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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Raymond Cross

Plaintiff,

vs.

United States Department of the Interior,

Defendant.

Case No. CV-18-220-TUC-CKJ
DEFENDANT'S REPLY TO
PLAINTIFF'S RESPONSE IN
OPPOSITION TO MOTION TO
DISMISS

Defendant United States Department of Interior, by and through undersigned counsel, hereby files its Reply to Plaintiff's Response in Opposition to Defendant's Motion to Dismiss for Lack of Subject Matter Under Rule 12(b)(1). (Doc.11.) This Reply is supported by Defendant's Motion to Dismiss and accompanying Memorandum of Points and Authorities (Doc. 10) and all matters of record.

MEMORANDUM OF POINTS AN AUTHORITIES

I. Discussion

Plaintiff brings this Complaint for Declaratory Relief ("Complaint") seeking a determination that the Department of the Interior ("DOI"), through its Fort Berthold Agency ("FBA") Superintendent and its Great Plains Regional Director ("Regional Director") of the Bureau of Indian Affairs ("BIA"), improperly determined the number of signatures needed for a valid petition to call a secretarial election to amend the Tribal

1 Constitution. (Doc. 1 at 1-2.) Plaintiff alleges this was done in contravention of 25 C.F.R.
 2 § 81.57 and Article X of the Constitution of the Three Affiliated Tribes (“TAT” or “Tribe”)
 3 of the Fort Berthold Reservation in North Dakota. *Id.* Plaintiff claims his ability to amend
 4 his own Tribe’s Constitution by presenting a proposed amendment and the appropriate
 5 number of signatures was “stymied” by actions of the BIA. *Id.* Plaintiff contends this
 6 Court has jurisdiction pursuant to 28 U.S.C. §1331 and the Administrative Procedures Act
 7 (“APA”), 5 U.S.C. § 706. *Id.* at 13.

8 Federal Rule of Civil Procedure 12(b)(1) permits a defendant to move for dismissal
 9 of a complaint for lack of subject-matter jurisdiction. A plaintiff who seeks to invoke
 10 jurisdiction by filing a complaint in federal court bears the burden of establishing that
 11 jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,377 (1994); *Farmers*
 12 *Ins. Exchange v. Portage La Prairie Mut. Ins. Co.*, 907 F. 2d 911, 912 (9th. Cir. 1991.)
 13 When a court is presented with a factual challenge to subject matter jurisdiction, a court
 14 may evaluate extrinsic evidence and resolve factual disputes when necessary. *See Roberts*
 15 *v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting *Augustine v. United States*, 704
 16 F.2d 1074, 1077 (9th Cir. 1983). In a factual challenge, the plaintiff “bears the burden of
 17 proving by a preponderance of the evidence that each of the requirements for subject-
 18 matter jurisdiction have been met. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014)
 19 (internal citations omitted).

20 As demonstrated in Defendant’s Motion to Dismiss, the only potential basis for
 21 jurisdiction in this matter is under the Administrative Procedures Act (“APA”), 5 U.S.C §§
 22 500-706. (Doc. 10 at 6-7.) Section 704 of the APA only permits judicial review of “final
 23 agency actions.” 5 U.S.C. § 704. The finality requirement is considered a necessary
 24 element of any APA claim. *See Dalton v. Specter*, 511 U.S.462, 469 (1994); *Or. Natural*
 25 *Desert Ass’n v. U.S. Forest Serv.*, 465 F. 3d 977, 982 (9th Cir. 2006) (party seeking judicial
 26 review under APA “must challenge a final agency action.”) There are two components to
 27 the finality requirement: first, whether the act in question qualifies as an agency action
 28 under the APA; and second, whether that action is final. *Fund for Animals, Inc. v. U.S.*

1 *Bureau of Land Mgmt.*, 460 F. 3d 13, 18 (D.C. Cir. 2006) (“Whether there has been agency
2 action or final agency action within the meaning of the APA are threshold questions; if
3 these requirements are not met, the action is not reviewable.”)

4 Instead of directly addressing the jurisdictional issue, Plaintiff complains about the
5 process of the Secretarial Elections and how the broader purpose of the signature collection
6 requirement is to discourage and squelch free expression and fair discussion of important
7 issues. (Doc. 11 at 3.) Plaintiff’s Response is also full of esoteric philosophical arguments
8 and anecdotes about the Board exceeding its jurisdiction and stifling Plaintiff’s
9 constitutionally guaranteed rights of Freedom of Association and Expression. These are
10 irrelevant and do not establish the threshold jurisdictional issue before this Court - whether
11 there was an agency action and whether that action was final.

12 The record demonstrates that early in the process, Plaintiff was unhappy with the
13 agency’s response to Plaintiff’s question regarding the number of signatures needed for a
14 valid petition to amend the Tribe’s Constitution. Plaintiff believed the number of
15 signatures was excessive and took the position that he did not have to comply with the
16 administrative requirements for submitting a valid petition prior to filing his action in
17 District Court. It is undisputed that Plaintiff never submitted a petition, signatures or any
18 other document to be reviewed as part of the petition process.¹ (Doc. 10 at 2-5.)

19 Because Plaintiff cannot meet the threshold requirements for jurisdiction under the
20 APA, Plaintiff now argues that Defendant has no immunity to suit in these circumstances
21 because § 702 of the APA waived the United States sovereign immunity “regardless of the
22 cause of action.” (Doc. 11 at 14.) Plaintiff is incorrect and ignores the relevant language
23 of 5 U.S.C. § 702 which states “A person . . . adversely affected or aggrieved by agency
24 action within the meaning of a relevant statute, is entitled to judicial review thereof ...”
25

26
27 ¹ Upon information and belief, Plaintiff is an attorney licensed in California
28 (although currently inactive) and cannot claim that he did not understand the requirements
and process for submitting a valid petition to amend the Tribe’s Constitution.

1 Plaintiff also ignores the fact that § 702 must be read in conjunction with §704, which only
2 permits judicial review of a “final agency actions.”

3 The Supreme Court has stated that an agency action for APA purposes is limited to
4 the set of “circumscribed, discrete agency actions” delineated in 5 U.S.C. §551(13), which
5 defines “action” as “an agency rule, order, license, sanction, relief, or the equivalent or
6 denial thereof, or failure to act.” *See Norton v. Southern Utah Wilderness Alliance*, 542
7 U.S. 55, 62 (2004). Not everything an agency does constitutes a final agency action
8 reviewable by the courts. *Ass’n of Admin. Law Judges v. Office of Pers. Mgmt*, 640 F.
9 Supp. 2d 66, 73 (D.D.C. 2009). Even if what is being challenged fits within the definition
10 of agency action found in § 551(13), the action must still be final. For an agency action to
11 be final, two elements must be met: 1) the action must mark the consummation of the
12 agency’s decision making process and cannot be tentative or interlocutory; and 2) the
13 action must be one by which rights or obligations have been determined or from which
14 legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (citations
15 omitted). *See also Or. Natural Desert Ass’n*, 465 F. 3d at 982 (citing *Bennett*). In his
16 Response, Plaintiff has failed to establish either of these elements and it is clear the agency
17 was never given an opportunity to determine the validity of Plaintiff’s petition, because
18 one was never submitted. As a result, the agency has yet to take action, let alone final
19 action.

20 Plaintiff’s reliance on *Reliable Automatic Sprinkler Co. v. Consumer Product Safety*
21 *Comm’n*, 324 F. 3d 726 (D.C. Cir. 2003) as a basis for jurisdiction is misplaced. In
22 *Reliable*, Plaintiff filed suit following a preliminary determination by Defendant that
23 Plaintiff’s sprinkler heads were hazardous. *Id.* at 731. In affirming the district court’s
24 dismissal for lack of final agency action, the Court of Appeals found that Defendant’s
25 investigation of the sprinkler heads, statement of intention regarding a preliminary
26 determination of product hazard, and request for voluntary corrective action did not
27 constitute a final agency action within the meaning of the APA, 5 U.S.C. § 704. *Id.* The
28 Court noted that that a final agency action marks the culmination of the agency’s decision

1 making process and is one by which rights or obligations have been determined, or from
 2 which legal consequences will flow. *Id.* (internal citations and quotations omitted.) Thus,
 3 rather than support Plaintiff's position, the ruling in *Reliable* supports Defendant's position
 4 and dismissal of this action.

5 Plaintiff's reliance on *Hudson v. Great Plains Regional Director*, 61 IBIA 253
 6 (2015) is also misplaced because it involves an administrative decision which Mr. Hudson
 7 has appealed to U.S. District Court. Mr. Hudson's APA lawsuit is currently being litigated
 8 in the D.C. Circuit and according to the docket sheet, cross-motions for summary judgment
 9 are currently pending. *See Hudson v. Jewell*, CV-15-1988 (TSC). While *Hudson* may
 10 provide one of the reasons Plaintiff disagreed with the number of signatures needed for a
 11 valid petition, it does not provide a basis for jurisdiction.²

12 As is demonstrated in Defendant's Motion to Dismiss (Doc. 10 at 8-9), throughout
 13 his interaction with the BIA, Plaintiff was made aware by BIA that the information
 14 provided by the FBA Superintendent was not a final agency action, but instead, an interim
 15 process by which the BIA conveyed information requested by Plaintiff.

- 16 • May 18, 2017 - the Superintendent informed the Chairman that she received
 17 a "*request for information on the process to initiate a Tribal Member*
sponsored Petition to amend the Tribe's Constitution" (emphasis added).
- 18 • May 18, 2017 - the Superintendent informed Plaintiff of the total number of
 19 living adult tribal members, and that consistent with Article X of the Tribe's
 20 Constitution, *3,447 signatures would be needed for a valid petition, provided*
the other strict requirements under the Secretarial Election regulations for a
valid petition are followed (emphasis added).
- 21 • June 11, 2017 - Plaintiff was aware the FBA Superintendent's letter did not
 22 include information regarding appeal rights and requested she re-issue the
 letter to include those rights.
- 23 • June 21, 2017 - the Superintendent informed Plaintiff that the number of
 24 signatures needed for the petition was based on information received from
 25 the TAT's Enrollment Office and that the total number was simply divided
 26 by 1/3 pursuant to Article X of the Constitution. She indicated that the
 information relayed by the TAT pertained to Article X of the Constitution
 and did not present any information or a decision that was appealable under

27 ² Importantly, the claims in *Hudson* pertain to certification of secretarial election
 28 results, not to validation of a petition for secretarial election. Moreover, *Hudson* does not
raise claims regarding finality under the APA.

25 C.F.R. § 2.7(c). The Superintendent further invited Plaintiff to submit his petition for review and comment.

- On October 16, 2017 - the Regional Director informed Plaintiff that the Superintendent was simply passing on information from the TAT pursuant to Plaintiff's request and that the information was not a final decision for purposes of appeal. The Regional Director also told Plaintiff that whether the Superintendent correctly informed Plaintiff that her statement regarding the required number of signatures to a petition for a Secretarial election was appealable or not, her decision was rendered moot by the Regional Director's decision on Plaintiff's appeal.
- January 11, 2018 - the IBIA dismissed Plaintiff's appeal finding that the Superintendent's calculation of signatures needed and the Regional Director's affirmation of that calculation did not constitute a final agency action within the meaning of 25 C.F.R. § 4.331. The court noted that BIA's response to Plaintiff's request for a determination of the number of signatures of tribal members that would be required for a petition to be valid once submitted, *see id.* § 81.57(a)(2), is an interim action." The Board concluded that "Subpart F does not envision BIA making a final decision on whether a petition is valid before a petition is submitted" and that that "[i]t appears doubtful that the Regional Director's interim action regarding the number of required signatures, in the absence of a petition submitted by Plaintiff and a decision on the validity of such a petition, has resulted in actual or imminent, concrete and particularized injury to Appellant...or that Appellant's arguments could not be raised, in an appropriate forum, as part of a challenge to a decision on the validity of a petition."
- February 28, 2018 – in its *Order Denying Reconsideration*, the IBIA again informed Plaintiff that the Superintendent's calculation was merely an interim agency action, not a final agency decision as Plaintiff asserted.

Although Plaintiff attempts to briefly critique "potential mischaracterizations" in the communications summarized above (Doc. 11 at 11-12), the communications speak for themselves.

II. Conclusion

In all of their interactions with Plaintiff, the BIA made it clear that they were simply responding to his request for information on the process to initiate a Tribal Member sponsored Petition for Secretarial Election, to amend the Tribe's Constitution. The BIA even requested Plaintiff provide a copy of his petition for review and comment. Plaintiff, however, never submitted a petition and never submitted signatures. Because the BIA did not (and could not) make a final decision on the validity of the petition before it was submitted, there was no final agency action and this Court lacks subject matter jurisdiction.

1 Respectfully submitted this 5th day of September, 2018.

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4 District of Arizona

5 *s/J. Cole Hernandez*
6 J. COLE HERNANDEZ
7 Assistant U.S. Attorney

8 Copy of the foregoing has been served
9 electronically or by other means
10 this 5th day of September, 2018, to:

11 Raymond Cross
12 2236 E. 3rd St.
13 Tucson, AZ 85719
14 Plaintiff Pro Per

15 *s/Mary M. Parker*
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