IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WESTERN REFINING SOUTHWEST, INC. et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants, PATRICK ADAKAI, et al., Intervenor-Defendants.	CIVIL ACTION NO. 1:16-cv-442-JCH-GBW

UNITED STATES' RESPONSE TO INTERVENOR-DEFENDANTS' MOTION TO DISMISS FOR WANT OF SUBJECT MATTER JURISDICTION (DOC. NO. 29)

Through undersigned counsel, the United States Department of the Interior and Sally Jewell, in her official capacity as Secretary of the Interior, hereby respond to Patrick Adakai's and Frank Adakai's *Motion to Dismiss for Want of Subject Matter Jurisdiction*, Doc. No. 29.

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INTRODUCTION

Plaintiffs, Western Refining Southwest, Inc. et al., brought this suit pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), challenging certain decisions issued by the United States Department of the Interior ("Interior") et al. ("Defendants") that culminated in the denial of Plaintiffs' request that BIA "renew the right-of-way across Allotment No. 2073 [("Allotment")] for a fixed and unqualified 20-year term." Doc. No. 28 at 4. Among other relief, Plaintiffs ask the Court to compel Interior to renew Plaintiffs' right-of-way. After this suit commenced, Patrick Adakai et al. ("Intervenors"), who own partial, undivided interests in the Allotment, sought to intervene and move for dismissal of the case. Doc. No. 16. On November 29, 2016, the Court issued a *Memorandum Opinion and Order*, Doc. No. 28 ("Order"), denying most of Intervenors' motion but granting Intervenors the opportunity to file a "motion to dismiss raising issues of subject matter jurisdiction" concerning Intervenors' "position that the Secretary of the Interior lacks authority to approve a right-of-way across Allotment No. 2073 in the absence of the consent of the Navajo Nation." Doc. No. 28 at 11.

Intervenors' *Motion to Dismiss for Want of Subject Matter Jurisdiction*, Doc. No. 29 ("Motion"), advances three arguments: (1) Plaintiffs have failed to establish the Court's jurisdiction to encumber tribal lands with a right-of-way absent tribal consent, *id.* at 2; (2) that because Plaintiffs seek an order compelling Interior to renew Plaintiffs' right-of-way across the Allotment that would encumber lands owned by the Navajo Nation ("Nation") without having first secured the Nation's consent, the Nation is a necessary and indispensable party under Fed. R. Civ. P. 19 ("Rule 19") to this suit but cannot be joined due to sovereign immunity and thus, the case must be dismissed, *id.* at 3; and (3) Interior's decision whether to grant a right-of-way to

Plaintiffs is not judicially reviewable because it is an agency action "committed to agency discretion by law" within the meaning of 5 U.S.C. § 701(a)(2), *id.* at 4.

Intervenors' concerns stem from Plaintiffs' request that the Court compel Interior either to renew Plaintiffs' right-of-way for a fixed and unqualified period of twenty years, or reinstate the Bureau of Indian Affairs' ("BIA") initial 2010 approval of Plaintiffs' right-of-way renewal request. Doc. No. 1 at 7. Defendants agree with Intervenors that, in this APA suit relief in the nature of mandamus is unavailable to Plaintiffs as a matter of law, and Interior is not authorized to encumber the Nation's interest in the Allotment without securing the Nation's consent. Nevertheless, Defendants do not agree that dismissal of the entire suit is warranted. As set forth below, Interior supports Intervenors' Motion to the extent it seeks to dismiss Plaintiffs' mandamus claims, including any claim for relief that seeks to encumber the Nation's interest in the Allotment, as such claims are not properly before this Court. Despite Intervenors' arguments to the contrary, however, the Court maintains subject matter jurisdiction to adjudicate the remaining claims and requests for relief that are properly before the Court, even if the Nation is not a party to this suit.[1]

BACKGROUND

I. Statutory and Regulatory Context

A. The 1948 Right-of-Way Act

In 1948, Congress enacted legislation "to simplify and facilitate [the] process of granting rights-of-way across Indian lands." *Neb. Pub. Power Dist. v. 100.95 Acres of Land in Thurston et*

[1] In this response brief, Defendants have narrowed their arguments to respond to the issues Intervenors raised in the Motion. Defendants reserve the right to raise additional arguments in subsequent briefing, both on the issues presented by Intervenors in the Motion, as may be required, and on other issues presented in this suit.

al., 719 F.2d 956, 959 (8th Cir. 1983) (discussing enactment of an *Act to empower the Secretary of the Interior to grant rights-of-way for various purposes across lands of individual Indians or Indian tribes, communities, bands or nations*, 62 Stat. 17 (1948), codified at 25 U.S.C. §§ 323-328 ("1948 Act")). "Prior to 1948, access across Indian lands was governed by an amalgam of special purpose access statutes dating back as far as 1875 . . . this statutory scheme . . . created an unnecessarily complicated method for obtaining rights-of-way." *Neb. Pub. Power Dist.*, 719 F.2d at 958-59. *See also Rights of Way Through Restricted Indian Land: Hearing on H.R. 3322 Before the H. Comm. On Public Lands*, 80th Cong. 8-11 (1947) (statement of Rep. George Schwabe discussing the administrative burden imposed by the "hodge podge" of prior right-of-way statutes; the financial cost to the tribe, including delayed compensation; and the dissatisfaction of both the tribe and the grantee under this system).

The 1948 Act delegates broad authority to the Secretary to "grant rights-of-way for all purposes, subject to such conditions as he may prescribe" over lands held in trust for Indian tribes or individual Indians, as well as over lands held in fee by Indian tribes or individual Indians that are subject to restrictions on alienation. 25 U.S.C. § 323. Among other things, the 1948 Act conditions the right-of-way grant on consent from landowners, mandating tribal consent while providing certain exceptions related to individual Indian landowners, *id.* § 324; requires that the landowner receive just compensation for the grant, *id.* § 325; and authorizes the Secretary to promulgate regulations to carry out the 1948 Act, *id.* § 328.

B. Interior's Regulations Governing Rights-of-Way Across Indian Lands

After first promulgating regulations to implement the 1948 Act in 1951, 16 Fed. Reg. 8,578 (Aug. 25, 1951), Interior sought in 1967 to remove "archaic" requirements; reduce costs on all parties engaged in the right-of-way issuance process; reorganize the regulations for clarity;

and remove provisions that were advisory, rather than regulatory, in nature. 32 Fed. Reg. 5,512 (Apr. 4, 1967) (explaining proposed regulatory changes). Interior subsequently promulgated revised regulations that scaled back its modernization effort. 33 Fed. Reg. 19,803, 19,804 (Dec. 27, 1968) ("the proposed regulations [were] materially changed and . . . many of the provisions of [the] existing regulations [were] retained" in the final rule).

With the exception of relatively minor modifications to the regulations in 1980, 45 Fed. Reg. 45,909 (July 8, 1980), the 1968 regulations[2] governed Interior's process for granting rights-of-way until they were revised in late 2015. *See* 80 Fed. Reg. 72,492 (Nov. 19, 2015) (publishing final revised regulations); 81 Fed. Reg. 14,976 (Mar. 21, 2016) (revised regulations in effect as of April 21, 2016).

II. Factual Context

A. Procedural History of Allotment No. 2073

On August 2, 2010, BIA approved Plaintiffs' request to renew their right-of-way across the Allotment for twenty years, after Plaintiffs secured consent from certain individual Indian landowners that together held a majority interest in the Allotment. *Adakai v. Acting Navajo Reg'l Dir.*, 56 IBIA 104, 104 (Jan. 8, 2013).[3] The Interior Board of Indian Appeals ("IBIA") subsequently vacated BIA's approval on January 8, 2013. The IBIA based its vacatur of the renewal on the fact that two of the landowners upon whom whose consent was relied only held a life estate in the Allotment and thus lacked the authority to consent to a right-of-way that would potentially encumber the Allotment beyond their respective lifetimes. *Id.* at 109. The IBIA held

[2] An excerpt of the regulations promulgated in 1968 are attached as Exhibit A.
[3] The Allotment is held in trust for more than two dozen individual Indians. The Nation first acquired an interest in the Allotment as of December 6, 2012, and has since acquired additional interests in the Allotment. *See* Declaration of Simone Jones at 1-2 (attached as Exhibit B).

that Plaintiffs were required to obtain the consent of the life estate owners' remaindermen to secure such "unqualified" 20-year right-of-way renewal. *Id.* On remand, Plaintiffs renewed its request for a right-of-way renewal with BIA, but after Plaintiffs were unable to secure consent from a majority of the remaindermen, BIA denied that request on April 8, 2014. *West. Refining Sw., Inc. et al. v. Acting Navajo Reg'l Dir.*, 63 IBIA 41, 41 (May 4, 2016). Plaintiffs administratively appealed the denial to the IBIA, which affirmed the denial in part on May 4, 2016, by rejecting Plaintiffs' request that BIA renew the right-of-way for a fixed, unqualified, 20-year term. *Id.* at 53-54. Plaintiffs then filed this suit pursuant to the APA.

Intervenors own a partial interest in the Allotment and oppose the renewal of Plaintiffs' right-of-way across it. Doc. No. 16 at 1-2. On June 13, 2016, Intervenors filed a Motion to Intervene. Doc. No. 16. The Court granted the Motion for the limited purpose[4] of allowing Intervenors to brief the issue of the Court's subject matter jurisdiction in light of the fact that the Nation is not a party to this suit. Doc No. 28 at 11-12. Intervenors filed their Motion on December 5, 2016. Doc. No. 29.

B. Navajo Nation's Interest in Allotment No. 2073

Effective December 6, 2012, the Nation acquired an undivided interest in the Allotment through a probate proceeding for Ms. Anita Adakai. *See Estate of Anita Adakai*, 61 IBIA 2 (June 4, 2015). On that date, an Interior administrative law judge concluded that Ms. Adakai's less-than-five-percent interest in the Allotment should be distributed to the Nation. *Id.* at 2, 10. The IBIA affirmed the administrative law judge's decision on June 4, 2015. *Id.* at 2, 10. Interior accordingly updated the ownership information for the Allotment reflecting the IBIA's

[4] Intervenors have not filed suit against the United States concerning the agency decisions at issue here. As such, Intervenors cannot pursue any remedies against the United States, including a remand to the agency, as they suggest in their Motion. *See* Doc. No. 29 at 3, 6.

affirmance of the distribution to the Nation. *See* Ex. B at 1-2. Defendants' understanding is that the Nation has not consented to renewal of Plaintiffs' right-of-way across the Allotment since the time it acquired interests in the Allotment.

ARGUMENT

I. Rights-of-Way Across the Allotment Require the Nation's Consent

In its Order, the Court concluded that neither Plaintiffs nor Defendants have "an interest in representing [Intervenors'] position that the Secretary of the Interior lacks authority to approve a right-of-way across [the Allotment] in the absence of the consent of the Navajo Nation." Doc. No. 28 at 11. To clarify the record, the position of the United States is that the Nation's consent is required under the 1948 Act and related regulations before the Secretary may grant a right-of-way across the Allotment. The term "tribal lands" includes allotments in which an Indian tribe owns a fractional interest, like the Allotment at issue here. *See* 25 U.S.C. § 323 (authorizing the Secretary "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe"); *id.* at § 324 (conditioning rights-of-way grants on landowner consent); 25 C.F.R. § 169.2(c)-(d) (2015) (defining "Tribe" as "a tribe, band, nation, community, group or pueblo of Indians" and "Tribal land" as including "land or any interest therein"). *See also* 80 Fed. Reg. at 72,509 ("Tribal consent for a right-of-way is required by statute at 25 U.S.C. [§] 324 . . . tribal consent is required for any tract in which the tribe owns an interest, regardless of whether the tribal interest is less than a majority.").

Defendants have taken no action in this suit, or in connection with Plaintiffs' right-of-way renewal request, that contravenes this position. As detailed above, when BIA initially approved Plaintiffs' right-of-way renewal request in 2010, the Nation had not yet acquired an interest in the Allotment. Thus, as of 2010, the Nation's consent for such right-of-way renewal

was not required. Interior's three right-of-way decisions that followed (IBIA's 2013 vacatur; BIA's 2014 denial; and IBIA's 2016 decision) culminated in a denial of Plaintiffs' request to renew their right-of-way "for a fixed and unqualified 20-year term." Doc. No. 28 at 4. As a result, to the extent that Intervenors contend that Defendants erred in prior agency proceedings by not obtaining the Nation's consent when issuing the above-mentioned decisions related to Plaintiffs' right-of-way renewal request, that position is in error.

II. Plaintiffs are Not Entitled to Mandamus Relief as a Matter of Law

In the Order, the Court characterized Intervenors' initial filings as seeking dismissal on subject matter jurisdiction, failure to join an indispensable party, and failure to state a claim grounds. Doc. No. 28 at 10. In their Motion, Intervenors allege that the Court lacks subject matter jurisdiction and that the Nation is an indispensable party that cannot be joined to the suit. Doc. No. 29 at 1, 3. Intervenors also state that "[e]ven were the Court granted jurisdiction to adjudicate Plaintiffs' claims against the [Nation's] real property interests in this case, the Court is not, without more, authorized to grant the extraordinary equitable relief requested by Plaintiffs." Doc. No. 29 at 5. Defendants construe this statement to mean that, even if subject matter jurisdiction exists in this case, Plaintiffs have failed to state a valid claim for the mandamus relief they seek in this suit. If the Court considers this argument, Defendants support dismissal of Plaintiffs' mandamus claims for the reasons set forth below.

Plaintiffs seek a "declaration" that BIA's initial 2010 approval of Plaintiffs' right-of-way renewal request is "valid and enforceable" (i.e., to reinstate the 2010 decision), and further ask this Court to "[e]njoin Defendants to approve renewal of [Plaintiffs'] 20-year unqualified right-of-way over [the Allotment]." Doc. No. 1 at 7. However Plaintiffs might describe the relief they

seek, *id.* at 7-8, it is inescapable that they seek an order from the Court compelling Interior to act. That relief, which is in the nature of mandamus, is unavailable to Plaintiffs as a matter of law.

Pursuant to the APA, a claim for mandamus relief under "[5 U.S.C.] § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis in original); *Kane Cty. Utah v. Salazar*, 562 F.3d 1077, 1086-87 (10th Cir. 2009). Moreover, mandamus "is a drastic remedy . . . to be invoked only in extraordinary circumstances." *Krumm v. Holder*, 594 Fed. Appx. 497, 501 (10th Cir. 2014) (quoting *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009)).

Even if the drastic and extraordinary remedy of mandamus were warranted here, and it is not, Plaintiffs have failed to state a claim for mandamus relief under the APA. Plaintiffs did not, and indeed cannot, identify any *discrete* action that Interior was *required* to take in connection with Plaintiffs' right-of-way renewal request. Indeed, the whole tenor of the 1948 Act reflects that the Secretary may, *but is not required to*, grant rights-of-way across Indian lands. *See*, *e.g.*, 25 U.S.C. § 323 ("empower[ing the Secretary] to grant rights-of-way for all purposes, subject to such conditions as *he* may prescribe"); *id.* at §§ 324-25 (requiring grants be conditioned on both tribal consent and just compensation); *id.* at § 327 (rights-of-way "may" be granted); *id.* at § 328 (authorizing the Secretary to "prescribe any necessary regulations" to carry out the provisions of the 1948 Act). Interior's implementing regulations reflect the same discretionary view as set forth in the 1948 Act—that the Secretary *may* but is certainly *not required* to grant a right-of-way. *See*, *e.g.*, 25 C.F.R. § 169.2(a) (2015) (setting forth the "procedures, terms and conditions under which rights-of-way . . . *may* be granted) (emphasis added); *id.* at § 169.15 (after "satisfactory compliance" with the regulatory requirements, "the Secretary *is authorized to grant*

a right-of-way"); *id.* at § 169.19 (after compliance with renewal requirements, including consent, the Secretary "may" extend the right-of-way). There is no language in the 1948 Act or related regulations that reflect a discrete action Interior was required to take in connection with Plaintiffs' renewal request. Indeed, even if the 1948 Act and related regulations *required* the grant of a right-of-way—and they do not—mandamus would be appropriate only if the 1948 Act and its regulations did not authorize the exercise of any discretion whatsoever in setting terms and conditions for approval. *See Norton*, 542 U.S. at 66 (denying mandamus when the statute at issue was "mandatory as to the object to be achieved, but it [left the agency] a great deal of discretion in deciding how to achieve it"). Accordingly, any claim Plaintiffs make for mandamus relief must fail.

III. The Court Maintains Subject Matter Jurisdiction to Consider Whether Defendants Erred in Connection with Plaintiffs' Right-of-Way Renewal Request and to Grant any Appropriate Relief

Intervenors contend that the Court lacks subject matter jurisdiction over this suit due to the fact that Plaintiffs ask this Court to compel Interior to grant their right-of-way renewal request without first securing the Nation's consent. Doc. 29 at 2-3. Should the Court dismiss or otherwise reject Plaintiffs' claims for mandamus relief, however, then the concern that this Court would encumber the Allotment absent the Nation's consent is resolved.[5]

The remaining issues in the suit—including the availability of other relief under the APA, should Plaintiffs meet their burden of demonstrating they are entitled to it—would not automatically result in an encumbrance of the Allotment. Instead, the suit, when properly

[5] Defendants note that, beyond the limited framework of a Fed. R. Civ. P. 19 analysis in support of their contention that the Court lacks subject matter jurisdiction, Intervenors lack standing or authority to speak on behalf of the Nation or its interests.

circumscribed, would constitute a "garden-variety APA claim"[6] concerning whether Interior erred in its interpretation of the scope of its authority under the 1948 Act and related regulations when considering Plaintiffs' right-of-way renewal request.

In Defendants' view, Plaintiffs are not entitled to any relief whatsoever in this suit. Should the Court eventually conclude otherwise, however, the "ordinary remand rule" counsels that a remand to Interior for reconsideration would be the appropriate remedy. *See*, *e.g.*, *Gonzales v. Thomas*, 547 U.S. 183, 187 (2006); *Fla. Power & Light v. Lorion*, 470 U.S. 729, 744 (1985). In the event of a remand, the Nation's acquired interest in the Allotment would necessarily bear on the agency's reconsideration of Plaintiffs' right-of-way renewal request. In this way, the adjudication of those claims that are properly before the Court poses no threat of encumbering the Allotment without consent from the Nation.

A. Rule 19 Does Not Warrant Dismissal of the Entire Suit

Intervenors invoked Rule 19 to assert that the Nation is a necessary and indispensable party to this suit that cannot be joined due to sovereign immunity and thus, the entire suit must be dismissed. Doc. No. 29 at 3. Defendants contend that if the Court concludes that Plaintiffs' are not entitled to the mandamus relief they seek—the aspect of this suit that seeks to encumber the Allotment with a right-of-way absent the Nation's consent—then Rule 19 need not be invoked and the case can proceed.

Whether a party is indispensable for Rule 19 purposes requires a court to find that (1) "a prospective party is 'required to be joined' under Rule 19(a)," (2) "the required party cannot feasibly be joined"; and (3) the "required-but-not-feasibly-joined party is so important to the

[6] *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2208 (2012) (describing an APA suit alleging that an agency action violated a federal statute as a "garden-variety APA claim").

action that the action cannot 'in equity and good conscience' proceed in that person's absence." *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1278-79 (10th Cir. 2012) (quoting Rule 19). Rule 19 sets out four factors courts should consider in determining whether to proceed in the required party's absence:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Id. at 1278 (quoting Rule 19).

As set forth above, were the Court to "shape the relief" Plaintiffs seek in their Complaint by dismissing or otherwise rejecting Plaintiffs' mandamus claims, then any judgment properly issued in Plaintiffs' favor could not, by itself, result in an encumbrance of the Allotment absent the Nation's consent. If Plaintiffs were to meet their burdens and prevail in this case, the appropriate remedy is remand under the APA. Accordingly, any such judgment would not prejudice the Nation. Lastly, because the APA is the only waiver of United States' sovereign immunity that authorizes this suit, it appears that if the entire case was dismissed on Rule 19 nonjoinder grounds, Plaintiffs would not have another avenue for judicial review of those claims that are properly before the Court. All of these factors counsel against dismissal under Rule 19.

To support their Rule 19 argument, Intervenors cite to certain condemnation cases for the proposition that Indians tribes have been deemed necessary and indispensable parties to those suits. Doc. 29 at 2, 5. Those cases are distinguishable, however, because condemnation (or a remedy akin to it) is not available to Plaintiffs. This is an APA suit, not a condemnation action

brought pursuant to 25 U.S.C. § 357, wherein a party seeks to condemn allotted Indian lands. Even if Plaintiffs prevail in this suit, the Court has no authority to condemn the Allotment in this APA action. The appropriate remedy, if any, is a remand to Interior for reconsideration, wherein the Nation's ownership interest in the Allotment would necessarily factor into Interior's analysis. Should the Court agree that Plaintiffs' claims for relief that seek nonconsensual encumbrance of the Nation's interest in the Allotment are unavailable as a matter of law, then Intervenors' concerns regarding the interests of the Nation are resolved. The Court therefore maintains subject matter jurisdiction over those of Plaintiffs' claims that *are* properly before this Court, even in the absence of the Nation.

B. Judicial Review is Not Precluded by 5 U.S.C. § 701(a)(2)

"The APA establishes a *strong presumption in favor of reviewability of agency action*." *McAlpine v. United States*, 112 F.3d 1429, 1432 (10th Cir. 1997) (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 140 (1967) *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977)) (emphasis in original). Intervenors contend that 5 U.S.C. § 701(a)(2) bars the Court's review of the agency decisions at issue in this case. Doc. No. 29 at 4. Section 701(a)(2) excepts from judicial review any "agency action . . . committed to agency discretion by law." Only "a very narrow range of agency decisions" fall within this exception, however. *McAlpine*, 112 F.3d at 1433. This exception only applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). "[W]hile the determination of whether there is 'law to apply' often focuses on the controlling statute, we have previously recognized that the 'law to apply' can also be derived from the agency's regulations where the agency is

acting pursuant to those regulations." *City of Colo. Springs v. Solis*, 589 F.3d 1121, 1129 (10th Cir. 2009) (quoting *McAlpine*, 112 F.3d at 1433).

Here, Plaintiffs allege that the IBIA misconstrued the relevant provisions of the 1948 Act and applicable regulations when concluding that Plaintiffs were required to obtain the consent of remaindermen as a prerequisite to securing their right-of-way renewal. Doc No. 1 at 5-7. Allegations that Interior misinterpreted the scope of its authority under the 1948 Act and relevant regulations, or that Interior exceeded its authority in rendering an agency decision, are "garden-variety APA claim[s]," *Patchak*, 132 S. Ct. at 2208, that fit within the category of discretionary agency decisions that are subject to judicial review under the APA. *See McAlpine*, 112 F.3d at 1435 (Interior's discretionary decision whether to acquire land in trust for an Indian tribe was just as reviewable as Interior's discretionary decisions whether to approve oil and gas agreements involving Indian mineral interests, and did not fall under the "narrow category of administrative decisions" that have been deemed unreviewable under Section 701(a)(2)).

CONCLUSION

In summary, should the Court dismiss or otherwise reject Plaintiffs' claims for mandamus relief, then the concern that the Court could encumber the Allotment absent the Nation's consent is resolved. Accordingly, the Court maintains subject matter jurisdiction to fully adjudicate those remaining issues properly before it pursuant to the APA.

Dated: December 16, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 16, 2016, the foregoing UNITED STATES' RESPONSE TO INTERVENOR-DEFENDANTS' MOTION TO DISMISS FOR WANT OF SUBJECT MATTER JURISDICTION (DOC. NO. 29) was filed electronically through the CM/ECF system, which caused counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Rebecca M. Ross
/s/ Howard R. Thomas

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