

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**(1) SARAH SUE CHANNING,
(2) LESTER JERRY CROW, and
(3) WILLIAM FISHER,**

Plaintiffs,

v.

Case No. 23-cv-00458-SH

**(1) SENECA-CAYUGA NATION,
Seneca-Cayuga Business Committee Members,
(2) CHARLES DIEBOLD,
Seneca-Cayuga Business Committee Members,
(3) CURT LAWRENCE,
Seneca-Cayuga Business Committee Members,
(4) KIM GUYETT,
Seneca-Cayuga Business Committee Members,
(5) CYNTHIA DONOHUE BAUER,
Seneca-Cayuga Business Committee Members,
(6) AMY NUCKOLLS,
Seneca-Cayuga Business Committee Members,
(7) HOYIT BACON,
Seneca-Cayuga Business Committee Members,
(8) TONYA BLACKFOX, and
Seneca-Cayuga Business Committee Members,
(9) JOHN DOES 1-10,
(10) DEB HAALAND,
Secretary of the Interior,
(11) BRYAN NEWLAND,
Assistant Secretary – Indian Affairs,
(12) UNITED STATES DEPARTMENT OF THE
INTERIOR,**

Defendants.

**FEDERAL DEFENDANT’S REPLY
IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS**

COMES NOW Defendants, United States Department of Interior, the Secretary, and the Assistant Secretary for Indian Affairs (collectively, the “Federal Defendants”), and submits this Reply in further support of their *Defendant United States of America’s Motion to Dismiss Pursuant to Federal Rules 12(b)(1) and 12(b)(6) and Brief in Support* (Dkt. 25) (“Motion to Dismiss”). *Plaintiffs’ Response to Federal Defendants’ Motion to Dismiss for 12(b)(1) Lack of Subject Matter Jurisdiction and 12(b)(6) Failure to State a Claim* (Dkt. 41) (“Response”) provides additional explanation of Plaintiff Sarah Sue Channing, Plaintiff Lester Jerry Crow, and Plaintiff William Fisher’s (collectively “Plaintiffs”) allegations against the Federal Defendants. The additional explanation coupled with the allegations raised in Plaintiffs’ *Petition for Writ of Habeas Corpus Under Indian Civil Rights Act 25 U.S.C. § 1303 and Complaint for Violation of Administrative Procedure Act 25 U.S.C. §§ 701-706 and 25 C.F.R. § 2.7* (Dkt. 2) (“Plaintiffs’ Complaint”) remain insufficient to state a claim upon which relief may be granted or to establish subject matter jurisdiction in this Court. Accordingly, the Federal Defendants’ Motion to Dismiss should be granted pursuant to Rules 12(b)(1) and/or 12(b)(6).

I. Argument & Authorities

A. Plaintiffs’ claims against the Federal Defendants should be dismissed under Fed. R. Civ. P. 12(b)(1) based on their failure to exhaust their administrative remedies.

Plaintiffs’ Complaint and Response make clear that the Plaintiffs ultimately seek an order by the Court setting aside the certification of the results of the Secretarial election at issue. Nevertheless, none of the instant Plaintiffs challenged the certification of the results of the Secretarial election as set out by 25 CFR § 81.43 based on their allegations that “ineligible individuals” voted in the election and caused an “unlawful Secretarial Election.” Compl. ¶¶

81-88. Exhaustion of administrative remedies is necessary to effectuate the APA's waiver of the United States' sovereign immunity and is, therefore, jurisdictional. *Pawnee Nation v. Zinke*, Case No. 16-cv-697-JHP-TLW, 2017 U.S. Dist. LEXIS 149128, *8 (N.D. Okla. Sep. 14, 2017) (citing *Davis v. U.S.*, 343 F.3d 1282, 1295-96 (10th Cir. 2013)).¹

25 CFR § 81.43 provides that any challenge to the results of a Secretarial election must be received by the Chairman of the Secretarial Election Board within 5 days after the Certificate of Results of Election is posted. Challenges received after the deadline for filing challenges will not be considered.

As argued in the Federal Defendants' Motion to Dismiss, the *LaRose* Court makes clear that in order to exhaust the required administrative remedies relating to a Secretarial election, a plaintiff must challenge the results of a Secretarial election pursuant to 25 CFR § 81.43 prior to filing suit against the Federal Government for allegations of unlawful Secretarial election conduct resulting in an illegitimate election. *LaRose v. United States DOI*, 2023 U.S. Dist. LEXIS 34592 (D. MN 2023) (citing *Chase v. Andeavor Logistics, L.P.*, 12 F.4th 864, 868 (8th Cir. 2021); *Runs After v. United States*, 766 F.2d 347, 351-52 (8th Cir. 1985)); Dkt. 25, p. 8-9. The *LaRose* Court plainly stated, "[e]ven if LaRose had standing to pursue his federal claims, the Court would dismiss those claims because LaRose did not exhaust his administrative remedies [by his failure to file a challenge per § 81.43]." *Id.* at *17.

To avoid the exhaustion requirement found in 25 CFR § 81.43, Plaintiffs couch all of their claims against the Federal Defendants on the basis of Plaintiff Crow's sole challenge to the Registered Voters List. First, assuming without conceding that Petitioner Crow's

¹ In the alternative, dismissal would be warranted pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

challenge to the Registered Voters List states a distinct claim based on a separate final agency action, Plaintiffs effectively concede that this would result in the dismissal of any claims by Plaintiffs Channing and Fisher since they did not challenge the Registered Voters List under 25 C.F.R. §§ 81.32 and 81.33, and also did not exhaust their administrative remedies by challenging the results of the election within five days pursuant to 25 C.F.R. § 81.43.

Second, it is clear that Plaintiffs' case and complaints (even Crow's) center on the results of the Secretarial election. Plaintiffs reiterate this point in their Complaint and Response by complaining: "[t]he result of the unlawful Secretarial Election was the approval of all five (5) proposed amendments to the Constitution," (Compl. ¶ 88); "Petitioners are entitled to an Order that the Tribal Defendants and Interior set aside the certification of the Secretarial Election. . ." (Compl. ¶ 158); and, "[t]he results of the Secretarial election amended the Nation's Constitution and have now legitimized the retaliation taken by Tribal Defendants. . ." (Response, p. 14).

The Plaintiffs here repeatedly allege "ineligible individuals" were allowed to vote in the Secretarial election at issue; however, the Plaintiffs also take their allegations a step further and allege that those "ineligible" votes caused an "unlawful election" resulting in the approval of five proposed amendments to the Seneca-Cayuga Nation's (the "Nation" or "Tribe") Constitution. Compl. ¶¶ 6, 88, H. Yet, all Plaintiffs here failed to exhaust their administrative remedies in their individual and collective failure to challenge the certified results of the election as set out in 25 CFR § 81.43.²

² Notably, as stated in Federal Defendants' Motion to Dismiss, Plaintiffs must have been listed on the Eligible Voters List and submitted a voter registration form to have standing to make a § 81.43 challenge to the BIA as to the results of a Secretarial election. Because Plaintiff Fisher failed to register to vote for the Secretarial election at issue, he lacks standing to pursue his claim against the Federal Defendants. (Dkt. 25, p. 9-11).

Given the Plaintiffs' focus and detailed allegations declaring that the Plaintiffs' harms are of direct consequence flowing from the proposed amendments to the Nation's Constitution allegedly being unlawfully passed via the Secretarial election – i.e., the result of the Secretarial election – Plaintiffs were required to bring their challenge regarding the results of the Secretarial election in accordance with 25 CFR § 81.43 to have met their burden of administrative exhaustion prior to filing the instant Complaint. Accordingly, Plaintiffs' claims should be dismissed per Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction due to their failure to exhaust their administrative remedies.

B. Plaintiffs' claims against the Federal Defendants should be dismissed under Fed. R. Civ. P. 12(b)(1) based on the Court's lack of subject matter jurisdiction related to Tribal membership determinations and disputes.

Assuming some or all of the Plaintiffs have exhausted their administrative remedies and are challenging a final agency action within the meaning of the APA, the Court nevertheless lacks subject matter jurisdiction because, at base, Plaintiffs' claims require resolution of an intratribal political dispute and interference with the Tribe's membership determinations.³ Plaintiff Crow's challenge to the Registered Voter List was based on individuals being listed who "failed to meet the criteria for [Tribal] membership. . .specifically referencing those who were not 'born of a marriage.'" Compl. ¶ 81. Plaintiffs' claim is literally and figuratively paternalistic, requiring the Federal Defendants and this Court to interrogate

³ As explained in the Motion to Dismiss, federal courts lack subject matter jurisdiction to interfere in intratribal political disputes or determine tribal membership. Dkt. 25, pp. 11-15. Accordingly, Plaintiffs' claims should be dismissed pursuant to Fed.R.Civ. P. 12(b)(1). Alternatively, Plaintiffs' claims may be dismissed pursuant to 12(b)(6) for failure to state claim against the Federal Defendants because they have not established any plausible basis on which the Federal Defendants, when resolving a challenge to the Registered Voters List, are required to determine whether any particular Registered Voter meets the Tribe's membership criteria or that the failure to do so is arbitrary and capricious.

fact-intensive circumstances of conception, paternity, validity of marriages, affairs, and a litany of emotionally charged personal matters regarding Tribal members' homes and families, and to arrogate to themselves the power to make the ultimate decision of whether individuals satisfy the Tribe's membership criteria.⁴

While the regulations do allow a challenge to the Registered Voters List before the election, 25 CFR § 81.32, such challenges do not extend to whether a Registered Voter has been properly enrolled by the tribe. Instead, challenges to the Registered Voters List are more modest – they include whether an individual is 18 years of age, has indeed registered to vote and did so timely, and meets other qualifications that tribe has imposed to vote in that particular type of Secretarial election.⁵ The Election Board verifies whether individuals on the Registered Voters List or omitted therefrom appear on the Eligible Voters List supplied by the Tribe and registered to vote for the election. In no case, however, do the regulations authorize the Election Board to question the accuracy of the Eligible Voters List “compiled and certified

⁴ Plaintiffs' Response attempts to disclaim any request to have the Federal Defendants make a tribal membership determine by claiming that they are merely requesting that the Federal Defendants “confirm” individuals' Tribal membership. *See* Response, p. 6. Respectfully, this is a distinction without a difference for these “confirmation” activities would require independent investigative efforts by the Federal Defendants and usurp the Nation's exclusive authority to determine its membership.

⁵ Plaintiffs suggest that these “other qualifications” include meeting the criteria for tribal membership, thereby authorizing the Federal Defendants to scrutinize whether an individual satisfies membership criteria. *See* Response, p. 16. However, these “qualifications” speak specifically to *additional* requirements to be eligible to vote in a specific Secretarial election – not membership eligibility generally. 25 CFR § 81.4 plainly states an eligible voter “means a tribal member who will be 18 years of age or older on the date of the Secretarial election (and, if the tribe's governing document imposes **additional requirements for voting in a Secretarial election**, also meets those requirements).” (emphasis added). This definition is further supported by 25 CFR § 81.10 setting out individuals who may cast a vote in Secretarial elections as being “any member of the tribe who: . . . otherwise meets the qualifications required by the tribe's governing documents or charter **for that particular type of Secretarial election**. . .”(emphasis added).

by the tribe’s governing body” and then independently decide whether the individuals on that list meet the criteria for tribal membership. *See* 25 CFR § 81.4. In short, if the regulations intended to allow challenges to whether a voter meets the criteria for tribal membership, it would have expressly so stated.⁶

To support the argument that the BIA must independently verify whether any challenged Registered Voter meets the criteria for tribal membership, Plaintiffs misleadingly string together several regulatory definitions. Plaintiffs begin with the “Registered Voters List” which means the list of all Registered Voters. 25 CFR § 81.4. In turn, a “Registered Voter” means an eligible voter who has registered to vote in the Secretarial election. *Id.* An “Eligible Voter” is a tribal member who will be 18 years of age or older on the date of the Secretarial election. *Id.* Finally, by using the term “tribal member” in the definition of “Eligible Voter,” Plaintiffs allege that this creates a duty on the part of the BIA to effectively verify that every Eligible and Registered Voter “meets the criteria for membership in [the] tribe.” *See* Response, p. 15; Compl. ¶ 79.

But a regulatory scheme does not “hide elephants in mouseholes,” *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001) (citations omitted), and it is not plausible that the regulations would authorize the BIA to second-guess whether any challenged voter meets the criteria for tribal membership. There are several indicia that this is the case. First, Plaintiffs conveniently ignore that the “Eligible Voters List” “is compiled by the tribe’s governing body” 25 CFR § 81.4. Plaintiffs concede that the Eligible Voters List was submitted by the

⁶ Plaintiffs’ arguments that Secretarial Elections are federal elections and that the Federal Defendants have duties relating thereto are not to the contrary. *See* Response, p. 16. Federal Defendants recognize that they have responsibilities for the conduct of Secretarial Elections. Those responsibilities do not entail, however, questioning whether Registered Voters were born of a marriage or out of wedlock and are therefore entitled to tribal membership.

Nation's attorney accompanied by an adopted Tribal resolution calling for the Secretarial election. *See* Compl. ¶ 78; Declaration of William Blake Follis, Exhibit 3, Dkt. 2-29-32.⁷ Therefore, the regulations contemplate that the BIA will rely on the tribe to determine its membership and then provide an Eligible Voters List to that effect.⁸ The Registered Voters List is then drawn from those Eligible Voters who actually registered to vote in the election. The regulations authorize a challenge to the *Registered* Voters List, not the *Eligible* Voters List. And they do not in any way indicate that the BIA is authorized to “look behind” the Eligible Voters List and conduct its own inquiry into whether individuals meet the Tribe's membership criteria.⁹ As the Preamble to the current regulations explained: “Each tribe is responsible for its own enrollment and maintaining its membership roll, if any. . . . The Department relies on

⁷ Plaintiffs have suggested that an improper representative of the Tribe submitted the request for the Secretarial Election. *See* Compl. ¶ 74. But the Nation submitted all documents required to perfect its request for a Secretarial election. Declaration of William Blake Follis, Exhibit 3, Dkt. 2-29-32; Exhibit 4, Dkt. 2-33. Section 81.6 outlines what is required to request a Secretarial election and there is no allegation that the required documents were not submitted. Section 81.6 does not set out a requirement as to a particular representative from the Tribe submitting the requirements in order to perfect a request for a Secretarial election. Further, Plaintiffs' claim is limited to a challenge to the Registered Voters List, not the propriety of the election in the first instance. Any challenge to whether the Secretarial Election was properly requested would have to be brought as a challenge to the election results pursuant to 25 CFR § 81.43 which, as explained above, Plaintiffs did not do and, therefore, have not exhausted their administrative remedies.

⁸ Only where the BIA “maintains the current membership roll for the tribe” does it “compile[] and certif[y]” the Eligible Voters List. 25 CFR § 81.4. This is further evidence that the BIA does not make determinations about whether voters meet tribal membership criteria where the tribe has provided the Eligible Voters List. The Complaint does not allege that the BIA maintains the current membership roll for the tribe.

⁹ Plaintiffs also cite 25 CFR § 81.9 which provides the Secretary can interpret tribal law when necessary to carry out the government-to-government relationship. But Plaintiffs do not explain how maintaining the government-to-government relationship requires verifying whether any and every potential Registered Voter that is challenged meets the tribe's membership criteria. Federal interpretation of tribal law is reserved for only the most rare circumstances.

the tribe's Eligible Voters List in compiling the Registered Voters List." 80 Fed. Reg. 63094, 63100 (Oct. 19, 2015).¹⁰

Second, the regulations make clear that the extent of the BIA's role in resolving a challenge to the Registered Voters List entails, at most, cross-referencing the Registered Voters List and Eligible Voters List, and verifying that the voter actually "registered to vote" and was qualified to do so by, for example, being at least 18 years of age or older on the date of the election. *See* 25 CFR § 81.10. Pursuant to 25 CFR § 81.33(b), when the Election Board receives a timely challenge, its role is limited to including or removing the name of any individual who should or should not appear on the Registered Voters List. Again, if the regulations intended to authorize and require the Election Board to determine whether any challenged Registered Voter meets the criteria for tribal membership it would have, at a minimum, authorized a challenge to the Eligible Voters List since that is the list that is "compiled and certified by the tribe's governing body."

Third, the regulations require the Election Board to resolve challenges to the Registered Voters List within three days. *See* 25 CFR § 81.33. This extremely short window is strongly indicative that the regulations did not intend to require the Election Board to verify whether a challenged Registered Voter meets the tribe's membership criteria which, as the

¹⁰ Plaintiffs cite *California Valley Miwok Tribe v. Haaland*, No. 22-CV-1740 (JMC), 2023 U.S. LEXIS 206197, and its history as an example of the Federal Defendants making membership determinations on behalf of a Tribe. However, *California Valley Miwok Tribe* is distinguishable from the instant case as the California Valley Miwok Tribe is not yet organized per the Indian Reorganization Act, 25 USC § 5101 *et. seq.*, and has not yet adopted and ratified a governing Constitution. *Id.* at *2. Conversely, the Nation has been organized per federal law, adopted a governing Constitution, and maintained its membership roll since 1937. Declaration of William Blake Follis, Exhibit 3, Dkt. 2-29, p. 58. *California Valley Miwok Tribe* does not stand for providing the Federal Defendants with authority, or a duty, to settle internal Tribal membership disputes for an established Tribe with an adopted Constitution.

Complaint explains, would require, *inter alia*, determining whether an individual was born of a marriage or out of wedlock, an inquiry that could be incredibly fact-intensive. Instead, this short timeframe indicates that the Election Board is entitled to rely on the Eligible Voters List supplied by the Tribe which would have had sufficient time to investigate whether an individual meets the Tribe's membership criteria.

Ultimately, Plaintiffs' grievance is not with the Registered Voters List or even the Eligible Voters List but is, instead, with the decision of "untrained representatives for the Nation" to enroll certain individuals in tribal membership that Plaintiffs believe do not qualify. *See* Compl., ¶ 60. This is an intratribal dispute about whether individuals qualify for membership (i.e., whether they were born of a marriage or out of wedlock) masquerading as a claim of unlawful agency action for the alleged failure to "confirm" (i.e., second guess) the Tribe's determination. Plaintiffs' remedy lies within the Tribe, not through federal usurpation of the core tribal sovereign power to determine its membership.¹¹ To be clear, what the Plaintiffs are requesting of the Court would require the Federal Defendants – in three days – to review and determine whether all alleged "ineligible" individuals on the Registered Voters List were born of a marriage and, if not, strip those individuals of the right to vote in the Secretarial Election. As an independent sovereign political body, the Nation processes all

¹¹ For example, in the instant case, at the time of and prior to the Secretarial election, the Nation had at least a Grievance Committee as provided for in its Constitution, Declaration of William Blake Follis, Exhibit 3, Dkt. 2-29, p. 58, wherein the Plaintiffs should have presented their allegations of ineligible members being enrolled in the Nation's Tribal membership. *Ordinance 59 Ass'n v. U.S. Dep't of Interior, et al.*, 163 F.3d 1150 (10th Cir. 1998). Plaintiff Crow has previously challenged a Tribal election candidate for the office of chief on the basis of the candidate having been allegedly "not eligible for membership" due to not being born of a marriage. Plaintiff Crow's prior challenge was submitted to the Nation's Election Committee, rather than to a federal court, evidencing his recognition that membership disputes must be resolved by the Nation. Declaration of Lester "Jerry" Crow, Exhibit 1, Dkt. 2-15, p. 1-6.

applications for membership, maintains its membership roll, and hears complaints as to members and their eligibility for membership through its Constitutionally created Grievance Committee. Compl. ¶¶ 78, 83; Declaration of William Blake Follis, Exhibit 3, Dkt. 2-29, p. 58. The Eligible Voters List submitted to the Federal Defendants was a result of the Nation's previously determined membership which is its sovereign right. The Federal Defendants' reliance on that list cannot be said to be arbitrary or capricious.¹² Given the absence of express statutory or regulatory language providing for the Federal Defendants' or the Court's interference with the Nation's membership determinations, Plaintiffs' claims should be dismissed per Fed. R. Civ. P. 12(b)(1) and/or 12(b)(6).¹³

III. Conclusion

For the reasons set out herein, the Federal Defendants respectfully request that they be dismissed from this matter based on the Court being without subject matter jurisdiction and Plaintiffs failure to state a claim upon which relief can be granted.

¹² Further, to the extent Plaintiffs could challenge the Federal Defendants reliance on the Eligible Voters List, that challenge would be time-barred. The Plaintiffs allege that the Eligible Voters List contains names of individuals who should not be enrolled due to the "Federal Defendants failure to assist . . . in 2017 with the Nation's enrollment audit." Compl., ¶ 155. They further allege this was confirmed by an audit dated February 2, 2018. At that time, Plaintiffs had knowledge that individuals allegedly did not meet the Tribe's membership criteria and, assuming Federal Defendants have some duty to enforce that criteria, could have brought a claim against the Federal Defendants. However, more than six years have elapsed since that time and such a claim would now be time-barred.

¹³ For the same reasons, Plaintiffs' allegation that the BIA was obligated to audit the Tribe's membership rolls, Compl., ¶ 155, as well as its request that the BIA be ordered to conduct an audit of the Nation's rolls, *id.* Prayer for Relief, Subsection I, should be rejected.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2024, the foregoing document was electronically transmitted to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to counsel of record.

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