to review. Moreover, Plaintiffs have failed to prove that abiding by the required process for administrative exhaustion would be futile.

Respectfully submitted this 21st day of September 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