IGNACIA S. MORENO
Assistant Attorney General
BARBARA M.R. MARVIN
Trial Attorney
United States Department of Justice
Environment and Natural Resources Division
601 D Street, N.W.
Washington, D.C. 20004
Telephone: (202) 305-0240
Fax: (202) 305-0267

Attorneys for Defendant, Ken Salazar,
Secretary of the United States Department of Interior

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KAWAIISU TRIBE OF TEJON, and DAVID LAUGHING HORSE ROBINSON, Chairman, Kawaiisu Tribe of Tejon, Plaintiffs v. KEN SALAZAR, Secretary of the United States Department of Interior, LARRY MEYERS, Executive Secretary of the California Native American Heritage Commission, COUNTY OF KERN, CALIFORNIA, and TEJON MOUNTAIN VILLAGE, LLC Defendants.	Case No. 1:09 CV 01977 OWW SMS MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT KEN SALAZAR'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) Date: December 6, 2010 Time: 10:00 a.m. Location: Courtroom 3, 7th Floor Before: Honorable Oliver W. Wanger

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

This memorandum is respectfully submitted on behalf of Defendant, Ken Salazar, Secretary of the United States Department of Interior ("Department") in support of Defendant Salazar's motion to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

PRELIMINARY STATEMENT

Plaintiffs, the Kawaiisu Tribe of Tejon ("Kawaiisu"), a non-federally recognized Indian group, and David Laughing Horse Robinson ("Robinson") who claims to be the group's Chairman, (collectively, "Plaintiffs"), challenge the authorization by the County of Kern, California ("County"), which is also a named defendant, of a large construction project on real property in the County, which the Complaint refers to as "the historical Tejon/Sebastian Indian Reservation." Plaintiffs' Amended Complaint, Docket No. 71, ¶ 65. With respect to the Defendant Salazar, the Complaint alleges that, if the construction project is allowed to proceed, the Kawaiisu will suffer irreparable injury as the result of the Department's alleged delay in reaching a determination on a petition for federal acknowledgment submitted by the Kawaiisu and the Department's "failure to step in and protect" certain of the Kawaiisu's vital resources. *Id.* ¶¶ 25, 27, 46, 47.[1]/ Plaintiffs also allege that the Kawaiisu have suffered harm because of the Department's claimed inaction as the result of the differences in the "services, protections and financial advantages" that are afforded to afforded to tribes that are federally recognized as compared with what is afforded to th Kawaiisu. *Id.* ¶¶ 51, 52.

As described below, this action should be dismissed because the Court lacks subject matter jurisdiction over this action. Plaintiffs allege jurisdiction pursuant to the APA, but the limited waiver of sovereign immunity provided by the APA is not applicable here. First, there has not been any "final agency action" by the Department with respect to federal acknowledgment of the Kawaiisu, and the Kawaiisu have abandoned the administrative process that could have resulted in such a final action by requesting that their petition for federal

---

[1]/ Plaintiffs' First and Second Claims for Relief are alleged "as to the Department of Interior," but the Amended Complaint does not name the Department as a party. *See* Amended Compl., Docket No. 71, ¶¶ 2-6.

acknowledgment be withdrawn. *See* Exhibit A, Declaration of R. Lee Fleming ("Fleming Decl."), ¶ 6, Exs. 6, 7. Moreover, inasmuch as Plaintiffs' allegations against Defendant Salazar in the Amended Complaint are based upon *inaction* by the Department of Interior, i.e., on the Department's alleged failure or refusal to act, *see* Amended Compl., Docket No. 71, ¶¶ 25, 27, 46-48, Plaintiffs have entirely failed to exhaust the available administrative remedies to address agency inaction.

Second, this action should be dismissed because, absent exhaustion of an administratively provided remedy, a decision concerning whether the United States should recognize a government-to-government relationship with an Indian group is a nonjusticiable political question that is inappropriate for judicial review.

Finally Plaintiffs' claims for violation of the APA and violation of the Equal Protection Clause of the Constitution are barred by the statute of limitations. Plaintiffs' claims as set forth in the Amended Complaint are premised on the Department's purported failure to act on the Kawaiisu's petition for federal acknowledgment. Here, by their own admission, Amended, Compl., Docket No. 71, ¶ 25, Plaintiffs knew at least in or about December 1994 that the Department did not consider the Kawaiisu to be a federally recognized tribe, but they took no action to address this alleged oversight or "neglect" by the Department until November 2009 when Plaintiff Robinson first filed this action. Plaintiffs have not alleged any facts to place their claims outside the bar of the statute of limitations.

BACKGROUND

On November 10, 2009, Plaintiff Robinson, on his own behalf, and purportedly on behalf of the Kawaiisu, initially filed suit naming the Department, Defendant Salazar, and the County as defendants, and Tejon Mountain Village, LLC ("TMV") as a "real party in interest." In the original pro se complaint, Plaintiff Robinson challenged the County's authorization of a construction project on certain real property in the County, which the Complaint referred to as the "Tejon/Sebastian Indian Reservation." The gravamen of the allegations as to the Department and Defendant Salazar was that the case was before the Court as the result of "administrative

oversights" by the Federal Defendants in omitting the Kawaiisu from the list of Indian groups recognized and eligible to receive services from the Department's Bureau of Indian Affairs ("BIA"), and omitting the real property from the list of Indian trust lands.

Pursuant to the Court's Order entered on July 7, 2010, Plaintiff Robinson and the Kawaiisu, now represented by counsel, filed an Amended Complaint on August 15, 2010, naming Defendant Salazar, the County, and TMV as defendants, and purporting to add Larry Meyers, Executive Secretary of the California Native Heritage Commission, and Does 1-100. (Docket No. 71). In the Amended Complaint, Plaintiffs now allege that the Kawaiisu filed a petition for federal acknowledgment with the BIA more than 30 years ago on February 27, 1979, but that the BIA has not yet made a determination on their petition. Amended Compl., Docket No. 71, ¶ 25. Plaintiffs claim that, as a result, the Kawaiisu have "suffered numerous injuries . . . due to the lack of privileges and immunities enjoyed by federally recognized tribes," *id.* ¶ 46, and that the Department's alleged failure to engage with the Kawaiisu in order to protect their natural resources "has been arbitrary, capricious and otherwise contrary to law" and will result in irreparable injury to the Kawaiisu. *Id.* ¶ 48. Plaintiffs further claim that, although the Kawaiisu are similarly situated to certain federally recognized Indian groups, they have not received equal treatment terms of the services, protections, and advantages afforded them due to the Department's alleged delay in granting the Kawaiisu federal acknowledgment. *Id.* ¶¶ 50-52.

1. Statutory Background

The United States is immune from suit unless it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Congress alone may consent to suit, and its consent – which is in effect a waiver of sovereign immunity – must be "unequivocally expressed" in the statutory text. *United States v. Idaho, ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 6 (1993) (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)).

Plaintiffs assert jurisdiction pursuant to the APA, Amended Compl., Docket No. 71, ¶ 9, and allege in their First Claim for Relief that Defendant Salazar and/or the Department have acted in violation of that statute. *See id.* ¶¶ 42-48. The APA, 5 U.S.C. §§ 701-706, is a limited

waiver of sovereign immunity that provides for judicial review of federal agency actions for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ." 5 U.S.C. § 702. Section 701(a) of the APA provides that the chapter on judicial review "applies, according to the provisions thereof, except to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701. A similar restriction appears in section 702 of the APA. Under section 702, sovereign immunity is not waived "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. "[A] waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign,"*Vacek v. United States Postal Service*, 447 F.3d 1248, 1250 (9th Cir.2006) (citing *Dept. of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999)), and "must not be enlarged beyond what the language requires." *United States v. Trident Seafoods Corp.*, 92 F.3d 855, 864 (9th Cir. 1996) (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686 (1983)).

Plaintiffs also assert jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), § 1346 (Little Tucker Act), and § 2201 (Declaratory Judgment Act). Amended Compl., Amended Compl., Docket No. 71, ¶ 9. None of these statutes present a cognizable claim that the United States has waived its sovereign immunity in this matter.

With respect to 28 U.S.C. § 1331, it is well established that such statutes granting general jurisdiction do not waive sovereign immunity. *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 924 (9th Cir. 2009); *Lonsdale v. United States*, 919 F.2d 1440, 1444 (10th Cir. 1990) ("Sovereign immunity is not waived by general jurisdictional statutes such as 28 U.S.C. § 1331 . . . ."). 28 U.S.C. § 1346, the Little Tucker Act, does contain a limited waiver of sovereign immunity, but this waiver is limited to claims for money damages and does not provide a consent to suit for actions seeking declaratory or equitable relief. *See Lee v. Thornton*, 420 U.S. 139, 140 (1975) (per curiam) (no declaratory or injunctive relief); *Richardson v. Morris*, 409 U.S. 464, 465–66 (1973) (per curiam) (no equitable relief); *Doe v. United States*, 372 F.3d 1308, 1312–14 (Fed. Cir. 2004). In their Amended Complaint as to the Secretary Salazar and the Department,

the plaintiffs seek only declaratory and injunctive relief. *See* Amended Compl., Docket No. 71 ¶¶ 69-74; thus, because the Plaintiffs do not seek money damages, the Little Tucker Act's limited waiver is not implicated. Finally, as this Court very recently stated, the Declaratory Judgment Act does not waive sovereign immunity. *Delano Farms Co. v. Cal. Table Grape Comm'n*, No. 1:07-CV-1610, 2010 WL 2952358, at * 4 (E.D. Cal., July 26, 2010); *accord United States v. King*, 395 U.S. 1, 4-5 (1969); *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1382-83 (9th Cir. 1988) (finding that Declaratory Judgment Act merely creates a remedy in cases otherwise within the court's jurisdiction, but does not constitute independent basis for jurisdiction). Thus, the APA provides the only waiver of sovereign immunity that is potentially applicable to this matter.

2. Regulatory Background: The Federal Acknowledgment Regulations

An Indian tribe "does not exist as a legal entity unless the federal government decides that it exists." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004). Therefore, non-federally recognized groups claiming status as "tribes do not enjoy the same status, rights and privileges accorded federally recognized tribes." *Id*. at n.1; *see also* 25 C.F.R. § 83.2.

Congress has authorized and charged the Department of the Interior to administer Indian affairs and, under the President of the United States, to clarify and elaborate departmental authority by regulation. 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1457. The authority to recognize Indian tribes therefore lies with Congress and the Executive and is essentially committed to the political branches of the government. *United States v. Sandoval*, 231 U.S. 28, 46 (1913) ("questions whether, to what extent, and for what time [Indian groups] shall be recognized and dealt with as dependent tribes [by the federal government] . . . are to be determined by Congress, and not by the courts"); *see United States v. Holliday*, 70 U.S. 407, 419 (1865) (if executive and other political departments recognize Indians as a tribe, courts must do the same); *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1496 (D.C. Cir. 1997) (same) (citing *Holliday*); *cf. Baker v. Carr*, 369 U.S. 186, 215-217 (1962).

The Department promulgated regulations governing the acknowledgment process in 1978,

which were revised in 1994. 25 C.F.R. Part 83; *see also* 43 Fed. Reg. 39361 (Sept. 5, 1978); 59 Fed. Reg. 9280 ((Feb. 25, 1994)); *Samish Indian Nation v. United States*, 419 F.3d 1355, 1372 (Fed Cir. 2005). The regulations establish uniform standards and procedures to answer the question "what is an Indian tribe?" *Miami Nation of Indians of Ind., Inc. v. Babbitt*, 887 F. Supp. 1158, 1167 (N.D. Ind. 1995).

Pursuant to 25 C.F.R. Part 83, the acknowledgment process is initiated when an Indian group files a documented petition to be acknowledged as an Indian tribe. 25 C.F.R. § 83.4. The burden is on the petitioning group to submit detailed evidence that establishes each of seven mandatory criteria. *See* 25 C.F.R. §§ 83.6, 83.7.[2]/ Upon receipt of the documented petition, the Assistant Secretary of Indian Affairs reviews the petition and supporting documentation and provides technical assistance with any additional research that may be needed to support the petitioning group's claims. *See* 25 C.F.R. § 83.10. Subsequently, the petition may be considered ready for a full review and placed on the "Ready, Waiting for Active Consideration" list, but only once the Assistant Secretary of Indian Affairs has determined that the documentation supporting the petition is adequate for full review. *See id.* Pursuant to the acknowledgment regulations, the order in which documented petitions are considered is "determined by the date of the Bureau's notification to the petitioner that it considers the documented petition is ready to be placed on active consideration. " *Id.* Actual evaluation of the petition and the supporting evidence under the criteria set forth in the federal acknowledgment regulations occurs only during "active consideration." At the conclusion of the "active consideration" period, which includes, inter alia,

---

[2]/ The seven criteria, which are set forth in 25 C.F.R. § 83.7 (a)- (g), are as follows: "(a) the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900; (b) a predominate portion of the petitioning group comprises a distinct community . . . from historical times until the present; (c) the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity from historical times until the present; (d) a copy of the group's present governing document . . . ; (e) the petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical tribes which combined and functioned as a single autonomous political entity; (f) the membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe . . . ; and (g) neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship."

publication of proposed findings in the Federal Register, a 180-day public comment period, final evaluation of the evidence in the record, and preparation of a summary of the evidence, the Assistant Secretary for Indian Affairs issues a final determination on the status of the petitioning group. *Id.*

STANDARDS OF REVIEW

1. Federal Rule of Civil Procedure 12(b)(1)

Defendant Salazar brings this motion in accordance with Fed. R. Civ. P. 12(b)(1) seeking dismissal of Plaintiffs' claims for lack of subject matter jurisdiction. The Supreme Court presumes that federal courts lack jurisdiction "unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted). Jurisdiction is a threshold issue that should be addressed before considering the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-96 (1998); *Blackburn v. United States*, 100 F.3d 1426, 1436 (9th Cir. 1996); *Idaho, Dep't. of Finance v. Clarke*, 786 F. Supp. 885, 886 (D. Idaho 1992). Furthermore, because "federal courts are courts of limited jurisdiction . . . there is a general presumption against federal court review, and the burden of establishing the contrary rests on the party asserting jurisdiction." *Lanza v. Ashcroft*, 389 F.3d 917, 930 (9th Cir. 2004) (citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994)); *Stock West, Inc. v. Confederated Tribes of the Coleville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citing *California ex rel. Younger v. Andrus*, 608 F.2d 1247, 1249 (9th Cir.1979)) ("A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears.").

When deciding a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court may consider extrinsic evidence. *Warren v. Fox Family Worldwide, Inc.*,171 F. Supp. 2d 1057, 1063 (C.D. Cal. 2001) (citing, inter alia, *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.1988)) ("... when considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction") (other citations omitted). Review of such extrinsic evidence does not convert the

motion to dismiss into a motion for summary judgment. *See McCarthy*, 850 F.2d at 560 (citing, inter alia, *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir.1983)).

2. Federal Rule of Civil Procedure 12(b)(6)

Defendant Salazar also brings this motion in accordance with Fed. R. Civ. P. 12 (b)(6) which authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41 (1957)). "[I]f as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,' a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one." *Neitzke*, 490 U.S. at 327 **(**quoting *Hishon*, 467 U.S. at 73). In assessing a motion pursuant to Rule 12(b)(6), the Court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n. 2 (9th Cir. 1986); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981)). Claims should be dismissed under Rule 12(b)(6) where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his legal claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46.

ARGUMENT

I. PLAINTIFFS' ACTION IS BARRED BY SOVEREIGN IMMUNITY

It is well settled that "the United States, as sovereign, is immune from suit save 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." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (quotations omitted). When the United States waives its immunity from suit, "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman*, 453 U.S. at 161 (quotations omitted); *see also United States v. Mitchell*, 445 U.S. 535, 538 (1980) (consent to suit must be "unequivocally expressed").

A. The APA Does Not Provide a Waiver of Sovereign Immunity for Plaintiffs' Claims Because There Has Been No Final Agency Action and the Kawaiisu Have Abandoned the Administrative Process

Plaintiffs cite to the APA as a source of authority for their claims and a basis on which they are entitled to relief. *See* Amended Compl.,Docket No. 71, ¶¶ 9-11, 43-48. The APA contains an express waiver of sovereign immunity for actions brought against the United States, but the waiver is effective only when the challenged agency action is "made reviewable by statute" or is "final agency action for which there is no other adequate remedy in a court." See *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549 (10th Cir. 2001) (citing 5 U.S.C. § 704). Judicial review under the APA is thus expressly conditioned on the existence of a final agency action. *In re SEC ex rel. Glotzer*, 374 F.3d 184, 192 (2d Cir. 2004).

In this case, there has been no final agency action. The plaintiffs allege that this is because, through "initial administrative oversight followed by continued indifference and . . . bureaucratic stagnancy," the Department neglected to act on their petition. Amended Compl., Docket No. 71, ¶ 46. The chronology of Plaintiffs' submission of the petition for federal acknowledgment and subsequent correspondence between the petitioners and the Department contradict these wholly conclusory assertions, however.

Plaintiffs allege that, as the Kern Valley Indian Community, they first filed a petition with the BIA on February 27, 1979. Amended Compl., Docket No. 71, ¶ 25, Ex. 10; *see* Fleming Decl. ¶¶ 5,6, Ex. 1. Documents in the possession of the Department's Office of Federal Acknowledgment ("OFA") show that, by letter dated March 28, 1979, the Deputy Assistant Secretary - Indian Affairs acknowledged receipt of the petition, but advised that a detailed petition and supporting documentation would be required before the Department could begin active consideration of the group. Fleming Decl., ¶ 6, Ex. 2. As plaintiffs allege, the Department then published official notice of receipt of this letter in the Federal Register. *See* Amended Compl., Docket No. 71, Ex. 11. In 1984, in a letter addressed to the Kern Valley Indian Community's Tribal Council responding to a letter from the Council, the Assistant Secretary -

Indian Affairs referenced that publication and as plaintiffs allege, advised the petitioners that, in order for the petition to become eligible for "active consideration," the Department needed to receive "a fully documented response" to each of the seven mandatory criteria set forth in 25 C.F.R. § 83.7 (a)- (g). *See* Amended Compl., Docket No. 71, Ex. 10.

Plaintiffs next allege without support that the petitioners subsequently provided the required documentation "sometime in 1987." Amended Compl., Docket No. 71, ¶ 25. Contrary to this allegation, however, a letter dated September 14, 1988 from attorneys representing the Kern Valley Indian Community to the BIA states that, as of the following year, supporting "[e]thnographic, ethnobotanic, genealogical and social and cultural data" was only then "ready to be put together in a formal petition." Fleming Decl., ¶ 6, Ex. 3. Plaintiffs further allege that "[a]t some time between 1992 and 1993, the Tribe was notified that their status was active." Amended Compl., Docket No. 71, ¶ 25. Contrary to this unsupported allegation, a letter from the Chief of the BIA's Division of Tribal Services dated some two or three years later, in April 1995, acknowledges receipt of "a *partial* documented petition for Federal acknowledgment of the Kern Valley Indian Community" and provides extensive suggestions concerning what the group needed to do to convert its "preliminary effort into a fully documented petition." Fleming Decl., ¶ 6, Ex. 4 at 1, (emphasis added). Additionally, a "Petitioner Update" submitted by Robert Robinson, then Chairman of the Kern Valley Indian Council, which is dated September 1997 and postmarked in November 1997, states that the Kern Valley Indian Community was still "gathering information for [their] petition." Fleming Decl., ¶ 6, Ex. 5. Thus, at least as of late 1997, the Kern Valley Indian Community's petition was not yet ready for active consideration by the Department in accordance with the procedures mandated by 25 C.F.R. Part 83.

More importantly, however, on September 29, 2006, the then-Chairman of the Kern Valley Indian Community wrote to R. Lee Fleming, the Director of OFA, and asked that the letter, together with an accompanying resolution be accepted as the group's request to withdraw its February 27, 1979 letter of intent to file a petition for federal acknowledgment. Fleming Decl., ¶ 6, Exs. 6, 7. By requesting that their claim be withdrawn, the Kawaiisu abandoned the

administrative process prior to having obtained final agency action on their claim for federal acknowledgment, and before the Department determined whether the Kawaiisu could and should be federally acknowledged, and they thus failed to exhaust their available administrative remedies. *Rivera v. United States Postal Serv.*, 830 F. 2d 1037, 1039 (9th Cir. 1987) ("To withdraw is to abandon one's claim, to fail to exhaust one's administrative remedies."). Accordingly, this Court lacks jurisdiction over Plaintiffs' claims. *See Vinieratos v. United States Dep't of Air Force*, 939 F. 2d 762, 772 (9th Cir. 1991) ("An exhaustion rule is meaningless if claimants may . . . abandon the administrative process and yet still be heard in the federal courts.") Also for this reason, Plaintiffs' Amended Complaint against Defendant Salazar fails to state claims upon which relief can be granted.

B. Plaintiffs Cannot Obtain Judicial Review of Their APA Claim Because They Have Failed To Exhaust Administrative Remedies.

Plaintiffs' claims in their Amended Complaint are based on the Department's purported thirty-year "neglect" of their petition for federal acknowledgment. Amended Compl., Docket No. 71, ¶¶ 25, 46, 48, and the resulting differences in the "services, protections and financial advantages" that are afforded to federally recognized tribes as compared to the Kawaiisu. *Id.* ¶¶ 51, 52. Here, despite having knowledge at least in or about December 1994 that the Kawaiisu was not a federally recognized Indian tribe, Plaintiffs have never pursued available administrative remedies for the Department's alleged inaction. Even if Plaintiffs' claims were viable, the doctrine of exhaustion of administrative remedies would bar consideration of these claims.

The doctrine of exhaustion of administrative remedies prevents a party from seeking judicial review of either agency action or inaction prior to having fully pursued all administrative remedies. "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.'" *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 924 (10th Cir. 1994) (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)) (additional citation omitted). "A party must exhaust administrative remedies when a statute or agency rule dictates that exhaustion is

required." *Id.* (citing *White Mountain Apache Tribe v. Hodel*, 840 F. 2d 675, 677 (9th Cir. 1988)). "Without an exhaustion requirement, people would be encouraged to ignore the administrative dispute resolution structure, destroying its utility." *Fort Berthold Land and Livestock Ass'n v. Anderson*, 361 F. Supp. 2d 1045, 1051 (D.N.D. 2005) (citing *Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984)).

Exhaustion is mandated here by the Department of the Interior's regulations at 25 C.F.R. Part 2. The exhaustion requirement applies to challenges to alleged inaction by the Department of the Interior or Bureau of Indian Affairs. *See Norton v. Bureau of Indian Affairs*, 804 F. Supp. 1279, 1280 (D. Idaho 1992); *Coosewoon*, 25 F.3d at 925 ("[c]onsistent with the exhaustion requirement, the Secretary has instituted an administrative procedure by which a party may challenge the Secretary's inaction concerning a particular issue."); *Davis v. United States*, 199 F. Supp. 2d 1164, 1179 (W.D. Okla. 2002) (dismissing Plaintiff's claims because they failed to exhaust administrative procedures pursuant to 25 C.F.R. § 2.8(a) and stating that, "even in the absence of requested action of a [Bureau of Indian Affairs] official, [Bureau of Indian Affairs] regulations still require a plaintiff to exhaust its specified administrative procedures before requesting judicial review").

Section 2.8 sets forth the proper procedure for challenging agency inaction, providing that:

> (a) A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, can make the official's inaction the subject of appeal, as follows:
>
> > (1) Request in writing that the official take the action originally asked of him/her;
> >
> > (2) Describe the interest adversely affected by the official's inaction, including a description of the loss, impairment or impediment of such interest caused by the official's inaction;
> >
> > (3) State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part.

Plaintiffs' claims are founded on the Department's purported thirty-year delay in reaching a

determination on the Kawaiisu's petition for federal acknowledgment. Amended Compl., Docket No. 71, ¶ 46. The Department has adopted, by rule, a specific procedure for addressing such claims, however, and therefore, Plaintiffs cannot seek judicial review of their claims if they have not exhausted those procedures prior to raising their related claims in this Court.

Even accepting as true Plaintiffs' allegation that they first received notice from the BIA that they were not a federally recognized tribe through a letter dated December 27, 1994, Amended Compl., Docket No. 71, ¶ 25, Plaintiffs have had the right since that time to challenge the Department's failure to act on their petition. Under the procedure set forth in 25 C.F.R. Part 2, Plaintiffs could have requested that the Secretary take action concerning their petition and stated that they would file an appeal unless the Secretary either acted on the merits of the request or established a date by which such action would be taken. 25 C.F.R. § 2.8(a). The Secretary would then have been required to "respond within ten days of receipt of the request by either issuing a decision on the merits of the request or establishing a later date by which a decision [would] be made[.]" *Coosewoon*, 25 F.3d at 925 (citing 25 C.F.R. § 2.8(b)). In the event that the Secretary did not subsequently render a decision concerning the election, the Secretary's inaction would then have "become[ ] final for purposes of judicial review." *Id.* (citing 25 C.F.R. § 2.6(a)).

At no time since their receipt of the December 27, 1994 letter, have Plaintiffs ever attempted to appeal their claims administratively, and the APA therefore prevents this Court from reviewing Plaintiffs' claims. *See Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (under doctrine of exhaustion, suit filed before exhausting available administrative remedies is premature and should be dismissed); *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1393-94 (9th Cir. 1993) ("On three occasions, we have upheld the dismissal of lawsuits challenging BIA decisions under the [APA] on the ground that the plaintiff failed to take the required administrative appeal. In doing so, we have noted the jurisdictional nature of the administrative appeal requirement.") (citations omitted).

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

Federal recognition of an Indian tribe - and the creation of a government to government relationship - may only be conferred by the political branches of government. Yet at the heart of Plaintiffs' claims against the Defendant Salazar and the Department is their request for a judicial determination concerning whether the Kawaiisu are a federally recognized Indian tribe entitled to a government-to-government relationship with the United States. Amended Compl., Docket No. 71, ¶ 69. The decision concerning whether an Indian group is a federally recognized Indian tribe within the meaning of federal law is, however, a quintessentially nonjusticiable political question. The political question doctrine precludes judicial involvement in determining the tribal status of plaintiffs for the purpose of federal recognition in the first instance. The doctrine "identifies a class of questions that either are not amenable to judicial resolution because the relevant considerations are beyond the courts' capacity to gather and weigh . . . or have been committed by the Constitution to the exclusive, unreviewable discretion of the executive and/or legislative — the so-called 'political' branches of the federal government." *Miami Nation of Indians of Ind. v. United States Dep't of the Interior*, 255 F.3d 342, 347 (7th Cir. 2001). When a political question is "inextricable from the case at bar," dismissal is warranted. *Baker*, 369 U.S. at 217.

Federal determination of tribal status has long been regarded a political question inappropriate for judicial decision. "'[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.'" *Miami Nation*, 255 F.3d at 347-48 (quoting William C. Canby, Jr., *American Indian Law in a Nutshell 5* (3d ed. 1998)); *see also Holliday*, 70 U.S. at 419 ("[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*, 369 U.S. at 215–17 (identifying the status of Indian tribes as reflecting familiar attributes of political questions); *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993) ("The judiciary has historically deferred to executive and legislative

determinations of tribal recognition."). Thus, the decision to extend federal recognition to a group as an Indian tribe is for the political branches of the government to determine in the first instance.[3]/

III. PLAINTIFFS' CLAIMS ARE ALSO BARRED BY THE STATUTE OF LIMITATIONS

Plaintiffs' First Claim for Relief for violation of the APA is based on the Department's purported thirty-year "neglect" of their petition for federal acknowledgment. Amended Compl., Docket No. 71, ¶¶ 25, 46, 48. Plaintiffs' Second Claim for Relief for violation of the Equal Protection Clause of the Constitution is likewise premised on the Department's alleged inaction and the resulting differences in the "services, protections and financial advantages" available to the Kawaiisu as compared to those afforded to tribes that are federally recognized. *Id.* ¶¶ 51, 52. These claims exceed the statute of limitations set out in 28 U.S.C. § 2401(a).

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); *Spannaus v. United States Dep't of Justice*, 643 F. Supp. 698, 700 (D.D.C. 1983), *aff'd*, 824 F.2d 52 (D.C. Cir. 1987) (citing *Soriano v. United States*, 352 U.S. 270, 276 (1957)) ("Unlike general statutes of limitations, . . . section 2401(a) is not merely a procedural requirement; it is a condition attached to the sovereign's consent and, like all waivers of sovereign immunity must be strictly construed"); *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir. 1990) ("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"); *Wild Fish Conservancy v. Salazar*, 688 F. Supp. 2d 1225, 1237 (E.D. Wash. 2010) (citing *United States v. Williams*, 514 U.S. 527 (1995); *Gandy Nursery, Inc. v. United States*, 318 F.3d 631 (5th Cir. 2003)); *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997))

---

[3]/ In the Advisory Council on California Indian Policy Act of 1992, 106 Stat. 2131, Congress implicitly acknowledged the political nature of the status of unrecognized tribes when it wrote: "there is an urgent need to clarify the eligibility of unrecognized and terminated California tribal groups to be federally acknowledged as Indian tribes with all the rights and powers attendant to that status." Congress established the Advisory Council to study the status and needs of California Indians.

"Failure to sue the United States within the limitations period is not merely a waiveable defense. It operates to deprive federal courts of jurisdiction.". *Dunn-McCampbell Royalty Interest, Inc.*, 112 F.3d at 1287.[4]/ Furthermore, "[e]xceptions to the limitations and conditions upon which the government consents to be sued are not to be implied." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (citing *Soriano*, 352 U.S. at 276).

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. "A cause of action accrues when a plaintiff knew or should have known of the wrong and was able to commence an action based upon that wrong." *Wild Fish Conservancy*, 688 F. Supp. 2d at 1233 (citing *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990)); *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1160 (D. Or. 2001) (quoting *Trafalgar Capital Assocs., Inc. v. Cuomo*, 159 F.3d 21, 34 (1st Cir. 1998)) ("[A] cause of action against an administrative agency 'first accrues,' within the meaning of § 2401(a), as soon as . . . the person challenging the agency action can institute and maintain a suit in court."). It is when the operative facts exist and are not inherently unknowable that dictates first accrual. *Menominee Tribe v. United States*, 726 F.2d 718, 720-22 (Fed. Cir. 1984). The rationale of this rule dictates that an Indian beneficiary, no less than anyone else, is charged with notice of whatever facts an inquiry appropriate to the circumstances would have uncovered. *See, e.g., Littlewolf v. Hodel*, 681 F. Supp. 929, 942 (D.D.C. 1988).

A cause of action generally accrues "when the plaintiff is aware of the wrong and can successfully bring a cause of action" based on that wrong. *Shiny Rock Mining Corp.*, 906 F.2d at 1364 (quoting *Acri v. Int'l Ass'n of Machinists*, 781 F.2d 1393, 1396 (9th Cir. 1986)). In *Shiny*

---

[4]/ *But see Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770-71 (9th Cir. 1997), wherein the Ninth Circuit held pre-*John R. Sand and Gravel*, that section 2401(a)'s six-year statute of limitations "erects only a procedural bar . . . [but] is not jurisdictional." *Contra W. Va. Highlands Conservancy v. Johnson*, 540 F. Supp.2d 125, 142 (D.D.C. 2008) (2401(a) and 2501 must be construed similarly after *John R. Sand and Gravel*, and are jurisdictional); *Georgalis v. United States Patent and Trademark Office*, 296 Fed. Appx. 14, 16 (Fed. Cir. 2008) (same). Nevertheless, whether jurisdictional or not, here, section 2401(a)'s statute of limitations is a complete bar to Plaintiff's First and Second Claims for Relief.

Rock, the Ninth Circuit held that the statute of limitations period began once the plaintiff had constructive notice after the agency published notice in the Federal Register preventing mining on the land. *Id.* at 1363. Actual notice likewise triggers the statute of limitations. *Sisseton-Wahpeton Sioux Tribe*, 895 F.2d at 590, 592-93.

Applying section 2401(a), it is clear that the Plaintiffs' First and Second Claims for Relief against Defendant Salazar exceed the six-year statute of limitations that is applicable to Plaintiffs' claims. By their own admission, Plaintiffs knew at least when they received the letter dated December 27, 1994 that the Kawaiisu were not on the Department's list of federally recognized tribes. Amended Compl., Docket No. 71, ¶ 25; Ex. No. 8. Plaintiffs have thus had actual notice for nearly sixteen years that the federal government was not in a fiduciary government-to-government relationship with the Kawaiisu, and the time for Plaintiffs to challenge the Department's alleged inaction in not reaching a determination on their petition, or to challenge the Department's statement that the Kawaiisu are not federally recognized, arose in December 1994 when all necessary events that allegedly fixed the Department's liability occurred. In this case, the statute of limitations applicable to Plaintiffs' claims has unquestionably expired.

IV. CONCLUSION

For the reasons set forth above, Defendant Salazar respectfully requests that his Motion to Dismiss Plaintiffs' Amended Complaint be granted.

Respectfully submitted this 3rd day of September 2010.

IGNACIA S. MORENO
Assistant Attorney General

/s Barbara M.R. Marvin
BARBARA M.R. MARVIN
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
601 D Street, N.W.
Washington, D.C. 20004
Telephone: (202) 305-0240
Fax: (202) 305-0267

Of Counsel:

Jane Smith
Attorney-Advisor
United States Department of the Interior
Division of Indian Affairs
Office of the Solicitor
1849 C Street, N.W.
Mail Stop 6456-MIB
Washington, D.C. 20240
Tel: (202) 208-6526