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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 REPLY BRIEF** Honorable Stephen V. Wilson United States District Judge

Defendants the United States of America et al. ("United States") hereby files a reply in connection with the Court's order for supplemental briefing. Dkt. No. 37.

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INTRODUCTION

Plaintiffs urge this Court to strike down U.S. Department of the Interior ("Interior") regulations on the basis that they are so vexing that no person, including a sophisticated business owner and publisher familiar with the issues, could ever know how to comply with them.[1] Plaintiffs are wrong as a matter of law, and their own words and actions demonstrate they understood and complied with Interior's exhaustion requirements when it suited them to do so. Plaintiffs have no basis to challenge Interior's exhaustion regulations as applied to them.

ARGUMENT

I. Interior's Regulations are Clear and Constitutionally Sound

Plaintiffs pluck words and phrases out of their regulatory context, ponder them in the abstract, and then conclude that the terms are so devoid of meaning that no one could divine how to comply with them. Dkt. No. 40 at 8-12 (p. ID#s: 675-79). But these regulations are the same as those Plaintiffs easily navigated in connection with a different Bureau of Indian Affairs ("BIA") decision, discussed below. Thus, Plaintiffs received "fair warning" of the requirements of Interior's exhaustion regulations, codified at 25 C.F.R. Part 2 and 43 C.F.R. Part 4.[2]

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[1] Plaintiffs urge the Court to find 25 C.F.R. § 2.2 "unconstitutional and void." Dkt. No. 40 at 14 (p. ID#: 681). Voiding requires an extraordinary showing, not present here, that "'no set of circumstances exists under which [it] would be valid, *i.e.*, that the [rule] is unconstitutional in all of its applications.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (internal quotation deleted). Plaintiffs' assertions concern application of Interior's exhaustion requirement to them, rather than generally.

[2] Plaintiffs primarily rely on cases that either do not apply, *e.g.*, *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (whether constitutional claims must be exhausted), or apply the wrong standard, *e.g.*, *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974) (applicable standard depends on nature of statute or regulation); *FCC v. Fox TV Stations Inc.*, 567 U.S. 239, 253-54 (2012) (discussing scrutiny applicable when protected speech at issue). The United States' initial supplemental brief discussed the governing standards. Dkt. No. 39 at 7 (p. ID#: 659).

A. Plaintiffs Easily Navigated Interior's Exhaustion Regulations When It Suited Them

In their Complaint, Plaintiffs discuss a decision issued by the BIA in 2013 ("TCA Order"), approving the Santa Ynez Band of Chumash Mission Indians' ("Tribe") tribal consolidation area plan ("TCA plan"). Compl. ¶ 47 (p. ID#: 14); U.S. Third RJN, Ex. A at 8.[3] The TCA plan confirmed that any *future* decision that *might* be made to acquire land within the area described by the TCA plan would comport with Interior policy. *See* 25 C.F.R. § 151.3; U.S. Third RJN, Ex. A at 8. Plaintiffs, who BIA had not identified as an "interested party," timely appealed the TCA Order. Compl. ¶ 47 (p. ID#: 14); U.S. Third RJN, Ex. A at 2-8.

Plaintiffs' appeal stated that (1) as one of several "interested parties," they were entitled to comment on the TCA plan before approval; (2) they did not receive direct notice of the TCA Order; and (3) that BIA failed to comply "*with the requirement to give notice of the right to appeal* the Order." U.S. Third RJN, Ex. A at 5 (emphasis added). That requirement—which Plaintiffs sought to police—is in the same set of agency regulations Plaintiffs now contend are so inscrutable that no one could be expected to comply with them. In connection with the TCA Order, however, Plaintiffs easily understood and complied with the regulations:

- Plaintiffs' appeal of the TCA Order included a "statement of reasons," a specific requirement of 25 C.F.R. § 2.10 and 43 C.F.R. § 4.332(a)(2);[4]
- Plaintiffs attached a copy of the TCA Order to the appeal, consistent with 25 C.F.R. § 2.9(c)(4)-(5);[5] and
- Plaintiffs crafted a "service list" of other "interested parties," consistent with 43 C.F.R. § 4.332(a)(3).[6]

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[3] The United States' Third Request for Judicial Notice ("U.S. Third RJN") is being filed concurrently herewith.
[4] U.S. Third RJN, Ex. A at 3-6.
[5] *Id.* at 8-30.
[6] *Id.* at 33-37 (emphasis added).

Plaintiffs claim they are excused from having to exhaust remedies on the 2012 Decision because they were not invited to submit comments prior to its issuance, were not sent direct notice, were not included on the list of *known* interested parties,[7] and were not provided copies of all regulations with specific advice regarding how to comply with them. Yet, facing the same circumstances with the TCA Order, Plaintiffs easily complied with Interior's regulations.

Plaintiffs further argue that it violates due process to expect them to have appealed the 2012 Decision on a record they did not help create, or to expect them to have appealed decisions that only pose potential future harm. The TCA Order, however, presented virtually identical circumstances. U.S. Third RJN, Ex. A at 4-5. Plaintiffs thus understood that the TCA Order—which acquired *no property* and only had *potential* relevance to *future* acquisitions—"could" nevertheless affect them and they took action to challenge it.[8] Plaintiffs once believed they had a right to appeal the TCA Order under 25 C.F.R. § 2.2, but now contend that the provision must only be applied narrowly to adjacent landowners if at all. Dkt. No. 44 (p. ID#: 699). Plaintiffs cannot have it both ways. They understood how to comply.

B. The Injury Plaintiffs' Allege in Their Second Claim for Relief Arose in 2012

As early as 2010, Plaintiffs understood that a BIA decision on whether Interior had statutory authority to acquire land in trust for the Tribe would have far-reaching impacts including whether Camp 4 could be acquired in trust. That year, Plaintiffs published a letter from Preservation of Los Olivos ("POLO")

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[7] Plaintiffs point to the fact that they were not on the distribution list BIA prepared in connection with the 2012 Decision. Dkt. No. 40 at 6 (p. ID#: 673). BIA is not omniscient, and thus can only include parties who make themselves known to it. Plaintiffs did not make themselves known to BIA.

[8] The TCA Order was ultimately vacated by the agency, granting Plaintiffs the relief requested. *County of Santa Barbara, Cal. et al. v. Pacific Reg'l Dir.*, 58 IBIA 57, 60 (Oct. 24, 2013) (dismissing appeals as moot and vacating 2013 Order).

explaining that BIA was evaluating issues beyond the 6.9-acre parcel. The letter discussed POLO's concerns about the Tribe's ability to acquire 1,400 acres (i.e., Camp 4) in trust. Dkt. No. 36-1 at 3-4 (p. ID#s: 618-19). After explaining its view that Interior lacked authority to acquire *any* property in trust for the Tribe, POLO's letter concludes, "if the [Tribe] cannot get 6.9 acres taken [in trust] . . . *they have no chance of getting 1,400 acres of land . . . into trust*." *Id.* (emphasis added).

Plaintiffs claim no injury stemming from any decision related to the 6.9-acre parcel, including, presumably, the 2012 Decision. Dkt No. 40 at 5 (p. ID#: 672). But as Plaintiffs understood at the time, the 2012 Decision was not just about the 6.9-acre parcel; it rendered a decision that would determine whether any land, including Camp 4, could be acquired in trust for the Tribe. This was evident to Plaintiffs no later than 2010, and by 2012, Plaintiffs understood that the 2012 Decision had "open[ed] the door" to allow them to try to foreclose *all* potential acquisitions of land for the Tribe, including Camp 4. Dkt. No. 29-6 (p. ID#: 464).

Section 2.2 has been interpreted as establishing who has standing to pursue an administrative appeal.[9] If a party is not injured by an agency decision, then it follows that they lack standing to challenge it. Those, however, are not the facts here. Plaintiffs had standing to challenge the 2012 Decision in 2012 and were thus subject to the exhaustion requirement at that time.

II. The Doctrine of Constitutional Avoidance Applies Here

Courts should construe regulations to avoid constitutional questions, *e.g.*, *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 816-18 (9th Cir. 2016), and resolve cases on different grounds when possible, *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). It is not necessary to decide

[9] *See, e.g.*, *Faras v. Hodel*, 845 F.2d 202, 204 (9th Cir. 1988) (discussing 25 C.F.R. § 2.2 as "somewhat akin to a 'standing' requirement for access to the appeals process"); *Pres. of Los Olivos v. Dep't of Interior*, 635 F. Supp. 2d 1076, 1090 (C.D. Cal. 2008) (describing 25 C.F.R. § 2.2 and 43 C.F.R. § 4.331 as containing "plain language" reflecting a "very broad and permissive" standing requirement).

whether Interior's exhaustion requirement is, itself, constitutional, because a court may require exhaustion even when no statute or regulation requires it. *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007) (exhaustion can "be either statutorily [or by regulation] required or judicially imposed as a matter of prudence"). The existence of prudential exhaustion doctrine[10] therefore means that this Court may appropriately examine whether Plaintiffs should have exhausted available remedies even if Interior's exhaustion regulations were not mandatory. Opining on the constitutionality of an exhaustion regulation is therefore both unnecessary, as exhaustion principles would nonetheless be applicable, and inconsistent with the doctrine cautioning against ruling on constitutional questions.

CONCLUSION

Interior regulations provided Plaintiffs with fair warning as to their requirements and due process in their application. The United States respectfully requests that the Court dismiss Plaintiffs' Second and Fifth Claims for Relief.

Dated: December 11, 2017.

Respectfully submitted,
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[10] "Courts may require prudential exhaustion if (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review." *Puga*, 488 F.3d at 815 (internal quotations omitted). All of these criteria were satisfied when Plaintiffs had an opportunity to administratively appeal.

CERTIFICATE OF SERVICE

I, Rebecca M. Ross, hereby certify that on December 11, 2017, I caused the foregoing UNITED STATES' SUPPLEMENTAL REPLY BRIEF to be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ *Rebecca M. Ross*
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