UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 10-cv-3801 (DWF/LIB)

Sandy Lake Band of Mississippi Chippewa, Plaintiff, v. United States of America; Ken Salazar, as Secretary of the Interior; Larry Echo Hawk, as the Assistant Secretary for Indian Affairs; Jodi Gillette,[1] as Acting Deputy Assistant Secretary for Policy and Economic Development, Indian Affairs; and Diane Rosen, Regional Director, Midwest Regional Office, Bureau of Indian Affairs, Defendants.	)	**FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

[1] George Skibine no longer serves as the Acting Deputy Assistant Secretary for Policy and Economic Development. Jodi Gillette, the current Deputy Assistant Secretary, is substituted for Mr. Skibine pursuant to Fed. R. Civ. P. 25(d).

INTRODUCTION

Defendants, Ken Salazar, Secretary of the United States Department of the Interior ("DOI"), Larry Echo Hawk, Assistant Secretary – Indian Affairs of the United States Department of the Interior, Jodi Gillette, Deputy Assistant Secretary – Policy and Economic Development, Indian Affairs, Diane Rosen, Regional Director – Midwest Regional Office, Bureau of Indian Affairs, (collectively referred to herein as "Defendants") hereby move to dismiss this action filed by Plaintiff, Sandy Lake Band of Mississippi Chippewa. Plaintiff brings suit asserting, *inter alia*, that 1) Defendants improperly failed to place Plaintiff on the list of federally recognized tribes pursuant to the Federal Recognized List Act ("List Act"), 25 U.S.C. §§ 479a, 479a-1, and 2) improperly denied Plaintiff's request for "reorganization" through the Indian Reorganization Act (IRA) Secretarial elections provision. 25 U.S.C. § 476.

Because the underlying question of federal acknowledgment[2] has never been presented through the proper federal regulatory process, Plaintiff has therefore failed to exhaust the administrative remedies. Thus, Plaintiff's seven claims[3] should be dismissed for lack of subject matter jurisdiction under the Administrative Procedure Act ("APA").

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[2] Both "recognition" and "acknowledgement" are legal terms of art that are used interchangeably. Cohen, 3.03[3], n. 25 (2005 ed.).

[3] Claim One, "Violation of the Federally Recognized List Act of 1994," ¶¶ 53-58; Claim Two, "Violation of the IRA," ¶¶ 59-69; Claim Three, "Violation of the Administrative Procedures Act," ¶¶ 70-74; Claim Four, "Violation of the Fifth Amendment," ¶¶ 75-79; Claim Five, "Breach of Trust, List Act, and IRA," ¶¶ 80-83; Claim Six, "Breach of Trust, Treaty Rights," ¶¶ 84-88; and Claim Seven, "Money Damages," ¶¶ 89-93.

Furthermore, in the absence of an exhausted administrative remedy, Plaintiff's request for federal recognition raises nonjusticiable political questions and is barred by the six year jurisdictional time bar found in § 2401. Plaintiff's claims must also be dismissed pursuant to Federal Rule of Civil Procedure 19 because both the Minnesota Chippewa Tribe and the Mille Lacs Band are necessary and indispensable parties to this litigation. Next, although the narrow APA waiver of sovereign immunity applies to Plaintiff's IRA claim for reorganization, Plaintiff nevertheless fails to state a claim upon which relief can be granted. Pursuant to the regulations promulgated governing Secretarial elections, Plaintiff is ineligible to request such an election. Finally, this Court should dismiss claims Five, Six, and Seven, for breach of trust and general monetary damages because Plaintiff fails to provide an explicit waiver of sovereign immunity, failed to file within the six year jurisdictional time bar in 28 U.S.C. § 2401(a) and also fails to state a claim upon which relief can be granted.[4]

BACKGROUND

A. Factual Background

Plaintiff claims to represent the Sandy Lake Band of Mississippi Chippewa ("Sandy Lake Band" or "Band"), an Indian group located in northern Minnesota. The Sandy Lake Band does not appear on the most recently published list in the Federal Register, entitled "Indian Entities Recognized and Eligible to Receive Services from the

[4] To the extent Plaintiff alludes to a Fifth Amendment violation in Claim Four, that claim should also be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). *See infra* Section VII.

United States Bureau of Indian Affairs." 75 Fed. Reg. 60810 (Oct. 1, 2010); *see also* 75 Fed. Reg. 66124 (Oct. 27, 2010) (supplemental listing adding the Shinnecock Indian Nation to the list of federally recognized tribes).[5] The Band is not federally recognized because Plaintiff has not initiated the federal acknowledgment process. Furthermore, the DOI has considered the historic Sandy Lake Band to be a part of the Mille Lacs Band of Mississippi Chippewa since the 1930s, when the Minnesota Chippewa Tribe organized under IRA.[6]

As indicated in the Complaint, the DOI reaffirmed its position in a May 29, 1980 letter by Field Solicitor Elmer Nitzschke in response to a jurisdictional dispute between the Fond du Lac and Mille Lacs bands over trust land at Sandy Lake. Compl. ¶ 43; *see*

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[5] Sandy Lake Band was not included in A*merican Indians and Their Federal Relationship*, United States Dept. of the Interior, Bureau of Indian Affairs (March, 1972), the predecessor to the publication of the list of tribal of tribal entities in the Federal Register. Nor does the Sandy Lake Band appear on any of the previously published lists. *See* 74 *Fed. Reg*. 40218 (Aug. 11, 2009); 73 *Fed. Reg.* 18,553 (April 4, 2008); 72 *Fed. Reg*. 13,648 (Mar. 22, 2007); 70 *Fed. Reg.* 71,193 (Nov. 25, 2005); 68 *Fed. Reg.* 68,179 (Dec. 5, 2003); 67 *Fed. Reg.* 46,327 (July 12, 2002); 65 *Fed. Reg.* 13,298 (Mar. 13, 2000); 63 *Fed. Reg.* 71,941 (Dec. 30, 1998); 62 *Fed. Reg.* 55,270 (Oct. 23, 1997); 61 *Fed. Reg.* 58,211 (Nov. 13, 1996); 60 *Fed. Reg.* 9,250 (Feb. 16, 1995); 58 *Fed. Reg.* 54,364 (Oct. 21, 1993); 53 *Fed. Reg.* 52,829 (Dec. 29, 1988); 51 *Fed. Reg.* 25,115 (July 10, 1986); 50 *Fed. Reg.* 6,055 (Feb. 13, 1985); 48 *Fed. Reg.* 56,862 (Dec. 23, 1983); 47 *Fed. Reg.* 53,130 (Nov. 24, 1982); 46 *Fed. Reg.* 35,360 (July 8, 1981); 45 *Fed. Reg.* 27,828 (April 24, 1980); and 44 *Fed. Reg.* 7,235 (Feb. 6, 1979).

[6] The organization of the Minnesota Chippewa Tribe in the 1930s was unique in that the DOI permitted several bands of Chippewa, such as the Mille Lacs Band, to organize as a single tribe despite those bands living on separate reservations. Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. REV. 297, 329-30 (2004).

also Compl. Ex. 23. In concluding that the Mille Lacs Band had jurisdiction, Field Solicitor Nitzschke stated that "the Mille Lacs Band is the political successor of the historic Sandy Lake Band." Compl. Ex. 23. Specifically, Field Solicitor Nitzschke stated that "the original charter of organization of the Mille Lacs Band (following organization of the Minnesota Chippewa Tribe under the Indian Reorganization Act) provided that the membership of the Mille Lacs Band would consist of 'all Chippewa Indians permanently residing on the Mille Lacs Reservation and at, or near, the villages of Isle, Danbury, East Lake and Sandy Lake.'" *Id.* (quoting the Mille Lacs charter).

B. Procedural Background

The procedural history of this case dates well before Plaintiff's July 27, 2007 letter requesting a Secretarial election. Over the past 22 years, Plaintiff has regularly communicated with the United States, and this is not the first time Plaintiff has brought suit seeking federal recognition. On June 7, 1988, Clifford Skinaway submitted "an incomplete and uncertified petition for acknowledgment as an Indian tribe for Sandy Lake." Fleming Decl. Ex. 1 at ¶ 24. On June 24, 1988, the Chief of the DOI's Division of Tribal Government Services responded and requested that Mr. Skinaway provide a formal expression from the group's governing body, declaring that the group is petitioning for federal acknowledgment. *Id.* ¶ 25. On January 24, 1991, the BIA responded to a telephone request from Sandra (Skinaway) Perry for information regarding how an Indian group must apply for federal acknowledgment. *Id.* ¶ 26. In that letter, the DOI provided copies of pertinent regulations governing the acknowledgement

process, guidelines for preparing a documented petition, and an informational brochure detailing the process of acknowledgment. *Id*. at ¶ 26.

Rather than submit a formal petition, Plaintiff filed suit for declaratory and injunctive relief and money damages. Complaint, Docket No. 1, *Clifford Skinaway v. Manuel Lujan, et al*, Civ. No. 5:91-170 (D. Minn. Nov. 27, 1991). That action was ultimately dismissed without prejudice in 1992. Docket No. 22, *Clifford Skinaway v. Manuel Lujan, et al*, Civ. No. 5:91-170 (D. Minn. July 30, 1992). Following dismissal, and between August 22, 1995 and August 1, 2006, the United States mailed at least 13 responses to individuals seeking federal recognition on behalf of the Sandy Lake Band, namely to Monroe Skinaway, Deborah Pearson, and Sandra Skinaway-Perry. Fleming Decl. at ¶¶ 27-39. In each of these responses, the United States cited the pertinent federal regulations outlining the federal recognition process.

Then, on July 10, 2007, Plaintiff sent substantively identical but separate letters to both the Assistant Secretary and to the Superintendent of the Minnesota Agency of the BIA, "requesting that the Superintendent *call and conduct an election* for the Tribe to vote on a constitution to organize a tribal government under the provisions of the IRA." Compl. ¶ 46 (emphasis added); *see also* Compl. Ex. 25 at 1 ("By letter . . . you requested the Superintendent, Minnesota Agency, *call a secretarial election*" under the IRA.) (emphasis added). In neither letter did Plaintiff "ask to have [Plaintiff] added to the list of Federally-recognized tribal entities; nor did he request federal acknowledgment of [Plaintiff] as an Indian tribe." *Sandy Lake Band of Ojibwe v. Midwest Regional Director*,

46 IBIA 310, 311 (2008) ("*Sandy Lake Band*").

The Assistant Secretary and the Superintendent separately responded[7] and denied Plaintiff's request for a Secretarial election. Plaintiff appealed these decisions to the IBIA. *Sandy Lake Band*, 46 IBIA 310; Compl. Ex. 27. The IBIA held that, for purposes of Plaintiff's *request for reorganization* through the Secretarial election process, the Assistant Secretary's September 25 denial was a final decision. *Id.* at 313 (holding that "[b]ecause the Assistant Secretary addressed and decided a request from [Plaintiff] that was substantively identical to [Plaintiff's] request to which the [Superintendent] responded, and because the Assistant Secretary's decision is final for the Department, we agree that this appeal should be dismissed"). During the appeal, Plaintiff argued that the Superintendent's letter was a denial of its request for acknowledgment.[8] The IBIA rejected this argument and observed that the Superintendent's letter "clearly indicates" that the Assistant Secretary was responding to a request to reorganize under the IRA. *Id.* at 312. Thus, the Assistant Secretary did not "deny' a request from [Plaintiff] to be federally recognized as an Indian tribe." *Id.* The IBIA concluded that "[t]he more natural construction of the Assistant Secretary's letter [was] that it effectively denied, as premature, Appellant's request to be allowed to reorganize under the IRA, because

[7] The Superintendent responded on August 28, 2007, *see* Compl. Ex. 25 at 1-2, and the Assistant Secretary responded on September 25, 2007. *See* Compl. Ex. 25 at 3.

[8] "Appellant [Plaintiff] contends the Assistant Secretary's response does not constitute a decision on Appellant's request for a Secretarial election. According to Appellant, the Assistant Secretary's letter 'simply thanks' Appellant for sending the July 10, 2007, letter, and then goes on to deny Appellant's 'other requests for federal acknowledgment.'" *Id.* at 312.

Appellant [was] not present federally recognized." *Id.* at 313. It is under this procedural context that Plaintiff has filed this Complaint.

STATUTORY AND REGULATORY BACKGROUND

A. Federal Recognition

"Whatever difficulty courts may have encountered in determining whether Congress or the Executive Branch has recognized a group as a tribe was substantially reduced in 1978 when the Department promulgated procedures governing federal recognition of Indian tribes." *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1498 (D.C. Cir. 1997); *see* 25 C.F.R. § 83. These regulations allow "any Indian group that is not currently acknowledged by the Department of the Interior to apply for federal recognition, thereby qualifying for federal protection, services and benefits." *James v. U.S. Dep't of Health and Human Servs.*, 824 F.2d 1132, 1136 (D.C. Cir. 1987). "A petition for federal recognition is required as a prerequisite to acknowledgment." *Id.* Completion of the federal acknowledgement process is a prerequisite for both those tribes seeking federal recognition in the first instance, 25 C.F.R. § 83.7, as well as those tribes seeking federal recognition premised on prior acts of federal recognition such as treaties or executive orders. 25 C.F.R. § 83.8.

Once federally recognized, the DOI has the duty of publishing "no less frequently than every three years, a list of all Indian tribes entitled to receive services from the Bureau by virtue of their status as Indian tribes." 25 C.F.R. § 83.5(a); Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (1994)

(codified at 25 U.S.C. § 479a) (List Act). The most recent list is found at 75 Fed. Reg. 60810-01 (Oct. 1, 2010). Plaintiff is not included on this list, nor is the Secretary required to include Plaintiff on this list.

Federal recognition or acknowledgment of Indian groups as Indian tribes establishes a government-to-government relationship with the United States and is a prerequisite to the protection, services, and benefits available to Indian tribes. 25 C.F.R. § 83.2. This political relationship includes potential access to federal funding for health, education, and other social programs, and the possibility of establishing casino gaming operations. *See California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263-64 (D.C. Cir. 2008). Federal recognition also means that an Indian tribe is entitled to the immunities and privileges available to other federally recognized tribes by virtue of their government-to-government relationship with the United States, as well as the responsibilities, powers, limitations, and other obligations of such tribes. *Id*. Federal recognition of tribal status subjects the Indian tribe to the same authority of Congress and the United States to which all other federally acknowledged tribes are subjected. *Id*.

B. The Indian Reorganization Act and Secretarial elections

The IRA was passed in 1934 as a result of the general recognition that the allotment policy[9] had failed to serve any beneficial purpose for Indians. F. Cohen,

[9] For most of the 19th century, the national policy toward Indians was to segregate reservation lands for the exclusive use and control of Indian tribes. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 253-54 (1992). Late in the 19th century, however, this policy gave way to a policy of "allotting" reservation lands to tribe members individually, in order to "extinguish tribal sovereignty,

Handbook of Federal Indian Law (1982 ed.) at 612-14. The IRA authorized reorganization, and in some instances the creation of tribal organizations, subject to the approval of the Secretary of the Interior. The original language of the IRA provided that any tribe or tribes residing on one reservation could reorganize. *See* 1 Op. Sol. 478 (Nov. 7, 1934). The Act also contemplated that more than one tribe could reorganize on one reservation. *Id.* However, once reorganized, the reorganized entity represented the government for the entire reservation.

The two sections of the IRA that relate to Secretarial elections are 25 U.S.C. § 476[10] and 479.[11] However, "the IRA left many of the terms and procedures for

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erase reservation boundaries, and force the assimilation of Indians into the society at large." *Id.* at 254; *see generally*, F. Cohen, at 612-14.

[10] 25 U.S.C. § 476 provides: Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when--

> (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and
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> (2) approved by the Secretary pursuant to subsection (d) of this section.

[11] 25 U.S.C. 479 provides: "The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words 'adult Indians' wherever used in this Act shall be construed to refer to Indians who have

Secretarial elections undefined." F. Cohen, § 4.06[2][b] (2005 ed.); thus, the Secretary promulgated rules and regulations, the purpose of which was "to provide uniformity and order in," *inter alia*, (1) holding elections for voting on proposed constitutions when tribes wish to reorganize, and (2) adopting constitutional amendments. § 81.2(a); *accord Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1087 (8th Cir. 1977); *see generally* 25 C.F.R. § 81.1 *et seq*., *Tribal Reorganization Under a Federal Statute*. The IRA and implementing federal regulations govern the procedure to amend or adopt tribal constitutions, such as that of the Minnesota Chippewa Tribe – a federally recognized tribe and the umbrella organization of the six component bands. 25 C.F.R. § 81.

STANDARDS OF REVIEW FOR A MOTION TO DISMISS

A. Subject Matter Jurisdiction

Under the Federal Rules of Civil Procedure, a complaint may be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A party may make either a facial or factual challenge to a court's subject matter jurisdiction. *Osborn v. United States*, 918 F.2d 724, 729, n.6. (8th Cir. 1990) . When considering a factual challenge, as is the case here, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Osborn*, 918 F.2d at 730. Furthermore, "no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* The plaintiff has the burden of proof that jurisdiction

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attained the age of twenty-one years."

does in fact exist. *Id.* Lack of subject matter jurisdiction, unlike many other objections to the jurisdiction of a particular court, cannot be waived. "It may be raised at any time by a party to an action, or by the court *sua sponte*." *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 485 (8th Cir. 1993) (citing Fed. R. Civ. P. 12(h)(3)).

B. Failure to State a Claim

A complaint may also be dismissed under Rule 12(b)(6) when it fails to state a claim upon which relief can be granted. In evaluating a motion to dismiss for failure to state a claim, a court must accept as true all allegations contained in the complaint and must view the complaint in the light most favorable to the plaintiff. *Weaver v. Clarke*, 45 F.3d 1253, 1255 (8th Cir. 1995). Moreover, the plaintiff must allege factual allegations beyond the speculative level, and the court must accept the allegations of the complaint as true and dismiss the case only when a plaintiff fails to demonstrate that a cause of action exists upon those allegations. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (internal citations and quotations omitted).

I. PLAINTIFF FAILS TO STATE A CLAIM FOR RELIEF UNDER THE IRA BECAUSE IT IS NOT ELIGIBLE TO REQUEST AN ELECTION

To the extent Plaintiff alleges the Defendants violated the IRA by denying its request for a Secretarial election, Compl. ¶¶ 59-69, Plaintiff fails to state a claim. Plaintiff fails to provide sufficient facts to allow this Court to draw a reasonable inference

that Defendants were required to "call and conduct a special election" pursuant to 25 U.S.C. § 476. Compl. ¶ 60. Plaintiff asserts that the "the Secretary will not call a special IRA election for the Tribe, even though the Tribe is an Indian tribe within the meaning of 25 U.S.C. §§ 476 and 479 and even though the Tribe has requested that the Secretary do so." Compl. ¶ 71. The regulations promulgated by the DOI for requesting IRA elections, however, limit eligibility to those tribes that are federally recognized and listed in the Federal Register. *See* 25 C.F.R. § 81.1(w). Section 81.1(w) defines "Tribe" as one that includes "[a]ny Indian entity . . . [that] is included, or is eligible to be included, among those tribes, bands, pueblos, groups, communities, or Alaska Native entities *listed in the Federal Register* pursuant to § 83.6(b) of this chapter as recognized and receiving services from the Bureau of Indian Affairs." (emphasis added). Thus, in accordance with these regulations, only those tribes that are included or eligible to be included on the list of federally acknowledged tribes can request the Secretary to call an election.[12]

[12] And this reading makes sense in light of the history of revisions of the IRA. The IRA was first passed in 1934 and revised in 1994 with the passage of the Federal List Act which added subsection § 479a, Definitions, and 479a-1, Publication of list of recognized tribes. 479a defines "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or community *that the Secretary of the Interior* acknowledges to exist as an Indian tribe." (emphasis added) 479a also defines "list" and cites directly 479a-1. Going to 479a-1, "Secretary shall publish list of all Indian tribes *which the Secretary recognizes* to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." In light of the legislative history, it would make sense that only those tribes that are federally acknowledged would be eligible not only for federal benefits, but to call Secretarial elections as well – which are *federal* elections. *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1088 (8th Cir. 1977) (holding for purposes of applying the twenty-sixth amendment that "Secretarial elections are specific federal elections regulated by federal statute.").

Because Plaintiff is not included or eligible to be included on the federal register list, it is not eligible for a Secretarial election held pursuant to section 16 of the IRA.

Plaintiff, however, makes no mention whatsoever of the Part 81 regulations and provides only the bald assertion that because "[t]he Tribe was federally recognized on June 18, 1934," that it is "an 'Indian tribe' within the meaning of 25 U.S.C. § 479." Compl. ¶ 63. In addition to the explicit regulatory language explained above, Plaintiff's argument fails for an additional reason. First, the acknowledgment procedures governing federal recognition "are binding on the [DOI] as to which Indian entities may be considered Indian tribes under statutes and regulations which do not define the term 'Indian tribe.'" *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993) (citing *Edwards, McCoy & Kennedy v. Acting Phoenix Area Dir.*, 18 IBIA 454 (1990)). Thus, even assuming *arguendo* "Indian tribe" under § 479 was not further defined, the DOI was not required to call a Secretarial election because Plaintiff never completed the acknowledgment process. Second, a band of Indians – the historic Sandy Lake Band – already participated in a Secretarial election and ratified a tribal constitution when the Minnesota Chippewa Tribe reorganized. Plaintiff's proper avenue to seek separation from the Mille Lacs Band must be in accordance with Minnesota Chippewa Tribe's Constitution or through congressional legislation.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO REVIEW A CLAIM FOR POLITICAL RECOGNITION IN THE ABSENCE OF AN EXHAUSTED ADMINISTRATIVE REMEDY.

A. Plaintiff Has Failed to Exhaust its Administrative Remedies.

At the center of this suit is Plaintiff's July 10, 2007 request to reorganize through the Secretarial election process provided by Section 16 of the IRA, 25 U.S.C. § 476. After the DOI denied Plaintiff's request, the Interior Board of Indian Appeals ("IBIA") held that the denial constituted a final decision, but only as to Plaintiff's request for a Secretarial election. Compl. Exs. 25-26. It did not make a final agency determination on the question of federal recognition. A final DOI decision on a petition for acknowledgment is required before Plaintiff can file for judicial review under the APA. *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549 (10th Cir. 2001). Despite 22 years of correspondence from the DOI and the Office of Federal Acknowledgment ("OFA"), wherein the DOI informed the Plaintiff of the acknowledgment process, Plaintiff has never filed a petition with the agency tasked with federal acknowledgment, the OFA. *See* Flemming Decl.

Under the doctrine of exhaustion of administrative remedies, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006) (quoting *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-51(1938)). "Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted,

suit is premature and must be dismissed." *Peters v. Union Pac. R. Co*. 80 F.3d 257, 262 (8th Cir. 1996) (citing *Reiter v. Cooper,* 507 U.S. 258, 269, 113 S.Ct. 1213, 1220, 122 L.Ed.2d 604 (1993)).

Here, although the Department issued a final decision in the September 25, 2007 letter regarding Plaintiff's request for a Secretarial election, there has been no final agency determination of federal recognition. *See Sandy Lake Band*, 46 IBIA at 311 (observing that neither letter Plaintiff submitted "ask[ed] to have the [Plaintiff] added to the list of Federally-recognized tribal entities; nor did [Plaintiff] request Federal acknowledgment of [Plaintiff] as an Indian tribe."). Without ever initiating the acknowledgment process, Plaintiff is asking this Court to declare it a federally recognized Indian tribe, direct the DOI to list it in the Federal Register, and accord it the federal benefits that federally recognized tribes are eligible to receive. Compl. At 27-28. Granting this premature relief would improperly expand the limited waiver of sovereign immunity provided by the APA, 5 U.S.C. § 551, *et seq*. Because Plaintiff has failed to exhaust its administrative remedies, this Court does not have subject matter jurisdiction to hear Plaintiff's claims for federal recognition.

B. Even Assuming Plaintiff Was Previously Recognized, It Must Still Exhaust the Administrative Process

Notwithstanding Plaintiff's failure to complete, or at the very least initiate, the acknowledgment process, Plaintiff asserts that because it entered into ten treaties with the United States and because the Congress of the United States has never enacted legislation

terminating Plaintiff's relationship with the United States,[13] that it must be federally recognized. Compl. ¶ 54-55. Plaintiff may likely argue that it is not required to initiate the process in the first instance because to do so would be redundant given its previously recognized status. The federal acknowledgment process, however, encompasses both those tribes seeking recognition in the first instance, as well as those tribes claiming previously recognition as demonstrated by treaties and executive orders. *See* 25 C.F.R. §§ 83.7; 83.8; *see also* 59 Fed. Reg. 9280, 9282 (Feb. 25, 1994) ("The provisions concerning previously acknowledged tribes have been further revised and set forth in a new, separate section of the regulations . . . Although these changes have been made, the revisions maintain the essential requirement that to be acknowledged a petitioner must be tribal in character and demonstrate historic continuity of tribal existence.").

Indeed, the acknowledgment process includes processes for those tribal claims

[13] Plaintiff also contends that the Defendants "[have] effectively terminated the Tribe's government-to-government relationship with the United States, without authorization from Congress, in direct violation of Congress' findings set forth in the [List Act]." Compl. ¶ 57. As support, Plaintiff cites the Congressional findings contained in the List Act. *Id.* (citing Section 103(3)-(4) of Pub. L. 103-454). Plaintiff urges this Court to disregard an established regulatory framework and afford Plaintiff the substantive right to obtain federal recognition through the courts in the absence of a final agency determination. It would be somewhat anomalous that Congress conferred upon the Plaintiff a substantive right within the Congressional findings, yet neglected to include any such right in the actual language of the statute. The Section 103 Congressional findings, found in the definitions section, merely sets forth the methods by which federal recognition was traditionally conferred; these findings do not create any substantive right. Congressional findings in a statute do not have the force and effect of law, although they can provide a factual justification and reasons for congressional enactments and may be considered in interpreting the statute or determining whether Congress has acted within its authority by enacting the legislation. *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994) (congressional findings provide a rather thin reed on which to base statutory construction).

premised on *previous federal recognition.* 25 C.F.R. § 83.8, *Previous Federal acknowledgment*.[14] Although the focus of the federal acknowledgment process is historic continuity of tribal existence, under § 83.8, the petitioning tribes can provide substantial evidence of "[u]nambiguous previous Federal acknowledgement." Furthermore, the evidence that petitioners are allowed to bring forth demonstrating the requisite historic continuity includes, *inter alia*, the following:

1) Evidence that the group has had treaty relations with the United States
2) Evidence that the group has been denominated a tribe by act of Congress or Executive Order
3) Evidence that the group has been treated by the Federal Government as having collective rights in tribal lands or funds

§ 83.8(c). Plaintiff claims that it is the political and historic successor to the historic Sandy Lake Band premised on ten treaties, Compl. ¶ 44, and as support, introduces 22 exhibits that purportedly demonstrate Plaintiff is federally recognized. This is the very evidence, however, that undercuts their request for injunctive relief. This evidence should be before the appropriate agency with the requisite expertise and established regulatory process: the OFA. Plaintiff has failed to even submit the initial petition to the OFA; therefore, Plaintiff has failed to exhaust its administrative remedies.

Furthermore, courts have consistently upheld the federal acknowledgment

[14] The federal acknowledgment regulations were revised in 1994 to address and encompass demonstrations of previous federal acknowledgment. 59 Fed. Reg. 9280 (Feb. 25, 1994) (codified at 25 C.F.R. Part 83); *see also* 25 C.F.R. § 83.8, Procedures for Establishing That an American Indian Group Exists as an Indian Tribe – *Previous Federal acknowledgement*. Section 83.8 may reduce the period during which petitioners must demonstrate community and political existence but petitioners are still required to demonstrate that they continued to exist as a distinct community.

regulations' applicability to once recognized tribes. In *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, a group asserted that it need not undergo the process set out in the federal acknowledgment regulations because it was previously recognized by the United States via two treaties. 217 F. Supp.2d 76, 78 (D.D.C. 2002). The group requested judicial relief ordering the Department to place it on the list of federally recognized Indian tribes. *Id*. at 77. The Court in *Burt Lake Band* dismissed the complaint for failing to exhaust administrative remedies and concluded that "historical recognition does not allow [a group] to bypass [the Department], even if the recognition occurred in a treaty." *Id*. at 79. The court further observed that "[t]he fact that BIA's regulations include separate fast tracking provisions for groups claiming prior federal recognition makes all the more evident that federal recognition does not allow an entity to completely bypass the BIA's recognition process." *Id.*

The Tenth Circuit also considered the applicability of the federal acknowledgment regulations to a group that alleged it was the present day continuation of the historically recognized Shawnee Tribe in *United Tribe*, 253 F.3d 543. The plaintiff in *United Tribe* attempted to bypass the acknowledgement process and sought a judicial ruling that it was a recognized tribe by virtue of: 1) treaty entered into in 1854 between Congress and the Shawnee Tribe; and 2) recognition by the Supreme Court in *The Kansas Indians*, 72 U.S. 737, 756 (1866) (holding the Shawnee tribe existed as a recognized tribal entity in 1866). *Id.* at 546. The Tenth Circuit rejected the plaintiffs' arguments and held that "exhaustion is required when, as here, a plaintiff attempts to bypass the regulatory framework for

establishing that an Indian group exists as an Indian tribe." *Id.* at 550.

As *Burt Lake Band* and *United Tribe* demonstrate, the Plaintiff cannot use the existence of treaties entered into between Plaintiff and Congress to attempt an end run around DOI's regulatory framework for previously recognized tribes. Accordingly, Plaintiff's complaint must be dismissed for failure to exhaust administrative remedies.[15]

III. PLAINTIFF FAILS TO PROVIDE AN UNEQUIVOCAL WAIVER OF THE UNITED STATES' SOVEREIGN IMMUNITY

"It is elementary that the United States, as sovereign, is immune from suit except as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (internal quotations, alterations, and omissions removed)). In *United States v. Idaho*, the Supreme Court

[15] And in the absence of an exhausted administrative remedy, Plaintiff's claims constitute non-justiciable political questions. Federal determination of tribal status has long been regarded a political question inappropriate for judicial decision. *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865) ("[I]t is the rule of this court to follow the action of the executive and other political departments . . . whose more special duty it is to determine such affairs. If by them . . . Indians are recognized as a tribe, this court must do the same."); *Baker v. Carr*, 369 U.S. 186, 215–217 (1962) (identifying the status of Indian tribes as reflecting familiar attributes of political questions); *Miami Nation of Indians of Indiana, Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342, 347-48 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002) ("'[T]he action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review.'"); *W. Shoshone Bus. Council*, 1 F.3d at 1057 ("The judiciary has historically deferred to executive and legislative determinations of tribal recognition.").

reaffirmed its frequent pronouncements that waivers of sovereign immunity must be "unequivocally expressed in the statutory text . . . strictly construed in favor of the United States...not enlarged beyond what the language of the statute requires." 508 U.S. 1, 6-7 (1993) (internal quotations and citations omitted). Furthermore, "[a]bsent an express waiver of sovereign immunity, money awards cannot be imposed against the United States." *McBride v. Coleman*, 955 F.2d 571, 576 (8th Cir. 1992); *accord Coleman v. Espy*, 986 F.2d 1184, 1191 (8th Cir. 1993).

The burden is on the plaintiff to find and prove an explicit waiver of sovereign immunity. *Fostvedt v. United States,* 978 F.2d 1201, 1203 (10th Cir. 1992); *Thomas v. Pierce,* 662 F. Supp. 519, 523 (D. Kan. 1987); *see also McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 188-189 (1936) (holding that because the plaintiff is the party seeking relief, that "it follows that he must carry throughout the litigation the burden of showing that he is properly in court."). This bar is jurisdictional – unless a statutory waiver exists, the district court lacks jurisdiction to entertain a suit against the United States or its agencies. *Sherwood*, 312 U.S. at 586; *see also Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 793 (8th Cir. 1996) (observing that "sovereign immunity is jurisdictional in nature."). Plaintiff seeks monetary damages and bases its claims on several statutes, 28 U.S.C. §§ 1331, 1337, 1361, and 1362, none of which constitute a waiver of sovereign immunity.

A. Reliance On General Jurisdictional Provisions Contained In 28 U.S.C. §§ 1331, 1337, 1361 Is Insufficient Because the Provisions Do Not Constitute Waivers of Sovereign Immunity

The general federal question statute, 28 U.S.C. § 1331, does not provide a waiver of sovereign immunity, it "is merely a jurisdictional statute that does not create any substantive rights that may be enforced against the United States for money damages." *Hagemeier v. Block*, 806 F.2d 197, 203 (8th Cir. 1986). "Likewise, Section 1337 is merely a jurisdictional statute and does not waive sovereign immunity." *Id.* Nor can Plaintiff rely on Section 1361, the mandamus statute; indeed, "[i]t is well settled that the mandamus statute, 28 U.S.C. § 1361, does not provide a waiver of sovereign immunity." *In re Russell*, 155 F.3d 1012 (8th Cir. 1998).

B. Section 1362 is a Jurisdictional Statute That Neither Provides a Waiver of Sovereign Immunity Nor Applies to Unrecognized Tribes

Section 1362 grants district courts "original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body *duly recognized* by the Secretary of the Interior . . . ." 28 U.S.C. § 1362 (emphasis added). Section 1362 is a general jurisdiction statute that was enacted "to eliminate the $10,000 jurisdictional requirement of 28 U.S.C. § 1331 for a particular class of cases, namely, federal-question actions brought by an Indian tribe or band." *Scholder v. United States*, 428 F.2d 1123, 1124 (9th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970) (citing *Quinault Tribe v. Gallagher*, 368 F.2d 648 (9th Cir. 1966), *cert. denied*, 387 U.S. 907 (1967)). Section 1362 does not, however, provide a waiver of sovereign immunity necessary for this Court to exercise jurisdiction over this suit. "Nothing on the face of section 1362 indicates an intention by Congress to waive sovereign immunity, and . . . nothing in its legislative history [suggests] such a purpose." *Scholder*, 428 F.2d at 1125. Rather, Section 1362

was merely enacted to remove the $10,000 jurisdictional requirement. Further, Plaintiff is ineligible to assert jurisdiction under this statute because it only applies in cases brought by federally recognized tribes. In light of Plaintiff's failure to initiate the acknowledgment process, and because Plaintiff is not an officially federally recognized tribe, *see* Flemming Decl, "they do not qualify for § 1362 jurisdiction." *Price v. Hawaii*, 764 F.2d 623, 626 (9th Cir. 1985) ("Because neither the [tribal plaintiffs] nor their governing body have been 'duly recognized' by the Secretary, they do not qualify for § 1362 jurisdiction . . . .").

C. Because Plaintiff's Claims for Money Damages Are Not Limited to Less Than $10,000, the Court of Federal Claims Has Exclusive Jurisdiction

Moreover, in this case, Plaintiff requests that this Court "award damages to the Tribe, according to proof," and "[t]ransfer to the United States Court of Federal Claims the Tribe's money damages claim if, after discovery in this case is completed, it is discovered that the amount in controversy exceeds the jurisdictional amount of this Court." Compl. 28, ¶ 7. This does not meet Plaintiff's burden to allege a claim within the jurisdictional limit of $10,000 or less in damages. This failure to meet the burden is consistent with the well established principle that "[t]he amount of a claim under the Little Tucker Act, for jurisdictional purposes, is based on the actual recovery sought by the Plaintiff pursuant to that claim and is not based on the potential worth of the claim. *Smith v. Orr*, 855 F.2d 1544, 1553 (Fed. Cir. 1988). Here, Plaintiff is pleading more than $10,000 if discovery so warrants. No attempt to limit their claim to Little Tucker Act limits is made. The Tucker Act grants the United States Court of Federal Claims

exclusive jurisdiction over any "claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a)(1). The Little Tucker Act, 28 U.S.C. § 1346, grants federal district courts concurrent jurisdiction with the Court of Federal Claims for claims against the United States "not exceeding $ 10,000 in amount" and "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department." 28 U.S.C. § 1346(a)(2).

The courts have repeatedly held that unless plaintiffs affirmatively waive the opportunity to recover amounts greater than $10,000.00, then the Court of Federal Claims has exclusive jurisdiction over Plaintiff's claims, and this Court lacks jurisdiction over the matter. *Orr*, 855 F.2d at 1553; *Roedler v. Dep't. of Energy*, 255 F.3d 1347, 1351 (Fed. Cir. 2001); *see also Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.*, 525 F.3d 1299, 1304 (Fed. Cir. 2008) (noting that, where plaintiffs sought more than $10,000.00 in just compensation, "concurrent district court jurisdiction provided by the Little Tucker Act was not available").

IV. IN ANY EVENT, PLAINTIFF'S REQUESTS FOR BOTH MONETARY AND INJUNCTIVE RELIEF ARE BARRED BY THE SIX YEAR JURISDICTIONAL TIME BAR IN 28 U.S.C. § 2401

In Claims Six and Seven, Plaintiff requests both monetary damages and equitable relief based on the alleged "failure of the defendants to recognize the Tribe as the historical successor to the Sandy Lake Band." Compl. at ¶ 86; *see also id.* at ¶ 91 ("By refusing to recognize the Tribe as the successor in interest to the Sandy Lake Band of

Mississippi Chippewa that entered into the Treaties with the United States . . . ."). The key determination, however, is when the claim first accrued. Here, the 1936 adoption of the Minnesota Chippewa Tribe's constitution, the 1939 issuance of a charter to the Mille Lacs Band and the 1980 decision by the Field Solicitor of DOI the Mille Lacs Band is the political successor for the historic Sandy Lake Band all could have been points in time at which Plaintiff's claim accrued. *See* Compl. Ex. 23. Thus, as result of the six-year jurisdictional time bar of 28 U.S.C. § 2401, Plaintiff is prevented from bringing suit nearly eighty years since the events in 1936 and 1939 transpired, and at the very latest, more than 30 years after the decision that reaffirmed DOI's position on the status of the Sandy Lake Band.[16]

Section 2401 mandates dismissal of both claims seeking monetary relief as well as those claims requesting injunctive and declaratory relief. Section 2401(a) provides, in part, that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132-36 (2008). The Eighth Circuit has held:

> The doctrine of sovereign immunity precludes suit against the United States without the consent of Congress; the terms of its consent define the extent of the court's jurisdiction. The applicable statute of limitations is a term of consent. The plaintiff's failure to sue within the period of limitations is not simply a waivable defense; it deprives the court of jurisdiction to entertain

[16] Moreover, Plaintiff was on notice when the predecessor to the List was first published in 1972 and every year thereafter when the list of recognized tribes was published in the Federal Register. *See supra* note 5.

the action.

Loudner v. United States, 108 F.3d 896, 900 n.1 (8th Cir. 1997) (quoting *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir.), *cert. denied*, 498 U.S. 824, 111 S.Ct. 75, 112 L.Ed.2d 48 (1990)).

In deciding an issue of dismissal on the grounds of statute of limitations, the proper focus is on "first accrual." Accordingly, the relevant question is when the events entitling the claimant to bring suit alleging the breach first transpired. In *Loudner*, the Eighth Circuit held that "'accrual,' for this purpose, occurs when the plaintiffs either knew, or in the exercise of reasonable diligence should have known, that they had a claim." 108 F.3d at 900.

In response to a jurisdictional dispute, Field Solicitor Nitzschke's 1980 opinion observed, "[t]here must be, however, a present tribal governing body with authority to manage these lands." *Id.* That authority resides in the Mille Lacs Band as a direct result of the original 1939 organization of the Mille Lacs Band whose membership "would consist of 'all Chippewa Indians permanently residing on the Mille Lacs Reservation and at, or near, the villages of Isle, Danbury, East Lake and Sandy Lake.'" *Id.* (quoting the original charter of the Mille Lacs Band). This "affiliation between the historic Sandy Lake Band and the successor Mille Lacs Band has been consistent" and has existed since 1939. Thus, Plaintiff's claim first accrued in 1939 with the issuance of the Mille Lacs Band's charter that incorporated the membership of the Sandy Lake community. However, at the very latest, Plaintiff has been or should have been on notice since 1980,

when the Field Solicitor concluded that "[t]he United States recognizes that it has a government-to-government relationship with the Minnesota Chippewa Tribe and its constitutent bands and it is clear that the Mille Lacs band is the modern governmental representative of the historic Sandy Lake residents." Accordingly, Plaintiff should have filed a complaint by May 29, 1986.

Any argument that DOI's September 2007 final decision is the event that constituted DOI's alleged failure to recognize Plaintiff is belied by the fact that the decision is expressly limited to a request for a Secretarial election. This decision made no conclusion as to who was the historic successor to the Sandy Lake Band. Thus, either in 1939 or 1980, not 2007, Plaintiff first became aware of this alleged failure, and by failing to bring suit for nearly three decades, Plaintiff has foreclosed any possibility of obtaining money damages and the Court should therefore dismiss Claims Six and Seven.

V. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED BECAUSE THE MINNESOTA CHIPPEWA TRIBE AND MILLE LACS BAND ARE INDISPENSIBLE PARTIES THAT WOULD BE GREATLY PREJUDICED BY PROCEEDING IN THEIR ABSENCE

Defendants move this Court to dismiss all of Plaintiff's claims pursuant to Rule 12(b)(7) and Rule 19 of the Federal Rules of Civil Procedure, because the Minnesota Chippewa Tribe and the Mille Lacs Band (collectively referred to in this section as "Tribes") are necessary and indispensable parties to all Plaintiff's claims. Rule 19 provides that a district court may dismiss an action if an absent party is determined to be "indispensable." Fed.R.Civ.P. 19(b). "Under Rule 19, a nonparty is indispensable to an action if (1) the nonparty is necessary; (2) the nonparty cannot be joined; and (3) the

action cannot continue in equity and good conscience without the nonparty." *U.S. ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249, 1251 (8th Cir. 1998). Here, the absent Minnesota Chippewa Tribe and the Mille Lacs Band are necessary parties, but because of their sovereign immunity, cannot be joined absent consent. These two parties are also indispensible to the Court's adjudication of the Plaintiff's claims, and Plaintiff's Complaint therefore should be dismissed.

A. The Minnessota Chippewa Tribe and Mille Lacs Band are Necessary Parties to Any Adjudication of Plaintiff's claims

Both Tribes are necessary parties under Rule 19(a). Under Rule 19(a), "the tribe should be a party to the suit, if feasible, if complete relief cannot be accorded to the plaintiffs without the tribe's inclusion *or* if the tribe claims an interest relating to the suit that could not be adequately protected if the tribe did not participate in the suit." *Pembina Treaty Comm. v. Lujan*, 980 F.2d 543, 545 (8th Cir.1992); *see also* Rule 19(a).[17]

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[17] Which states in relevant part:

(a) Persons Required to Be Joined if Feasible.

(1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring

Here, both Tribes claim a legal interest that is the subject of Plaintiff's suit. The DOI and component bands of the Minnesota Chippewa have considered the Sandy Lake Band a part of the Mille Lacs Band since the organization of the Minnesota Chippewa Tribe in 1934. It is and has been the position of the DOI that Indians from Sandy Lake actively joined in the process during the 1930s, and voted to pass the constitution that bound them as members of a federally recognized Minnesota Chippewa Tribe. Flemming Decl. Ex. 5 (listing Sandy Lake as one of the tribal districts under the authority of the Mille Lacs Band and as one of the reservation districts under the reservation organization of the Minnesota Chippewa). The constitution and by-laws of the Minnesota Chippewa were ratified by the Tribe on June 20, 1936 and approved by the Secretary of the Interior on July 24, 1936. Flemming Decl. Ex. 2. However, the individuals who allege to be members of the Sandy Lake Band are now enrolled members of several of the component bands of the Minnesota Chippewa Tribe and the Red Lake Tribe. Compl. Ex. 26 at 2. The Minnesota Chippewa Tribe has a direct interest in maintaining the integrity of governmental structure in existence for the past eight decades. Plaintiff's suit threatens the jurisdiction of the greater Minnesota Chippewa Tribe, the Chippewa bands in Minnesota, as well as the jurisdiction of the Mille Lacs Band over the Sandy Lake Band.

Plaintiff also requests that this Court mandate a Secretarial election thereby

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> double, multiple, or otherwise inconsistent obligations because of the interest.

allowing Plaintiff to organize under the banner of the Sandy Lake Band, a band whose political successor was already determined to be the Mille Lacs Band. In 1980, Field Solicitor Nitzschke concluded that "the Mille Lacs Band is the political successor of the historic Sandy Lake Band." Compl. Ex. 23. Based upon this finding, it is the Mille Lacs Band that exercises authority over tribal governance and the management of trust land set aside at Sandy Lake. *Id.*

B. Joining the Minnesota Chippewa Tribe and the Mille Lacs Band Is Not Feasible Because They Are Entitled to Sovereign Immunity and Have Not Consented to Suit

Joining the necessary Tribes to Plaintiff's suit is not feasible. Federally recognized Indian Tribes enjoy sovereign immunity from suit absent a clear consent to suit by the Tribe or the United States Congress. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Here, both Tribes are federally recognized Indian Tribes, s*ee* 75 Fed. Reg. 60810 (Oct. 1, 2010), and enjoy sovereign immunity. Joining the Tribes is therefore not only infeasible under Rule 19(a), but presently impossible. *See e.g. Pembina Treaty Comm. v. Lujan*, 980 F.2d 543, 545 (8th Cir.1992) (affirming the district court's dismissal based upon the sovereign immunity of the tribe). Plaintiff has not attempted to join either Tribe, nor provided any evidence that either Tribe or Congress has waived the Band's sovereign immunity. Quite to the contrary, both Tribes oppose Plaintiff's suit. *See* Flemming Decl. Ex.4 (letters from both Tribes to the Assistant Secretary opposing Plaintiff's suit).

C. The Tribes' Sovereign Immunity Warrants Dismissal Pursuant to Rule 19(b)

As Plaintiff's claims directly impact necessary and absent Tribes that cannot be joined,

Plaintiff's Complaint should be dismissed under Rule 19(b). Rule 19(b) sets forth the following four factors to determine whether in "equity and good conscience" the action should proceed without the indispensable party, 1) prejudice caused to any party or the absent party; 2) whether relief can be shaped to lessen prejudice; 3) whether an adequate remedy can be awarded without the absent party; and 4) whether there is an alternative forum for the plaintiff's claims. Fed. R. Civ. Pro. 19(b). In addition to those factors, there are four "interests" that the Eighth Circuit balances:

> First, the plaintiff has an interest in having a forum.... Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another.... Third, there is the interest of the outsider whom it would have been desirable to join.... Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.

Nichols v. Rysavy, 809 F.2d 1317, 1332 (8th Cir. 1987) *cert. denied*, 484 U.S. 848 (1987) (citing *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968). In *Provident*, "[t]he Supreme Court rejected a rigid and formulistic approach to the application of this test and instead instructed that the determination should rest on the practical conditions of each case." *Manypenny v. United States*, 125 F.R.D. 497, 501 (D. Minn. 1989) *aff'd on other grounds*, 948 F.2d 1057 (8th Cir. 1991) (internal citations omitted).

Here, Plaintiff presses forward with litigation that will divest both the Minnesota Chippewa Tribe and the Mille Lacs Band of its authority over the communities at Sandy Lake. In 1936 the United States approved the Minnesota Chippewa tribal organization – comprised of the six component bands – and in 1939, the Secretary of the Interior approved the issuance of the Mille Lacs Charter which incorporated the communities living at Sandy Lake. Fleming Decl. Ex. 3 at 2. To accord Plaintiff federal recognition as the historic Sandy Lake Band would strip the Mille Lacs Band of jurisdiction over communities that were explicitly within the original scope of the organization. *See id.* A determination that calls into question the very foundation of the Mille Lacs Band's governing authority over the surrounding communities and its role in membership cannot be determined in its absence. *See e.g.*, *Guthrie v. Circle of Life*, 176 F.Supp. 2d 919, 923 (D. Minn. 2001) (dismissing suit where claims were brought against only the tribal school, but where the absent Tribe was the umbrella entity operating the equivalent of the school district, and finding that the "tribal fisc would be compromised without the tribe having had the opportunity to protect its interests.").

While the judicial forum is jurisprudentially inappropriate because the indispensable Tribes retain sovereign immunity, Plaintiff is not without all remedy. Plaintiff can avail themselves of the administrative forum and a process capable of providing the relief Plaintiff seeks; the federal acknowledgment process. Plaintiff can avail themselves of a forum and process capable of providing the exact relief Plaintiff seeks: The acknowledgment process.

VI. PLAINTIFF FAILS TO STATE A CLAIM FOR BREACH OF TRUST

Claims Five and Six,[18] breach of trust actions, are premised on the notion that the United States owes a fiduciary duty to Plaintiff based upon the List Act, the IRA, and the various treaties cited. *See* Compl. at ¶¶ 80-88. The claims founded upon the List Act and the IRA should be dismissed because neither the List Act nor the IRA impose upon the federal government specific fiduciary duties. Although there exists a "general trust relationship between the United States and the Indian People," *United States v. Mitchell,* 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*), that relationship alone does not suffice to impose an actionable fiduciary duty on the United States. *Ashley v. U.S. Dept. of Interior*, 408 F.3d 997, 1002 (8th Cir. 2005) (citing *United States v. Navajo Nation,* 537 U.S. 488, 506, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003); *United States v. Mitchell,* 445 U.S. 535, 541-43, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) (*Mitchell I*). As the Eighth Circuit has emphasized, "to determine whether such a duty exists, we must look to 'specific rights-creating or duty-imposing statutory or regulatory prescriptions.'" *Ashley*, 408 F.3d at 1002 (citing *Navajo Nation,* 537 U.S. at 506, 123 S.Ct. 1079). This Circuit further explained that "for a duty to exist, there must be something akin to elaborate provisions ... [that] give the Federal government full responsibility to manage Indian resources for the benefit of the Indians." *Id.* (internal quotations and citations omitted).

[18] To the extent Claim Seven, monetary damages, incorporates any breach of trust claims, this claim should be dismissed as well.

The Supreme Court has distinguished between a general trust responsibility which the United States owes to all federally recognized Indian tribes and those specific fiduciary duties which arise when the United States manages Indian property pursuant to the standards prescribed specifically in federal statutes and regulations. *United States v. Mitchell*, 463 U.S. 206, 209, 217-218, 220-25 (1983)("*Mitchell II*"); *United States v. Mitchell*, 445 U.S. 535, 541-543, 545-46 (1980)("*Mitchell I*"); *Inter Tribal Council v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (noting that elements of a trust require "a trust corpus."). This rule is the central principle affirmed by the Supreme Court in its decisions in *United States v. Navajo Nation*, 537 U.S. 488 (2003) and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003). Those two cases stand for the general proposition applicable to this case that the only cognizable breach of trust claim is one founded upon a definite and express fiduciary duty imposed on the federal government by administrative regulation or Act of Congress (*i.e.*, a "textual basis", *Navajo Nation*, 537 U.S. at 1094) which provides law to apply. Stated differently, breach of trust claims should focus on the enforcement of fiduciary duties in circumstances when the governmental trustee actually controls trust assets pursuant to sensible standards announced in positive law.

In the absence of a specific duty that has been placed on the government with respect to a tribe and its trust property, the United States' general trust responsibility is discharged by compliance with generally applicable regulations and statutes. *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 479 (9th Cir. 2000) (Tribe's claim that

BLM approval of gold mine violated trust obligations is satisfied by compliance with NEPA) (*citing Morongo Band of Mission Indians v. F.A.A*, 161 F.3d 569, 574 (9th Cir. 1998)). When a tribe asserts the applicability of a more demanding fiduciary duty, "the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo Nation*, 537 U.S. at 506. Enforceable fiduciary obligations falling within this category are also characterized by the basic elements of a common law trust - a trustee (the United States), a beneficiary (Indian tribe or allottees) and a trust corpus (the regulated Indian property, lands or funds) over which the government exercises elaborate control. *White Mountain Apache Tribe*, 537 U.S. 465 (J. Ginsburg concurring).

A. List Act and IRA

Here, Plaintiff claims the federal government has "a fiduciary obligation, measured by the most exacting fiduciary standards, in the nature of a continuing trust obligation to assist the Tribe in reorganization its tribal government and to conduct a government-to-government relationship with its existing tribal government." Compl. ¶ 81. As a basis for the alleged breach of trust, Plaintiff looks to the Defendants' alleged "failure . . . to recognize the Tribe's existing tribal government, to contract directly with the Tribe to provide BIA benefits and services to the Tribe, to conduct a special IRA election for the benefit of the Tribe under 25 U.S.C. § 476, and to review and approve the Tribe's constitution under the IRA . . . ." Compl. ¶ 82. Plaintiff's claims for breach of trust must be dismissed pursuant to 12(b)(6) for two reasons: 1) Neither the List Act nor the IRA can be construed as "specific rights-creating or duty-imposing statutory or

regulatory prescriptions," *Ashley*, 408 F.3d at 1002; and 2) no tribal trust assets are at issue.

Plaintiff looks to the List Act and the IRA as their basis for breach of trust, Compl. ¶¶ 81-82, yet neither statutory scheme imposes upon the Defendants' specific fiduciary duties above and beyond the government's general statutory and regulatory obligations. Just as in *Ashley*, the List Act and IRA fall far short of anything "akin to elaborate provisions ... [that] give the Federal government full responsibility to manage Indian resources for the benefit of the Indians." *Ashley*, 408 F.3d at 1002 (internal quotations omitted).

Should this Court decide that the Acts are "akin to elaborate provisions," Plaintiff fails to allege that these allegations "give the Federal government full responsibility to manage *Indian resources* for the benefit of the *Indians*." *Id.* (emphasis added). Plaintiff fails to identify any tribal assets (also referred to as the trust corpus) that the government exercises elaborate control over. To the contrary, Plaintiff alleges the government's violations stem from "refusing to provide the Tribe and its members with *BIA benefits and services* . . . ."[19] Compl. ¶ 83 (emphasis added).

B. Treaty Rights

[19] Insofar as Plaintiff attempts to argue that failing to provide BIA benefits is a breach of trust, this is without merit. Although "[t]he federal government has broad fiduciary obligations to the Indian tribes . . . the federal government generally is not obligated to provide particular services or benefits in the absence of a specific provision in a treaty, agreement, executive order, or statute." *Vigil v. Andrus*, 667 F.2d 931, 934 (10th Cir. 1982).

Plaintiff also contends that the Defendants "have a fiduciary obligation, measured by the most exacting fiduciary standards, to fulfill the United States' obligations owed to the Tribe under the ten treaties entered into, spanning the years from 1825 to 1867. Compl. ¶ 85. The breach, Plaintiff alleges, arises from the Defendants' failure to recognize Plaintiff as "the historical successor to the Sandy Lake Band," the original signatory Tribe to the ten treaties. Compl. ¶ 86. Plaintiff, however, fails to state a claim for several reasons. In 1980, the Department of the Interior determined that the historic successor to the Sandy Lake Band, signatory to those treaties, is the Mille Lacs Band. *See* Compl. Ex. 23.

Thus, not only does the six-year jurisdictional time bar preclude Plaintiff from bringing suit nearly three decades after the alleged breach occurred, but the proper party to such a suit – assuming such a suit would bring colorable claims – would not be Plaintiff, but the historic successor to the Sandy Lake Band which is the Mille Lacs Band. Accordingly, Plaintiff can prove no set of facts in support of either breach of trust claim that would entitle them to relief. Thus, they have failed to state claims upon which relief can be granted. For this reason also, their Complaint should be dismissed.

VII. PLAINTIFF FAILS TO STATE A CLAIM FOR VIOLATION OF THE FIFTH AMENDMENT

In Plaintiff's Fourth Claim, Plaintiff vaguely alludes to a violation of the Fifth Amendment by ways of what appears to be an Equal Protection Claim.[20] Plaintiff

[20] Insofar as Plaintiff alleges a deprivation of a protected property interest under the Due Process Clause of the Fifth Amendment, Plaintiff fails to state a claim because BIA

contends that the Defendants have "unreasonably discriminated" against the Plaintiff by "failing to recognize the Tribe's governing body, refusing to call an IRA election for the Tribe after receiving a request to do so, and denying the Tribe and its members BIA benefits and services." Compl. ¶ 77. Far from articulating any plausible claim of a Fifth Amendment violation, it appears that Plaintiff's Fourth Claim merely echoes Plaintiff's First and Second claims, but is now thinly veiled as a Constitutional violation. Accordingly, the Fourth claim should be dismissed.

Notwithstanding Plaintiff's failure to engage or complete the federal acknowledgment process – a result that dictates whether Plaintiff is eligible for an IRA election – Plaintiff contends the Defendants "have acted arbitrarily and have unreasonably discriminated against the Tribe in direct violation of the Fifth Amendment to the United States Constitution." Compl. at ¶ 77. Assuming, *arguendo*, Plaintiff brings claims against Defendants pursuant to the Equal Protection Clause, to succeed on a claim based on unlawful racial discrimination, a plaintiff must demonstrate the government's action had "a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 238–

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benefits in relation to unrecognized tribes are not property interests. *Cf. Miami Nation*, 887 F. Supp. at 1174 (finding that "the Supreme Court has never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement"), *aff'd,* 255 F.3d 342 (7th Cir.), *cert. denied*, 534 U.S. 1129 (2002). Only federally recognized tribes are eligible to apply for and potentially receive certain programs, services and benefits. For due process purposes, a plaintiff has a property interest in disputed property when he or she has a "legitimate claim of entitlement" to it. *Barnes v. City of Omaha*, 574 F.3d 1003, 1006 (8th Cir. 2009) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972)). Here, BIA benefits and services are not entitlements; they are contingent on Plaintiff's eligibility. Plaintiff is not federally recognized; thus, they are precluded from seeking any BIA benefits.

42 (1976). However, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact," *Britton v. Rogers*, 631 F.2d 572, 577 (8th Cir. 1980); instead, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* (citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977)).

Far from providing factual allegations sufficient to state a plausible claim for relief under the Fifth Amendment, Plaintiff merely restates the factual underpinnings for their claim that the Defendants are required to hold and conduct an IRA election, Claim Two. Plaintiff eschews the requisite demonstration that Defendants have acted in a discriminatory manner or acted with the requisite discriminatory intent as is required, and instead chooses to describe the alleged consequences that will arise as a result of the Defendant's actions. This notable paucity of relevant allegations compels dismissal.

CONCLUSIONS

For the reasons set forth above, the Defendants' Motion to Dismiss Plaintiff's Complaint should be granted.

Date: February 8, 2010

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division

s/ Kenneth Rooney
KENNETH ROONEY
U.S. Department of Justice
United States Department of Justice
Environment and Natural Resources Division

Natural Resources Section
P.O. Box 663
Washington, D.C. 20044-0663
Phone: (202) 514-9269
Fax: (202) 305-0506
Attorney ID# 128670NM
E-mail: kenneth.rooney@usdoj.gov

s/ Bahram Samie
BAHRAM SAMIE
Assistant United States Attorney
District of Minnesota
600 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612)664-5630
Attorney ID# 6300748IL
Email: bahram.samie@usdoj.gov

Of counsel:

Marcia M. Kimball
Attorney/Advisor
Department of the Interior
Office of the Solicitor, Twin Cities Field Office
One Federal Dr., Rm. 686
Ft. Snelling, MN 55111
Phone: (612) 713 – 7100
Email: marcia.kimball@sol.doi.gov