ORAL ARGUMENT IS REQUESTED

No. 16-5174

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARTHA DONELSON, *ET AL.*,
Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA, *ET AL.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(NO. 4:14-CV-00316-JHP-FHM) (HONORABLE JAMES H. PAYNE)

RESPONSE BRIEF FOR THE FEDERAL APPELLEES

LORETTA F. RADFORD
Acting U.S. Attorney,
Northern District of Oklahoma

CATHRYN D. McCLANAHAN
Assistant United States Attorney

JEFFREY H. WOOD
Acting Assistant Attorney General

MICHAEL T. GRAY
JODY H. SCHWARZ
KEVIN W. MCARDLE
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202)305-0219
Kevin.mcardle@usdoj.gov

Of Counsel:

CHARLES R. BABST, JR.
Office of the Solicitor
U.S. Department of the Interior
Tulsa, Oklahoma

STEPHEN L. SIMPSON
KRISTEN D. KOKINOS
Office of the Solicitor
U.S. Department of the Interior
Washington, D.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES AND REGULATIONS:

LEGISLATIVE HISTORY:

MISCELLANEOUS:

GLOSSARY

APA	Administrative Procedure Act
Aplt. App.	Appellants' Appendix, filed February 17, 2017
BIA	Bureau of Indian Affairs
Br.	Opening brief of Plaintiffs, Martha Donelson, *et al.*, filed February 17, 2017
NEPA	National Environmental Policy Act

STATEMENT OF PRIOR OR RELATED CASES

There are no prior or related appeals within the meaning of 10th Cir. R. 28.2(C)(1). However, the Court should be aware that *Hayes v. Osage Minerals Council*, No. 16-5060 (10th Cir. appeal docketed May 24, 2016), raises the issue of the whether the Osage Minerals Council is an indispensable party under Fed. R. Civ. P. 19 in a lawsuit alleging that the Bureau of Indian Affairs violated the National Environmental Policy Act in approving an Osage Mineral Estate lease to which the Osage Minerals Council is a party. The Non-Federal Appellees in this case have raised a similar issue. *See* Non-Federal Appellees' Resp. Br., filed March 24, 2017, at 18-25. Oral argument in *Hayes* is scheduled for May 10, 2017.

STATEMENT OF JURISDICTION

For their claims against the United States Department of the Interior, Bureau of Indian Affairs (BIA), Plaintiffs, Martha Donelson and John Friend, on behalf of themselves and all allegedly similarly-situated persons, alleged jurisdiction under 28 U.S.C. § 1346 (United States as defendant), 28 U.S.C. § 1331 (federal question), 5 U.S.C. §§ 701-706 (Administrative Procedure Act), and 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act). Appellants' Appendix ("Aplt. App.") 65. For their state law claims against the non-federal Defendants, Plaintiffs alleged supplemental jurisdiction under 28 U.S.C. § 1367(a). As explained in the Argument section below, the district court correctly concluded that it lacked subject matter jurisdiction because Plaintiffs' claims against the BIA do not state a cause of action within the APA's limited waiver of sovereign immunity, 5 U.S.C. § 702.

The district court entered final judgment on March 31, 2016. Aplt. App. 229. On April 28, 2016, Plaintiffs filed a motion to alter or amend the district court's dismissal order and to vacate the judgment pursuant to Federal Rules of Civil Procedure 59(e) and 60(b). Aplt. App. 230, 233. The district court denied the motion by order dated November 23, 2016. *Id.* at 354. Plaintiffs timely filed a notice of appeal on December 6, 2016. *Id.* at 40-41; Fed. R. App. P. 4(a)(1)(B). This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiffs, two landowners in Osage County, Oklahoma, brought a putative class action challenging the BIA's administration of the subsurface Osage Mineral Estate for the benefit of the Osage Nation, a federally-recognized Indian tribe. Plaintiffs allege that the BIA has approved unidentified Osage oil and gas leases, assignments, concession agreements, and drilling permits in violation of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* Plaintiffs' amended complaint sought a declaration that, for every unidentified BIA approval granted in violation of NEPA since the statute's enactment in 1970, the approval was improper and the subject lease, assignment, concession agreement, or drilling permit is "void *ab initio*." Aplt. App. 77-79. Plaintiffs also brought state law claims for monetary damages against the lessees. The district court dismissed Plaintiffs' claims for lack of subject matter jurisdiction. This appeal presents the following issues:

1. Whether the amended complaint, which fails to identify any particular agency action that is adversely affecting either the named Plaintiffs or any putative class plaintiff, fails to state a cause of action within the APA's limited waiver of sovereign immunity, 5 U.S.C. § 702.

2. Whether the named Plaintiffs lack standing to challenge – in their own right or on behalf of the putative class – BIA approvals of unidentified leases, assignments, concession agreements, and drilling permits that do not affect the named Plaintiffs' property.

3. Whether Plaintiffs' challenge to BIA approvals granted more than six years before the amended complaint was filed is barred by the statute of limitations, 28 U.S.C. § 2401(a).

4. Whether the district court properly denied Plaintiffs' post-judgment motion for leave to file a second amended complaint when the judgment had not been vacated, Plaintiffs' motion was untimely, and the amendment was futile.

5. Whether the magistrate judge properly denied Plaintiffs' motion for leave to conduct discovery on class certification, without prejudice to refiling after a ruling on the BIA's motion to dismiss, when the BIA brought a facial challenge to jurisdiction that did not raise any factual issues requiring discovery, and Plaintiffs did not assert a need for discovery in order to respond to the motion.

STATEMENT OF THE CASE

A. Statutory Background

1. Regulation of the Osage Mineral Estate

In 1872, Congress established a reservation for the Osage Nation, a federally recognized Indian tribe, in what is now Oklahoma. *See* Act of June 5, 1872, ch. 310, 17 Stat. 228; 79 Fed. Reg. 4748, 4752 (Jan. 29, 2014); *see also Osage Nation v. Irby*, 597 F.3d 1117, 1121 (10th Cir. 2010). In 1907, Oklahoma became a state, and the Osage Reservation was incorporated into the new state as Osage County. *See* Act of June 16, 1906, ch. 3335, 34 Stat. 267, §§ 2, 21; *see also* Okla. Const., art. XVII, § 8. Osage

County is the largest in Oklahoma, covering about 2,250 square miles or 1,475,000 acres of surface land. *Osage Nation*, 597 F.3d at 1121; Aplt. App. 66.

In 1906, Congress enacted the Osage Allotment Act, which provided for the disposition of lands in Osage County, then owned by the Osage Nation, to individual tribal members. Act of June 28, 1906, ch. 3572, 34 Stat. 539, § 2. The mineral estate underlying those tracts, however, was not transferred to individual ownership. *Id.* § 3. Instead, Congress severed the subsurface mineral estate (the "Osage Mineral Estate") from the surface estate and directed that the United States hold the mineral estate in trust for the benefit of the tribe. *Id.*, amended by Act of Mar. 2, 1929, 45 Stat. 1478 (extending restricted-trust status of mineral estate to 1959); Act of June 24, 1938, 52 Stat. 1034 (extending restricted-trust status of mineral estate to 1983); Act of Oct. 21, 1978, 92 Stat. 1660 (extending restricted-trust status of mineral estate in perpetuity).

Under the Osage Allotment Act, the Osage Nation may exercise its sovereign authority to lease the Osage Mineral Estate for oil and gas exploration and development, subject to the approval of the Secretary of the Interior. 34 Stat. 539, 543 § 3. The Secretary has delegated this authority to the Superintendent of the BIA Osage Agency. *See* 25 C.F.R. §§ 226.1(c), 226.4, 226.5(b).

The Osage Nation may enter into leases through a competitive bidding process administered by the Superintendent, through negotiation, or through a combination of both methods. *Id.* § 226.2(f). Any resulting lease requires the Superintendent's approval. *See* 34 Stat. 539, 543 § 3; *see also* 25 C.F.R. §§ 226.2(b), 226.16(a). Any

assignment of a lease also requires the Superintendent's approval. 25 C.F.R. § 226.15(b). A lease is for a primary term of years "and so long thereafter as the minerals specified are produced in paying quantities." *Id.* § 226.10. Leases may also be terminated for inactivity or nonpayment of rent. *Id.* § 226.9.

After the Superintendent approves a lease, the lessee has the right to use so much of the associated surface land as may be reasonable for operations and marketing. 25 C.F.R. § 226.19(a). However, except for the surveying and staking of a proposed well, no operations of any kind may commence until the lessee meets with the surface owner. *Id.* § 226.18. At the meeting, the lessee must indicate the location of wells to be drilled, arrange for access routes, and provide the name and address of the party upon whom any claim for surface damages must be served, along with a description of the procedures for resolving such a claim. *Id.* § 226.18(a)-(c).

Although a lease grants the lessee access to the subject tract, it does not authorize the commencement of drilling operations. Prior to drilling a well, a lessee must submit an application for permit to drill and obtain the Superintendent's approval thereof. 25 C.F.R. § 226.16. The lessee must also pay the surface owner commencement money in the amount of $300 for each well. *Id.* § 226.19(b).

2. The National Environmental Policy Act

"NEPA is strictly a procedural statute; it does not mandate substantive results." *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1237 (10th Cir. 2011). Instead, NEPA "'prescribes the necessary process' by which federal agencies must 'take a "hard look"

at the environmental consequences" of their actions. *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1150 (10th Cir. 2004) (quoting *Utahns for Better Transp. v. U.S. Dep't of Transp*, 305 F.3d 1152, 1162–63 (10th Cir. 2002)). NEPA requires federal agencies to prepare an environmental impact statement before taking any "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i). An agency may first prepare an environmental assessment to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). If the agency makes a finding of no significant impact, an environmental impact statement is not required. *Id.*

B. Factual Background

Plaintiff Martha Donelson, owner of surface land in Osage County, originally filed suit on June 11, 2014, alleging that the BIA had approved certain Osage leases and permits in violation of NEPA and that the permitted operations threatened her property. Aplt. App. 42-54. Ms. Donelson sought a declaratory judgment that the approvals were invalid and that the leases and permits were void *ab initio*. *Id.* at 50-53. She also brought a state law claim for unlawful trespass against Devon Energy Production Company, L.P., holder of the leases and permits. *Id.* at 52-53.

After the BIA filed the administrative record for the challenged approvals, Aplt. App. 19, Ms. Donelson and John Friend, another Osage County landowner, filed an amended complaint. Aplt. App. 55-101. The two named Plaintiffs brought a

putative class action on behalf of all owners of surface land in Osage County that is or has been the subject of an Osage Mineral Estate lease, concession agreement,[1] or drilling permit approved by BIA, and upon which the named Defendants or putative class defendants have either "commenced, threatened to commence, or completed drilling and completion operations." *Id.* at 59, 83. In addition to the BIA, the named Defendants include 28 private entities who allegedly own "oil and gas wells, and engage[] in drilling, completion, production and operation of oil, gas and disposal wells located in Osage County." *Id.* at 60-65. The putative class defendants include all other oil and gas operators and lessees who, prior to the filing of the amended complaint, "obtained concession agreements, leases and/or drilling permits approved by the BIA" in violation of NEPA. *Id.* at 57.

Plaintiffs allege that the Osage Nation "holds six lease auctions per year," *id.* at 72, that Osage County "has approximately 19,500 active wells," *id.* at 76, and that the BIA approved 1,401 drilling permits between 2009 and 2012, for an average of 350 per year, *id.* Plaintiffs acknowledge that in 1979, the BIA prepared an environmental assessment pursuant to NEPA for the Osage oil and gas leasing program, and found that approval of the proposed actions analyzed in the environmental assessment would have no significant impact on the environment. *See id.* at 71-72. Plaintiffs

[1] Plaintiffs describe a "concession agreement" as an agreement between the Osage Nation and an operator granting the operator "the sole right to lease and drill upon [an area] provided certain conditions are met." Plaintiffs' Opening Brief (Br.) 6.

allege, however, that there have been "significant changes" since 1979 and that the environmental assessment is outdated. *Id.*

The amended complaint alleges that BIA has approved "certain" unidentified leases, assignments, concession agreements, and drilling permits in violation of NEPA, Aplt. App. 57, and that the BIA's "unlawful acts and practices" violate the rights of the named Plaintiffs and the putative class. *Id.* at 77-79. Plaintiffs sought a declaration that, for "every" unidentified lease, concession agreement, assignment, or permit approved by the BIA in violation of NEPA, the approval was improper and the subject lease, concession agreement, assignment, or permit is "void *ab initio*." *Id.*

Against the non-federal Defendants, Plaintiffs asserted state law claims for monetary damages for unlawful trespass, nuisance, negligence, and unjust enrichment. The amended complaint alleges that the non-federal Defendants have "engaged in exploration, drilling, completion, production, enhanced recovery, and transportation related oil and gas activities on Plaintiffs' and Putative Plaintiff Class Members' respective properties without valid leases, valid drilling permit, surface owner authorization and requisite NEPA documentation." Aplt. App. 58.

C. Procedural Background

On October 10, 2014, the BIA and the non-federal Defendants filed separate motions to dismiss the amended complaint. Aplt. App. 216. The BIA argued that the court lacked subject matter jurisdiction because the amended complaint brought an impermissible programmatic challenge that, under the Supreme Court's reasoning in

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990), fails to state a cause of action within the APA's waiver of sovereign immunity, 5 U.S.C. § 702. Aplt. App. 221-222. The BIA also argued that Plaintiffs' challenge to BIA approvals granted on or before August 10, 2008, more than six years before the amended complaint was filed, is barred by the statute of limitations, 28 U.S.C. § 2401(a). Aplt. App. 226 n.2. The non-federal Defendants raised additional bases for dismissal. *Id.* at 226.

On December 7, 2015, after the motions to dismiss had been fully briefed but before the district court had ruled, Plaintiffs filed a motion for leave to conduct discovery from BIA "concerning matters relevant to class certification." Aplt. App. 190-213. BIA opposed the motion. *Id.* at 214. On March 24, 2016, the magistrate judge denied the motion, without prejudice to renewal following the district court's ruling on the motions to dismiss. *Id.* at 214-215.

On March 31, 2016, the district court issued an opinion and order granting the motions to dismiss. The court agreed with the BIA that Plaintiffs' amended complaint brought an improper programmatic challenge under *Lujan v. National Wildlife Federation* that "does not fall within the scope of the APA and is therefore not subject to review." Aplt. App. 224. The court accordingly dismissed the claims against the BIA for lack of subject matter jurisdiction without reaching the BIA's statute of limitations defense. *Id.* 226. Having dismissed the claims against the BIA, the district court held that there was no independent basis for jurisdiction over the state law claims against the non-federal Defendants. *Id.* at 227-28. The district court

therefore dismissed the state law claims for failure to statue a claim for which relief can be granted or, alternatively, for lack of subject matter jurisdiction. *Id.* at 227. The district court entered final judgment on March 31, 2016. *Id.* at 229.

On April 28, 2016, Plaintiffs filed a motion under Federal Rules of Civil Procedure 59(e) and 60(b) to alter or amend the district court's dismissal order and to vacate the judgment, arguing that the district court had misread the amended complaint and *Lujan v. National Wildlife Federation*. Aplt. App. 230-254. Plaintiffs concurrently filed a separate motion under Fed. R. Civ. P. 15(a) for leave to file a second amended complaint to "further refine [their] claims against the Defendants." Aplt. App. 308-352. The BIA opposed both motions.

By order dated November 23, 2016, the district court denied Plaintiffs' motion to vacate the judgment. Aplt. App. 354. The same day, the district court issued a second order denying the motion for leave to amend, explaining that the proposed amended complaint "does not cure the deficiencies in the First Amended Complaint and would therefore be futile." *Id.* at 357. This appeal followed.

SUMMARY OF ARGUMENT

The district court correctly held that it lacked subject matter jurisdiction over Plaintiffs' claims against the BIA because the amended complaint does not state a cause of action within the APA's limited waiver of sovereign immunity, 5 U.S.C. § 702. Section 702 imposes two requirements on each person bringing suit: (1) she must identify the "agency action" she is challenging; and (2) she must show that she is

adversely affected or aggrieved by that action. 5 U.S.C. § 702; *Nat'l Wildlife Fed'n*, 497 U.S. at 882-83. The amended complaint does not satisfy those requirements for either the named Plaintiffs or for any putative class plaintiff; indeed, the amended complaint does not identify any specific agency action for which judicial review is sought.

Instead, the amended complaint improperly seeks wholesale review of the entirety of the BIA's Osage leasing and permitting decisions dating back to the enactment of NEPA in 1970. Because such a programmatic attack is not justiciable under the APA, *see Nat'l Wildlife Fed'n*, 497 U.S. at 890-94, the district court properly dismissed the claims against the BIA for lack of subject matter jurisdiction.

The district court also lacked jurisdiction over most (if not all) of Plaintiffs' claims against the BIA for two additional reasons. First, the named Plaintiffs lack standing to challenge BIA approvals of unidentified leases, concession agreements, assignments, and drilling permits that do not affect their property because the named Plaintiffs are not injured by those approvals. Contrary to their assertions, Plaintiffs do not acquire standing through injuries allegedly suffered by the putative class members. Rather, the named Plaintiffs themselves must establish standing for each approval they seek to challenge on behalf of the putative class. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); William B. Rubenstein, *Newberg on Class Actions* § 2:5 (5th ed. Dec. 2016 Update). Because the named Plaintiffs lack standing to challenge BIA approvals that do not affect their property, the district court lacked subject matter jurisdiction over Plaintiffs' challenge to all such approvals.

Second, Plaintiffs' challenge to BIA approvals granted more than six years before the amended complaint was filed is barred by the statute of limitations, 28 U.S.C. § 2401(a). Although Plaintiffs argued below that the limitations period should be equitably tolled, the argument fails for two reasons: (1) Section 2401(a) states the exclusive circumstances under which courts may toll the limitations period, and those circumstances do not exist here; and (2) there is no factual basis for equitable tolling. Accordingly, the district court lacked subject matter jurisdiction over Plaintiffs' challenges to BIA approvals granted on or before August 10, 2008.

Plaintiffs' challenge to the district court's procedural orders also lacks merit. The district court properly denied Plaintiffs' post-judgment motion for leave to file a second amended complaint because the judgment had not been vacated, Plaintiffs' motion was untimely, and the proposed amendment was futile. *See The Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084, 1086–88 (10th Cir. 2005).

The magistrate judge also correctly denied Plaintiffs' motion for leave to conduct discovery on class certification, without prejudice to renewal following a ruling on the motions to dismiss, because the BIA's motion brought a facial challenge to jurisdiction that did not raise any factual issues, Plaintiffs did not assert a need for discovery to respond to the motions to dismiss, and jurisdiction is a threshold issue that a court must resolve before proceeding to secondary issues such as class certification. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

For all of these reasons, the district court's judgment should be affirmed.

STANDARDS OF REVIEW

Motions to dismiss for lack of subject matter jurisdiction "generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based." *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002). Where, as here, a defendant brings a facial attack, courts "presume all of the allegations contained in the amended complaint to be true." *Id.*; Aplt. App. 221. Whether those allegations state a cause of action within the APA's waiver of sovereign immunity is a legal question that this Court reviews de novo. *Colorado Farm Bureau Fed'n v. United States Forest Service*, 220 F.3d 1171, 1173 (10th Cir. 2000).

Although the district court did not address the statute of limitations or standing (which the Plaintiffs raise in their brief of appeal, Br. 20-22), this Court "may affirm the district court on any ground supported by the record," *Colorado Farm Bureau Fed'n*, 220 F.3d at 1173 n.1, standing may be raised "for the first time at any stage of the litigation," *New Eng. Health Care Emps. Pension Fund v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008), and jurisdictional issues are reviewed de novo in any event. *See Plaza Speedway Inc. v. United States*, 311 F.3d 1262, 1266 (10th Cir. 2002) (statute of limitations); *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1228 (10th Cir. 2001) (standing).

The district court's denial of Plaintiffs' motion for leave to amend the complaint is reviewed for an abuse of discretion. *The Tool Box*, 419 F.3d at 1086-87. However, "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) (quoting *Cohen v. Longshore*, 621 F.3d 1311, 1314 (10th Cir. 2010)).

"This [C]ourt reviews discovery rulings for an abuse of discretion." *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1238 (10th Cir. 2000).

ARGUMENT

I. Plaintiffs' claims against the BIA do not state a cause of action within the APA's limited waiver of sovereign immunity.

"Sovereign immunity protects the United States and its agencies from being sued without their consent." *Poche v. Joubran*, 644 F.3d 1105, 1108 (10th Cir. 2011). "Courts lack subject matter jurisdiction over a claim against the United States for which sovereign immunity has not been waived." *Iowa Tribe Of Kansas & Nebraska v. Salazar*, 607 F.3d 1225, 1232 (10th Cir. 2010). "Consequently, plaintiffs may not proceed unless they can establish that the United States has waived its sovereign immunity with respect to their claim." *Id.* A waiver of sovereign immunity must "be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citations omitted).

Because NEPA does not waive sovereign immunity or create a private right of action, Plaintiffs "invoke the limited waiver of sovereign immunity provided for in the APA." *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1245 (10th Cir. 2012); *Colorado Farm Bureau Fed'n*, 220 F.3d at 1173; *High Country Citizens All. v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006); Aplt. App. 65, 70-71. Although the APA waives

sovereign immunity and provides a right of action for persons adversely affected or aggrieved by "agency action," 5 U.S.C. § 702, the amended complaint does not satisfy § 702's requirements for either the named Plaintiffs or for any putative class plaintiff. Therefore, the district court properly dismissed Plaintiffs' claims against the BIA for lack of subject matter jurisdiction.

A. APA Section 702 requires each person bringing suit to identify the specific "agency action" that is adversely affecting him.

Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "[A]gency action" means "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13). "All of those categories involve circumscribed, discrete agency actions, as their definitions make clear." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004); *see* 5 U.S.C. § 553(4), (6), (8), (10), (11). "Where no other statute provides a private right of action, the 'agency action' complained of must [also] be '*final* agency action.'" *S. Utah Wilderness Alliance*, 542 U.S. at 61-62 (quoting 5 U.S.C. § 704); *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (discussing finality requirements).

Section 702 thus imposes two threshold requirements on each person seeking to bring suit. "First, the person claiming a right to sue must identify some 'agency action' that affects him in the specified fashion; it is judicial review 'thereof' to which

he is entitled." *Nat'l Wildlife Fed'n*, 497 U.S. at 882 (quoting § 702) (emphasis added). "Second, the party seeking review under § 702 must show that he has 'suffer[ed] legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action 'within the meaning of a relevant statute.'" *Id.* at 883 (quoting § 702). In short, "[u]nder the terms of the APA, [a claimant] must direct its attack against some particular 'agency action' that causes it harm." *Id.* at 891.[2]

B. The amended complaint does not satisfy § 702's requirements.

"Federal courts are courts of limited jurisdiction, and the presumption is that they lack jurisdiction unless and until a plaintiff pleads sufficient facts to establish it." *Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir. 1994); *Iowa Tribe of Kansas & Nebraska*, 607 F.3d at 1232. The district court correctly held that it lacked jurisdiction because the Plaintiffs did not plead sufficient facts to satisfy § 702's threshold requirements.

The two named Plaintiffs own land in Osage County. Aplt. App. 59. Although they style their lawsuit as a class action, they do not challenge any discrete "agency action," 5 U.S.C. § 551(13), that affects all putative class members across the board. Instead, Plaintiffs purport to challenge the BIA's approval of "certain" Osage oil and

[2] *See also Colo. Farm Bureau*, 220 F.3d at 1173 (plaintiff suing under the APA has the "burden of identifying specific federal conduct and explaining how it is 'final agency action'"); *Found. on Econ. Trends v. Lyng*, 943 F.2d 79, 87 (D.C. Cir. 1991) (plaintiff suing under APA "must show the *particular* agency action … that allegedly triggered the violation and thereby caused the injury"); *Hells Canyon Preservation Council v. United States Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010) (to bring an APA claim, "plaintiffs must identify a final agency action upon which the claim is based").

gas leases, concession agreements, assignments, and drilling permits dating back to the enactment of NEPA in 1970. Aplt. App. 57, 77-79; Br. 4, 14.

A particular BIA-approved lease or concession agreement might affect one or several Osage County landowners, but it certainly does not affect all of them. *See* 25 C.F.R. § 226.2(b); Aplt. App. 77. Similarly, a BIA-approved drilling permit affects only the owner or owners of the specific parcel on which the well will be drilled. 25 C.F.R. §§ 226.16(b), 226.19(b). Thus, to comply with § 702, each person bringing suit "must identify" the specific BIA-approved lease, concession agreement, assignment, or drilling permit allegedly affecting his property; "it is judicial review 'thereof'" – and only thereof – "to which he is entitled." *Nat'l Wildlife Fed'n*, 497 U.S. at 882.

The amended complaint does not satisfy that basic requirement for either the named Plaintiffs or for any putative class plaintiff; indeed, the amended complaint does not identify any particular approval for which judicial review is sought, let alone identify the person allegedly adversely affected by the approval. Accordingly, the amended complaint does not state a cause of action within § 702's waiver of sovereign immunity, and the district court properly dismissed the claims against the BIA for lack of subject matter jurisdiction. *See Nat'l Wildlife Fed'n*, 497 U.S. at 882-83, 891.

C. The entirety of BIA approvals dating back to 1970 cannot be laid before the district court for wholesale review under the APA.

Instead of identifying the particular BIA approvals for which judicial review is sought, the amended complaint seeks wholesale review of all BIA approvals of Osage

oil and gas leases, concession agreements, assignments, and permits dating back to the enactment of NEPA in 1970, and a declaration that, for "every" approval found to be in violation of NEPA, the approval was improper and the subject lease, concession agreement, assignment, or drilling permit is "void *ab initio*." Aplt. App. 77-79; Br. 4, 14. As the district court correctly held, Plaintiffs' programmatic challenge to the entirety of the BIA's "acts and practices in approving" leases, concession agreements, assignments, and drilling permits over more than four decades, Aplt. App. 77-79, is foreclosed by the Supreme Court's decision in *Lujan v. National Wildlife Federation*.

The plaintiff in *National Wildlife Federation* challenged approximately 1,250 agency land status determinations, which the plaintiff dubbed the "land withdrawal review program." *Id.* at 881, 890. The Court held that the "program" was not reviewable under the APA because it was "not an 'agency action' within the meaning of § 702, much less a final agency action' within the meaning of § 704." *Id.* at 890. The Court explained that "the flaws in the entire 'program'—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects [the plaintiff]." *Id.* at 892-93. "Under the terms of the APA, [a claimant] must direct its attack against some particular 'agency action' that causes it harm." *Id.* at 891.

The same reasoning applies here. The "hundreds, if not thousands" of leases, concession agreements, assignments, and drilling permits approved by the BIA since

1970, Br. 14-15, many of which have likely expired or become inoperative,[3] cannot be laid before the court for "wholesale" review under the APA. *See Nat'l Wildlife Fed'n*, 497 U.S. at 893. That the Plaintiffs do not explicitly challenge "the Osage County oil and gas leasing program as a whole," Br. 14, but rather the agency's "acts and practices" in carrying out the program, Aplt. App. 77-79, is immaterial. There is no substantive difference between the BIA's "program" and the entirety of BIA-approved leases, concession agreements, assignments, and permits comprising the "program." Neither is reviewable under APA § 702. *See Nat'l Wildlife Fed'n*, 497 U.S. at 892-93 (non-reviewable "program" consisted "principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well"); *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 490 (5th Cir. 2014) (claim not reviewable under § 702 where it was "structured as a blanket challenge to *all* of the Government's actions with respect to *all* permits and leases granted for natural resource extraction on a significantly large amount of land"); *Osage Producers Ass'n v. Jewell*, 191 F. Supp. 3d 1243, 1249 (N.D. Okla. 2016) (claim not reviewable under § 702 where it "generically describes certain arbitrary or unlawful agency practices … and requests review of *all* agency actions falling within those descriptions. This is no different than the challenge at issue in *Lujan*.").

[3] *See, e.g.*, 25 C.F.R. §§ 226.9(a) (providing for termination of lease for non-payment of rent), 226.10 (providing for expiration of leases not producing minerals in paying quantities), 226.28 (providing for shutdown, abandonment, and plugging of wells).

Section 702's prohibition against programmatic challenges does not necessarily preclude multiple landowners from attempting to join their challenges to discrete BIA approvals in a single suit. *See* Fed. R. Civ. P. 20(a)(1). But even assuming (without conceding) that joinder would be permissible under the federal rules, it would not relieve each landowner of § 702's requirement that he identify the specific approval "that affects *him* in the specified fashion." *Nat'l Wildlife Fed'n*, 497 U.S. at 882 (emphasis added). Statutory limits on the availability of judicial review are "unaffected by the Federal Rules of Civil Procedure." *United States v. Sherwood*, 312 U.S. 584, 591 (1941); 28 U.S.C. § 2072(b); *see King Fisher Marine Serv., Inc. v. 21st Phoenix Corp.*, 893 F.2d 1155, 1158 n.2 (10th Cir. 1990) (federal rules "do not confer jurisdiction on the federal courts, Fed. R. Civ. P. 82; hence, a court may decide claims joined under rule 18(a) only if independent jurisdiction and venue requirements are satisfied").

Nor is there any obstacle preventing a landowner from identifying, at the outset, the specific BIA-approved lease or permit currently affecting her property. *See, e.g.*, *Hayes v. Chaparral Energy, LLC*, 180 F. Supp. 3d 902 (N.D. Okla. 2016) (reviewing NEPA challenge to BIA approval of specific Osage lease and drilling permits affecting Mr. Hayes's property), *appeal docketed*, No. 16-5060 (10th Cir. May 24, 2016); Aplt. App. 46-49; *see also* 25 C.F.R. § 226.18 (requiring meeting between lessee and surface owner prior to commencement of operations).

The "case-by-case approach" that § 702 requires may be "understandably frustrating" for two Plaintiffs who seek "across-the-board" relief in a single suit. *See*

Nat'l Wildlife Fed'n, 497 U.S. at 894. "But this is the traditional, and remains the normal, mode of operation of the courts." *Id.* While one landowner's successful challenge to a particular BIA approval might ultimately have the effect of requiring the "whole 'program' to be revised by the agency in order to avoid the unlawful result that the court discerns," *id.*, courts may intervene under the APA "only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Id.* Because the amended complaint does not satisfy § 702's requirements for either the named Plaintiffs or for any putative class plaintiff, the district court properly dismissed the claims against BIA for lack of subject matter jurisdiction.

II. The named Plaintiffs lack standing to challenge BIA approvals that do not affect their property.

The district court lacked jurisdiction over most (if not all) of Plaintiffs' claims against the BIA for a second, related reason: the two named Plaintiffs lack standing to challenge – in their own right or on behalf of the putative class – BIA approvals of leases, concession agreements, assignments, and drilling permits that do not affect their property because the named Plaintiffs are not injured by those approvals.

Standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish Article III standing, a plaintiff must prove that: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of

the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *New Eng. Health Care*, 512 F.3d at 1288. "The plaintiffs have the burden of alleging facts establishing these three elements." *Colorado Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1234 (10th Cir. 2004).

"[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6, (1996). A plaintiff must demonstrate standing "for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). "The actual-injury requirement would hardly serve the purpose … of preventing courts from undertaking tasks assigned to the political branches – if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration." *Lewis*, 518 U.S. at 357.

"In a class action suit with multiple claims, at least one named class representative must have standing with respect to each claim." William B. Rubenstein, *Newberg on Class Actions* § 2:5 (5th ed. 2016 update). "It is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to one of many claims he wishes to assert. Rather, 'each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.'" *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1280 (11th Cir. 2000) (citation omitted); *Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co.*, 862 F. Supp. 2d 322, 331 (S.D.N.Y. 2012).

Under the APA, each "agency action" gives rise to a distinct claim for the person or persons adversely affected. 5 U.S.C. § 702; *Nat'l Wildlife Fed'n*, 497 U.S. at 882-83; *S. Utah Wilderness Alliance*, 542 U.S. at 62-65. Plaintiffs likewise assert that the BIA's approval of a particular lease, concession agreement, assignment, or permit "is a *final* agency action subject to judicial review" under APA § 704. Br. 19, 32 (emphasis added).[4] Therefore, the named Plaintiffs must establish standing for each BIA approval they seek to challenge, either in their own right or on behalf of the putative class. *See Newberg on Class Actions* § 2.5; *Prado-Steiman*, 221 F.3d at 1279-80.

The named Plaintiffs allege that they have been injured by the BIA's approval of unidentified leases and drilling permits because third-party operations under the leases and permits have harmed their property. Aplt. App. 58-59, 76-79; Br. 31-32. Those allegations might have sufficed, at the pleading stage, to establish the named Plaintiffs' standing to challenge the BIA's approval of a particular lease or permit currently affecting their property – had one been identified in the amended complaint. But the allegations certainly do not give the named Plaintiffs Article III standing to

[4] Although the BIA's approval of a lease or permit is "agency action" under 5 U.S.C. § 702, it would not be "final" under § 704 if, for example, applicable administrative appeal requirements have not been exhausted. *See* Non-Federal Appellees' Resp. Br. 15-17. However, because the amended complaint does not identify any particular approval for which judicial review is sought, this Court need not address when a particular approval becomes final. The Court also need not address whether the Osage Nation would be an indispensable party to some future, otherwise justiciable challenge to a particular approval. *See id.* at 18-25.

challenge other BIA approvals that do not affect their property because the named Plaintiffs allege no injury from those approvals. *See DaimlerChrysler*, 547 U.S. at 353 n.5 (noting that a litigant cannot, "by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him"). The named Plaintiffs similarly lack APA standing to challenge BIA approvals that do not affect their property because they are not "person[s] … adversely affected or aggrieved by" such approvals. 5 U.S.C. § 702; *Nat'l Wildlife Fed'n*, 497 U.S. at 883-85.

Plaintiffs' assertion that they have standing because "every individual agency action challenged by Plaintiffs affects the Plaintiffs via one of the putative class members," Br. 44-45, has it backwards. "Class representatives do not gain standing through injuries to class members." Rubenstein, *Newberg on Class Actions* § 2:3; *see Lewis v. Casey*, 518 U.S. at 347. "In class action cases, the standing inquiry focuses on the class representatives. The class representatives must have individual standing in order to sue." Rubenstein, *Newberg on Class Actions* § 2:1. "A finding that no class representative has standing with respect to a given claim requires dismissal of that claim." *Id.* § 2:5; *Prado-Steiman*, 221 F.3d at 1279-80.

Accordingly, the named Plaintiffs cannot challenge a particular "agency action" on behalf of a putative class when they lack standing to challenge the action in their own right. That is one reason "why Plaintiffs cannot accomplish via a class action what the individual landowners [allegedly] can accomplish on their own." Br. 45. The APA's limited right of action for "[a] person … adversely affected or aggrieved by" a

specific and discrete "agency action," 5 U.S.C. § 702, effectively precludes a class action, at least where, as here, the named plaintiff is not challenging a single "agency action" affecting the putative class, but instead is improperly attempting to challenge a multitude of distinct agency actions, the vast majority of which do not affect him. *Cf. Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1564-65, 1571 (10th Cir. 1994) (class action challenge to discrete final agency action imposing temporary yield and deficiency payment reductions on all similarly-situated Kansas farmers).

Because each BIA approval gives rise to a distinct claim under § 702, and because the named Plaintiffs lack Article III and APA standing to challenge BIA approvals that do not affect their property, the district court lacked subject matter jurisdiction over Plaintiffs' challenges to all such approvals. Therefore, even if the Court does not affirm the dismissal of the claims against the BIA in their entirety for the reasons stated in Section I, the Court should, at a minimum, affirm the dismissal of Plaintiffs' challenges to BIA approvals of leases, concession agreements, assignments, and permits that do not affect the named Plaintiffs' properties.

III. Any challenge to BIA approvals granted prior to August 11, 2008, is barred by the statute of limitations.

APA claims are subject to the six-year statute of limitations in 28 U.S.C. § 2401(a). *Chem. Weapons Working Grp., Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1494 (10th Cir. 1997). Section 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years

after the right of action first accrues." 28 U.S.C. § 2401(a). "A claim against the United States first accrues on the date when all events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Ute Distrib. Corp. v. Sec'y of Interior*, 584 F.3d 1275, 1282 (10th Cir. 2009). Because a litigant may commence a lawsuit under the APA when there has been final agency action, 5 U.S.C. § 704, an APA claim "first accrues on the date of the final agency action." *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004). Therefore, assuming BIA's approval of a lease, concession agreement, assignment, or drilling permit is a "final agency action," 5 U.S.C. § 704; Br. 19, Plaintiffs' challenge to any such approvals granted prior to August 11, 2008, six years before the amended complaint was filed, is time barred.

Before the district court, Plaintiffs argued that the statute of limitations should be equitably tolled because the BIA did not notify the Plaintiffs of its approvals or disclose the basis for its NEPA compliance. Aplt. App. 180-182, 186-189. Courts "[have] no authority to create equitable exceptions to jurisdictional requirements," *Bowles v. Russell*, 551 U.S. 205, 214 (2007), and the courts of appeals "have divided on the question whether § 2401(a)'s limit is 'jurisdictional.'" *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 145 (2008) (Ginsburg, J., dissenting). Although this Court has held that § 2401(a) is jurisdictional, *Urabazo v. United States*, 1991 WL 213406, at *1 (10th Cir. Oct. 21, 1991), the Court has "not considered this question in a published decision, and the Supreme Court has since held that a limitations provision should not be treated as 'jurisdictional' unless Congress has clearly indicated that the rule is

jurisdictional." *Wild Horse Observers Ass'n, Inc. v. Jewell*, 550 F. App'x 638, 641 n.2 (10th Cir. 2013) (unpublished) (citing *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013)); *see also United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015) (limitations period in § 2401(b) is not jurisdictional and thus is subject to equitable tolling).

This Court need not revisit whether § 2401(a) is jurisdictional in this case because equitable tolling does not apply for two independent reasons. First, § 2401(a) states the exclusive circumstances under which courts may toll the limitations period, and those circumstances do not exist here. Second, Plaintiffs have not established a factual basis for equitable tolling. Accordingly, regardless of whether § 2401(a) is jurisdictional, Plaintiffs' challenge to BIA approvals granted on or before August 10, 2008, is time barred. *See Wild Horse Observers*, 550 F. App'x at 641 (declining to address whether § 2401(a) is jurisdictional and subject to continuing violation exception where the exception did not apply as a factual matter).[5]

[5] Although the Court need not revisit whether § 2401(a) is jurisdictional, the Court should be aware that the legislative history of § 2401(a) and the link between § 2401(a) and § 2501, which is jurisdictional, *John R. Sand*, 552 U.S. at 136, strongly indicate that Congress also intended for § 2401(a) to be jurisdictional. *Cf. Wong*, 135 S. Ct. at 1633 (a limitations period is jurisdictional if Congress "conditions [a] jurisdictional grant on [a] limitations period[] or otherwise links those separate provisions"). Should the Court decide to revisit whether § 2401(a) is jurisdictional, we stand ready to provide additional briefing on the matter in order to assist the Court.

A. Plaintiffs do not meet the express requirements to toll the limitations period under § 2401(a).

"Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *United States v. Beggerly*, 524 U.S. 38, 48 (1998). For example, in *United States v. Brockamp*, the Supreme Court held that a statute did not permit equitable tolling because it contained "explicit exceptions to its basic time limits … [that] do not include 'equitable tolling.'" 519 U.S. 347, 351-52 (1997). The Court has also refused to read equitable exemptions into a time limit where Congress had expressly provided limited grounds for an extension. *Bowles v. Russell*, 551 U.S. at 214.

The same reasoning applies here. Unlike § 2401(b), which does not contain any express tolling provisions, § 2401(a) provides that the "action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." 28 U.S.C. § 2401(a).[6] The inclusion of those express exceptions indicates that Congress "did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute." *Brockamp*, 519 U.S. at 352. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980).

[6] The term "legal disability" refers to a mental condition that "impair[s] the claimant's access to the court" and prevents the claimant "from comprehending his or her legal rights." *Shinogee v. Fanning*, No. CV 15-2261 (RBW), 2017 WL 149953, at *4 (D.D.C. Jan. 13, 2017) (quoting *Hyde v. United States*, 85 Fed. Cl. 354, 358 (2008)).

Indeed, § 2401(a)'s predecessor provision stated that "no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively." 28 U.S.C. § 41(20) (1946). When Congress moved that provision to § 2401(a) in 1948, Congress "omitted" the aforementioned sentence "as superfluous." H.R. Rep. No. 308, § 2401, at A185 (1947). The legislative history therefore shows that Congress did not intend courts to toll § 2401(a) for circumstances other than those specified in the statute. For that reason alone, Plaintiffs' equitable tolling argument fails.

B. There is no factual basis for equitable tolling.

"Equitable tolling is granted sparingly." *Impact Energy Res.*, 693 F.3d at 1246. "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). This Court has "held that tolling is appropriate 'when the defendant's conduct rises to the level of active deception; where a plaintiff has been lulled into inaction by a defendant, and likewise, if a plaintiff is actively misled or has in some extraordinary way been prevented from asserting his or her rights.'" *Impact Energy Res.*, 693 F.3d at 1246 (quoting *United States v. Clymore*, 245 F.3d 1195, 1199 (10th Cir. 2001)). Plaintiffs have not demonstrated that any of those circumstances exist here.

Plaintiffs argued below that tolling is warranted because the BIA never notified them that it had approved leases, concession agreements, and permits affecting their

properties. Aplt. App. 180. However, the applicable regulations make clear that no mineral extraction activities could occur in Osage County – and, by extension, on the Plaintiffs' properties – without a BIA-approved lease or permit. *See* 25 C.F.R. § 226.16. Plaintiffs are charged with knowledge of the regulations, *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947) (the publishing of rules and regulations in the Federal Register gives legal notice of their contents), and, in any event, "ignorance of the law … generally does not excuse prompt filing," *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (citations and internal quotation marks omitted).

The regulations also demonstrate that each Plaintiff or putative class plaintiff knew or reasonably should have known that mineral extraction activities would be occurring on his or her property pursuant to BIA-approved leases and permits before those activities even commenced. Except for the surveying and staking of a well, no operations may commence under a lease "until the lessee … shall meet with the surface owner." 25 C.F.R. § 226.18. During the meeting, the lessee is required to indicate the location of the well or wells to be drilled; arrange for route of ingress and egress; and provide the name and address of the party upon whom the surface owner shall serve any claim for damages resulting from mineral development or operations. *Id.* The lessee must also pay the surface owner commencement money in the amount of $300 per well before commencing drilling operations. *Id.* § 226.19(b). Plaintiffs have not alleged that any lessee failed to comply with these requirements, which have been in place for decades. *See*, *e.g.*, 39 Fed. Reg. 22,254, 22,258 (June 17, 1974).

Moreover, the very presence of wells and associated "pipelines, electric lines, pull rods, other appliances necessary for operations and marketing, and the right-of-way for ingress and egress to any point of operations," 25 C.F.R. § 226.19(a), would put a reasonable landowner on notice that mineral extraction activities were occurring on his or her property pursuant to BIA-approved leases or permits. Consequently, Plaintiffs' lack of notice argument has no merit.

Plaintiffs also argued below that the BIA's "failure to notify Plaintiffs that it was relying upon the 1979 Environmental Assessment for each approval[] misled the Plaintiffs into reasonably believing that the Superintendent had complied with NEPA." Aplt. App. 180. However, the BIA's supposed failure to provide unsolicited notice of the basis for its NEPA compliance is not "active deception" required for equitable tolling. *See Montoya v. Chao,* 296 F.3d 952, 957-58 (10th Cir. 2002); *Impact Energy Res.*, 693 F.3d at 1246; *Wild Horse Observers*, 550 F. App'x at 642.

In addition, even when knowledge is required to trigger a limitations period, it is knowledge of the plaintiff's injury, not knowledge of the elements of the legal theory she ultimately decides to pursue. *See United States v. Kubrick*, 444 U.S. 111, 123-124 (1979) (accrual of tort claim under 28 U.S.C. § 2401(b) occurs when plaintiff becomes aware of the injury, not when plaintiff learns that the injury resulted from negligence); *Bradley v. U.S. by Veterans Admin.*, 951 F.2d 268, 270 (10th Cir. 1991) (same); *see also Ute. Distrib. Corp.* 584 F.3d at 1283 (continuing violation doctrine does not apply where plaintiff's "injury" is definite and discoverable).

The injury on which this lawsuit is predicated is the alleged harm to the Plaintiffs' properties from mineral extraction activities conducted pursuant to BIA-approved leases and drilling permits. Aplt. App. 59, 77-79. Regardless of when Plaintiffs formed a belief that the BIA's approvals were unlawful, Plaintiffs had reason to know of the allegedly harmful activities – and that they would be occurring pursuant to BIA approvals – before those activities even commenced. *See supra* at 30-31. Section 2401(a) provided Plaintiffs with ample time to investigate the approvals and bring suit, and Plaintiffs have not identified any extraordinary circumstances that stood in their way. Accordingly, even if § 2401(a) were subject to equitable tolling, the doctrine does not apply here. *See Montoya*, 296 F.3d at 957-58; *Impact Energy Res.*, 693 F.3d at 1246; *Pace*, 544 U.S. at 418. Therefore, even if the Court does not affirm the district court's dismissal of the claims against the BIA in their entirety, the Court should, at a minimum, affirm the dismissal of Plaintiffs' challenges to any BIA approvals granted on or before August 10, 2008.[7]

[7] We agree that the district court's dismissal of the claims against the BIA was without prejudice, Br. 40-41, and the district court did not state otherwise. Aplt. App. 225-226. The district court also dismissed the state law claims pursuant to Fed. R. Civ. P. 12(b)(6), "or alternatively under Fed. R. Civ. P. 12(b)(1)." Aplt. App. 227. Accordingly, this Court can affirm the dismissal of the state law claims for lack of jurisdiction; there is no need to vacate and remand to the district court with instructions to dismiss those claims pursuant to Rule 12(b)(1). *Contra* Br. 40-41.

IV. The district court properly denied Plaintiffs' post-judgment motion for leave to amend.

The district court properly denied Plaintiffs' post-judgment motion for leave to file a second amended complaint because the judgment had not been vacated, the motion was untimely, and the proposed amendment was futile. As an initial matter, however, Plaintiffs' suggestion that they properly sought leave to amend before the entry of judgment, *see* Br. 41, is incorrect.

A. Plaintiffs did not seek leave to amend before entry of judgment.

"[A] request for leave to amend must give adequate notice to the district court and to the opposing party of the basis of the proposed amendment before the court is required to recognize that a motion for leave to amend is before it." *Calderon v. Kansas Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1186-87 (10th Cir. 1999). Plaintiffs did not submit a proper request for leave to amend prior to the entry of judgment. Instead, Plaintiffs included a single sentence at the very end of their oppositions to the motions to dismiss stating that if the court found any merit in the movants' arguments, the court should grant leave to amend. Aplt. App. 100, 184. A "single sentence, lacking a statement for the grounds for amendment and dangling at the end of [a] memorandum, d[oes] not rise to the level of a motion for leave to amend" that a district court is required to address. *Calderon*, 181 F.3d at 1187.

Plaintiffs' reliance on *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1131 (10th Cir. 1994), is misplaced. *See* Br. 41. There, "the record showed that the plaintiff had

repeatedly expressed a willingness to amend and had demonstrated particular grounds but had been misled by the district court to believe she should wait to amend until after the court disposed of motions to dismiss." *Calderon*, 181 F.3d at 1186. None of those facts applies here. Rather, "[b]ecause a motion for leave to amend was never properly before it, the district court did not abuse its discretion in failing to address [Plaintiffs'] request for leave to cure deficiencies in [their] pleadings." *Id.* at 1187.

B. The district court properly denied Plaintiffs' post-judgment motion.

The district court also properly denied Plaintiffs' post-judgment application for leave to amend for three independent reasons. First, "[o]nce judgment is entered, the filing of an amended complaint is not permissible until judgment is set aside or vacated pursuant to Fed. R. Civ. P. 59(e) or 60(b)." *The Tool Box*, 419 F.3d at 1087. "To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation." *Id.* (citations omitted).

Here, the district court denied Plaintiffs' motion under Rules 59(e) and 60(b) to set aside or vacate the judgment. Aplt. App. 233, 354. Because Plaintiffs did not challenge the district court's order in their opening brief, any challenge is waived. *See Hanh Ho Tran v. Trustees of State Colls. in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004).

Having denied Plaintiffs' motion to vacate the judgment, the district court lacked authority to consider Plaintiffs' request for leave to amend. *See The Tool Box*,

419 F.3d at 1088 (district court "could not consider Tool Box's Rule 15(a) motion to amend the complaint unless the judgment was first vacated"); *Cooper v. Shumway*, 780 F.2d 27, 29 (10th Cir. 1985) (per curiam) (same). For this reason alone, the district court properly denied Plaintiffs' motion for leave to amend.

Second, Plaintiffs misstate the applicable standard. *See* Br. 41-42. Although Rule 15(a) states that "[t]he court should freely give leave when justice so requires," Fed. R. Civ. P. 15(a)(2), "this presumption is reversed in cases, such as here, where a plaintiff seeks to amend a complaint after judgment has been entered and a case has been dismissed." *The Tool Box, Inc.*, 419 F.3d at 1087 (quoting *Bressner v. Ambroziak*, 379 F.3d 478, 484 (7th Cir. 2004)). Plaintiffs have not overcome the presumption against granting post-judgment leave to amend because they have not shown that anything prevented them from seeking leave earlier in the case. *See id.*

The second amended complaint is not based on any new facts or legal developments that post-date the entry of judgment, or even the filing of the first amended complaint. *See* Br. 41-44. Plaintiffs thus had ample time to seek leave to amend prior to judgment; briefing on the motions to dismiss concluded in November 2014, and final judgment was not entered until March 31, 2016. Aplt. App. 31-32, 35. Indeed, Plaintiffs' could have amended as of right within 21 days of the filing of the motions to dismiss. *See* Fed. R. Civ. P. 15(a)(1)(B). Courts properly "refuse[] to allow a postjudgment amendment when, as here, the moving party had an opportunity to

seek the amendment before entry of judgment but waited until after judgment before requesting leave." *The Tool Box*, 419 F.3d at 1088.

Finally, the district court correctly found that Plaintiffs' proposed amendment was futile because it does not cure the jurisdictional defects in the first amended complaint. Aplt. App. 357; *see Gohier v. Enright*, 186 F.3d 1216, 1218 (10th Cir. 1999) ("A proposed amendment is futile if the complaint, as amended, would be subject to dismissal."). Plaintiffs assert that the second amended complaint now identifies the particular approvals affecting the two named Plaintiffs. Br. 42; Aplt. Appl. 337-40. However, as discussed, that does not allow the named Plaintiffs to bring a putative class action challenging every BIA-approved lease, concession agreement, assignment, and drilling permit dating back to 1970, the vast majority of which do not affect them. *See supra* §§ I-III; *see also Nat'l Wildlife Fed'n*, 497 U.S. at 892-93 (flaws in entire program cannot "be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects [the plaintiff]"); *Sierra Club v. Peterson*, 228 F.3d 559, 567 (5th Cir. 2000) (plaintiffs cannot "challenge an entire program by simply identifying specific allegedly-improper final agency actions within that program"). The district court properly denied Plaintiffs' post-judgment motion for leave to amend.

V. The magistrate judge properly denied Plaintiffs' request for discovery on class certification.

Well after opposing the motion to dismiss – but before the district court had ruled on the motions – Plaintiffs moved for leave to take discovery from the BIA on class certification. Aplt. App. 190-200. The magistrate judge denied the motion, without prejudice to renewal after the district court ruled on the motions to dismiss. *Id.* at 214-215. The magistrate judge acted well within his discretion.

The BIA's motion to dismiss brought a facial challenge to jurisdiction that was limited to the allegations in the amended complaint and did not raise any factual issues requiring discovery. Aplt. App. 221; *see Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) ("Discovery is only appropriate where there are factual issues raised by a Rule 12(b) motion."). Plaintiffs also did not assert a need for jurisdictional discovery to respond to the BIA's motion. Instead, Plaintiffs sought leave to conduct discovery on the secondary issue of class certification well after responding to the motions to dismiss. The magistrate judge appropriately determined that any such discovery should, at a minimum, be deferred pending resolution of the threshold jurisdictional issues. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (jurisdiction must be resolved before a court proceeds at all in any cause). The magistrate judge did not abuse his discretion, and his decision should be affirmed.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

CHARLES R. BABST, JR.
Office of the Solicitor
Department of the Interior
Tulsa, Oklahoma

STEPHEN L. SIMPSON
KRISTEN D. KOKINOS
Office of the Solicitor
Department of the Interior
Washington, D.C.

LORETTA F. RADFORD
Acting U.S. Attorney,
Northern District of Oklahoma

CATHRYN D. McCLANAHAN
Assistant United States Attorney

JEFFREY H. WOOD
Acting Assistant Attorney General

s/ Kevin W. McArdle
MICHAEL T. GRAY
JODY H. SCHWARZ
KEVIN W. MCARDLE
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 305-0219
kevin.mcardle@usdoj.gov

April 7, 2017
90-1-4-14525

STATEMENT RESPECTING ORAL ARGUMENT

The federal appellees concur in the Plaintiffs' request for oral argument. Oral argument may aid the Court's understanding of the statutory and legal framework.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. Aplt. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. Aplt. App. P. 32(a)(7)(B) because it contains **10,000 words**, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

s/ Kevin W. McArdle
KEVIN W. MCARDLE

CERTIFICATIONS FOR PRIVACY REDACTIONS, EXACT COPY, AND SCAN FOR VIRUSES

I certify that all required privacy redactions have been made.

I certify that, within two business days, I will cause to be delivered to the Clerk of the Court seven copies in paper form of this Response Brief of Federal Appellees, which will be exact replicas of the electronically filed version.

I certify that, prior to filing, I have scanned this file using System Center Endpoint Protection, which is updated daily, and which indicates that it is free of viruses.

s/ Kevin W. McArdle
KEVIN W. MCARDLE

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Kevin W. McArdle
KEVIN W. MCARDLE