

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

CHAD EVERET BRACKEEN, et al.,

and

STATE OF TEXAS,
STATE OF LOUISIANA, and
STATE OF INDIANA,

Plaintiffs,

v.

RYAN ZINKE, in his official capacity as
Secretary of the United States Depart-
ment of the Interior, et al.,

Defendants,

CHEROKEE NATION, et al.,

Intervenor-Defendants.

Case No. 4:17-cv-00868-O

**STATE PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE FEDERAL
DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

State Plaintiffs oppose the motion for partial summary judgment, ECF No. 146, and memorandum in support, ECF No. 147, filed by the United States of America, the Departments of Interior and Health and Human Services, Secretary of Interior Ryan Zinke, Secretary of Health and Human Services Alex Azar, Bureau of Indian Affairs, Director of the Bureau of Indian Affairs Bryan Rice, and Acting Assistant Secretary—Indian Affairs John Tahsuda III (collectively, the “Federal Defendants”). The Federal Defendants are not entitled to judgment on any of the claims.

The Federal Defendants’ memorandum in support of partial summary judg-

ment repeats and restates arguments made in their memorandum in support of motion to dismiss, ECF No. 57, reply in support of their motion to dismiss, ECF No. 115, and memorandum in opposition to State Plaintiffs' motion for summary judgment, ECF No. 121. State Plaintiffs responded to those arguments in prior briefing. Thus, State Plaintiffs hereby respond to the Federal Defendants' motion for partial summary judgment by adopting, as if fully set forth herein, the facts and arguments in State Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss and Memorandum in Support of Motion for Summary Judgment, ECF No. 74, Individual Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss and in Support of Individual Plaintiffs' Motion for Summary Judgment, ECF No. 80, State Plaintiffs' Reply in Support of Motion for Summary Judgment, ECF No. 142, and Individual Plaintiffs' Reply in Support of Their Motion for Summary Judgment, ECF No. 143.

One argument in the Federal Defendants' brief, however, warrants a brief response. Almost *nine months* after Plaintiffs filed their original complaint, the Federal Defendants still have yet to file the administrative record for the Final Rule. That failure—or tactical ploy—on the part of Federal Defendants precludes this Court from granting judgment to Defendants on Plaintiffs' claim that the Final Rule violates the Administrative Procedure Act. *See* 2d Am. Compl. ¶¶ 247–65, ECF No. 35. While the Court may grant summary judgment to Plaintiffs on their APA claim based on the limited APA arguments they have advanced, which are based ICWA itself and on what the Federal Defendants stated in the Federal Register, the Court cannot grant judgment to Defendants on Plaintiffs' APA claim—including Plaintiffs' contention that the Final Rule is arbitrary and capricious—until it is able to review “the whole record.” 5 U.S.C. § 706; *see Miss. River Basin All. v. Westphal*, 230 F.3d 170, 174–75 (5th Cir. 2000); *see also Texas Comm. on Nat. Res. v. Van Winkle*, 197 F. Supp. 2d 586, 595 (N.D. Tex. 2002) (“In reviewing administrative agency decisions, the function of the district court is to determine whether as a matter of law, evidence in the

administrative record permitted the agency to make the decision it did. . . .”). Particularly given that the Final Rule regulates child custody proceedings, the Court should not allow Defendants to delay the timely adjudication of Plaintiffs’ APA claims by withholding the administrative record. The Court should proceed to resolve Plaintiffs’ motions for summary judgment, and defer resolution of Defendants’ motions (if not mooted by the Court’s disposition of Plaintiffs’ motions) until such time as the Federal Defendants have filed the complete administrative record. In this connection, the Court may wish to order the Federal Defendants to file the record by a date certain.

For the reasons stated herein and in prior briefing, State Plaintiffs respectfully request that the Court deny the Federal Defendants’ motion for summary judgment.

Respectfully submitted this 29th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2018, I electronically filed the foregoing document through the Court's ECF system, which automatically serves notification of the filing on counsel for all parties.

/s/ David J. Hacker
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