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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' SUPPLEMENTAL BRIEF** Honorable Stephen V. Wilson United States District Judge

Defendants the United States of America et al. ("United States") hereby respond to the Court's order for additional briefing "on the constitutionality of 25 C.F.R. § 2.2, whether it is void for vagueness, and whether it violates the requirements of procedural due process and Article III review of administrative courts." Dkt. No. 37.

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INTRODUCTION

There is no constitutional infirmity, or due process violation, in federal laws that require citizens to step forward in a timely manner and act in good faith to protect their interests. Citizens are presumed to know the law. Even if ignorance of the law could excuse one from obligations under it, those are not the facts here. Plaintiffs had actual notice of the agency's 2012 decision ("2012 Decision") concluding it had the requisite statutory authority to acquire land in trust for the Santa Ynez Band of Chumash Mission Indians ("Tribe"). Plaintiffs also had the opportunity to exhaust administrative remedies on the 2012 Decision.

Plaintiffs assert that either they did not understand they were required to exhaust remedies on the 2012 Decision, or that they are excused from doing so based on a vague notion of due process, which in Plaintiffs' view requires only those parties who were "known" to the agency and received direct notice of the 2012 Decision to exhaust. Plaintiffs' position, therefore, is that a person or entity can actively monitor an agency's actions from the sidelines, choose not to engage with or otherwise reveal themselves to the agency, wait out the exhaustion process, and then proceed to federal court at any time thereafter. Plaintiffs are incorrect, and their arguments must be rejected.

ARGUMENT

I. The Ninth Circuit Has Repeatedly Enforced Interior's Mandatory, Unambiguous Exhaustion Requirement

The United States Department of the Interior ("Interior") requires, through regulations, persons or entities that are adversely affected by a decision of the Bureau of Indian Affairs ("BIA"), 25 C.F.R. § 2.2, to first exhaust administrative remedies before seeking judicial review of that decision. 43 C.F.R. § 4.314; 25 C.F.R. § 2.6(a). These regulations are set forth at 25 C.F.R. Part 2 and 43 C.F.R. Part 4, and apply "to all appeals from decisions made by officials of the [BIA] by persons who may be adversely affected by such decisions." 25 C.F.R. § 2.3(a). An

explicit exhaustion requirement applicable to BIA decisions is also found at 43 C.F.R. § 4.314, and is specifically titled "Exhaustion of administrative remedies." A copy of this regulatory provision was provided with the 2012 Decision Plaintiffs admit receiving. *See* Dkt. No. 29-2 (p. ID#: 408).

The Ninth Circuit has consistently interpreted Interior regulations as requiring exhaustion of administrative remedies pertaining to BIA decisions and has consistently enforced that requirement. *See Stock West Corp. v. Lujan*, 982 F.2d 1389, 1393-94 (9th Cir. 1993); *Joint Bd. of Control v. United States*, 862 F.2d 195, 199-201 (9th Cir. 1988) ("BIA regulations provide procedures for the exhaustion of administrative remedies so that a final decision may be presented for judicial review under 5 U.S.C. § 704"); *Faras v. Hodel*, 845 F.2d 202, 204 (9th Cir. 1988) ("[e]xhaustion of the appeal procedures is made a jurisdictional prerequisite to judicial review by 25 C.F.R. § 2.3(b)"); *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677-78 (9th Cir. 1988) (citing 25 C.F.R. § 2.3(b), *id.* § 2.3(a), *id.* § 2.10, and 43 C.F.R. § 4.332, the Court stated bluntly that "BIA regulations require the exhaustion of administrative remedies.").[1] The rulings could not be more explicit, and at no time has the Court (or any other court) questioned the constitutionality of the exhaustion obligation.[2]

II. Interior's Exhaustion Requirement is Not Void for Vagueness

Plaintiffs face a significant burden in trying to demonstrate that Interior's exhaustion regulations, as applied to them, violate the Fifth Amendment's Due

[1] The Ninth Circuit applied these precedents even after Interior amended its appeal regulations in 1989. *Stock West*, 982 F.2d at 1393-94. The Court cited 25 C.F.R. § 2.3(b) (1988); 54 Fed. Reg. 6478, 7666 (1989) (preamble to the amended regulations); 25 C.F.R. § 2.6(a) (1992); and 43 C.F.R. § 4.314(a) (1991), among others, as reflecting Interior's mandatory exhaustion requirement. *Id.* at 1393.

[2] In *Stock West*, the Court enforced the same appeal regulations applicable to Plaintiffs and held that the untimely filing of an administrative appeal amounted to a failure to exhaust administrative remedies that deprived the court of jurisdiction to review the merits of the agency's decision under the APA. 982 F.2d at 1394.

Process Clause. Interior's regulations provide the requisite "fair warning" that exhaustion is required before seeking judicial review of BIA decisions. The Ninth Circuit has, without exception, expressly described BIA regulations as imposing an unambiguous exhaustion requirement. Those decisions are well-founded, as nothing could be more unequivocal than a regulatory provision literally titled, "Exhaustion of administrative remedies." 43 C.F.R. § 4.314. This, combined with Plaintiffs' statements demonstrating actual knowledge of the 2012 Decision and the process for challenging it, make clear that Interior's regulations are constitutionally sound and can be appropriately enforced against Plaintiffs.

A. Interior Regulations Provide "Fair Warning" of the Agency's Exhaustion Requirements

A law, even one that imposes criminal sanctions, is not void for vagueness if it "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *id.* at 110 (upholding ordinance where "clear what the [regulation] as a whole prohibits"); *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1144-45 (9th Cir. 2009) (finding no vagueness with authority that was sufficiently clear as to the scope of its application). Civil statutes are held to a less demanding vagueness standard than criminal statutes. *U.S. Tel. Ass'n v. FCC*, 825 F.3d 674, 736 (D.C. Cir. 2016). And where a challenged rule, rather than a statute, "regulates business conduct and imposes civil penalties," it will satisfy due process

> so long as [it is] sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require.

Id. (citation omitted).

Even if Interior's exhaustion requirement can be appropriately construed as imposing a "penalty" for failing to exhaust, the regulations provide the "fair

warning" required to avoid vagueness. To bring their Second Claim for Relief, Plaintiffs contend they are harmed by Interior's determination that it has the requisite statutory authority to acquire Camp 4 in trust. Plaintiffs knew in 2012, however, that the 2012 Decision constituted that precise determination. Plaintiffs also had constructive, if not actual, knowledge of Interior regulations at the time which could not be more clear: if a BIA decision adversely affects you, you not only have a right of appeal, 25 C.F.R. § 2.2; 43 C.F.R. § 4.331, but you must do so to preserve the opportunity for judicial review, 43 C.F.R. § 4.314; 25 C.F.R. § 2.6(a). Interior regulations also gave Plaintiffs fair warning of the consequences of their decision not to appeal. *See* 43 C.F.R. § 4.332(a) ("A notice of appeal not timely filed shall be dismissed for lack of jurisdiction."); 25 C.F.R. § 2.6(b) (BIA decisions "shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed."). Interior's regulations are not vague.

B. While Perfect Clarity is Not Required, Interior Regulations and Relevant Court Decisions Could Not Be More Clear

Plaintiffs contend that their subjective misunderstanding excuses them from complying with Interior regulations. But that is not the standard. The regulations unambiguously provide the requisite "fair warning" of what was required. *U.S. Tel. Ass'n*, 825 F.3d at 736; *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 110 F. Supp. 3d 176, 203 (D.D.C. 2015) ("[T]he vagueness doctrine does not require perfect clarity and precise guidance."); *see also Am. Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 796 F.3d 18, 28 (D.C. Cir. 2015) (upholding regulation even though agency only "provided limited direction" because "an interpretation need not be prolix to avoid impermissible vagueness").

As a matter of law, even if Plaintiffs were misinformed as to the regulations, that would not render those regulations void for vagueness. Plaintiffs were, of course, obligated to know the relevant law, including applicable court decisions. *Pittsburgh and Lake Angeline Iron Co. v. Cleveland Iron Mining Co.*, 178 U.S.

270, 278 (1900); *see also* U.S. Reply at 6, Dkt. No. 35 (p. ID#: 598). Even a cursory review of relevant case law, or of the regulations themselves, would have made clear the obligation to administratively appeal. Like the "reasonable person" standard applied in many other contexts, Plaintiffs should have known of the obligation to exhaust if they wanted to preserve the opportunity for judicial review.

C. In Any Event, Plaintiffs Knew of the Exhaustion Requirement and Chose Not to Appeal

This case does not involve a plaintiff who only recently learned of the 2012 Decision. Plaintiffs' published statements at the time of the 2012 Decision demonstrate they understood Interior's exhaustion requirements:

- Plaintiffs understood by 2010, that BIA was working on a decision that would directly impact whether it could acquire Camp 4 in trust;[3]
- Plaintiffs admit they received actual notice of the 2012 Decision;[4]
- Plaintiffs described the 2012 Decision as having "profound implications for the future of [the Santa Ynez Valley]";[5]
- Plaintiffs understood that to challenge the 2012 Decision, an administrative appeal was required and it needed to be filed by a date certain;[6] and
- Plaintiffs understood that the 2012 Decision "open[ed] the door" for persons or entities— other than those already litigating with the agency—to appeal.[7]

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[3] Dkt. No. 36-1 (p. ID#s: 618-19); Dkt. No. 36-2 (p. ID#s: 621-22).
[4] Dkt. No. 34 ¶ 6 (p. ID#: 585).
[5] Dkt. No. 29-4 (p. ID#: 459).
[6] *Id.* (the decision "will require a response from citizens and the [County] Board of Supervisors"); Dkt. No. 29-5 (p. ID#: 461) (referencing "a July 12 deadline set by the U.S. Department of the Interior's Board of Indian Appeals in Virginia" to file an appeal); Dkt. No. 29-6 (p. ID#: 464) (referencing a July 17 deadline).
[7] Dkt. No. 29-6 (p. ID#: 464) (stating that the 2012 Decision "open[ed] the door for the county to appeal," and because the County voted against doing so, "several local community groups . . . plan to appeal the decision without the [County's] backing."); Dkt. No. 29-8 (p. ID#: 474) ("Once again, the residents have had to file an appeal because our government won't.")

These statements demonstrate that Plaintiffs had actual knowledge of the 2012 Decision and understood that any challenge to it had to be brought in short order. Plaintiffs now contend that they were never under any obligation to exhaust available remedies pertaining to the 2012 Decision. That is at odds with the articles they published in 2012, which repeatedly stressed the deadline for filing an appeal. Despite being aware of the appeal requirement and the consequences of failing to do so,[8] Plaintiffs simply chose not to pursue an appeal. Plaintiffs cannot now disavow what was clear to them in 2012. Dismissing Plaintiffs' Second Claim is not a draconian consequence, as Plaintiffs would have it, but a necessary and sensible result stemming from Plaintiffs' choice to forego a well-established and easily identifiable exhaustion requirement.

III. Application of the Exhaustion Requirement to Plaintiffs Does Not Violate Procedural Due Process

Plaintiffs cannot demonstrate they have been deprived of some protected liberty or property interest, which they must do to support a claim for a violation of procedural due process. *See Paul v. Davis*, 424 U.S. 693, 696-97 (1976). The Ninth Circuit has found that the BIA exhaustion requirement applies even when, as here, no affirmative agency action was taken directly against the plaintiff. Citing to 25 C.F.R. Part 2 and specifically 25 C.F.R. § 2.2, the *Faras* Court concluded that there was

> no reason to limit the appeals process [and the exhaustion requirement] to only those who allege direct agency violation of individualized legal interests. It is more reasonable to employ a construction of part 2 that is somewhat akin to a "standing" requirement for access to the appeals process.

[8] Interior's regulations are clear as to the consequences of failing to timely exhaust. 43 C.F.R. § 4.332(a) (untimely appeals "shall be dismissed for lack of jurisdiction"); 25 C.F.R. § 2.6(b) (BIA decisions "shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed.").

845 F.2d at 204. That comparison is particularly apt here: if Plaintiffs have standing *now* to challenge the agency's determination that it has the requisite authority to acquire Camp 4 in trust, then Plaintiffs *necessarily* had standing in *2012*, when Plaintiffs learned that Interior concluded it had such authority. The United States is not arguing that Plaintiffs had to administratively appeal the 2012 Decision so as to preserve the opportunity to challenge some other, subsequent agency decision. Dkt. No. 37. The United States is arguing instead that if Plaintiffs are harmed—i.e., "adversely affected," *see* 43 C.F.R. § 4.331; 25 C.F.R. § 2.2—by Interior's determination that it has the requisite statutory authority to acquire land in trust for the Tribe, Plaintiffs were harmed *in 2012* when they learned the agency made that exact decision. Thus, under *Faras*, it is wholly appropriate to conclude that Plaintiffs fell within the scope of Interior's exhaustion requirement in 2012.

A. Plaintiffs Received Adequate Notice of the 2012 Decision

Procedural due process requires notice, but all that is constitutionally required is that notice be provided for those parties that are known and can be readily ascertained. *Mullane v. Hanover Bank and Trust Co.*, 339 U.S 306, 317 (1950). "[D]ue process does not require actual notice." *Jones v. Flowers*, 547 U.S. 220, 225 (2006). Even when notice is required, courts do not insist on perfection in delivery. *Dusenbery v. U.S.*, 534 U.S. 161, 169-73 (2002).

Due process also does not require limiting the exhaustion requirement to only those who receive direct notice. *See, e.g., United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010) (no due process violation when creditor indirectly received "*actual* notice of the filing and contents of [debtor's Chapter 13] plan.") (emphasis in original); *In re Medaglia*, 52 F.3d 451, 455-56 (2d Cir. 1995) (due process not offended when a party obtains "actual, timely knowledge of an event that may affect a right to exercise due diligence and takes necessary steps to preserve that right."). Interior's regulations are entirely consistent with these principles. *See Valley Center-Pauma Unified School Dist. v. Pacific Reg'l Dir.*, 53

IBIA 155, 159 (Apr. 29, 2011). BIA provides direct notice of decisions to parties who make themselves known to the agency. 25 C.F.R. § 2.7. Plaintiffs chose not to make themselves known and thus, BIA could not have included them on the distribution list for the decision. Dkt. No. 29-2 (p. ID#: 402). Plaintiffs' actual receipt of the 2012 Decision, however, satisfied procedural due process.

Moreover, Plaintiffs had constructive, if not actual, notice that BIA regulations permit parties who are adversely affected by a BIA decision—regardless of whether they are known to the agency—to administratively appeal that decision in a timely manner. 25 C.F.R. § 2.2 (defining "interested party"); *id.* § 2.6 (finality); *id.* § 2.9(a) (deadline for filing appeals); 43 C.F.R. § 4.331 ("Who may appeal" BIA decisions); *id.* § 4.332(a) (deadline for filing appeals). Plaintiffs' receipt of the 2012 Decision, together with their constructive, if not actual, knowledge of their administrative appeal rights, obviates the possibility that Interior's appeal process violates any of Plaintiffs' due process rights. Despite having the opportunity to do so, Plaintiffs chose not to make themselves known to BIA, and they chose not to administratively appeal the 2012 Decision. Plaintiffs' choices do not make Interior's exhaustion process constitutionally infirm.

B. Had Plaintiffs Pursued It, Interior's Exhaustion Requirement Would Have Offered the Opportunity to Be Heard

Interior's administrative appeal process provides procedural due process to those parties who choose to utilize it. As the Ninth Circuit has emphasized, *see* U.S. Mem. at 6-7, Dkt. No. 28-1 (p. ID#s: 372-73), requiring administrative exhaustion provides the BIA with an opportunity to correct its errors and avoids further duplicative litigation of the matter. Among other things, The IBIA can vacate and remand BIA decisions that are not supported by the record developed by the BIA. *E.g.*, *Harper v. Rocky Mountain Reg'l Dir.*, 60 IBIA 129, 133 (Mar. 18, 2015) ("where the administrative record does not support the decision, the decision must be vacated"). Interior did nothing to preclude Plaintiffs from

submitting comments to BIA before the 2012 Decision was issued. Plaintiffs made a choice not to engage with BIA. Nevertheless, had Plaintiffs appealed, at a minimum they could have challenged the 2012 Decision on the basis that BIA's record was inadequate. If that argument was successful, the IBIA could have vacated the 2012 Decision, granting them full relief. Interior's exhaustion process is constitutionally sound and affords adequate due process protections.

C. Plaintiffs' Failure to Exhaust Precludes Article III Jurisdiction Over Their Second Claim for Relief

As explained previously, *see* U.S. Mem. at 5-7, Dkt. No. 28-1 (p. ID#s: 371-73), the Administrative Procedure Act ("APA") only waives the United States' sovereign immunity for "final agency actions." Where, as here, exhaustion is required by regulation, the agency action is not "final" for APA judicial review until and unless such exhaustion occurs. *Darby v. Cisneros*, 509 U.S. 137, 146 (1993). Exhaustion also serves the twin purposes of protecting agency authority and promoting judicial efficiency. *E.g., Woodford v. Ngo*, 548 U.S. 81, 89-90 (2006). That is why, in the particular context of the BIA regulations and in light of the limited waiver of sovereign immunity provided by the APA, the Ninth Circuit has ruled that the exhaustion requirement applicable here *must always be satisfied* unless there is proof of actual bias in the process or that exhaustion would be futile. *White Mountain Apache Tribe*, 840 F.2d at 677-78. Plaintiffs have not attempted to demonstrate either bias or futility, nor could they.

First, no proof of actual bias exists, *id.*, and courts have rejected the assertion that Interior has an institutional bias.[9] Plaintiffs have not asserted bias to excuse their failure to exhaust and cannot demonstrate actual bias in any event.

[9] *South Dakota v. U.S. Dep't of Interior*, 401 F. Supp. 2d 1000, 1011 (D.S.D. 2005), *aff'd*, 487 F.3d 548 (8th Cir. 2007); see also *State of South Dakota et al. v. Acting Great Plains Reg'l Dir.*, 49 IBIA 129, 144 (Apr. 30, 2009).

Second, the futility exception is inapplicable here. A party's own failure to timely exhaust does not excuse the exhaustion requirement. *Stock West*, 982 F.2d at 1394; *see also Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004) ("[E]xhaustion may not be achieved through a litigant's procedural default of his or her available remedies."). To allow otherwise would not only contravene exhaustion principles, but would "eviscerate" Interior's exhaustion regulations, which were duly enacted pursuant to the APA. *Stock West*, 982 F.2d at 1394. As the Supreme Court has stated: "exhaustion requirements are designed to deal with parties who do not want to exhaust." *See Woodford*, 548 U.S. at 90. The Court should not excuse the consequence of Plaintiffs' decision to forego exhaustion.

CONCLUSION

The United States recognizes that enforcing the exhaustion requirement against a party who never knew of the 2012 Decision and did not have the chance to exhaust would raise difficult concerns. This case, however, does not involve those facts. Plaintiffs received actual notice of the 2012 Decision shortly after it was issued and were offered a full and fair opportunity to challenge it. Plaintiffs chose not to appeal the 2012 Decision despite the requisite fair warning that failing to file a timely appeal has consequences. It is therefore appropriate and necessary that Interior's exhaustion requirement be enforced against Plaintiffs.

DATED: December 4, 2017.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Rebecca M. Ross, hereby certify that on December 4, 2017, I caused the foregoing UNITED STATES' SUPPLEMENTAL BRIEF to be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

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