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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ANNE CRAWFORD-HALL et al., Plaintiffs, v. UNITED STATES OF AMERICA et al., Defendants.	CASE NO. 2:17-cv-1616-SVW **UNITED STATES' REPLY IN SUPPORT OF MOTION FOR PARTIAL DISMISSAL** Honorable Stephen V. Wilson United States District Judge

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INTRODUCTION

The Second and Fifth Claims for Relief filed by Plaintiffs Crawford-Hall and the business interests she represents[1] ("Plaintiffs") must be dismissed.

Plaintiffs' Second Claim seeks a declaration that the Secretary lacks authority, under the Indian Reorganization Act, 25 U.S.C. § 5101 *et seq.* ("IRA"), to acquire land in trust for the Santa Ynez Band of Chumash Mission Indians ("Tribe"). Plaintiffs knew, at the time, that the United States Department of the Interior ("Interior"), through its Bureau of Indian Affairs ("BIA"), issued a June 13, 2012 decision ("2012 Decision") on that *exact* issue, concluding that Interior possessed the requisite IRA authority to acquire land in trust for the Tribe. Plaintiffs had notice, opportunity, and a vested interest in challenging the 2012 Decision and were obligated to administratively appeal it before pursuing judicial review.[2] In response, Plaintiffs contend that it is "unwarranted" to expect publishers such as Ms. Crawford-Hall, who wrote and published numerous articles on the decision and vigorously encouraged the filing of administrative appeals of it, "to take action whenever they hear of any potential issue that could affect them." Pls. Opp. at 13 (Dkt. No. 31, p. ID #: 540). But that is *precisely* what Interior regulations and the Administrative Procedure Act, 5 U.S.C. §§ 701-06 ("APA") require. Plaintiffs were obligated to timely appeal the 2012 Decision when it was issued and they failed to do so. Plaintiffs' Second Claim for Relief must therefore be dismissed.

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[1] Plaintiffs admit that Ms. Crawford-Hall is the sole manager and authorized representative of San Lucas Ranch, LLC and Holy Cow Performance Horses, LLC, and that both businesses existed at the time of the 2012 Decision. *See* Crawford-Hall Decl. ¶ 2 (Dkt. No. 34, p. ID#: 585).

[2] Any interested party "who could be adversely affected" by a decision issued by the BIA is obligated to timely file an administrative appeal. 25 C.F.R. § 2.2; *id.* § 2.3(a); *id.* § 2.4; 43 C.F.R. § 4.331 ("[a]ny interested party affected by a final administrative action or decision" of a BIA official may appeal); *id.* § 4.332(a) (no jurisdiction to consider untimely appeals).

Plaintiffs fail to defend their Fifth Claim for Relief, which seeks mandamus to remove the property at issue in this suit (commonly referred to as "Camp 4") from trust. Instead, Plaintiffs attempt to revamp that claim into something else. Plaintiffs acknowledge that Camp 4 was held in trust by the United States at the time they filed their suit. Compl. ¶ 129 (Dkt. No. 1, p. ID#: 33); Pls. Opp. at 6 (Dkt. No. 31, p. ID#: 533). Despite the plain language of their Complaint which specifically requests mandamus relief, Compl. (Dkt. No. 1, p. ID#: 33), they now assert that their Fifth Claim instead requests a "stay." Pls. Opp. at 18 (Dkt. No. 31, p. ID#: 545). Rather than amending their Complaint to drop the mandamus claim, Plaintiffs now attempt to demonstrate, unsuccessfully, how the mandamus they requested meets the requirements for a preliminary injunction. Plaintiffs cannot recast their mandamus claim in a brief. Moreover, their arguments only confirm that Interior's ministerial act of accepting title to Camp 4 is not the source of any present or future alleged injury. Because Plaintiffs cannot articulate a viable claim for mandamus relief, nor demonstrate its appropriateness in this suit, their Fifth Claim for Relief must also be dismissed.

BACKGROUND

I. Interior Regulations

As previously discussed, U.S. Mem. at 2 (Dkt. No. 28-1, p. ID#: 368), the IRA authorizes the Secretary to acquire land in trust for "Indians." 25 U.S.C. § 5108. Interior's exercise of this authority is governed by regulations codified at 25 C.F.R. Part 151. Interior considers several factors when considering applications to acquire land in trust, including "the existence of statutory authority for the acquisition and any limitations on that authority." 25 C.F.R. § 151.10(a).

II. 6.9-Acre Litigation

In 2005, the BIA issued a decision to acquire 6.9 acres in trust for the Tribe ("2005 BIA Decision"). U.S. RJN, Ex. C (Dkt. No. 29-3, p. ID#: 446). An administrative appeal of the 2005 BIA Decision was timely filed by two citizens

groups, Preservation of Los Olivos ("POLO") and Preservation of Santa Ynez ("POSY") ("6.9-Acre Litigation"). *Id.* (p. ID#: 445). In 2009, while the 6.9-Acre Litigation was pending before the Interior Board of Indian Appeals ("IBIA"),[3] the Supreme Court decided *Carcieri v. Salazar*, 555 U.S. 379 (2009) ("*Carcieri*").

III. *Carcieri* Remand to the BIA and the 2012 Decision

The IRA defines "Indian" in three distinct ways. 25 U.S.C. § 5129. In *Carcieri*, the Supreme Court held that the word "now" in the phrase "now under Federal jurisdiction" in the IRA's first definition of "Indian," meant 1934, such that the phrase "unambiguously refers to those tribes that were under federal jurisdiction when the IRA was enacted in 1934." *Carcieri*, 555 U.S. at 395. *See also* U.S. Mem. at 3 (Dkt. No. 28-1, p. ID#: 369).

In 2010, following the *Carcieri* decision and while the 6.9-Acre Litigation was pending before the IBIA, the BIA requested that IBIA remand the 2005 BIA Decision to allow BIA to determine whether the Tribe, consistent with *Carcieri*, was "under Federal jurisdiction" in 1934. U.S. Second RJN, Ex. A at 4 (providing contents of BIA's motion for remand).[4] The IBIA granted BIA's request for a remand, and in doing so, vacated the portion of the 2005 BIA Decision (specifically, 25 C.F.R. § 151.10(a)) pertaining to statutory authority. U.S. RJN, Ex. C (Dkt. No. 29-3, p. ID#s: 446-47). The IBIA directed the BIA to issue a new decision for the 25 C.F.R. § 151.10(a) factor that specifically addressed whether *Carcieri* or *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009) ("*Hawaii*"), limited Interior's IRA authority to acquire land in trust for the Tribe. *Id.*

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[3] Appeals of BIA decisions are heard by the IBIA unless the Office of the Assistant Secretary assumes jurisdiction over the appeal pursuant to authority provided by 25 C.F.R. § 2.20. *See* 43 C.F.R. § 4.332(b).

[4] The United States' Second Request for Judicial Notice ("U.S. Second RJN") is being filed concurrently herewith.

BIA's 2012 Decision ended the *Carcieri* remand, as it concluded that neither *Carcieri* nor *Hawaii* limited Interior's authority to acquire land in trust for the Tribe. *Id.* (p. ID#: 445). BIA provided notice of the 2012 Decision and specific and accurate instructions for filing an administrative appeal of that decision, including the thirty-day deadline for doing so. *Id.* (p. ID#s: 450-51). No party timely appealed the 2012 Decision. *Id.* (p. ID#s: 454-55).

IV. Camp 4 Administrative Appeal

On December 24, 2014, the BIA issued its decision to acquire Camp 4 in trust for the Tribe. (Dkt. No. 1-2, p. ID#: 58). Thereafter, several parties, including Plaintiffs, filed timely administrative appeals of the decision to the IBIA. (Dkt. No. 1-3, p. ID#: 94). Shortly thereafter, acting pursuant to 25 C.F.R. § 2.20, the Office of the Assistant Secretary-Indian Affairs ("Assistant Secretary") assumed jurisdiction over the appeals and, on January 19, 2017, the Assistant Secretary issued a final order affirming BIA's decision ("2017 Camp 4 Decision"). *Id.* (p. ID#: 135).

In this suit, Plaintiffs seek APA review of the BIA's December 24, 2014 decision to acquire Camp 4 in trust, as well as the 2017 Camp 4 Decision that affirmed the BIA's decision in the context of an administrative appeal. Compl. ¶¶ 5-6 (Dkt. No. 1, p. ID#: 3).

ARGUMENT

I. Plaintiffs Were Required to Timely Appeal the 2012 Decision in order to Obtain Judicial Review

Plaintiffs admit they had notice of the 2012 Decision soon after it was issued and do not dispute that the 2012 Decision provided correct appeal instructions. *See* Crawford-Hall Decl. ¶ 6 (Dkt. No. 34, p. ID#: 585) (confirming notice of the 2012 Decision); *see also* U.S. RJN, Ex. C (Dkt. No. 29-3, p. ID#: 451) (concluding that the 2012 Decision contained accurate appeal instructions that potential appellants were obligated to follow). These facts alone confirm Plaintiffs' obligation, under

Interior regulations, to have timely filed an administrative appeal of the 2012 Decision. *See* 43 C.F.R. § 4.332(a) (interested parties have 30 days to appeal, and the IBIA has no jurisdiction over untimely appeals); U.S. RJN, Ex. C (Dkt. No. 29-3 (p. ID#: 451 n.7) ("When Appellant received a copy of the Decision, the appeal period began to run and Appellant had 30 days—just like any other potentially interested party—to file an appeal with the [IBIA].").

A. Plaintiffs Admit They Must Administratively Exhaust in order to Obtain Judicial Review

Plaintiffs admit that the 2012 Decision, which concluded that Interior possessed the requisite IRA authority to acquire land in trust for the Tribe, was a decision that, at the time it was issued, "could affect them." Pls. Opp. at 13 (Dkt. No. 31, p. ID#: 540). Parties who are, or could be affected by a BIA decision, are obligated to administratively appeal that decision in a timely manner before pursuing federal court review of it. 25 C.F.R. § 2.2 (defining "interested party"); *id.* § 2.6 (when BIA decisions are final); *id.* § 2.9(a) (appeals must be filed within 30 days of receipt); 43 C.F.R. § 4.331 (defining "interested party"); *id.* § 4.332(a) (appeals must be filed within 30 days of receipt).

Plaintiffs try to deny the relevance of binding precedents confirming that Interior regulations require Plaintiffs to have exhausted remedies pertaining to the 2012 Decision. Pls. Opp. at 11 (Dkt. No. 31, p. ID#: 538). These cases confirm, however, that Interior regulations require "any interested party" who "could be affected" by a BIA decision, such as the 2012 Decision, to timely appeal it. The cases do not rewrite agency regulations to narrow their scope as Plaintiffs suggest. Interior regulations required Plaintiffs, once they received notice of the 2012 Decision, to have timely appealed it before seeking judicial review.

B. Plaintiffs Had a Vested Interest in the 2012 Decision and Understood Its Implications for Camp 4

Plaintiffs contend that the numerous articles and personal statements published in the *Santa Ynez Valley Journal* only reflect a "journalistic" interest in the 2012 Decision, and do not show that Plaintiffs understood that they were obligated to appeal it. Crawford-Hall Decl. ¶¶ 3, 6-8 (Dkt. No. 34, p. ID#s: 585-86). There is no obligation to show that Plaintiffs subjectively understood that they were required, under Interior regulations, to pursue an administrative appeal. Indeed, Plaintiffs are presumed to know the law and its requirements. *Atkins v. Parker*, 472 U.S. 115, 130 (1985) ("All citizens are presumptively charged with knowledge of the law."); *see also Gilmore v. Taylor*, 508 U.S. 333, 359 (1993) ("[A] citizen . . . is presumed to know the law"); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947) (persons presumed to know applicable regulations); *Heckler v. Comty. Health Servs, of Crawford Cty., Inc.*, 467 U.S. 51, 63 (1984) ("those who deal with the Government are expected to know the law").

Even if it were a defense to their failure to exhaust, Plaintiffs' own statements and articles belie their claims that their interest in the 2012 Decision was merely "journalistic" in nature. As the United States previously detailed, Plaintiffs used the *Santa Ynez Valley Journal* as a platform to discuss the issuance of the 2012 Decision; how to obtain a copy of it; how to appeal it; and the deadline for doing so. U.S. Mem. at 8-10 (Dkt. No. 28-1, p. ID#s: 374-76). Under the byline of "Nancy Crawford-Hall," Plaintiffs editorialized at length about the 2012 Decision and the County of Santa Barbara's decision not to appeal it. *Id.* Plaintiffs' publications demonstrate more than a mere "journalistic" interest in the 2012 Decision.

Plaintiffs' claim that they are only interested in Camp 4 and had no interest in the outcome of the 6.9-Acre Litigation pending at the time the 2012 Decision was issued, Pls. Opp. at 5-6 (Dkt. No. 31, p. ID#s: 532-33), is similarly

questionable. Plaintiffs' articles demonstrate that they understood, as early as 2010, that a forthcoming decision from BIA evaluating whether the Tribe was "under Federal jurisdiction" in 1934 pursuant to *Carcieri* would have a *direct* impact on whether *Camp 4* could be acquired in trust. On March 25, 2010, Plaintiffs' *Santa Ynez Valley Journal* published a letter from POLO discussing "recent news of the potential sale of 1,400 acres to the [Tribe], and ***whether it could be taken into trust.***" U.S. Second RJN, Ex. A at 2 (emphasis added). POLO's letter discussed the remand then pending before BIA, in which BIA was tasked with evaluating whether the Secretary possessed the requisite IRA authority, consistent with *Carcieri*, to acquire land in trust for the Tribe. POLO's letter then detailed its own submission to the BIA on that issue before concluding that:

> If the [Tribe] cannot get 6.9 acres taken [in trust] that is contiguous to the land they already have [due to an unfavorable determination by the BIA on the *Carcieri* issue], ***they have no chance of getting 1,400 acres of land that is completely off their reservation into trust***.

Id. at 2-3 (brackets and emphasis added).

On April 22, 2010, Plaintiffs published an article that referenced Camp 4 in the title and discussed POLO's involvement in the 6.9-Acre Litigation. U.S. Second RJN, Ex. B at 1-2. Plaintiffs' article explained that POLO pursued the 6.9-Acre Litigation because the citizens group "knew [it] was ***just the beginning*** of [the Tribal Chairman's] plan to use their gambling windfall and buy thousands of acres of farm land to place into trust," including "***1,400 acres*** in the heart of Santa Ynez Valley." *Id.* at 1 (brackets and emphasis added).

Even if Plaintiffs had no direct interest in the outcome of the 6.9-Acre Litigation, their articles demonstrate that they understood by 2010 that BIA was, at that time, evaluating whether *Carcieri* limited Interior's IRA authority to acquire any land in trust for the Tribe, including Camp 4. Plaintiffs used their publication to make that clear to readers: if the BIA determined it lacked IRA authority to acquire land in trust for the Tribe in light of *Carcieri*, the Tribe would "have no

chance" of getting Camp 4 in trust. RJN at Ex. A at 3. Any purported interest Plaintiffs have in litigating the question of the Secretary's IRA authority to acquire Camp 4 in trust for the Tribe plainly arose no later than 2010.

C. Plaintiffs Had the Opportunity to Appeal the 2012 Decision

Plaintiffs argue, without support, that because they were not parties to the 6.9-Acre Litigation, and because they were not personally invited to participate in the remand to BIA during the course of that litigation, they either were not obligated to appeal the 2012 Decision, or were "excluded" from doing so. Pls. Opp. at 7-8, 12 (Dkt. No. 31, p. ID#s: 534-35, 539). They are mistaken.

As set forth above, "any party" who could be adversely affected by the 2012 Decision was obligated to timely appeal that decision under Interior regulations. 25 C.F.R. § 2.2; *id.* § 2.9; 43 C.F.R. § 4.331; *id.* § 4.332(a). Plaintiffs admit that the 2012 Decision "could affect them," Pls. Opp. at 13 (Dkt. No. 31, p. ID #: 540), and thus they fell within the category of parties obligated to appeal the 2012 Decision before seeking judicial review of it.

Whether Plaintiffs were also parties to the 6.9-Acre Litigation is not legally relevant to their obligation to have timely appealed the 2012 Decision. As discussed in the pages of the *Santa Ynez Valley Journal*, in 2010 the BIA requested a remand from the IBIA to allow it to evaluate, in the first instance, whether *Carcieri* limited its authority to acquire land in trust for the Tribe. U.S. Second RJN, Ex A at 4. The IBIA thereafter *vacated and remanded* that portion of the 2005 BIA Decision concerning BIA's authority to acquire land in trust for the Tribe (i.e., the 25 C.F.R. § 151.10(a) portion of the 2005 BIA Decision). U.S. RJN, Ex. C (Dkt. No. 29-3, p. ID#s: 446-47). Such vacatur and remand required BIA to issue a new decision on the question of statutory authority for the acquisition, taking into account the intervening *Carcieri* and *Hawaii* Supreme Court decisions. *Id.* The IBIA further directed BIA to provide notice and the opportunity to appeal that new decision, explaining that:

> Because the [decision] on remand will be addressing issues that were not previously considered or decided by BIA [in the 2005 BIA Decision], and must take into account intervening Supreme Court decisions, interested parties are entitled to a right of appeal from that decision, ***without regard to whether they are parties to*** [the 6.9-Acre Litigation]. In issuing the decision, the Regional Director shall comply with the requirements of 25 C.F.R. § 2.7.

Id. (brackets and emphasis added).[5] Thus, by the time Plaintiffs reviewed the 2012 Decision, if not before, they were on notice that the 2012 Decision could be administratively appealed by "non-parties" to the 6.9-Acre Litigation.

Plaintiffs also argue, without support, that absent a personal invitation from BIA to participate in the remand, Plaintiffs were "excluded" from participating and thus under no obligation to administratively appeal the 2012 Decision. Pls. Opp. at 7-8 (Dkt. No. 31, p. ID#s: 534-35). BIA need not personally invite parties to engage with the agency in order to expect them to comply with Interior regulations concerning exhaustion. To the contrary, any interested party is required to file timely appeals, regardless of whether they received notice directly from the agency. *Valley Center-Pauma Unified School Dist. v. Pacific Reg'l Dir.*, 53 IBIA 155, 159 (Apr. 29, 2011)).[6] Once Plaintiffs were on notice that Interior could take an action that could affect them, their duty to engage with the agency arose. As evidenced by their engagement with BIA on Camp 4, Plaintiffs know how to engage with the agency when it suits them, including when they were not personally invited to do so.

At the time of the 2012 Decision, Plaintiffs had the same status as the County of Santa Barbara, as well as the citizens groups No More Slots and Santa Ynez Valley Concerned Citizens, all "non-parties" to the 6.9-Acre Litigation that likewise did not receive personal invitations to participate in the remand. Despite

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[5] BIA complied with IBIA's directives when it issued the 2012 Decision. U.S. RJN, Ex. C (Dkt. No. 29-3, p. ID#s: 447).

[6] *Available at* https://www.oha.doi.gov/ibia/Ibiadecisions/53ibia/53ibia155.pdf.

this, Plaintiffs understood the County could pursue an appeal, explaining to readers that "[t]he BIA used the [*Carcieri*] ruling to make a decision to remand the 2005 case to the regional director, Amy Dutschke, ***thus opening the door for the county to appeal***." U.S. RJN at Ex. F (Dkt. No. 29-6, p. ID# 464) (brackets and emphasis added). Moreover, their "non-party" status and lack of a personal invitation did not stop No More Slots and Santa Ynez Valley Concerned Citizens from trying to appeal the 2012 Decision, albeit unsuccessfully due to untimeliness. U.S. RJN, Ex. C (Dkt. No. 29-3, p. ID#s: 448-49, 451 n.7, 454-55).

Nothing precluded Plaintiffs' participation in the remand or any timely appeal of the 2012 Decision. When BIA issued the 2012 Decision, Plaintiffs were on notice that it directly impacted whether Camp 4 could be acquired in trust. Plaintiffs had the opportunity to appeal, but they instead chose to leave that task to others. That decision, made by them alone, is now fatal to their Second Claim.

II. Plaintiffs Cannot Collaterally Attack the 2012 Decision in This Suit

As discussed above and in prior briefing, U.S. Mem. at 6-7 (Dkt. No. 28-1, p. ID#s: 372-73), Plaintiffs were required by the APA and Interior regulations to exhaust administrative remedies pertaining to the 2012 Decision before pursuing judicial review of the matter. Their failure to have done so poses a jurisdictional bar to their Second Claim for Relief. *Id.*[7] Plaintiffs seek to avoid this by arguing that (1) the United States waived its subject matter jurisdiction defense; (2) the 2012 Decision is not a decision, but rather a "non-binding legal memorandum" or a "policy statement" subject to indefinite reconsideration by the agency; and (3) the 2017 Camp 4 Decision offers "new analysis" such that Plaintiffs can bootstrap a challenge to the 2012 Decision into this suit. These arguments must be rejected.

[7] For this reason, Plaintiffs' contention that the agency cannot "withdraw a key issue from scrutiny" rings hollow. Pls. Opp. at 9 (Dkt. No. 31, p. ID#: 536). It is Plaintiffs' failure to have timely exhausted administrative remedies pertaining to the 2012 Decision, and not any action by the United States, that precludes judicial review of such decision now.

A. Subject Matter Jurisdiction Defenses Cannot be Waived

Plaintiffs contend that Interior had to specifically "preserve" an exhaustion argument in the 2017 Camp 4 Decision in order for the United States to raise its subject matter jurisdiction defense in this suit. Plaintiffs are mistaken, as subject matter jurisdiction defenses cannot be waived. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("'subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.'") (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). None of the cases Plaintiffs' cite stand for the proposition that the agency must preserve subject matter jurisdiction during the course of an administrative appeal in order for the United States to raise the defense in federal court. Instead, the cases confirm that arguments not raised by *appellants* during an administrative appeal can be waived by those same appellants in subsequent federal court litigation.[8] And in any event, there was no simply legal or practical reason for the Assistant Secretary to go further and determine whether any of the appellants challenging the Camp 4 decision had exhausted remedies for the 2012 Decision, as the point was that none did. As a result, the 2012 Decision was outside the scope of the appeal. (Dkt. No. 1-3, p. ID#: 107). *See also* 43 C.F.R. § 4.332(a) (no jurisdiction over untimely appeals).

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[8] *See Sims v. Apfel*, 530 U.S. 103, 108 (2000) (discussing *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 665 (1982) ("[no] objection that has not been urged before the Board . . . shall be considered by the court); *Fed. Power Comm'n v. Colo. Interstate Gas Co.*, 348 U.S. 492, 497 (1955) (same); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952) (*appellee*'s claims must be first raised with the agency); *Wash. Ass'n for Television & Children v. FCC*, 712 F.2d 677, 680-81 (D.C. Cir. 1983) (*plaintiff*'s claims could not be advanced in federal court if they had not first been presented to the agency)). Interior's administrative case law is entirely consistent with these precedents. *See, e.g.*, *Jackson Cty. et al. v. S. Plains Reg'l Dir.*, 47 IBIA 222, 228, 230 (Sept. 10, 2008), *available at* https://www.oha.doi.gov/IBIA/Ibiadecisions/47ibia/47ibia222.pdf (stating that the IBIA reviews only those issues an *appellant* raised to the Regional Director, and not issues an appellant raises for the first time on appeal).

Plaintiffs do not dispute that the APA requires administrative exhaustion when proscribed by agency rule, *Darby v. Cisneros*, 509 U.S. 137, 146 (1993), or that Interior regulations require administrative exhaustion, *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1393 (9th Cir. 1993). They also do not dispute that such exhaustion requirement is required to invoke this Court's subject matter jurisdiction. *Darby*, 509 U.S. at 146; *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006). No party, including the United States, can waive subject matter jurisdiction defenses.

B. The 2012 Decision is Agency Action, Not a "Non-Binding Legal Memorandum" or "Policy Statement"

Plaintiffs next try to salvage their Second Claim for Relief by constructing a strawman. They assert that the United States argued that the May 23, 2012 memorandum, prepared by former Associate Solicitor Michael Berrigan ("Berrigan Memorandum")[9] constituted an agency decision that Plaintiffs were required to appeal. Pls. Opp. at 8-9, 13 (Dkt. No. 31, p. ID#s: 535-36, 540). Plaintiffs then claim that agency legal opinions are not agency actions subject to judicial review. *Id.* at 8-9 (p. ID#s: 535-36). Plaintiffs' arguments miss the mark.

First, the United States never stated that the Berrigan Memorandum was the operative agency decision Plaintiffs were required to administratively appeal. The United States consistently said that BIA's 2012 Decision, which determined that Interior had the requisite IRA authority to acquire land in trust for the Tribe,[10] was the agency decision Plaintiffs were required to appeal. U.S. Mem. at 1, 8-10 (Dkt. No. 28-1, p. ID#s: 367, 374-76). To be sure, the BIA relied upon and made the Berrigan Memorandum part of the 2012 Decision it issued on behalf of the agency. U.S. RJN, Ex. B (Dkt. No. 29-2, p. ID#s: 401-02). Had Plaintiffs timely appealed the 2012 Decision, they certainly could have challenged the 2012 Decision by

[9] *See* U.S. RJN, Ex. B (Dkt. No. 29-2, p. ID#s: 427-42).
[10] *See id.* (p. ID#s: 401-02).

attacking its rationale. But because they failed to timely appeal the 2012 Decision, they cannot challenge it in this suit.

Second, Plaintiffs' reliance on cases such as *Bechtel v. F.C.C.*, 10 F.3d 875, 878 (D.C. Cir. 1993) is misplaced. Pls. Opp. at 9 (Dkt. No. 31, p. ID#: 536). The 2012 Decision is a *decision*, reflecting the culmination of agency decision making, not a "policy statement" that *guides* decision making. After no party timely appealed the 2012 Decision, it went into effect and was not subject to further administrative review by the IBIA or the Assistant Secretary under Interior regulations. *See* 25 C.F.R. § 2.6(b); 43 § C.F.R. 4.332(a). Plaintiffs cite to no authority or Interior regulation that would allow the IBIA or the Assistant Secretary to subject the 2012 Decision to further administrative review.

C. The 2017 Camp 4 Decision Does Not Afford Plaintiffs the Opportunity to Attack the 2012 Decision

Plaintiffs characterize the 2017 Camp 4 Decision as offering "new legal analysis" to reach its conclusions, such that Plaintiffs can now bootstrap a challenge to the 2012 Decision into this suit. Pls. Opp. at 9-10 (Dkt. No. 31, (p. ID#s: 536-37). The 2017 Camp 4 Decision does not support such a reading, and Plaintiffs' characterizations should be rejected. The 2017 Camp 4 Decision simply discussed the issuance of the 2012 Decision, and the fact that no party timely appealed it. (Dkt. No. 1-3, p. ID#: 107). Consistent with Interior regulations, the 2017 Camp 4 Decision explains that the 2012 Decision was "final for the Department and not subject to additional administrative review." *Id.* This is not new legal analysis, but a factual statement concerning the status of the 2012 Decision under Interior regulations—a status obtained as early as July 2012 after no party timely appealed the decision. 25 C.F.R. § 2.6(b); 43 C.F.R. § 4.332(a).

Plaintiffs expect the Court to believe that, after the Assistant Secretary explained why the 2012 Decision "was not subject to additional administrative review," (Dkt. No. 1-3, p. ID#: 107), he nevertheless went ahead and subjected the

2012 Decision to such "additional administrative review" by "relying" on an M-Opinion[11] issued in 2014 ("2014 M-Opinion"). Pls. Mem. at 9-10 (Dkt. No. 31, p. ID#s: 536-37). The 2014 M-Opinion,[12] however, simply formalized the same two-part test Interior was already using on a case-by-case basis, including in the 2012 Decision, to determine whether an Indian tribe was "under Federal jurisdiction" in 1934. *See County of Amador v. U.S. Dep't of Interior*, 872 F.3d 1012; 1025 n.15 (9th Cir. 2017). It did not, as Plaintiffs suggest, make any findings regarding the Tribe, or any other Indian tribe. Thus, there was nothing in the 2014 M-Opinion that alters the fact that the 2012 Decision was final and not subject to further administrative review.

Plaintiffs had notice, opportunity, and an unmistakable interest in challenging the 2012 Decision at the time it was issued. Plaintiffs failed to exhaust the administrative remedies known and available to them concerning the 2012 Decision and are now barred from challenging, directly or indirectly, such decision in this suit. Plaintiffs' Second Claim for Relief must be dismissed.

III. Plaintiffs Fail to Plead a Viable Claim for Mandamus Relief

A. Plaintiffs Fail to Establish Standing

At an irreducible minimum, Plaintiffs have to demonstrate they have constitutional standing to pursue their claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs' mandamus arguments confirm that Interior's ministerial act of accepting title to Camp 4 is not the cause of their alleged

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[11] M-Opinions are legal opinions issued by Interior's Solicitor (i.e., the agency's chief legal officer) that formally institutionalize Interior's position on a particular legal issue, binding the agency to that position. *See Citizens for a Better Way et al. v. U.S. Dep't of Interior*, No. 2:12-cv-3021, 2015 U.S. Dist. LEXIS 128745, *54 n. 8 (E.D. Cal. Sept. 24, 2015).

[12] *See* U.S. Second RJN, Ex. C (setting forth the two-part interpretive test the agency uses to determine whether an Indian tribe is "under Federal jurisdiction" in 1934, but not making any findings about any particular Indian tribe).

potential future injury. Plaintiffs' allegations of harm instead turn on future actions by the Tribe—a non-party to this suit.

Plaintiffs contend that Camp 4 needs to be conveyed out of trust because "if Camp 4 remained in fee, it would be subject to County regulations and left as undeveloped agricultural land." Pls. Opp. at 14 (Dkt. No. 31, p. ID#: 541). But as Plaintiffs know, *see* AR0114, the Williamson Act restriction on Camp 4, which reduces the amount of property taxes owed in exchange for the owner's agreement not to develop agricultural land,[13] is set to expire by 2023. Pls. RJN, Ex. B (Dkt. No. 33-2, p. ID# 571). As a result, even if Camp 4 was never acquired in trust by the United States, the Tribe could, at any point after 2023, develop Camp 4 under state and local zoning regulations. Thus, whether Camp 4 will forever remain as "undeveloped agricultural land" cannot, in fact, depend on whether the United States holds Camp 4 in trust for the Tribe. Plaintiffs have therefore failed to establish that Interior's ministerial act of accepting title to Camp 4 is the cause of their alleged harm and their Fifth Claim for Relief must be dismissed as a result.

B. Plaintiffs Either Abandon Their Mandamus Claim, or Improperly Seek to Transform It to Avoid Dismissal

Plaintiffs acknowledge that Camp 4 was held in trust by the United States for the Tribe at the time they filed suit. Compl. ¶ 19 (Dkt. No. 1, p. ID#: 8). They also describe their Fifth Claim for Relief as requesting "mandamus," *Id.* p. 33 (p. ID#: 33); and they ask the Court to "compel Defendants to immediately remove Camp 4 from trust," *Id.* ¶ 137 (p. ID#: 34). When responding to the United States' arguments that Plaintiffs failed to either articulate the standards for obtaining mandamus or demonstrate how they meet them,[14] however, Plaintiffs abandon any attempt to articulate that they are entitled to mandamus. Instead, they now claim their Fifth Claim for Relief is actually a request for *injunctive* relief, rather than

[13] *See* Compl. ¶ 28 (Dkt. No. 1, p. ID#: 10).
[14] *See* U.S. Mem. at 13-16 (Dkt. No. 28-1, p. ID#s: 379-82).

mandatory relief. Pls. Opp. at 18 (Dkt. No. 31, p. ID#: 545). Plaintiffs then attempt, unsuccessfully, to demonstrate they meet the standards for a preliminary injunction. *Id.* at 19 (p. ID# 546). Plaintiffs effectively admit that mandamus relief cannot be granted in this case.

Plaintiffs cannot avoid the dismissal of a claim by arguing for the availability of another form of relief that they failed to plead. "It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984), (citing *Jacobson v. Peat, Marwick, Mitchell & Co.*, 445 F. Supp. 518, 526 (S.D.N.Y. 1977)); *Chambliss v. Coca-Cola Bottling Corp.*, 274 F. Supp. 401, 409 (E.D. Tenn. 1967. Plaintiffs could amend their Complaint to drop their mandamus claim, but short of that, the claim is subject to dismissal.[15]

Plaintiffs' improvised attempt to meet the pleading standards for a preliminary injunction are unavailing and do nothing to salvage their Fifth Claim for Relief. Nor does the attempt satisfy the applicable requirements for a claim for injunctive relief in any event. As set forth above, Plaintiffs fail to establish that trust status of Camp 4 is the cause of any alleged injury stemming from Plaintiffs' interest in the property remaining as "undeveloped agricultural land," as such status is not guaranteed even if Camp 4 continued to be owned by the Tribe in fee simple. Additionally, Plaintiffs cannot demonstrate that construction on Camp 4 is

[15] None of the cases relied on by Plaintiffs support the proposition that Plaintiffs are entitled to an order compelling Interior to convey Camp 4 out of trust absent a showing that they are entitled to mandamus relief. *Fredericks v. Huber*, 180 Pa. 572, 575 (Pa. 1897) is particularly illustrative: when the complainants in that case obtained a writ of mandate, forcing respondents to vacate certain disputed property before the court had the opportunity to litigate the underlying merits of complainants' claim to such property, the court reversed that mandate. Likewise in this suit: mandamus relief is not warranted when Plaintiffs have not even attempted to demonstrate their entitlement to such an extreme remedy.

either actual or imminent, a fact they readily acknowledge. Pls. Opp. at 19, (Dkt. No. 31, p. ID#: 546). Thus, Plaintiffs cannot make the required "clear showing" of injury in fact necessary to obtain a preliminary injunction. *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (citing *Winter v. Natural Resources Def. Council Inc.*, 555 U.S. 7 (2008)). This is further confirmed by the Memorandum of Agreement between the Tribe and the County of Santa Barbara,[16] in which the Tribe has agreed to refrain from construction on Camp 4 until 2023. Pls. RJN, Ex. B (Dkt. No. 33-2, p. ID#: 571).

Lastly, Plaintiffs cannot demonstrate a likelihood of success on the presumption that their legal assertions—thinly disguised, if at all, as factual allegations—will be taken as true under Rule 12(b)(6). "[U]nreasonable inferences or legal conclusions cast in the form of factual allegations" need not be accepted as true in the context of a 12(b)(6) motion to dismiss. *Freeney v. Bank of Am. Corp.*, No. 15-cv-02376, 2015 U.S. Dist. LEXIS 189247, *58 (C.D. Cal. Nov. 19, 2015) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

For their Fifth Claim for Relief to be viable, Plaintiffs would have to establish their standing to bring the claim and demonstrate they meet the standards for such an extraordinary remedy. U.S. Mem. at 12-16 (Dkt. No. 28-1, p. ID#s 378-82). Having failed to do so, the Fifth Claim for Relief must be dismissed.

CONCLUSION

The United States respectfully requests that the Court dismiss with prejudice Plaintiffs' Second and Fifth Claims for Relief.

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[16] On October 31, 2017, the County voted to approve the Memorandum of Agreement. *See, e.g.*, "Chumash Camp 4 agreement approved by Board of Supervisors," SANTA YNEZ VALLEY STAR (Oct. 31, 2017) *available at* http://www.santaynezvalleystar.com/chumash-camp-4-agreement-passed-board-supervisors/. The Memorandum of Agreement requires the County to seek the voluntarily dismissal of its lawsuit, *County of Santa Barbara v. Zinke et al.*, No. 2:17-cv-703-SVW (C.D. Cal.), which it did on November 1, 2017.

DATED: November 3, 2017.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Rebecca M. Ross, hereby certify that on November 3, 2017, I caused the foregoing UNITED STATES' REPLY IN SUPPORT OF MOTION FOR PARTIAL DISMISSAL to be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ *Rebecca M. Ross*
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