Case No. 16-5174
ORAL ARGUMENT REQUESTED

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.**	**No. 16-5174** **(D.C. No. 4:14-CV-00316-JHP-FHM)** **(N.D. Okla.)** **Judge James H. Payne**

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees, Martha Donelson and John Friend, are not corporate entities subject to Federal Rules of Appellate Procedure 26.1.

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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).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in granting the Federal Defendants' motion to dismiss under Fed. R. Civ. 12(b)(1) for lack of subject matter jurisdiction.

2. Whether the district court erred in granting the non-Federal Defendants' motions to dismiss "under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted, or alternatively, under Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction."

3. Whether the district court erred by not specifying that its dismissal of Plaintiffs' First Amended Complaint was without prejudice.

4. Whether the district court abused its discretion in denying Plaintiffs' Application for Leave to File Second Amended Complaint.

5. Whether the district court abused its discretion in denying Plaintiffs' Motion for Leave to Conduct Discovery.

STATEMENT OF THE CASE

This matter arises out of the repeated and willful violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., by the Osage Agency of the Bureau of Indian Affair's ("BIA") in the granting of final agency approvals of certain oil and gas related activities to be conducted upon the surface estates of the Plaintiffs and similarly situated landowners in Osage County, Oklahoma. Since the 1970 enactment of NEPA through the August 11, 2014 filing of the First Amended Complaint, the Osage Agency had not conducted a single site-specific environmental assessment prior to approval of leases and drilling permits for oil and gas operations in Osage County. The Osage Agency's failure to prepare environmental assessments required by NEPA prior to granting approvals of oil and gas activities renders those approvals invalid. *See Hayes v. Chaparral Energy, LLC*, 180 F.Supp.3d 902 (N.D. Okla. 2016). As such, the oil and gas operators conducting operations pursuant to the invalid approvals are trespassing on the affected surface owners' property.

Plaintiffs, on behalf of themselves and similarly situated landowners in Osage County, filed their class action complaint against the Federal Defendants, pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq*., seeking, *inter alia*, a declaration that the Osage Agency's granting of certain approvals violated NEPA and, therefore, were invalid. Aplt. App. 55-90.

Additionally, Plaintiffs, on behalf of themselves and similarly situated landowners in Osage County, brought state law tort claims against the non-Federal Defendants seeking redress for their activities on the Plaintiffs' and putative plaintiff class members' property without valid authorization. *Id*. Plaintiffs appeal the district court's granting of the Federal Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and the non-Federal Defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or, alternatively, under Fed. R. Civ. P. 12(b)(1).

BACKGROUND

The Osage Nation Mineral Estate underlies approximately 1,475,000 surface acres of land constituting the entirety of Osage County, Oklahoma. Aplt. App. 66. In 1906, Congress passed the Osage Allotment Act ("Act"), 34 Stat. 539, in part for the purpose of dividing the land in the Osage Reservation among the members of the Osage Tribe.[1] The Act also established a subsurface mineral estate trust, held by the United States, on behalf of the Osage Tribe. Under the Act, the Secretary of the Department of Interior is directed to manage oil and gas extraction leases, with the royalties earned from the leases reserved to the Osage Tribe.

Federal regulations regarding the management and handling of oil and gas drilling in Osage County are promulgated in 25 CFR, Part 226. Pursuant to

[1] The surface estate was allocated to the tribal members in fee simple; however, most of Osage County is now owned by non-tribal members.

delegated authority, the Superintendent for the Osage Agency of the BIA is authorized to approve leases for oil and gas drilling within Osage County. 25 CFR § 226.2(c) provides that "[e]ach oil and/or gas lease and activities and installations associated therewith subject to these regulations shall be assessed and evaluated for its environmental impact *prior* to its approval by the Superintendent." (emphasis added). 25 CFR § 226.16 requires that the Superintendent approve a drilling permit prior to commencement of any operations.

The Osage Minerals Council ("OMC") is the elected governing body for the mineral affairs of the Osage Mineral Estate. The Osage Nation Constitution vests the OMC with the power to administer and develop the Osage Mineral Estate. Oil and gas operators acquire leases at auctions conducted by the OMC. The tracts for lease are nominated by prospective lessees. The OMC holds six lease auctions per year. The OMC and the successful bidder enter into a standard oil and gas mining lease, which is submitted to the Osage Agency for review by the BIA. The lease is not valid until approved by the Superintendent. Aplt. App. 72.

In certain instances, the OMC has entered into concession agreements with certain operators. Concession agreements grant to the operator a large area over which the operator has the sole right to lease and drill upon provided certain conditions are met. Aplt. App. 74. The OMC has entered into concession agreements with a number of the non-Federal Defendants.

In order to disturb the surface of the leasehold, the lessees must submit an Application for Permit to Drill ("APD") to the Osage Agency. According to the BIA's Fluid Mineral Estate Handbook, prior to submission of the APD, completed environmental review documents must be submitted to the Osage Agency as environmental review is a mandatory component of the permit application package. The Superintendent is to prepare a report of findings and compile other documentation required to support the permit approval or disapproval. Aplt. App. 74-75.

Osage Agency's History of Non-Compliance with NEPA

After enactment of NEPA, the Osage Agency did not, as a matter of course, prepare any NEPA required documents prior to approval of leases and APDs. As a consequence, in 1977, two cases (later consolidated) were filed in the United States Court for the Northern District of Oklahoma seeking a declaration that certain oil and gas activities approved by the Superintendent of the Osage Agency were performed without prior compliance with NEPA and were therefore void. *See William H. Bell v. Cecil D. Andrus*, 77-C-159-C, Northern District of Oklahoma; *Bank of Oklahoma v. Republic Gas and Oil Company*, 77-C-115-C, Northern District of Oklahoma. Aplt. App. 334. Similar to the instant lawsuit, the plaintiffs in those cases sought an injunction enjoining the oil and gas activities until the requirements of NEPA had been met.

On May 4, 1978, the Honorable Judge H. Dale Cook entered a Judgment and Order in the consolidated cases ordering, *inter alia*, the Superintendent of the Osage Agency to prepare an environmental assessment pursuant to NEPA on "the effect on the environment of oil and gas operations under oil mining leases, gas mining leases, oil and gas mining leases, drilling permits, authorizations to use water and other such documents approved or used by the Secretary relating to oil and gas operations on the lands in Osage County," and to cause a copy of the EA to be available for public inspection. Aplt. App. 334. On May 30, 1979, the Area Director for the BIA, Thomas Ellison, approved the Environmental Assessment for the Oil and Gas Leasing Program of the Osage Indian Tribe, Osage County, Oklahoma ("1979 EA"). In the correspondence addressed to Judge Cook accompanying the 1979 EA, the Area Director states that the purpose of the proposed action "is to provide an Oil and Gas Leasing Program for the Osage Indian Tribe in Osage County . . ." Aplt. App. 335.

Since the 1979 EA was prepared, there have been significant changes in the drilling technology that were not considered in the 1979 EA. For example, at the time of approval of the 1979 EA, drilling in Osage County was primarily accomplished through shallow vertical wells. Although hydraulic fracturing existed, it was uncommon and the 1979 EA made only a passing reference to it. Furthermore, nowhere in the 1979 EA is there any mention of horizontal drilling.

Additionally, since the 1979 EA was prepared, there have been significant changes in the relevant environmental laws and regulations. For example, at the time of the 1979 EA, air and water quality standards differed from the standards today. In spite of the myriad of changes in circumstances, the BIA neglected or otherwise refused to supplement or replace the 1979 EA. Aplt. App. 335.

Office of Inspector General Investigation of Osage Agency

In 2013, the Office of Inspector General ("OIG") for the Department of Interior began an investigation in the oil and gas leasing program in Osage County, including a review of NEPA compliance by the Osage Agency. *See BIA Needs Sweeping Changes To Manage The Osage Nation's Energy Resources* (Report No.: CR-EV-BIA-0002-2013, October 2014). During the course of the OIG investigation, auditors determined that the Osage Agency was not conducting any site-specific environmental analysis prior to approving APDs. Aplt. App. 281. Based upon a discussion with Ben Daniels, the environmental specialist for the Eastern Region of BIA, the OIG learned that the Osage Agency does not complete a site-specific environmental assessment for every APD, but the Agency tiers off an invalid programmatic Environmental Impact Statement. *Id.* Despite the fact that BIA management was aware of the invalidity of the 1979 EA and that its NEPA compliance was deficient, the BIA chose to forge ahead with approving

leases and drilling permits, with complete and utter disregard for the environmental protection of lands within Osage County. *Id.*

The BIA's apathy toward NEPA compliance is most vividly demonstrated by its actions after it determined that it was violating NEPA in its oil and gas leasing activities. Mr. Daniels knew by at least 2011 that the Osage Agency was not complying with NEPA and advised the Superintendent that the Agency would need to change its operations. Aplt. App. 281. When Mr. Daniels alerted Regional Office officials to these violations, the officials "determined that it would be better to wait until the Rulemaking process was completed to address the issue." *Id.* They discussed preparing an Environmental Impact Statement, "but due to cost and time, BIA was unwilling to pursue this option." *Id.*

The OIG auditors further learned that the Osage County Cattlemen's Association ("OCCA") had sent a Freedom of Information Act ("FOIA") request to the Osage Agency seeking documents relating to NEPA compliance. Aplt. App. 286. The Agency could only provide Categorical Exclusions as it had not conducted any site-specific EAs. Aplt. App. 287. Instead of providing the Categorical Exclusions in response to the FOIA request, the Agency sent a bill to the OCCA, which was appealed and is unresolved almost three years later. *Id.* The OIG auditors concluded that providing a response to the FOIA request "would

likely disclose the deficiencies in the Agency's APD process" and that legal action could result. *Id*.

Procedural History of Instant Lawsuit

The genesis of this lawsuit is the approval by the Osage Agency Superintendent of three separate drilling permits in favor of Defendant-Appellee, Devon Energy Production, L.P. ("Devon"), for wells to be located on real property owned by Plaintiff-Appellant, Martha Donelson ("Donelson"). Aplt. App. 48. The proposed wells were horizontal wells identified as Donelson 29-26N-5E 1SWD, Donelson 29-16N-5E 1MH and Donelson 32-26N-5E 1 MH. Aplt. App. 49. On or about April 29, 2014, Devon commenced oil and gas drilling activities on her property, to which Donelson objected and sought a meeting with the BIA to voice her concerns. *Id*. On May 4, 2014, Donelson's representatives met with the BIA at the Osage Agency to seek a cancellation of the drilling permits, or, in the alternative, to move the well at least 200 yards to the West. *Id*.

On May 13, 2014, Devon filed a Petition in Osage County District Court, along with an Application for Temporary Restraining Order ("TRO") and Temporary Injunction, asking the state court to enjoin Donelson from hindering drilling operations. Aplt. App. 49. On May 15, 2014, Donelson filed a Response to the Application for TRO and Temporary Injunction, together with her own Motion for Temporary Injunction, seeking to prohibit Devon from commencing

operations based upon Superintendent's failure to comply with NEPA prior to approving the drilling permits. *Id*. On March 16, 2014, Osage County District Judge B. David Gambill held a hearing on the competing motions. Aplt. App. 50. On May 28, 2014, Judge Gambill issued a written order entering a TRO enjoining Devon from commencing drilling operations and further enjoining Donelson from prohibiting Devon from performing surveys or other information gathering activities. Judge Gambill's order ruled that the TRO for each party would remain in effect for fourteen (14) days in order to provide the parties an opportunity to remove the matter to federal court. *Id*.

On June 1, 2014, Donelson filed this action in the Northern District of Oklahoma against the Federal Defendants and Devon seeking an order from the Court: (1) ruling that the Devon leases and permits are void *ab initio*, (2) requiring the BIA to remove Devon from her property; (3) granting judgment in her favor and against Devon for trespass; and (4) enjoining Devon from further entering upon her property without a valid lease or permit. Aplt. App. 42-54. On August 11, 2014, Donelson filed her First Amended Complaint ("FAC") to convert this lawsuit to a class action on behalf of other similarly situated persons in Osage County. Aplt. App. 55-90. The FAC added John Friend as a Plaintiff and several oil companies as Defendants.

In response to the FAC, each of the Defendants moved to dismiss the FAC on various grounds. Specifically, the Federal Defendants moved to dismiss on two grounds: (1) the FAC is an impermissible programmatic challenge under *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990) and (2) that challenges to approvals more than six years old are barred by the statute of limitations. The non-Federal Defendants moved on the same grounds, but also raised additional grounds such as failure to exhaust administrative remedies and failure to join the OMC as an indispensable party.

On December 7, 2015, Plaintiffs filed their Motion for Leave to Conduct Discovery from the Federal Defendants in order to obtain information for class certification. Aplt. App. 190. On March 24, 2016, the district court denied the motion for leave to conduct discovery, stating that it was premature since no motion for class certification was pending. Aplt. App. 214-15.

On March 31, 2016, the district court, relying upon *Lujan*, dismissed the FAC for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Aplt. App. 216-226. The district court also granted the non-Federal Defendants' motions to dismiss "under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted, or alternatively, under Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction." Aplt. App. 226-27.

On April 28, 2016, Plaintiffs filed a Motion to Alter and Vacate Judgment arguing that the district court's characterization of the APA claims as programmatic is erroneous because the FAC challenges individual discrete approvals of leases and permits, not the program as a whole. Aplt. App. 230. Contemporaneously, Plaintiffs filed an Application for Leave to File Second Amended Complaint ("SAC") to cure the alleged defects in the FAC. Aplt. App. 308.

On November 23, 2016, the district court denied the Motion to Alter in a minute order without explanation. Aplt. App. 354. On the same day, the district court denied Plaintiffs' Application for Leave to File SAC in a minute order stating that amendment would be futile. Aplt. App. 357. On December 6, 2016, Plaintiffs filed the Notice of Appeal, which is properly before this Court.

SUMMARY OF ARGUMENT

Plaintiffs' FAC set forth claims subject to judicial review under the APA of certain individual, discrete approvals granted by the Osage Agency Superintendent since the enactment of NEPA in 1970. Contrary to the district court's order, the FAC does not challenge the Osage County oil and gas leasing program as a whole. The sheer magnitude of the repeated violations of NEPA committed by the Osage Agency has enabled the Defendants to mischaracterize the FAC as a programmatic challenge. However, just because the challenged approvals are in the hundreds, if

not thousands, does not mean that Plaintiffs are challenging the program as whole. Indeed, Plaintiffs' FAC does not attack the BIA's right to conduct the program. Instead, Plaintiffs, on behalf of themselves and similarly situated landowners in Osage County, challenge identifiable final agency actions, i.e., leases, APDs and concession agreements, which adversely affect real property owned by the Plaintiffs and those similarly situated. As such, the district court has subject matter jurisdiction to hear the APA claims set forth in the FAC. Accordingly, the district court erred by dismissing the APA claims pursuant to Fed. R. Civ. P. 12(b)(1).

Because the district court wrongfully dismissed the APA claims against the Federal Defendants, the claims against non-Federal Defendants were likewise wrongfully dismissed, as those claims derive from the invalidity of the improper approvals granted to the non-Federal Defendants. Moreover, even if the district court had properly dismissed the APA claims, the dismissal of claims against the the non-Federal Defendants' should have been under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, not Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Because the dismissals, if proper, should have been pursuant to Fed. R. Civ. P. 12(b)(1), the dismissals should have been without prejudice.

Additionally, assuming *arguendo* that the district court properly dismissed Plaintiffs' FAC, the district court erred in denying Plaintiffs' Application for Leave to File SAC because the SAC clearly limited the challenged approvals to discrete,

individual decisions which are final agency actions reviewable under the APA. Finally, the district court abused its discretion in denying Plaintiffs' Motion for Leave to Conduct Discovery on matters relevant to class certification.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). *Gilmore v. Weatherford*, 694 F.3d 1160, 1170 (10th Cir. 2012).

This Court reviews de novo a district court's dismissal for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6). *Mocek v. City of Albuquerque*, 813 F.3d 912, 921 (10th Cir. 2015).

This Court reviews a district court's failure to grant leave to amend for abuse of discretion. *Cohen v. Longshore*, 621 F.3d 1311, 1315 (10th Cir. 2010). In general, "the grant or denial of an opportunity to amend is within the discretion of the District Court." *Foman v. Davis*, 371 U.S. 178, 182 (1962). But in exercising this discretion, the court must heed Rule 15(a)'s direction that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); *see also Curley v. Perry*, 246 F.3d 1278, 1284 (10th Cir. 2001) ("We reiterate that the district court should allow a plaintiff an opportunity to cure technical errors or otherwise amend the complaint when doing so would yield a meritorious claim."); *Murray v. Archambo*, 132 F.3d 609, 612 (10th Cir. 1998). Where leave was denied

based on a determination that amendment would be futile, this Court's review for abuse of discretion includes de novo review of the legal basis for the finding of futility. *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1018 (10th Cir. 2013)

This Court reviews de novo whether the district court employed the correct legal standard in resolving a discovery request. *Murphy v. Deloitte & Touche Grp. Ins. Plan*, 619 F.3d 1151, 1164 (10th Cir. 2010). If the district court has employed the correct legal standard, the Court reviews the district court's decision for an abuse of discretion. *Id.*

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION OVER THE APA CLAIMS IN THE FIRST AMENDED COMPLAINT.

Under the APA, federal courts have jurisdiction to review challenges to "final agency action." *Chem. Weapons Working Grp., Inc. (CWWG) v. U.S. Dep't of the Army*, 111 F.3d 1485, 1494 (10th Cir. 1997). Section 702 of the APA provides both a cause of action for claims in which a plaintiff has suffered "a legal wrong because of agency action," or has been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Thus, in order to obtain review under Section 702, a plaintiff must (1) identify some final "agency action" to be reviewed, and (2) show that it has suffered a "legal wrong" or been "adversely affected or aggrieved" by the action at issue. *See Lujan*, 497 at

882–83. Here, Plaintiffs have identified final agency actions, i.e., approvals of leases, APDs and concession agreements, which adversely affect property owned by them. Moreover, Plaintiffs have alleged class claims on behalf of similarly situated landowners in Osage County. As such, the district court has subject matter jurisdiction to hear the APA claims set forth in the FAC.

A. The FAC Identifies Final Agency Action.

The APA defines "agency action" as an "agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Under the APA, two conditions must be met for an agency action to be final: the action (1) must be a "consummation" of the decision-making process, and (2) "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted).

This Court has said, "[i]f an agency has issued a 'definitive statement of its position, determining the rights and obligations of the parties,' the agency's action is final ... so long as 'judicial review at the time [would not] disrupt the administrative process.'" *Ctr. For Native Ecosystems v. Cables*, 509 F.3d 1310, 1329 (10th Cir. 2007) (quoting *Bell v. New Jersey*, 461 U.S. 773, 779-80 (1983)). A decision is consummated when it is "definitive, immediately effective, and

directly and immediately affect[s] petitioners' daily business activities." *Id.* (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 151-53 (1967)).

In the FAC, Plaintiffs allege that the Superintendent has approved leases and APDs on their property. Aplt. App. 59 at ¶¶ 8-9. The approvals of the leases and APDs constitute "agency action" under 5 U.S.C. § 551(13). Furthermore, the approval by the Superintendent of the leases and APDs is "final" agency action because the Superintendent's approval is the "consummation" of the decision-making process and "rights or obligations have been determined" and "legal consequences ... flow" from the approvals as the lessees immediately have the right to access the surface land and the permittees are immediately entitled to drill. Accordingly, each approval by the Superintendent is a final agency action subject to judicial review under APA. *See Southern Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1159 (10th Cir. 2013) ("Federal courts have repeatedly considered the act of issuing a lease to be final agency action which may be challenged in court."); *Utah Envtl. Cong. v. Dale Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006); *Utah Envtl. Cong. v. Bosworth*, 372 F.3d 1219, 1223 n. 3 (10th Cir. 2004); and *Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000).

B. Plaintiffs Have Standing to Bring These APA Claims.

The relevant section of the APA concerning standing to challenge final agency actions states:

> A person suffering legal wrong because of agency action ... is entitled to judicial review thereof. An action ... seeking relief other than money damages ... shall not be dismissed ... on the ground that it is against the United States.

5 U.S.C. § 702.

The injury caused by a violation of NEPA is the increased risk of actual, threatened or imminent environmental harm. *See Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1265 (10th Cir. 2002). The Tenth Circuit has noted that "Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment." *Davis v. Mineta*, 302 F.3d 1104, 1114–15 (10th Cir. 2002). Thus, an Agency's failure to conduct NEPA analysis prior to granting approvals is a material violation of NEPA. *See Hayes*, 180 F.Supp.2d at 910-15.

The Tenth Circuit in *Committee to Save Rio Hondo v. Lucero*, 102 F.3d 445 (10th Cir. 1996), held that:

> An agency's failure to follow the National Environmental Policy Act's prescribed procedures creates a risk that serious environmental consequences of the agency action will not be brought to the agency decisionmaker's attention. The injury of an increased risk of harm due to an agency's uninformed decision is precisely the type of injury the National Environmental Policy Act was designed to prevent. Thus,

> under the National Environmental Policy Act, an injury of alleged increased environmental risks due to an agency's uninformed decisionmaking may be the foundation for injury in fact under Article III.

Id. at 448-49.

A party properly alleges an injury in fact from failure to perform a NEPA analysis by showing: "(1) that in making its decision without following the NEPA's procedures, the agency created an increased risk of actual, threatened or imminent environmental harm; and (2) that this increased risk of environmental harm injures its concrete interest." *Sierra Club*, 287 F.3d at 1265.

Here, Plaintiffs and the putative plaintiff class members are owners of surface land in Osage County. Aplt. App. 59 at ¶¶ 8-9. The Superintendent's approval of the leases, concession agreements and APDs without conducting any environmental analysis violated NEPA, rendering the approvals invalid. Aplt. App. 73-76 at ¶¶ 84, 86, 91, 93 and 103. Plaintiffs, on behalf of themselves and others similarly situated, seek declaratory judgment from this Court that the individual leases, concession agreements and APDs approved by the Superintendent in violation of NEPA were improperly approved and, as a consequence, are void *ab initio*. Aplt. App. 77-79 at ¶¶ 113-14, 119-20 and 125-26. Moreover, Plaintiffs have alleged that they have suffered harm as a result of the Superintendents' actions. Aplt. App. 59 at ¶¶ 6 and 8-9. Accordingly, Plaintiffs

have standing to bring the claims asserted in the FAC. The district court's holding otherwise is in clear error.

II. THE DISTRICT COURT ERRED BY FINDING THAT IT LACKS SUBJECT MATTER JURISIDCTION OVER THE PLAINTIFFS' APA CLAIMS.

The district court held that Plaintiffs' FAC did not challenge individual final agency actions because it was an impermissible programmatic challenge in violation of *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990). Aplt. App. 222. However, the district court's Order is premised upon a mischaracterization of the claims asserted in the FAC and a misapplication of the case law to those claims. Accordingly, the district court's Order and Judgment should be reversed and vacated.

A. The District Court's Order Mischaracterizes the Facts in the FAC.

The district court's Order makes at least five pronouncements concerning the Plaintiffs' FAC that are incorrect.

First, the district court's Order adopts an argument advanced by the Federal Defendants, which is a misrepresentation of the FAC to this district court. The Federal Defendants contend, and the district court agreed, that Plaintiffs are challenging the oil and gas leasing program in its entirety. Aplt. App. 222. In support of its conclusion that Plaintiffs are challenging the Osage County oil and

gas leasing program as a whole, the district court cites to paragraphs 74-76 in the FAC in which Plaintiffs are merely providing background information regarding the history of NEPA compliance by the Osage Agency. Aplt. App. 222.

Specifically, Paragraph 74 states this 1979 EA is the only environmental assessment for oil and gas leasing activities prepared by the Osage Agency since that time. Aplt. App. 71. Paragraph 75 states that since the 1979 EA was prepared there have been significant changes in drilling technology not considered by the 1979 EA. Aplt. App. 72. Finally, Paragraph 76 states that since the time the 1979 EA was prepared there have been significant changes in environmental laws and regulations, including changes in air and water quality standards, as well as inclusion of the American Burying Beetle as an endangered species. *Id*.

There is nothing in those paragraphs from which it could be inferred that Plaintiffs are challenging the "entirety of the Bureau of Indian Affairs' oil leasing and extraction program in Osage County since 1979." Aplt. App. 222. The district court's reliance upon this mischaracterization by the Federal Defendants is a misapprehension of the facts. To utilize paragraphs 74-76 in the FAC to support the district court's ruling is clear error.

Second, the district court states the following in its Order:

> Here, [Plaintiffs] challenge thousands of unspecified leases, assignments, concession agreements, and drilling permits in Osage County dating back to 1979. Donelson do not identify even one

> particular agency action for challenge, but rather seek to challenge the entirety of the BIA's oil lease program in Osage County as far back as 1979. As *Lujan* mandates, the final agency action must be an 'identifiable action or event.' 497 U.S. at 899. It is apparent Donelson seek 'wholesale improvement' of the BIA's leasing practices, which *Lujan* plainly prohibits.

Aplt. App. 224.

The district court's conclusion that it is "apparent" Plaintiffs are seeking "wholesale improvement of the BIA's leasing practices" as prohibited by *Lujan* is belied by the district court's own statements. Aplt. App. 224. The district court first states that "Plaintiffs challenge thousands of unspecified leases, assignments, concession agreements, and drilling permits," but in the very next sentence states that "[Plaintiffs] do not identify even one particular agency action for challenge, but rather seek to challenge the entirety of the BIA's oil lease program …" *Id.* That is a *non sequitur*. Clearly, the FAC identifies a particular agency action by identifying the approvals of the leases and APDs affecting Plaintiffs' and the putative plaintiff class members' property as having been made in violation of NEPA. The district court's reference to these activities as being "unspecified" is irrelevant as to whether the FAC challenges an "identifiable action or event" under the APA. Unquestionably, the approval of the leases and permits is an "identifiable action or event." The district court appears to use "specified" and "identifiable" interchangeably, which is clearly erroneous. An unspecified action

can still be an identifiable action. Regardless of whether the FAC provides specificity as to the approvals affecting the Plaintiffs' or putative class members' property, Plaintiffs have identified approvals of the leases and permits affecting their property as the agency actions that they challenge. The district court's holding otherwise is in error.

Third, in response to Plaintiffs' argument that they are challenging the discrete individual approvals by the Superintendent, the district court rejects this argument, stating "it is apparent [Plaintiffs] are attempting to challenge not only the individual approvals but also the 'Superintendent's wholesale failure to take a 'hard look' at the environmental impacts of drilling in Osage County." Aplt. App. 224. For support of its conclusion, the district court lifts out of context a line from page 2 of the Response to the Federal Defendants' Motion to Dismiss, which reads in full as follows:

> In complete disregard for NEPA, the Superintendent has routinely failed to require an EIS, EA or any semblance of an environmental study prior to approving concession agreements, leases and APDs. After this lawsuit was filed, the current Superintendent of the Osage Agency, in a letter to all oil and gas operators in Osage County, declared that operators would have to submit an EA with all APDs beginning August 12, 2014. This letter represents the Superintendent's belated effort to comply with a federal law that has been in existence since January 1, 1970. However, the Superintendent's decision to prospectively comply with NEPA does not cure the thousands of violations of NEPA that have occurred under the BIA's watch prior to August 12, 2014. **The Superintendent's wholesale failure to take a "hard look" at the environmental impacts of drilling in Osage**

> **County has resulted in environmentally hazardous conditions at a myriad of well sites across the entire county.**

Aplt. App. 177 (emphasis added.).

When reading the paragraph in full, it is clear that Plaintiffs are not asking the district court to make changes to the oil and gas leasing program. The quoted language from the Introduction section of the Response is merely intended to show the district court the scope of the NEPA violations committed by the Osage Agency. Plaintiffs are not concerned with future decisions made by the Superintendent in furtherance of the Osage County oil and gas leasing program. Instead, Plaintiffs are attempting to remedy the numerous uninformed past approvals made by the Superintendent, which have resulted in an environmental wasteland in many parts of Osage County.

Fourth, the district court states that even if Plaintiffs provided examples of specific leases that might constitute final agency action, Plaintiffs could not challenge an entire leasing program by using those improper final agency actions to support "a sweeping argument that the BIA's entire leasing program dating back to 1979 violates NEPA." Aplt. App. 225. The district court does not cite to any specific allegation in the FAC supporting this conclusion. Plaintiffs do not allege anywhere in the FAC that the Osage County oil and gas leasing program violates NEPA. Quite plainly, Plaintiffs challenge "certain" approvals by the

Superintendent within the program. Aplt. App. 57 at ¶ 3. The challenging of certain approvals within the program does not equate to a challenge of the program itself.

It is likely that the basis for the district court's faulty reasoning can be traced to misrepresentations made by the Federal Defendants in their Motion to Dismiss, which were adopted by the district court. In an attempt to evade judicial review of its unlawful final agency actions, the Federal Defendants have used the wide-ranging scope of the BIA's malfeasance to their advantage to confuse the district court into finding that it lacks subject matter jurisdiction to review the individual approvals of leases, concession agreements and APDs in violation of NEPA. By characterizing the FAC as a programmatic challenge, the Federal Defendants have used the breadth of the BIA's violation of NEPA to their tactical advantage to the detriment of the landowners in Osage County who have been harmed by the BIA's actions. Ironically, if the Osage Agency had only ignored its duties with respect to NEPA a handful of times, or even a few hundred times, the Federal Defendants' attempt to apply *Lujan* to the case at bar would be rejected out of hand. However, because the BIA ignored NEPA across-the-board by neglecting to conduct any site-specific environmental analysis prior to *any* approvals of oil and gas related activity since the enactment of NEPA, the Federal Defendants were able to confuse

the district court by casting the attack on the individual approvals as a challenge to the program as a whole.

B. The District Court Misinterpreted *Lujan*.

In its Order, the district court states: "[t]he district court fails to discern any difference between [Plaintiffs'] challenge here and the impermissible challenge made in *Lujan* to hundreds of individual BLM actions, which those plaintiffs used to challenge the entire BLM land management program." Aplt. App. 224. However, the differences between the two cases are stark and undeniable. As shown below, *Lujan* addresses whether an environmental organization has standing to challenge a federal program and its related policies affecting public lands. The instant lawsuit involves private landowners challenging distinct approvals of leases and APDs by the BIA for oil and gas drilling upon the landowners' private property. The district court's application of *Lujan* to the FAC is clear error.

1. Lujan

Lujan involved the challenge by a national wildlife group to past and future actions taken by the Bureau of Land Management ("BLM") with respect to its "land withdrawal program" involving the reclassification of public lands which were previously deemed suitable for either disposal or federal retention and management. 497 U.S. at 875-76. The plaintiff wildlife group was concerned that the reclassification of these lands would open the lands to mining activities and,

thus, filed suit. *Id*. at 879. The plaintiff's challenge in *Lujan* was two-fold. First, the plaintiff challenged decisions made by the BLM that reclassified certain public lands. *Id*. at 879-82. Second, the plaintiff challenged the BLM program as a whole. *Id*.

The BLM moved to dismiss the case pursuant to 12(b) for lack of standing. *Id*. at 880. The district court denied the motion to dismiss based upon the allegations in the complaint that the plaintiff's members used the environmental resources affected by the BLM's action. *Id*. The BLM thereafter filed a motion for summary judgment on the same grounds. *Id*. at 880-81. The district court granted summary judgment to the BLM pursuant to Rule 56, which was reversed by the Court of Appeals and the United States Supreme Court granted certiorari. *Id*. at 881-82.

In addressing whether the plaintiff wildlife group had standing, the court first noted that in order to have standing under the APA, the person claiming a right to sue must first identify a final agency action as defined by 5 U.S.C. § 551(13). *Id*. at 882. Second, the party seeking review must have either suffered a "legal wrong" or be "adversely affected or aggrieved . . . within the meaning of a relevant statute." *Id*. at 883; 5 U.S.C. § 702. In response to the government's motion for summary judgment on the standing issue, the plaintiff produced six

affidavits from members of the plaintiff in order to establish standing under the APA.

The plaintiff relied upon two of the six affidavits to support its challenge to decisions made by the BLM to open up certain lands to oil and gas leasing. *Id*. at 885-87. The proffered affidavits alleged that the members had been aggrieved by the reclassification decision in that it adversely affected their aesthetic enjoyment of federal lands in the vicinity of the reclassified public lands. *Id*. at 886-87. The district court agreed that the reclassification decisions were reviewable agency actions, *id*. at 885, but it held that the members' affidavits had not made the requisite showing that they were adversely affected or aggrieved. *Id*. at 889. Thus, the Supreme Court determined that the wildlife group did not have standing to challenge the reclassification decisions which have already been made. *Id*.

Next, the plaintiff relied upon four of the six affidavits to support their claim challenging future actions of the BLM with regard to the "land withdrawal *program*." *Id*. at 890-92. The Court of Appeals found that these affidavits were sufficient to enable the plaintiff to challenge the entirety of the "land withdrawal review program." *Id*. at 890. However, the Supreme Court held that the "program" was not an identifiable agency action, noting that when proceeding under the APA the plaintiff must direct its attack against some particular agency action that causes it harm. *Id*. at 891. In *Lujan*, the plaintiffs' affidavits identified

"rules of general applicability . . . announcing, with respect to vast expanses of territory that they cover, the agency's intent to grant requisite permission for certain activities, to decline to interfere with other activities, and to take other particular action if requested." *Id*. at 892. Because the plaintiff had not focused its challenge on any particular agency actions, but on these "rules of general applicability," the plaintiff had not established the right of judicial review under 5 U.S.C. § 702. *Id*.

This district court's Order applies the second part of *Lujan* to the case at bar. However, Plaintiffs' claims are more akin to the first part of *Lujan* where the plaintiff challenged the individual reclassification decisions.

2. Differences Between *Lujan* and Instant Lawsuit.

The differences between the wildlife group's challenges in *Lujan* and the Plaintiffs' claims in the FAC render *Lujan* inapplicable to the Plaintiffs' APA claims. First, the plaintiff in *Lujan* was a national wildlife group whose alleged injury was the impairment of aesthetic enjoyment of certain public lands adversely affected by BLM decisions. Here, Plaintiffs and the putative plaintiff class members are landowners who have been directly injured by the issuance of leases and drilling permits in violation of NEPA, which has resulted in surface disturbance to their private property. Whereas the plaintiff's members in *Lujan* could not show they were personally aggrieved by the BLM's reclassification

decisions, Plaintiffs can make such showing as they are the landowners upon whose land the unlawful activity has occurred. There is a fundamental difference between a case such as the instant one where the Plaintiffs and putative plaintiff class members can show direct harm by their status as landowners of the property upon which the unlawful activity is occurring, as opposed to the plaintiff wildlife group in *Lujan* which was not "adversely affected or aggrieved by agency within the meaning of a relevant statute." 5 U.S.C. § 702.

Second, the plaintiffs in *Lujan* challenged the entirety of the land withdrawal review program, which was not an agency action under 5 U.S.C. § 702. *Lujan*, 497 U.S. at 890. Here, Plaintiffs, on behalf of themselves and other similarly situated landowners, are challenging distinct approvals of leases and permits by the Superintendent in violation of NEPA. Aplt. App. 76-79, 88-89, ¶¶ 108-126 and Prayer For Relief. Under the APA, approvals of leases and drilling permits are final agency actions subject to review. 5 U.S.C. §§ 702, 704. In *Lujan*, the plaintiff's affidavits identified "rules of general applicability." 497 U.S. at 892. Here, on the other hand, the challenged agency actions are approvals that have already been granted and, in many cases, environmental harm that has already occurred.

Third, the Supreme Court in *Lujan*, in referring to the actions challenged by the plaintiff, noted that while the approval of permit applications are ripe for

judicial review, the permit applications had not yet been approved. *Id*. The district court in *Lujan* noted:

***

> In one of the four new affidavits, Peggy Peterson, one of the original affiants, states that a corporation has filed a mine permit application with the BLM covering a portion of the land to which her original affidavit pertained. App. to Brief in Opposition for Respondent National Wildlife Federation 16. **If that permit is granted, there is no doubt that agency action ripe for review will have occurred; nor any doubt that, in the course of an otherwise proper court challenge, affiant Peterson, and through her respondent, would be able to call into question the validity of the classification order authorizing the permit.** However, before the grant of such a permit, or (when it will suffice) the filing of a notice to engage in mining activities, or (when only "negligible disturbance" will occur) actual mining of the land, it is impossible to tell where or whether mining activities will occur. Indeed, it is often impossible to tell from a classification order alone whether mining activities will even be permissible.

Id. at 892 n. 3. (emphasis added). Here, just the opposite has occurred. The leases and APDs have already been approved, and the Plaintiffs' land has been accessed and permanently affected. Thus, the approvals in the case at bar are ripe for judicial review, unlike those in *Lujan*.

Fourth, *Lujan* was decided pursuant to Rule 56, not on a motion to dismiss. The case at bar was decided at the motion to dismiss stage. For the purpose of making the dismissal determination, a court must accept all the well-pleaded allegations of the complaint as true, even if doubtful in fact, and must

construe the allegations in the light most favorable to claimant. *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007); *Moffet v. Haliburton Energy Servs., Inc.*, 291 F.3d 1227, 1231 (10th Cir. 2002); and *Stuart v. Colo. Interstate Gas Co.*, 271 F.3d 1221, 1225 (10th Cir. 2001). The district court's analysis in its Order shows that the district court has viewed the allegations in the light most favorable to the Federal Defendants, instead of the reverse.

Finally, in reviewing the district court's analysis, it seems that the district court has confused the two claims made by the plaintiff in *Lujan*. The plaintiff in *Lujan* challenged the reclassification decisions and the program as a whole, and the *Lujan* district court addressed those claims separately. The Supreme Court said with respect to the challenges to the reclassification decisions that the plaintiff's members did not make a sufficient showing that they were personally aggrieved. With respect to the challenge to the program as a whole, the district court held that the "program" was not an identifiable agency action. Here, Plaintiffs' claims are similar to the challenge to the reclassification decisions in *Lujan*. Therefore, because Plaintiffs and the putative plaintiff class members can make a showing that they have been aggrieved by the approvals as owners of the affected property, Plaintiffs have standing to proceed with this lawsuit. Accordingly, this Court should reverse the district court's Order and vacate its Judgment.

C. Additional Cases Cited By the District Court Are Inapposite.

In support of its ruling, the district court's Order also cites to a number of post-*Lujan* cases. Aplt. App. 225. However, each of those cases is also distinguishable from the instant case. The district court cites *Fanin v. U.S. Dept. of Veterans Affairs*, 572 F.3d 868 (11th Cir. 2009) for the proposition that "[b]road programmatic attacks against agencies are not permissible under the APA." *Id*. at 876. *Fanin* involved a challenge by two veterans affected by the VA's loss of a computer hard drive containing private data of 198,000 living veterans. *Id*. at 870. The district court's citation to *Fanin* is curious in that the Court of Appeals actually reversed the lower court's grant of summary judgment and remanded to the lower court for analysis of each individual claim to determine whether the claim was proper under the APA. *Id*. at 877-78. The claims in *Fanin* are clearly distinguishable from the claims herein because the plaintiffs in *Fanin* were challenging failures to act by the VA, *id*. at 875-76, whereas Plaintiffs herein are challenging final agency actions.

The district court cites *Colo. Farm Bureau Fed'n v. U.S. Forest Serv*., 220 F.3d 1171 (10th Cir. 2000) for the proposition that plaintiffs have the burden of identifying specific federal conduct and explaining how it is final agency action. Aplt. App. 224. *Colo. Farm Bureau* involved a challenge to the State of

Colorado's "Lynx Recovery Plan" based upon Forest Service's failure to follow reporting requirements under NEPA. *Id.* at 1173. The action identified by the plaintiff was a "general agreement" for state and federal agencies to work together in the future. *Id.* Thus, the challenged program was an "agency's intent to take action if requested" and not final agency action. *Id.* Here, Plaintiffs have identified the approvals granted by the agency, not simply the agency's intent to act on the approvals.

The district court further relied upon two Fifth Circuit cases, *Alabama-Coushatta Tribe of Texas v. U.S.*, 757 F.3d 484 (5th Cir. 2014) and *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2009), to support its ruling. Aplt. App. 224-25. However, those cases differ from the present case because, even though the plaintiffs therein identify agency action, they do not challenge the individual agency action.

In *Sierra Club*, the plaintiff challenged "the Forest Service's entire program of allowing timber harvesting in the Texas forests." 228 F.3d at 563. Because the plaintiff did not challenge individual timber sales, the district court ruled that the plaintiff had brought an impermissible programmatic challenge. *Id.* at 569. The district court noted that the plaintiff could challenge individual timber sales, but could not, as they were attempting, attack "general Forest Service practice the Texas forests." *Id.*

In *Alabama-Coushatta*, the plaintiff Indian Tribe sought to prevent the federal government "from continuing to breach its fiduciary duties in recent and pending discretionary administrative decisions with respect to federal land in the Tribe's territory." 757 U.S. F.3d at 487. The Tribe did not challenge any past decisions by the government. *Id*. at 487 n. 4. Because the Tribe brought a challenge to the federal management of natural resources on their land by attacking the broad policies of the agency, the Tribe's claim ran afoul of *Lujan*. *Id*. at 491. In dismissing the Tribe's complaint, the district court noted that, unlike in the case at bar, the plaintiff Tribe was not contesting the issuance of leases and permits. *Id*. at 491 n.8.

In *Sierra Club* and *Alabama-Coushatta*, the plaintiffs identified or made reference to final agency actions in their complaint. However, the plaintiffs in those cases did not actually challenge those actions, but instead sought broader relief. Here, Plaintiffs challenge the individual decisions, and, therefore, the FAC is not an impermissible challenge prohibited by *Lujan*.

In *Lujan*, *Alabama-Coushatta Tribe of Texas*, and *Sierra Club v. Peterson*, the plaintiffs sought **prospective** injunctive relief regarding NEPA compliance. In the current case, Plaintiffs seek remedies as to **past** approvals by the BIA, not future approvals. That distinction in the relief sought is key. Obviously, future approvals are not **final** agency actions. Because Plaintiffs do not seek injunctive

relief as to how the Osage Agency handles future leases, APDs and concession agreements, they are not seeking modification of the program. Plaintiffs properly challenge the uninformed approvals previously made by the Osage Agency in violation of NEPA. Therefore, the APA claims in the FAC are not prohibited, and the district court erred by ruling otherwise.

III. DISMISSAL OF NON-FEDERAL DEFENDANTS UNDER FED. R. CIV. P. 12(b)(6) WAS IN ERROR.

In granting the motions to dismiss of the non-Federal Defendants, the district court noted that "if Plaintiffs' NEPA and APA claims against the Federal Defendants fail, Plaintiffs' claims against the non-Federal Defendants also fail." Aplt. App. 226. The district court then ruled:

> As discussed above in Part I, the Federal Defendants have sovereign immunity from Plaintiffs' alleged "programmatic" violations of NEPA. There is no independent basis for the Court to exercise jurisdiction over the non-Federal Defendants in this case. For this reason, Plaintiffs have not stated a claim against the non-Federal Defendants. Therefore, Plaintiffs' claims against the non-Federal Defendants must be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, or alternatively under Fed. R. Civ. P. 12 (b)(1) for lack of subject matter jurisdiction. To the extent Plaintiffs ask the Court to retain supplemental jurisdiction over the state law claims, the Court declines to do so, having dismissed all claims over which it has original jurisdiction. *See* 28 U.S.C. §1367(c)(3).

Aplt. App. 226-27.

The district court's reference to Fed. R. Civ. P. 12(b)(6) is erroneous. If the district court had correctly ruled that it lacked subject matter jurisdiction over the APA claims, the district court's dismissal of the claims against the non-Federal Defendants would also be pursuant to Fed. R. Civ. P. 12(b)(1).

Different standards apply to a motion to dismiss based on lack of subject matter jurisdiction under Rule 12(b)(1) and a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167 (10th Cir. 2012). When faced with motions for dismissal relying on both aspects of Rule 12, a court must first determine whether it has subject matter jurisdiction over the controversy before addressing the merits of the case under a Rule 12(b)(6) analysis. *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.").

Assuming *arguendo* that the district court properly dismissed the APA claims, the district court lacked subject-matter jurisdiction to render a merits dismissal under Rule 12(b)(6) on the state law claims against the non-Federal Defendants. *See Muscogee (Creek) Nation*, 669 F.3d at 1167–68. Therefore, if this Court affirms the district court's dismissal of the APA claims, this Court should vacate the district court's dismissal of the non-Federal Defendants pursuant to Fed.

R. Civ. P. 12(b)(6) and remand with instructions to dismiss for lack of subject matter jurisidction. *See Topeka Hous. Auth. v. Johnson,* 404 F.3d 1245, 1247–48 (10th Cir. 2005)

IV. THE DISTRICT COURT'S DISMISSALS, IF PROPER, SHOULD HAVE BEEN WITHOUT PREJUDICE.

As shown above, if the district court's dismissal were proper, they were for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Dismissal pursuant to Rule 12(b)(1) deprives a district court of original subject matter jurisdiction because it is a recognition that the court does not properly have statutory or constitutional power to adjudicate the case. *Estate of Harshman v. Jackson Hole Mountain Resort Corp.*, 379 F.3d 1161, 1167 (10th Cir. 2004). Thus, a district court's dismissal for lack of subject matter jurisdiction should be without prejudice. *See Brereton v. Bountiful City Corp*., 434 F.3d 1213, 1216 (10th Cir. 2006); *Strozier v. Potter*, 71 F. App'x 802, 804 (10th Cir. 2003); Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits, but, rather, it is a determination that the court lacks authority to adjudicate the matter. *Birdsong v. Westglen Endoscopy Center, L.L.C.*, 176 F.Supp.2d 1245, 1247 (D. Kansas 2001)(citing *Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994)). Accordingly, if the district court's order of dismissal was proper, the Order should be modified to reflect that dismissal of all claims was without prejudice.

V. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' APPLICATION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT.

Assuming *arguendo* the district court properly granted the Defendants' motions to dismiss, the district court abused its discretion by dismissing the Plaintiffs' FAC without allowing Plaintiffs an opportunity to cure the alleged defects in the FAC. Even if the failure of the district court's order to grant Plaintiff's the opportunity to cure was not a reversible abuse of discretion, the district court abused its discretion by denying the Plaintiffs' Application for Leave to File SAC.

This Court has previously explained that a court "should dismiss *with leave to amend* ... if it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief." *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1131 (10th Cir. 1994) (quoting 6 C. Wright & A. Miller, Federal Practice and Procedure, § 1483, at 587 (2d ed.1990)). In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court held:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Id. at 182; *see also Duncan v. Manager, Dept. of Safety*, 397 F.3d 1300, 1315 (10th Cir. 2005).

The district court denied Plaintiffs' Application for Leave by stating that such amendment would be futile. Aplt. App. 357. The district court's minute order does not include any discussion of its reasons why the proposed SAC would not cure the alleged defect, i.e., it challenges program as opposed to identifiable agency actions. However, this Court considers de novo whether "it is 'patently obvious' that the plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Rule 15(a) states that "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The purpose of Rule 15(a) is to provide litigants "the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *Hardin v. Manitowoc–Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982).

Plaintiffs submit to this Court that the proposed SAC, attached to the Application for Leave, makes abundantly clear that Plaintiffs are challenging individual and distinct approvals made by the Osage Agency on behalf of themselves and those similarly situated. In the SAC, Plaintiffs have identified those approvals which directly affect them. Aplt. App. 337-40. Further, Plaintiffs allege that there are similarly situated individuals in Osage County who own

property upon which oil and gas related activity has occurred pursuant to leases and permits approved by the Superintendent in violation of NEPA. Aplt. App. 346. Thus, Plaintiffs have standing to bring their claims under the Administrative Procedures Act, 5 U.S.C. §701 *et seq*.

Specifically in the SAC, Plaintiffs allege as follows:

OIL AND GAS LEASING PROGRAM IN OSAGE COUNTY

128. **Donelson and Putative Class Representatives do not challenge the oil and gas leasing and extraction program in Osage County, which is operated by the BIA on behalf and for the benefit of the Osage Nation and its headright owners, which includes Plaintiff Donelson and several of the Putative Plaintiff Class Members.**

129. However, in managing the oil and gas leasing and extraction program, the BIA must grant approvals of leases and APDs in accordance with federal laws, including NEPA.

130. The Osage Agency of the BIA, however, has approved leases and APDs since the enactment of NEPA through the date of the filing of the First Amended Complaint without first complying with NEPA, the applicable federal regulations or in accordance the BIA's own rules and regulations.

131. Donelson and Putative Class Representatives challenge those **individual and distinct** approvals of the leases and permits since the enactment of NEPA through the date of the First Amended Complaint, which have been granted in violation of NEPA, the applicable federal regulations and the BIA's own rules and regulations.

132. Donelson and Putative Class Representatives do not challenge herein those individual and distinct approvals of the leases and permits, which are not subject to NEPA or have been granted in

> compliance with NEPA, the applicable federal regulations and the BIA's own rules and regulations.

Aplt. App. 340-41 (emphasis added.)

Plaintiffs' SAC unambiguously provides that Plaintiffs are challenging "**individual and distinct** approvals of the leases and permits since the enactment of NEPA through the date of the First Amended Complaint," and that Plaintiffs are not challenging the program as a whole. Plaintiffs seek certification of a class action on behalf of landowners in Osage County. Thus, Plaintiffs, as representatives of the putative class members, challenge the approvals which affect the property of all of the putative class members. Because every individual agency action challenged by Plaintiffs affects the Plaintiffs via one of the putative class members, Plaintiffs have standing to challenge, and the district court has authority to review, every approval which affects the property of a putative class member.

It is irrefutable that each of the individual approvals by the BIA can be challenged by the landowner upon whose property the approvals affect. Each adversely affected landowner in Osage County can challenge individual approvals which affect their specific property. Therefore, it logically follows that all approvals of leases, APDs and concession agreements in Osage County granted in violation of NEPA can be challenged if every adversely affected landowner in Osage County separately challenges the approvals affecting their specific property.

As such, if the individual landowners can separately challenge all BIA approvals which affect their specific property, then they can use a class action as a vehicle to accomplish the same result. To date, no party has provided any authority or argument explaining why Plaintiffs cannot accomplish via a class action what the individual landowners can accomplish on their own. No such authority exists as such a contention strikes counter to logic and the purpose of class actions.

Without apparent grounds to deny leave such as undue delay, repeated failure to cure deficiencies in the pleadings, or undue prejudice to the Defendants, the district court should have "afforded [Plaintiffs] an opportunity to test [their] claim on the merits." *Foman*, 371 U.S. at 182. Moreover, because dismissal for lack of subject matter jurisdiction is without prejudice to refiling in the Tenth Circuit, *Brereton*, 434 F.3d at 1216, denial of Plaintiffs' request for leave to amend will result in judicial inefficiency and unnecessary expenditure of resources, as Plaintiffs have the right (and will so exercise that right) to re-file the SAC as a new action. Accordingly, the district court abused its discretion by refusing to allow Plaintiffs an opportunity to amend their FAC and file the SAC in this action.

VI. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING PLAINTIFFS LEAVE TO CONDUCT DISCOVERY RELEVANT TO CLASS CERTIFICATION.

The district court denied Plaintiffs' request for leave to conduct discovery from the Federal Defendants concerning issues relevant to class certification. Aplt.

App. 214-15. The district court denied the motion on the grounds that Plaintiffs had "not met the burden of demonstrating the necessity of conduct discovery at this point." Aplt. App. 214. In making its ruling, the district court noted that motions to dismiss were pending and that no motion for class certification was pending. *Id*. The district court's reliance upon the absence of a motion for class certification was improper, and, thus, it was an abuse of discretion.

Federal R. Civ. P. 23 provides that a certification order should issue "[a]t an early practicable time after a person sues or is sued as a class representative...." Fed. R. Civ. P. 23(c)(1)(A). In *Tracy v. Dean Witter Reynolds, Inc.*, 185 F.R.D. 303 (D. Colo. 1998), the court recognized that "some discovery is necessary prior to a determination of class certification." *Id*. at 304. Certainly, the district court has discretion to impose limitations on the scope of discovery. *Id*. at 304-305. As such, the district court may require the movant to make a prima facie showing that the requirements of Fed. R. Civ. P. 23 have been met or that discovery is likely to prove class allegations. *Id*. at 305 (quoting *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985)). However, the district court did not undertake any such analysis. Instead, the district court groundlessly ruled against permitting discovery because motions to dismiss were pending and no motion for class certification had been filed. Such perfunctory ruling by the district court on Plaintiff's Motion for Leave was an abuse of discretion. Plaintiffs are clearly permitted to conduct some

pre-class certification discovery, which should be curtailed only to prevent undue burden to the Federal Defendants. *Id.* at 305. Plaintiffs ask that this Court order the district court to undertake the proper analysis of the Plaintiffs' Motion for Leave to Conduct Discovery on remand.

CONCLUSION

For the foregoing reasons, the district court's Order dismissing this lawsuit for lack of subject matter jurisdiction was erroneous and should be reversed and the Judgment vacated. The FAC sufficiently identified final agency actions which are reviewable under the APA. As such, the district court has subject matter jurisdiction over the NEPA claims in the FAC against the Federal Defendants. Because the district court has jurisdiction over the NEPA claims against the Federal Defendants, the district court has supplemental jurisdiction over the state law claims against the non-Federal Defendants. Plaintiffs further request that the Court order the district court to properly analyze on remand the Plaintiff's Motion for Leave to Conduct Discovery relevant to class certification.

If this Court determines that the district court properly dismissed the FAC, Plaintiffs request that the Court find that the district court improperly denied the Plaintiffs' Motion for Leave to file their SAC and remand with instructions to permit Plaintiffs to file their SAC. If the Court finds that amendment would be futile, Plaintiffs request that this Court modify the district court's Order to show

that all claims were dismissed without prejudice pursuant to Fed. R. Civ. P. 12(b)(1).

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Plaintiffs-Appellants requests oral argument. Counsel believes that oral argument will assist the Court's understanding of the issues and will aid the Court in its disposition of this appeal. Plaintiffs-Appellants, on behalf of themselves and similarly situated landowners in Osage County, have been aggrieved by the uninformed approvals of oil and gas related activities on their property in violation of NEPA. This lawsuit is vitally important to the public welfare of the landowners in Osage County, the largest county in Oklahoma. The Defendants-Appellants' mischaracterization of the claims has resulted in the wrongful dismissal of this lawsuit. Moreover, this lawsuit presents novel issues of fact and law relating to NEPA compliance on a split estate where the aggrieved parties are private landowners. Counsel believes that oral argument will assist this Court in its understanding of the claims herein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 10,639 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. Local Rule 32(b). I relied upon my word processor to obtain the count and it is Microsoft Word 2013.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman, 14 point font.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: /s/ *Donald A. Lepp*
Donald A. Lepp

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **Appellants' Opening Brief,** as submitted in Digital Form via the Court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Sophos Endpoint Security and Control, dated February 17, 2017 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ *Donald A. Lepp*
Donald A. Lepp

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2017, I electronically transmitted the foregoing to the Clerk of Court using the ECF System and transmittal of a Notice of Electronic Filing to all persons who have entered their appearance as ECF registrants in this case.

s/Donald A. Lepp
Donald A. Lepp