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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NELLIE RAMOS, ET AL., Plaintiffs, v. BUREAU OF INDIAN AFFAIRS, ET AL., Defendants.	Case No.: 1:13-CV-10065-RBC FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION TO DISMISS

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FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION TO DISMISS

Defendants the BUREAU OF INDIAN AFFAIRS, MICHAEL BLACK, Director, Bureau of Indian Affairs, MIKE SMITH, Deputy Director, Bureau of Indian Affairs, FRANKLIN KEEL, Regional Director, Bureau of Indian Affairs, and KEVIN WASHBURN, Assistant Secretary – Indian Affairs, in their respective official capacities, (hereinafter "Federal Defendants") hereby submit this Memorandum of Points and Authorities in Support of their Motion to Dismiss under Federal Rules of Procedure 12(b)(1), 12(b)(6) and 12(b)(7).

Plaintiffs challenge the conduct and results of a Tribal election that occurred in 2009. They set out one cause of action, seeking an injunction compelling the BIA to conduct an investigation into the allegations raised by Plaintiffs about the conduct of the election, including examining the enrollment records of the Tribe "to determine that only legitimate members are being allowed to enroll" and to "take any and all further action necessary to ensure that the Tribe's elections are conducted in an open and fair manner that respects Tribal law." First Amended Complaint, ECF No. 9, ("Compl.") at ¶ 40.

Plaintiffs' Complaint is largely moot because a subsequent election has occurred, and a new Tribal Council governs. Even if the suit were not moot, however, Plaintiffs have not demonstrated a waiver of sovereign immunity or stated a claim under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. In the absence of a valid, administratively exhausted APA claim, Plaintiffs fail to join a necessary party, the Mashpee Wampanoag Tribe ("Tribe"). For these reasons their complaint must be dismissed.

I. STATEMENT OF THE FACTS

Plaintiffs are members of the Mashpee Wampanoag Tribe, located in Mashpee, Massachusetts. The Tribe is a federally recognized Indian Tribe that gained federal recognition in 2007 through the acknowledgement process set out in 25 C.F.R. Part 83. Compl. ¶ 9. This suit arises from a series of alleged irregularities in the Tribe's general election held in 2009. Plaintiffs allege the election was marred by improper procedures that violated tribal law and failed to ensure the integrity of the election results. *Id.* at ¶¶ 16-20. After the election, members of the Tribe's Election

Committee met with BIA officials in Washington to discuss the irregularities in the February 2009 election, and make allegations of misconduct. Compl. ¶ 28. Tribal members met again with BIA officials on July 31, 2009, where they asked the BIA to nullify the February 2009 election and oversee a new election. *Id.* ¶ 29. The BIA officials took no action other than to ask the Tribal members to "clarify their request." *Id.*

On December 28, 2012, Tribal members sent a letter to BIA Director Michael Black, asking the Director to act on the Tribal members' August 5, 2009, request within ten days. *Id.* ¶ 34. Also on December 28, 2012, Tribal members submitted a request to Franklin Keel, Director of the Bureau's Eastern Regional Office in Atlanta, to oversee the Tribe's February 10, 2013, Tribal election. *Id.* On January 3, 2013, Tribal members sent a letter to Assistant Secretary – Indian Affairs Kevin Washburn, requesting that the BIA oversee the Tribe's February 10, 2013, election. *Id.* ¶ 35. Federal officials took no actions in response to any of the Tribal members' requests. *Id.* ¶¶ 40-41.

Plaintiffs assert that the federal Defendants "unlawfully failed to respond to the Plaintiffs' repeated request that they investigate the allowance of ineligible voters to vote in the 2009 General Election, to set aside the election results and institute an intermediate government, and oversee the conduct of a new election." *Id.* ¶ 40. Plaintiffs further assert that Defendants "unreasonably delayed" a response to Plaintiffs' request, and that the Tribal government serving during the time of that unreasonable delay had been "fraudulently certified." *Id.* ¶ 41. Plaintiffs assert that the Defendants owe them "a duty to respond to correspondence and requests indicating that election results certified to BIA violated Tribal Law," *Id.* ¶ 42, and that Plaintiffs have been harmed by "Defendants' inaction, which continues to recognize the authority of the current Tribal Council." *Id.* ¶ 43. Since the Complaint was filed, a subsequent election has occurred, *Id.* ¶ 35, and a new Council is in place.

II. STANDARDS OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) allows dismissal of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)).

In ruling on a motion to dismiss, a court must "accept all well-pleaded facts of the complaint as true and draw all reasonable inferences in favor of the plaintiff.'" *Moss v. Camp Pemigewassett, Inc.*, 312 F.3d 503, 506 (1st Cir. 2002) (quoting *Aybar v. Crispin-Reyes*, 118 F.3d 10, 13 (1st Cir. 1997)). However, "factual allegations" must be separated from "conclusory statements in order to analyze whether the former, if taken as true, set forth a plausible, not merely a conceivable, case for relief." *Juarez v. Select Portfolio Servicing, Inc.*, 708 F.3d 269, 276 (1st Cir. 2013) (internal quotations omitted).

Federal Rule of Civil Procedure 12(b)(1) is "[t]he proper vehicle for challenging a court's subject-matter jurisdiction" including challenges "grounded in consideration of . . . . sovereign immunity." *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 362-63 (1st Cir. 2001); *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir.1995). In considering a motion to dismiss for lack of subject matter jurisdiction under 12(b)(1), the Court also assumes that all material allegations set forth in the complaint are true. *See Mulloy v. United States*, 884 F. Supp. 622, 626 (D. Mass.1995); *Williams v. City of Boston*, 784 F.2d 430, 433 (1st Cir. 1986). The complaint, as well as all inferences properly drawn from it, are construed in favor of the plaintiff and the claim will not be dismissed unless "it appears beyond doubt that the plaintiff can provide no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45 (1957) (alterations omitted); *Mulloy*, 884 F. Supp. at 626.

A court may not consider materials outside the pleadings on a motion to dismiss under Rule 12(b)(6), however it may do so under Rule 12(b)(1) because the motion relates to the court's subject matter jurisdiction. *See Gonzalez v. United States*, 284 F.3d 281, 287 (1st Cir. 2002) (discussing Rule 12(b)(1) standard); *Sanchez v. United States*, No. 12-12C39-NMG, 2013 WL 687272, at *1 (D. Mass. Feb. 21, 2013).

Federal Rule of Civil Procedure 12(b)(7) allows for dismissal of a suit for failure to join an indispensible party as described in Rule 19. Under a motion pursuant to Rule 12(b)(7), the moving party carries the burden of showing why an absent party should be joined. *See Raytheon Co. v. Cont'l Cas. Co.*, 123 F. Supp. 2d 22, 32 (D. Mass. 2000). In meeting its burden, the moving party may present, and the court may consider, evidence outside of the pleadings. *Id.*

III. ARGUMENT

A. Plaintiffs' Action is Barred As Moot.

Article III of the Constitution allows federal courts to decide only cases or controversies. *See, e.g., Burke v. Barnes*, 479 U.S. 361, 363 (1987). A live case or controversy must exist not only when a case is filed, but "at the time that a federal court decides the case." *Id*. Thus, "t[o] qualify as a case fit for federal-court jurisdiction, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (*quoting Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). Accordingly, "if a case is moot, even if it becomes moot on appeal, [a court] cannot hear it because 'Article III of the Constitution restricts federal courts to the resolution of actual cases or controversies.'" *Libertarian Party of N.H. v. Gardner*, 638 F.3d 6, 12 (1st Cir.) (citation omitted), *cert. denied*, 132 S. Ct. 402 (2011). *Accord United States v. Reid*, 369 F.3d 619, 624, 626 (1st Cir. 2004).

"A case becomes moot if, at some point after the institution of the action, the parties no longer have a legally cognizable stake in the outcome," or if the court can no longer afford the plaintiff any effective relief. *Goodwin v. C.N.J., Inc.*, 436 F.3d 44, 48 (1st Cir. 2006) (citations omitted). In that situation, "'a case or controversy ceases to exist, and dismissal of the action is compulsory.'" *Libertarian Party of N.H.*, 638 F.3d at 12 (citations omitted); *Mangual v. Roger Sabot*, 317 F.3d 45, 60 (1st Cir. 2003).

Here, Plaintiffs challenge the results and conduct of a January 2009 election. Compl. ¶¶ 16-20. However, since the Complaint was filed, a subsequent election has occurred. Compl. ¶ 34-35 (referring to "February 10, 2013 election"); Press Release, Mashpee Wampanoag Tribe Election Results (A true and correct copy is attached as Exhibit A). Plaintiffs assert that they are harmed by the "Defendants inaction which continues to recognize the authority of the *current* Tribal Council." Compl. ¶ 43 (emphasis added). However what the Complaint refers to as the "current" Council has since been replaced by a new Council. *See* Exhibit A. Therefore Plaintiffs' alleged harm stemming from recognition of this previous Council is surely moot.[1] *See Smith v. Acting Pac. Reg'l Dir.*, 42

[1] Similarly, Plaintiffs can no longer demonstrate that they suffer the harm of being governed by an allegedly illegal Council, and for this reason lack an injury as required for standing. *See, e.g.*,

IBIA 224, 224 (2006) (holding subsequent election rendered case election dispute moot, rejecting Appellants argument that subsequent "election did not moot his 'core' complaint that ineligible individuals are being allowed to run for office and vote in tribal elections"); *see also Hamilton v. Acting Sacramento Area Dir.*, 29 IBIA 122, 123 (1996) ("[T]he determination of tribal leadership is quintessentially an intra-tribal matter raising issues of tribal sovereignty, and therefore the Department should defer to tribal resolution of the matter through an appropriate tribal forum, including the normal electoral process."); *Williams v. Alaska Reg'l Dir.*, 39 IBIA 140, 142 (2003); *Kostzuta v. S. Plains Reg'l Dir.*, 35 IBIA 205, 205 (2000); *Rosales v. Sacramento Area Director*, 34 IBIA 125, 126 (1999).

Further, Plaintiffs object to Defendants' failure to "set aside the election results and institute an intermediate government, and oversee the conduct of a new election." Compl. ¶ 40. An injunction requiring Defendants to set aside the results of an election that has, in effect, already been set aside by the subsequent election would have no effect, and as such would be advisory. For this reason, Plaintiffs' Complaint must be dismissed as moot.

B. Plaintiffs' Action Is Barred Because the United States Has Not Waived Its Sovereign Immunity and Therefore No Subject Matter Jurisdiction Exists for the Suit.

Even if not moot, Plaintiffs' claim must still be dismissed, as they have failed to assert a valid waiver of sovereign immunity. "It is elementary 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." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (citing *United States v. Sherwood*, 312 U.S. 548, 586 (1941) (internal quotations, alterations, and omissions

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Am. Postal Workers Union v. Frank, 968 F.2d 1373, 1376 (1st Cir. 1992). Nor can Plaintiffs satisfy the redressability requirement of standing, which requires a plaintiff to show that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl Servs.*, 528 U.S.167, 181 (2000). "[T]he specific items of relief sought" must "eliminate any effects of that [wrongful act] upon [the plaintiff]." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105–06 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (quotation omitted) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects.").

removed)). Waivers of sovereign immunity must be "unequivocally expressed in the statutory text . . . strictly construed in favor of the United States . . . and not enlarged beyond what the language of the statute requires." *United States v. Idaho ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 6-7 (1993) (internal quotations and citations omitted); *Gonsalves v. IRS*, 975 F.2d 13, 15 (1st Cir. 1992) (per curiam). Defendants in this case are agents and agencies of the United States government; as such, they enjoy sovereign immunity. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949). *Muirhead v. Mecham*, 427 F.3d 14, 18 (1st Cir. 2005).

The burden is on the plaintiff to find and prove an explicit waiver of sovereign immunity. *McNutt v. Gen. Motor Acceptance Corp. of Ind.*, 298 U.S. 178, 188-89 (1936); *Lehigh Mining and Mf'g Co. v. Kelly*, 160 U.S. 327, 337 (1895). Unless a statutory waiver exists, the district courts lack subject matter jurisdiction to entertain a suit against the United States or its agencies. *Sherwood*, 312 U.S. at 586; *Limar Shipping Ltd. v. United States*, 324 F.3d 1, 6 (1st Cir. 2003) ("Absent express waiver of sovereign immunity, federal courts lack subject matter jurisdiction over suits against the United States."). Plaintiffs do not identify an unequivocal waiver of immunity in their Complaint. Instead, they identify several bases for the Court's jurisdiction, which are discussed below.

1. Reliance on General Jurisdictional Provisions Contained in 28 U.S.C. §§ 1331 and 1361 Is Insufficient Because the Provisions Do Not Constitute Waivers of Sovereign Immunity.

Plaintiffs seek to invoke 28 U.S.C. § 1331 and § 1361 to establish jurisdiction. Compl. ¶ 7. Those sections afford a grant of jurisdiction to district courts for matters raising federal questions and permit lawsuits against federal officials, respectively. However it is well settled that they do not, in themselves, constitute a waiver of federal sovereign immunity.

Section 1331 establishes the federal district courts' jurisdiction to hear suits arising from "the Constitution, laws, or treaties of the United States," but does not set out a waiver of federal sovereign immunity. *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 n.3 (9th Cir. 2007). Nor does it create an action. *See DeVilbiss v. Small Bus. Admin*. 661 F.2d 716, 718 (8th Cir. 1981); *Louisville & N. Ry. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (§ 1331 gives district courts jurisdiction not over federal questions themselves but only over those actions that otherwise arise under federal law).

Therefore, Plaintiff cannot rely on section 1331 as a jurisdictional basis unless another statute—such as the APA—provides an applicable waiver of sovereign immunity and cause of action.

Section 1361 provides jurisdiction for actions for mandamus—to compel an officer of the United States to perform a duty. However, this section, too, "is not a general waiver of sovereign immunity. . . . It merely establishes a subject matter that is within the competence of federal courts to entertain. It does not expand the power of those courts in terms of the parties over whom it may exercise jurisdiction." *Coggeshall Dev. Corp. v Diamond*, 884 F.2d 1, 4 (1st Cir. 1989); *Heckler v. Ringer*, 466 U.S. 602, 616 (1984).[2]

The only statute Plaintiffs invoke that may possibly serve as a waiver of Federal Defendants' sovereign immunity and provide a cause of action is the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *See* Compl. ¶ 39.[3] Thus, for this action to proceed, Plaintiff must meet the jurisdictional requirements of the APA. The APA waives sovereign immunity for suits seeking relief other than money damages from federal agencies. *See* 5 U.S.C. § 702. However, the APA's waiver contains several limitations.

2. Plaintiffs Have Not Demonstrated a Waiver of Sovereign Immunity or Stated a Valid Claim Under the APA.

The APA provides a waiver of federal sovereign immunity for lawsuits based on two types of challenges to the activities of federal agencies. Section 706(2) provides that a person affected by an administrative decision can, after exhausting administrative remedies, file a federal suit to obtain relief from the agency decision. 5 U.S.C. §§ 704; 706(2). Section 706(1) provides that a court may compel agency action "unlawfully held or unreasonably delayed." 5 U.S.C. § 706(1). Plaintiffs appear to seek to invoke § 706(1). Compl. ¶ 36. However, Plaintiffs have neither demonstrated inaction on a mandatory duty, nor shown that they have exhausted applicable administrative appeals.

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[2] Moreover, before the federal court can exercise jurisdiction to hear a case against the federal government under the authority of § 1361, the person must have exhausted all other available channels of relief, which they have not done here, as explained in section C, *infra*. *See Heckler*, 466 U.S. at 616.

[3] Plaintiffs do not explicitly refer to the APA in the jurisdiction section of their complaint, nor do they specifically allege a waiver of sovereign immunity under the APA.

For these reasons Plaintiffs claim is not amenable to review under section 706(1) of the APA and must be dismissed.

Section 704 limits APA review to only those instances when agency action is "made reviewable by statute" or when it constitutes "final agency action for which there is no other adequate remedy in a court. . ." 5 U.S.C. § 704. No other statute provides for judicial review of the alleged agency action at issue here. Accordingly, the "action" challenged by Plaintiff is reviewable under the APA only if it constitutes "final agency action" as that term is defined by statute and case law.

Under § 706(1) of the APA, an agency's failure to act—what Plaintiffs allege here—can constitute agency "action" subject to judicial review. However, a "claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. SUWA*, 542 U.S. 55, 64 (2004) (emphasis in original).[4] The First Circuit has noted that "'[t]he limitation to *required* agency action rules out judicial direction of even discrete agency action that is not demanded by law.'" *Scarborough Citizens Protecting Res. v. U.S. Fish & Wildlife Serv.*, 674 F.3d 97, 100 (1st Cir. 2012) (emphasis in original) (quoting *Norton*, 542 U.S. at 65). Accordingly, Plaintiffs cannot maintain a § 706(1) suit unless the agency has "a clear, mandatory, non-discretionary duty to act." *King v. Office for Civil Rights of U.S. Dep't. of Health & Human Sers.*, 573 F. Supp. 2d 425, 429 (D. Mass. 2008) (citation omitted).

Here, Plaintiffs allege that Defendants "unlawfully failed to respond to the Plaintiffs[']repeated request," "unreasonably delayed a response to Plaintiffs['] request," and that the Defendants "owe a duty to respond to correspondence and requests." Compl. ¶ 41-43. However, the complaint fails to allege inaction on "a clear, mandatory, non-discretionary duty to act." *King*, 573 F. Supp. 2d at 429. Plaintiffs have failed to identify any statutes or Department regulations containing specific duties Defendants were *required* to take. Indeed, Plaintiffs do not even purport to identify a source of law imposing a duty on the Department officials to take the requested actions. Plaintiffs fail to identify any statute, case law, or regulation requiring a Department official to "conduct an

[4] *SUWA* also noted that "§ 706(1) also authorizes courts to 'compel agency action . . . unreasonably delayed' – but a delay cannot be unreasonable with respect to action that is not required." *Id.* at n1.

investigation into the allegations raised by Plaintiffs in their August 5, 2009, letter, specifically examin[ing] the enrollment records [of the Tribe] to determine that only eligible members [are being] allowed to enroll" or to "[t]ake any and all further action necessary to ensure that the Tribe's elections are conducted in an open and fair manner that respects Tribal law." Compl. ¶ 45. Absent an explicit legal requirement that the federal government take the action requested by Plaintiffs, the court cannot compel such action.[5] Defendants assert that there is in fact no such legal requirement. Under similar circumstances, where plaintiffs complained that the BIA failed to respond to a letter objecting to upcoming tribal elections, the D.C. district court noted, "the Court is not aware of any statutory or regulatory provision requiring the Bureau to respond in writing, and Plaintiffs have not cited any such authority. *Rosales v. United States*, 477 F. Supp. 2d 119, 127-28 (D.D.C 2007).

The actions which Plaintiffs seek to compel are not legally required and are therefore not subject to judicial review under section 706(1) of the APA. However, even if Plaintiffs had challenged an "action" as defined by the APA, their claim would still fail as they have not exhausted available administrative remedies as required by Interior regulation. For this reason any otherwise reviewable action would not "final" as defined by the APA and case law.

Section 704 specifies that challenged agency action is not final for purposes of the APA if the agency "requires by rule[,] and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704. In other words, agency action or inaction is not final for purposes of Section 704 and amenable to review until "an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule." *Darby v. Cisneros*, 509 U.S. 137, 146 (1993); *see also Nulankeyutmonen Nkihtaqmikon v. Impson* (*NN I*), 503 F.3d 18, 33 (1st Cir.

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[5] *See Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("[A]n Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty."); *Vigil v. Andrus*, 667 F.2d 931, 934 (10th Cir. 1982) ("[T]he 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."); *Miccosukee Tribe of Indians of Fla. v. United States*, 980 F. Supp. 448, 461 (S.D. Fla. 1997)("[T]he government assumes no specific duties to Indian tribes beyond those found in applicable statutes, regulations, treaties or other agreements."); *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006).

2007) (holding that "exhaustion [of administrative remedies] . . . is mandatory" under 25 C.F.R. § 2).[6] Interior prescribes by rule the process for administrative appeal of inaction. *See* 25 C.F.R. § 2.8 ("Appeal from inaction of official."). The regulations also provide that any agency action is not final until no further administrative appeals are available. 25 C.F.R § 2.6(a).

Plaintiffs have not demonstrated that they have exhausted, or even attempted to exhaust, any applicable administrative remedies. Instead, Plaintiffs cite 25 C.F.R. § 2.6 and simply assert that "Defendants actions are final." Compl. ¶ 44. They are not. First, there has been no "action" on the part of the Federal defendants, as argued above. However, even if there were challengeable agency "actions" in this case, they would not be "final" and subject to review under the APA because Plaintiffs have not exhausted administrative remedies as required by the very regulation they cite. *See* 25 C.F.R. § 2.8 (describing process of appeal from alleged agency inaction). *See also Nulankeyutmonen Nkihtaqmikon v. Impson* (*NN II*), 573 F. Supp. 2d 311, 332 (D. Me. 2008) (marks omitted) ("Neither those plaintiffs whose appeal to the IBIA is pending nor those who chose not to appeal can point to a final agency action upon which to base their [APA] claim."); *Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (under doctrine of exhaustion, a suit filed before exhausting available administrative remedies is premature and should be dismissed).

Because Plaintiffs have not demonstrated the existence of a final agency action, nor that administrative appeal of any such action has been exhausted, there exists no agency action "subject to judicial review under the APA." *NN I*, 503 F.3d at 33. Therefore, Plaintiffs have not stated a claim under the APA, the APA provides no waiver of sovereign immunity, the court has no subject matter jurisdiction for this suit, and it must be dismissed.

[6] The First Circuit has recognized "exceptional circumstances where exhaustion may not be required"; however, none are relevant to the facts of this case. *See NN I*, 503 F.3d at 33-34 (quoting *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988)); *see also NN II*, 573 F. Supp. 2d at 318-32 (analyzing exceptions to exhaustion which First Circuit Court identified for consideration on remand).

C. In the Absence of a Valid, Exhausted APA Claim, the Suit Must Be Dismissed for Failure to Join the Tribe, an Indispensible Party.

Given that Plaintiffs' Complaint does not present a valid APA claim, and therefore asserts a freestanding mandamus claim and a demand for injunctive relief, this claim is barred because of Plaintiffs' failure to join an indispensable party. The relief that Plaintiffs request goes beyond the relief that is available under the APA. Of particular importance to an analysis under Rule 19, the Plaintiffs do not merely want this Court to order DOI and BIA to oversee or supervise tribal elections; rather, Plaintiffs object to BIA's failure to "examin[e] the enrollment records of the Tribe to determine that only eligible members [are being] allowed to enroll." Compl. p. 11. Plaintiffs further object to BIA's failure to "set aside the election results and institute an intermediate government, and oversee the conduct of a new election." Compl. ¶ 40. This type of relief clearly implicates the interests of the current Tribal government, who potentially could be ousted were the Court to grant the relief Plaintiffs seek. And one of the most fundamental rights of a Tribe is the right to determine its own membership. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.") Therefore, it is plain that this case cannot proceed in fairness without the Tribe as a party.

1. The Tribe is a Necessary Party to this Action

Federal Rule of Civil Procedure Rule 19 establishes a two-part analysis to determine whether a court should dismiss an action for failure to join a party. *Jimenez v. Rodriguez–Pagan*, 597 F.3d 18, 25 (1st Cir. 2010); *Downing v. Globe Direct LLC*, 806 F. Supp. 2d 461, 465-66 (D. Mass. 2011) *aff'd*, 682 F.3d 18 (1st Cir. 2012).[7] First, Rule 19(a) requires joinder of "necessary" parties when feasible. *Id.* A party is "necessary" if (1) a "court cannot accord complete relief" in that party's absence; or (2) the party "claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party]'s absence may . . . impair or impede the [party]'s ability to

[7] While Rule 19 is structured as a two-part test (subsections "a" and "b"), some courts have recognized that the Rule is better understood has having three steps: (1) whether non-party is necessary; (2) whether joinder is feasible; (3) whether the non-party is indispensible. *EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1078 (9th Cir. 2010); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir. 2001).

protect the interest," or "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(A), (B).

Second, if a person is "necessary" under Rule 19(a)—that is, "required to be joined if feasible"—but cannot be joined, then the court must determine whether "in equity and good conscience" the action should proceed among the parties or be dismissed because the person is "indispensable" under Rule 19(b). Fed. R. Civ. P. 19(a); *Jimenez*, 597 F.3d at 25.[8]

The Tribe is a necessary party under the test of Rule 19(a)(1)(B)(I). *See Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022-24 (9th Cir. 2002); *Manybeads v. United States*, 209 F.3d 1164, 1166 (9th Cir. 2000). The interest of the Tribe is amply demonstrated by the kinds of harm it would suffer if the Plaintiffs were granted the relief they request. In considering similar issues, the U.S. District Court in Minnesota held that the harm that would inure to the defendant Indian community and its members if the requested injunctive relief were imposed would "far outweigh[ ] that caused by not issuing the injunction." More specifically, the court stated:

> Unseating the Community's elected tribal officials, disrupting the Community's membership determinations, intruding in the Community's electoral processes, and limiting the right to participate in Community governance to purportedly 'constitutionally qualified' Community members fundamentally impairs the Community's sovereign power of self-governance and self-determination.

Smith v. Babbitt, 875 F. Supp. 1353, 1370 (D. Minn.1995).

Rule 19(a)(1)(B)(ii) also applies. Any relief granted to the Plaintiffs in this case would surely be opposed by the Tribe. In reaction to any relief awarded to the Plaintiffs in this case, there is nothing to stop the Tribe, if it remains a non-party, from holding its own separate election or continuing to recognize the existing election results. If the BIA were also to conduct an election as requested by Plaintiffs, there would potentially be two different Tribal governments, each purporting to exercise jurisdiction over the Tribe. That situation would undermine the authority of the Tribe and could require this Court's frequent intervention in tribal political matters. There would also be

[8] Though case law often uses this terminology, the current version of the rule no longer uses the term "indispensible."

nothing to stop the Tribe from bringing its own action, raising the prospect of a possible differing view of the merits, and a different judicial outcome. Thus, the Federal Defendants would be subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. *See Davis v. United States*, 199 F. Supp. 2d 1164, 1177 (W.D. Okla. 2002) ("The Court also finds compelling the very real possibility that defendants would incur a substantial risk of inconsistent legal obligations if the BIA officials were subsequently sued by the Seminole Nation for actions taken in violation of tribal law as a result of plaintiffs' success in this cause of action.").

2. Joinder of the Tribe is Not Feasible.

If the absent person is necessary, the Court must then determine whether joinder is "feasible." Fed. R. Civ. P. 19(a)-(b). In the instant case, joinder of the Tribe is not feasible because the Tribe possesses sovereign immunity and therefore cannot be sued without its consent. *See Maynard v. Narragansett Indian Tribe*, 984 F.2d 14, 15 (1st Cir. 1993); *Wampanoag Tribe of Gay Head (Aquinnah) v. Mass. Comm'n Against Discrimination*, 63 F. Supp. 2d 119, 123 (D. Mass. 1999). There is no indication that the Tribe has or would consent to suit in this case.

3. The Tribe is An Indispensable Party Without Whom This Action Cannot Proceed.

As there is no evidence that the Tribe has waived its sovereign immunity, the next question under Rule 19 is whether in equity and good conscience this case can proceed without the Mashpee Wampanoag as a party. *See* Fed. R. Civ. P. 19(b). The factors to be considered are:

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

Fed. R. Civ. P. 19(b).[9]

[9] However "when a party is immune from suit, there is very little room for balancing of other factors set out in rule 19(b), because immunity may be viewed as one of those interests compelling by

Clearly the scope of the relief that Plaintiffs call for in their Complaint would severely prejudice the Tribe, thus meeting the first test. Here, Plaintiffs request not merely DOI's and BIA's oversight of the next election. Rather, they seek to displace the elected officials and membership in the Tribe. These actions would completely undermine the Tribe's authority, particularly if it is not a party to this action.

As for the second test, it is clear that there is no way to shape relief in this case to avoid impairing the Tribe's interest. No matter how the remedy is shaped, essentially the Court will be modifying the Tribe's elected government and membership. *See Davis*, 199 F. Supp. 2d at 1177 ("there are no protective provisions which could be included in the judgment which would prevent trampling on the . . . [Tribe's] sovereign right to make its own laws and be ruled by them.").

The Tribe has a significant interest in the validity of its elections, membership, and elected government. If this Court were to find the Federal Defendants' actions or inactions with respect to the election inadequate, the validity of the election and government of the Tribe could be called into question.

Any remedy would be inadequate under the third consideration of Rule 19(b). There can be no adequate remedy for the parties who are now present. The Tribe is not a party here and therefore cannot be bound by a judgment from this court that revokes or eviscerates the Tribe's government and the election procedures. *See Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1293 (10th Cir. 2003) (explaining that "the concern underlying th[e] [third Rule 19(b)] factor is . . . 'that of the courts and the public in complete, consistent, and efficient settlement of controversies,' that is, the 'public stake in settling disputes by wholes whenever possible."). As for the fourth consideration under Rule 19(b), to the extent that this dispute is, at bottom, an intra-tribal matter, Plaintiffs can and should address their complaints within the current tribal government structures.

Defendants cannot adequately represent the Tribe in its absence. The Secretary has a trust relationship both with the Tribe and with the Plaintiffs as individual Indians. This split allegiance

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themselves." *Downing v. Globe Direct LLC*, 806 F. Supp. 2d 461, 470 (D. Mass. 2011) *aff'd*, 682 F.3d 18 (1st Cir. 2012) (internal marks and citations omitted).

precludes a determination of adequate representation. As in *Wichita and Affiliated Tribes of Oklahoma v. Hodel,* this case "falls squarely under the rule that when 'there is a conflict between the interests of the United States and the interests of Indians, representation of the Indians by the United States is not adequate.'" 788 F.2d at 765-775 (quoting *Manygoats v. Kleppe,* 558 F.2d 556, 558 (10th Cir. 1977)), citing *New Mexico v. Aamodt,* 537 F.2d 1102, 1106 (10th Cir. 1976), *cert. denied,* 429 U.S. 1121 (1977); *Hansen v. Peoples Bank of Bloomington,* 594 F.2d 1149 (7th Cir.1979)). Plaintiffs are arguing for changes that the Tribe presumably does not want. It is therefore impossible for the Federal government to adequately represent the interests of both the Tribe and the individual Plaintiffs. *See Manybeads,* 209 F.3d at 1166 ("[T]he government is a trustee not only for the Hopi Tribe and the Navajo Nation but for the very plaintiffs in this case. . . . The government, if it undertook to act for the Hopi Tribe, would stand on both sides of the question.").

Without the Tribe's participation as a full party to this litigation, its interests will certainly suffer. *Davis v. United States,* 192 F.3d 951, 959 (10th Cir. 1999) ("Unless the Tribe is a party to the lawsuit, it has no ability to protect its claimed interest in determining eligibility requirements."). The Tribe is thus clearly both necessary and indispensable to this suit. Since the Court cannot shape meaningful relief for Plaintiffs without the presence of the Tribe, and the Tribe is unavailable because it has not waived its sovereign immunity from suit, this case should be dismissed. *Downing* 806 F. Supp. 2d at 470.

IV. CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court dismiss all of Plaintiffs' claims pursuant to Fed. R. Civ. P. 12(b)(1), (6) and (7).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will be transmitted to the following CM/ECF participant listed below:

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