UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| Mackinac Tribe,<br><br>Plaintiff,<br><br>v.<br><br>S.M.R. Jewell, as Secretary of the Interior,<br><br>Defendant. | ) | Civil No. 1:14-cv-00456 |

**DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS**

SAM HIRSCH
Acting Assistant Attorney General
Environment & Natural Resources Division

MATTHEW MARINELLI
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 305-0293
Fax: (202) 305-2021
Illinois Bar No.: 6277967
E-mail:matthew.marinelli@usdoj.gov

Attorney for Defendant

OF COUNSEL:

Barbara Coen
Senior Attorney
Department of the Interior
Office of the Solicitor
Washington, DC 20240

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

### CASES

**STATUTES**

**RULES**



**REGULATIONS**

## INTRODUCTION

Defendant Sarah M.R. Jewell, Secretary of the United States Department of the Interior ("Interior") hereby respectfully moves to dismiss this action filed by Plaintiff Mackinac Tribe pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.").[1] Plaintiff petitions the court to determine that it is a federally-recognized tribe and to order the Secretary of the Interior to hold an election to ratify Plaintiff's proposed tribal constitution under the Indian Reorganization Act ("IRA"). 25 U.S.C. § 476. Plaintiff's claim should be dismissed for several reasons.

First, Plaintiff identifies no waiver of the United States sovereign immunity to Plaintiff's claims. Furthermore, in the absence of exhaustion of administrative remedies, Plaintiff's request for the court to determine its federal recognition raises a non-justiciable political question and is constitutionally unripe. Finally, Plaintiff is ineligible to request a Secretarial election under the IRA because it is not an Indian tribe within the meaning of the IRA.

## FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff claims that it is "the modern historical successor to the Mackinac/Michilimackinac Indians . . . and constitute[s] a federally recognized Indian tribe" known as the Mackinac Tribe ("Mackinac"). Compl. at ¶ 1, ECF No. 1. Plaintiff does not appear on Interior's most recent list (or any previous version of the list, *see* footnote 3, below) of federally recognized tribes, entitled "Indian Entities Recognized and Eligible To Receive

[1] Although Plaintiff does not rely upon the Administrative Procedure Act ("APA"), the basis for Plaintiff's claim is administrative action or inaction. Because the administrative record for the challenged agency action or inaction is unnecessary to resolve the threshold legal arguments presented in this motion, Federal Defendants do not submit an index of the administrative record contemporaneously with this dispositive motion. *See* United States District Court for the District of Columbia Local Rule 7(n).

Services From the United States Bureau of Indian Affairs." 79 Fed. Reg. 4,748 (Jan. 29, 2014). As discussed below, Plaintiff's relationship to the many purported Mackinac, Michilimackinac, and Michilmackinac entities referenced in Plaintiff's complaint, as well as the relationship between Plaintiff's members and the Sault Ste. Marie Tribe, is unclear. *See* Compl. at ¶¶ 1, 10-11, 16, 19, 24-34; fn. 6, 8, 11, below.

Plaintiff has not completed the federal acknowledgment process – a process that allows experts in Interior's Office of Federal Acknowledgment ("OFA") to evaluate the evidence presented to determine whether a petitioning group meets the mandatory criteria for federal acknowledgment as an Indian tribe under federal law. 25 C.F.R. Part 83, *Procedures for Establishing That an American Indian Group Exists as an Indian Tribe.*

Plaintiff alleges that over the past thirty-five years, entities purporting to represent different bands, or coalitions of bands, of Mackinac Indians have corresponded with Interior. Compl. at ¶¶ 26, 28-29, 31-34. But while Plaintiff alleges that some Mackinac entities filed letters of intent to petition for federal acknowledgment under the regulations, Plaintiff does not allege that it, or any other entity purporting to represent the Mackinac Tribe, has filed a documented petition for acknowledgment under 25 C.F.R. Part 83, much less exhausted the administrative process for obtaining federal recognition. Compl. at ¶¶ 26, 29.[2]

In July 2009, the Acting Midwest Regional Director, Bureau of Indian Affairs, declined to countersign treaty fishing identification cards because the "Mackinac Tribe" was not presently a federally recognized Indian tribe. The Interior Board of Indian Appeals ("IBIA") upheld that

[2] Plaintiff contends only that in November 1979 "the Mackinac, through . . . the Consolidated Bahweting Ojibwa and Mackinac Tribe wrote a letter of intent . . . requesting federal reaffirmation" Compl. at ¶ 26, and that on May 13, 1998, "the Mackinac Bands of Chippewa and Ottawa Indians filed a letter of intent to file a petition seeking federal acknowledgment of the Mackinac" under Interior's regulations. Compl. at ¶ 29.

decision, noting also that appellants in that case conceded that the "Mackinac Tribe" is not federally recognized. *Adams & Hanson v. Acting Midwest Reg'l Dir., BIA*, 50 IBIA 354, 355 (2009).

Plaintiff sent a letter to the Secretary of the Interior on August 8, 2011, asking the Secretary "to call and conduct an election to approve" a draft constitution approved by a coalition "Tribal Government with Limited Powers" formed from "various Mackinac groups." Compl. at ¶¶ 31-34.

Plaintiff never exhausted its administrative remedies. It has not filed a petition for federal acknowledgment nor appealed any alleged inaction in response to its request for an election under the IRA to the IBIA. Plaintiff instead filed this action for a declaratory judgment that it is a federally recognized tribe and an injunction requiring Interior to call and hold an election to ratify Plaintiff's proposed constitution. *See* Compl. at ¶ 1.

## STATUTORY AND REGULATORY BACKGROUND

### I. FEDERAL ACKNOWLEDGMENT OR RECOGNITION

Federal acknowledgment or recognition of Indian groups as Indian tribes acknowledges that a group has existed continuously as a political community retaining inherent sovereign authority and immunity, independent of the United States and independent of the state in which it is located. *Miami Nation of Indians of Ind. v. Babbitt*, 112 F. Supp. 2d 742, 745 (N.D. Ind. 2000), *aff'd* 255 F.3d 342 (7th Cir. 2001). An acknowledged tribe may exercise jurisdiction over its territory and establish tribal courts. *Id.* at 745-46. Acknowledgment 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 Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263-64 (D.C. Cir. 2008). "Once recognized, a tribe may qualify for additional federal benefits by organizing its government" under the IRA by adopting a constitution subject to approval by the Secretary of the Interior. *Id*. at 1264.

The United States "historically recognized tribes through treaties, statutes, and executive orders." *Id*. at 1263. In the nineteenth century, Congress delegated to the Executive branch the authority to manage Indian affairs and authority to prescribe regulations to carry out the various acts relating to Indian affairs. 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1457. Prior to 1978, Interior determined whether Indian groups were Indian tribes on an *ad hoc* basis. *See Kahawaiolaa v. Norton*, 386 F.3d 1271, 1272-73 (9th Cir. 2004). In 1978, following notice and comment rule-making, Interior promulgated final regulations that provide uniform procedures to acknowledge Indian tribes. 43 Fed. Reg. 39,361 (Sept. 5, 1978). These regulations were revised in 1994, codifying existing practices, and the criteria for acknowledgment of tribal status remained the same. 59 Fed. Reg. 9,280 (Feb. 25, 1994); *Miami Nation*, 112 F. Supp. 2d at 758; 25 C.F.R. Pt. 83. These regulations "substantially reduced" "[w]hatever difficulty courts may have encountered in determining whether Congress or the Executive Branch has recognized a group as a tribe." *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1498 (D.C. Cir. 1997). The Part 83 regulations establish "uniform standards and procedures" to determine what entities are Indian tribes. *Miami Nation of Indians of Ind., Inc. v. Babbitt*, 887 F. Supp. 1158, 1167 (N.D. Ind. 1995).[3]

[3] The Department is considering revisions to the Part 83 regulations. *See* Office of Federal Acknowledgment (OFA), available at http://www.bia.gov/WhoWeAre/AS-IA/OFA/index.html (last visited on May 27, 2014).

The 25 C.F.R. Part 83 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 & Human Servs.*, 824 F.2d 1132, 1136 (D.C. Cir. 1987). "A petition for federal recognition is required as a prerequisite to acknowledgment." *Id*. Pursuant to these regulations, completion of the federal acknowledgment process is a prerequisite both for petitioners seeking federal acknowledgment in the first instance, 25 C.F.R. §§ 83.5, 83.7, and for petitioners who purport to have been recognized in the past, such as through treaties or executive orders, *id.* § 83.8, *see also* 59 Fed. Reg. 9,280, 9,282 (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."). *See James*, 824 F.2d at 1136; *Burt Lake Band of Ottawa & Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 79 (D.D.C. 2002) ("historical recognition . . . does not allow a [plaintiff] to bypass BIA"), *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 218 (D.C. Cir. 2013) ("[T]he Part 83 process applies to a petition of a previously recognized tribe that seeks current recognition on that basis.").

Recognition is granted to Indian groups that can establish a "substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present." 25 C.F.R. § 83.3(a). "Splinter groups, political factions, communities or groups of any character that separate from the main body of a currently acknowledged tribe" generally are ineligible for recognition, but may be acknowledged if they "can establish clearly that they have functioned throughout history until the present as an autonomous tribal entity." *Id*. §§ 83.3(d),

83.7(f). There is no presumption of continuous existence as an Indian tribe. *United States v. Washington*, 641 F.2d 1368, 1374 (9th Cir. 1981) ("We reject their argument that, because their ancestors belonged to treaty tribes, the[y] . . . benefitted from a presumption of continuing existence."), *Miami Nation*, 887 F. Supp. at 1169, (upholding regulations against challenge to require presumption of continuous existence through tribal abandonment standard), *aff'd* 255 F.3d at 350-51.

The Federal acknowledgment regulations establish seven mandatory criteria for acknowledgment to demonstrate continuous existence as a political entity. 25 C.F.R. § 83.7 (a) – (g), *Miami Nation*, 112 F. Supp. 2d at 746, 43 Fed. Reg. 39,361-62 ("The Department must be assured of the tribal character of the petitioner before the group is acknowledged. . . . Maintenance of tribal relations – a political relationship – is indispensable.") For petitioners seeking current federal recognition premised on prior acts of federal recognition, the regulations require evidence of unambiguous prior federal recognition during the acknowledgment process. 25 C.F.R. § 83.8(c). If a petitioning group establishes that it had unambiguous federal recognition, then it must establish that it satisfies the seven criteria as modified by 25 C.F.R. §§ 83.8(a), (d). To establish that a previously recognized Indian tribe has been a continuous and autonomous entity since the point of last federal recognition, the petitioner must demonstrate: (a) that it has been identified as an American Indian entity on a substantially continuous basis since the point of last federal recognition as the same entity that was previously acknowledged; (b) that the group comprises a distinct community at present; (c) under a relaxed evidentiary standard, that the petitioner maintained political influence or authority over its members as an autonomous entity from the last point for federal acknowledgment to the present; (d) that it has submitted a governing document including its membership criteria; (e) that its members descend from a

historical Indian tribe or from historical tribes which combined and functioned as a single autonomous entity; (f) that its membership is composed principally of persons who are not members of any other North American Indian tribe; and (g) that Congress has not expressly terminated or forbidden a federal relationship with the group. *See id.*; 25 C.F.R. § 83.7

Evidence establishing these requirements must be provided to Interior through a petition "that contains detailed, specific evidence." *Id*. § 83.6(a). The "petition must include thorough explanations and supporting documentation in response to" all applicable criteria for acknowledgment. *Id*. § 83.6(c).

Interior then evaluates the information contained in the petition and supplemental information provided by the petitioner or third parties and publishes a proposed finding evaluating the evidence under the criteria. Notice of this finding regarding a petitioner's tribal status is published in the Federal Register. *Id*. at § 83.10(h). There follows a comment period during which Interior provides technical assistance and petitioner and third parties may submit argument and evidence in support of or opposed to the proposed finding. *Id.* at § 83.10(i)-(j). The petitioner then has a period in which to respond to the comments submitted. *Id.* at § 83.10(l). Interior then issues a final determination, notice of which is published in the Federal Register. *Id.* at § 83.10(l)(2). The petitioner and interested parties may seek reconsideration before the IBIA. *Id*. at § 83.11.

Under the Part 83 regulations and the 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"), Interior publishes in the Federal Register a list of all federally recognized Indian tribes entitled to receive benefits and services from Interior. *See* 25 C.F.R. § 83.5(a). The list is ordinarily dispositive evidence of whether or not an Indian tribe is federally recognized. *See Cherokee*

*Nation*, 117 F.3d 1499 (inclusion of tribe on the List "would ordinarily suffice to establish that the group is a sovereign power entitled to immunity from suit"); *James*, 824 F.2d at 1135-36 (tribe could not be recognized through placement on list where it failed to exhaust administrative procedure). The most recent list is found in the Federal Register at 79 Fed. Reg. 4,748 (Jan. 29, 2014). Plaintiff is not included on the list.[4]

## II. THE INDIAN REORGANIZATION ACT AND SECRETARIAL ELECTIONS

Congress's enactment of the IRA in 1934 "marked a shift away 'from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture.'" *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2327 n.8 (2011) (citation omitted). The IRA marked a return to "principles of tribal self-determination and self-governance" for Indian tribes. *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992). To revitalize Tribal governments, Congress ended the allotment process, 25 U.S.C. § 461, authorized Interior to purchase land to take into trust for tribes, 25 U.S.C. § 465, and authorized loans for economic development, 25 U.S.C. § 470. The IRA also authorized tribes to reorganize, 25 U.S.C. § 476, and, in some circumstances, form corporate entities, 25 U.S.C. § 477.

[4] The Mackinac Tribe does not appear on any of the previously published Federal Register lists of recognized Indian tribes. *See* 79 Fed. Reg. 4,748 (Jan. 29, 2014); 78 Fed. Reg. 26,384 (May 6, 2013); 77 Fed. Reg. 47,868 (Aug. 10, 2012); 75 Fed. Reg. 60,810 (Oct. 1, 2010); 74 Fed. Reg. 40,218 (Aug. 11, 2009); 73 Fed. Reg. 18,553 (Apr. 4, 2008); 72 Fed. Reg. 13,648 (Mar. 22, 2007); 70 Fed. Reg. 71,194 (Nov. 25, 2005); 68 Fed. Reg. 68,180 (Dec. 5, 2003); 67 Fed. Reg. 46,328 (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 (Apr. 24, 1980); 44 Fed. Reg. 7,235 (Feb. 6, 1979); and 25 Fed. Reg. 12,521 (Dec. 7, 1960).

Section 476 allows for reorganization by providing that:

> 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
>
> (2) approved by the Secretary pursuant to subsection (d) of this section.

Section 479 defines "tribe" as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Id.* at § 479.

The Secretary promulgated rules and regulations, the purpose of which was "to provide uniformity and order in," among other things, holding elections for voting on proposed constitutions when tribes wish to reorganize. 25 C.F.R. § 81.2(a); *accord Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1087 (8th Cir. 1977); *see generally*, Tribal Reorganization Under a Federal Statute, 25 C.F.R. § 81.1 – .24. The 25 C.F.R. Part 81 regulations define "Tribe" as "Any 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." 25 C.F.R. § 81.1(w).

## STANDARDS OF REVIEW FOR A MOTION TO DISMISS

### I. SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is a threshold issue, which should be addressed prior to any consideration of the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Federal courts presumptively lack jurisdiction "unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quotation omitted). Furthermore, because "[f]ederal courts are courts of limited jurisdiction . . . . [i]t is to be presumed that a cause

lies outside this limited jurisdiction, and the burden of establishing the contrary rests on the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Therefore, to survive a motion to dismiss pursuant to Rule 12(b)(1), a plaintiff bears the burden of establishing that the court has subject matter jurisdiction over its claim. *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007); *El Paso Natural Gas Co. v. United States*, 605 F. Supp. 2d 224, 227 (D.D.C. 2009) ("When evaluating subject matter jurisdiction, plaintiffs bear the burden of proof."). When the United States is the defendant, "a plaintiff must overcome the defense of sovereign immunity in order to establish the jurisdiction necessary to survive a Rule 12(b)(1) motion to dismiss." *Jackson v. Bush*, 448 F. Supp. 2d 198, 200 (D.D.C. 2006) (citing *Tri State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003)).

"In ruling upon a motion to dismiss brought under Rule 12(b)(1), a court must construe the allegations in the complaint in the light most favorable to the plaintiff." *Scolaro v. Dist. of Columbia Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000). "But where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992).

## II. FAILURE TO STATE A CLAIM

"A Rule 12(b)(6) motion tests the legal sufficiency of a complaint." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows

the court to draw [a] reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

Legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" to state a cause of action and must be disregarded. *Id.* (citing *Twombly*. 550 U.S. at 555). Similarly, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 555, 557). In evaluating a Rule 12(b)(6) motion, the court "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

## ARGUMENT

### I. THIS COURT LACKS JURISDICTION OVER PLAINTIFF'S CLAIMS BECAUSE PLAINTIFF FAILS TO PROVIDE AN EXPRESS, UNEQUIVOCAL WAIVER OF THE UNITED STATES' SOVEREIGN IMMUNITY.

The United States is immune from suit unless it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). "When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." *United States v. Mottaz*, 476 U.S. 834, 841 (1986). Congress alone may grant 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); *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). "[T]he Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992)

(internal citations and quotations omitted).

Plaintiff has failed to set forth any waiver of the United States' sovereign immunity. Plaintiff claims that this Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction), 1361 (action to compel an officer of the United States to perform his duty), and 1362 (jurisdiction over suit by Indian tribes). Compl. at ¶ 3.

Neither the general federal question statute, 28 U.S.C. § 1331, nor the mandamus statute, 28 U.S.C. § 1361, provide the necessary waiver of sovereign immunity. *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996) ("Neither the general federal question statute nor the mandamus statute by itself waives sovereign immunity"). "Section 1331 is merely a jurisdictional statute that does not create any substantive rights that may be enforced against the United States." *Hagemeier v. Block*, 806 F.2d 197, 203 (8th Cir. 1986); *Reed v. Reno*, 146 F.3d 392, 397-398 (6th Cir. 1998); *Fostvedt v. United States*, 978 F.2d 1201, 1203 (10th Cir. 1992) ("[s]overeign immunity is not waived by general jurisdictional statutes" such as 28 U.S.C. § 1331). Similarly, "[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); *Scholder v. United States*, 428 F.2d 1123, 1125 (9th Cir. 1970); *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989). Plaintiff's reliance on these statutes therefore does not provide the necessary waiver of sovereign immunity.

Plaintiff's reliance on 28 U.S. C. § 1362 is doubly misplaced. 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 suits, namely,

federal-question actions brought by an Indian tribe or band." *Scholder*, 428 F.2d at 1125. Significantly, "[n]othing 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." *Id.* Further, Plaintiff is ineligible to assert jurisdiction under Section 1362 because it only applies in cases brought by federally-recognized tribes. *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 . . . ."). As discussed below, Plaintiff is not a federally-recognized tribe because it 1) is not listed on Interior's list of federally-recognized tribes and 2) failed to complete the steps necessary to potentially become a federally-recognized tribe.[5] Plaintiff therefore does not cite to any statute that waives the sovereign immunity of the United States and therefore this Court is without jurisdiction over the Federal Defendants.

## II. PLAINTIFF'S CHALLENGE TO ITS STATUS AS NOT FEDERALLY RECOGNIZED IS PREMATURE UNTIL IT EXHAUSTS ITS ADMINISTRATIVE REMEDIES BY COMPLETING THE FEDERAL ACKNOWLEDGMENT PROCESS.

Any challenge to Plaintiff's status as not federally recognized is premature until Plaintiff completes the federal acknowledgment process under 25 C.F.R. Part 83. Indeed, despite alleging

[5] The Complaint notably fails to cite to the APA. *See, e.g.*, Compl. at ¶ 3. The APA provides a limited waiver of the United States' sovereign immunity by providing "a right to judicial review of all 'final agency action for which there is no other adequate remedy in a court,'" *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (quoting 5 U.S.C. § 704). But an action is not final, and therefore reviewable under the APA, unless it "mark[s] the 'consummation' of the agency's decisionmaking process." *Id.* at 177-178. Plaintiff suggests that it, or some potentially-related entity, commenced the administrative process that could lead to a final tribal acknowledgment decision that would be appealable under the APA. But, as discussed below, Plaintiff has not, and cannot, plead facts that would permit the Court to conclude that there has been any final agency action or inaction for which Defendant can be held liable. Plaintiff is precluded from relying on the only potentially available waiver of sovereign immunity because it has not exhausted the administrative remedies that are necessary to consummate Interior's decision-making process.

that "the Mackinac, through . . . the Consolidated Bahweting Ojibwa and Mackinac Tribe" and "the Mackinac bands of Chippewa and Ottawa Indians" filed letters of intent, Compl. at ¶¶ 26, 29, Plaintiff does not allege that a documented petition seeking acknowledgment was submitted nor explain its relationship (if any) to these other entities. Plaintiff's failure to exhaust the federal acknowledgment process bars this lawsuit.[6]

**A. The decision to recognize Indian tribes is a non-justiciable political question.**

Without initiating the federal acknowledgment process provided by Interior, Plaintiff requests that this Court declare it a federally recognized Indian tribe, and accord it one of the federal benefits – calling and holding an election under the IRA - that federally recognized tribes are eligible to receive. Compl. at ¶¶ 36-38, 40. But federal recognition of Indian tribes is committed to the political branches of government, rather than the courts. *United States v. Holliday*, 70 U.S. 407, 419 (1865) (if executive and other political departments recognized Indians as a tribe, courts must do the same).

It is well-established that the decision to recognize Indian tribes is a non-justiciable political question because of the political nature of recognizing a government-to-government relationship. *See, e.g., United States v. Sandoval*, 231 U.S. 28, 46 (1913) ("questions whether, to what extent, and for what time [Indian communities] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts"); *United States v. Rickert*, 188 U.S. 432, 445 (1903); *Miami Nation*, 255 F.3d at 347 ("the action of the federal government in recognizing or

[6] It is unclear whether these groups 1) are the Plaintiff, 2) represent some subset of the "Mackinac organizations" referenced in the Complaint, or 3) are groups or entities that are not part of Plaintiff. *See* Compl. at ¶¶ 26, 29, 30. Moreover, as discussed below, Plaintiff's allegations fall far short of providing specific information regarding Plaintiff's membership and leaders.

failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review.") (citation omitted). *See also Muwekma*, 708 F.3d at 216 (discussing importance of government-to-government relationship in recognition). "[R]ecognition lies at the heart of the doctrine of 'political questions.' 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*, 255 F.3d at 347 (citations omitted); *Holliday*,70 U.S. at 419.[7]

Plaintiff's petition that the court declare it a federally recognized tribe is similar to those dismissed by two courts recently under the political question doctrine. The Eastern District of New York held that the "issue of federal recognition of an Indian tribe is a quintessential political question that, in the first instance, must be left to the political branches of government and not the courts." *Shinnecock*, 2008 WL 4455599 at *2. As the court explained in *Shinnecock*, "it is not the role of the court to usurp the constitutionally-protected province of the politically-elected branches of government by attempting to address the merits of the recognition issue before the Secretary of the Interior has acted." *Id.* Similarly, the Northern District of California recently held that whether a putative tribe is entitled to federal "acknowledgment is a

[7] Recognition's status as a non-justiciable political question flows, in part, from "Article I, Section 8 of the United States Constitution, [which] explicitly granted Congress the authority to regulate commerce with Indian tribes." *Shinnecock Indian Nation v. Kempthorne*, No. 06-cv-5013, 2008 WL 4455599 at *2 (E.D.N.Y. Sept. 30, 2008). Congress delegated its "general responsibility over matters pertaining to Indian Tribes to the Department of the Interior." *Id.*; 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1457.

non-justiciable political question and thus beyond the purview of the court." *Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1031 (E.D. Cal. 2012).

Precedent in this circuit similarly provides that decisions regarding tribal recognition "should be made in the first instance by the Department of the Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations." *James*, 824 F.2d at 1137. Interior's decisions must then be respected by the judicial branch. *See id.* The judiciary therefore treats a group's absence from Interior's list of federally recognized tribes as dispositive evidence that the group is not recognized as an Indian tribe. *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993).

Judicial review is available only after Interior makes a final decision under the Part 83 acknowledgment regulations. *Miami Nation*, 255 F.3d at 348. And then the only question subject to judicial review is whether, under the APA, Interior arbitrarily, capriciously, or unlawfully applied its regulations in recognizing or failing to recognize Plaintiff as an Indian tribe. *Id.* Thus, until Plaintiff obtains a final decision from Interior on the question of recognition and an APA claim ripens, the political question doctrine precludes any challenge to Plaintiff's status as not federally recognized. Because Interior has not made any decision – let alone a final one – regarding Plaintiff's status, its demand for recognition presents a political question that cannot be resolved by this court. *See id.* at 348; *James*, 824 F.2d at 1137.

The Michigan Indian Lands Claims Settlement Act ("MILCSA") highlights the political nature of recognition and the appropriateness of deferring any decision regarding Plaintiff's recognition, in particular, to Interior. MILCSA provided for the division, use, and distribution of judgment funds of the Ottawa and Chippewa Indians of Michigan. Plaintiff alleges that MILCSA provided funds "to certain individual members of the Michilmackinac (*i.e.*, the

Mackinac)," apparently in support of its contention that Plaintiff is a federally recognized tribe. Compl. at ¶¶ 27, 37.[8] But the MILCSA does not assist Plaintiff. To the contrary, it highlights that Plaintiff is not a federally recognized tribe.

MILCSA clearly identifies and provides for the distribution of judgment funds to five federally recognized Indian tribes. 105 Pub. L. No. 143, 111 Stat. 2652, §§ 104(a)(2-5), 104(b)(2-5), 104(c) (1997) (directed specific percentages of the awards to: 1) the Sault Ste. Marie Tribe of Chippewa Indians of Michigan; 2) the Bay Mills Indian Community; 3) the Grand Traverse Band of Ottawa and Chippewa Indians of Michigan; 4) the Little Traverse Bay Bands of Odawa and Chippewa Indians of Michigan; and 5) the Little River Band of Ottawa Indians of Michigan. The MILCSA distinguishes these federally recognized tribes from unnamed "newly recognized or reaffirmed tribes" under § 110. *Id*. at §§ 104(a)(1), 104(b)(1), 104(d). Under Section 110, the Act provides that "[i]n order to be eligible for tribal funds under this Act, a tribe that is not federally recognized or reaffirmed on the date of the enactment of this Act . . . shall not later than 3 years after the date of the enactment of this Act, submit to the Bureau of Indian Affairs a documented petition for Federal recognition." *Id*. at § 110.[9] Simply put, Congress reinforced the general prohibition on courts making initial determinations regarding tribal recognition by explicitly directing Plaintiff, to the extent it sought to participate in the settlement of Michigan land claims as a federally recognized tribe, to submit a petition for recognition to Interior.

---

[8] Plaintiff's reliance on the historical "Michilmackinac" tribe raises questions regarding the relationship between it and the historical Michilmackinac, and its relationship to the federally recognized tribes referenced in MILCSA, descendants from the same treaty bands referenced by Plaintiff. As discussed below, such questions involving the evaluation of historical evidence should be deferred to Interior.

[9] Congress also provided for an award to descendants who were not members of federally recognized tribes. *Id*. at § 106.

**B. Plaintiff's challenge is not ripe for review until Interior issues a final decision.**

Because Plaintiff has not completed the federal acknowledgment process, any challenge to its status as not federally recognized also is not ripe for review. The ripeness doctrine limits the power of federal courts in adjudicating disputes. Its roots are found in both the Article III requirement of "case or controversy" and prudential considerations favoring the orderly conduct of the administrative and judicial processes. *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 479 (D.C. Cir. 1986). The ripeness doctrine has two purposes. First, it is intended 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies.' Second, the doctrine is intended 'to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Id.* (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). Courts consider three factors in determining whether an agency decision is ripe for review: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). Judicial review prior to Interior making a determination regarding Plaintiff's recognition under its Part 83 regulations would, at a minimum, inappropriately interfere with administrative action and deprive the court, in the event that any future review is appropriate, of necessary factual development.

Congress delegated the political authority to acknowledge Indian tribes to Interior, and Interior must have the opportunity to make that determination. *See James*, 824 F.2d at 1137. As the D.C. Circuit found, Interior has special expertise in Indian affairs and employs an expert staff

of historians, anthropologists, and genealogists to resolve tribal recognition issues. *Id.* at 1138. Therefore "[i]t is apparent that the agency should be given the opportunity to apply its expertise prior to judicial involvement." *Id.*[10] The resulting "factual record developed at the administrative level would most assuredly aid in judicial review." *Id*. Judicial review is therefore only appropriate once Interior makes a final decision on Plaintiff's recognition status. *See Id.; Miami Nation,* 255 F.3d at 348. Thus, until Plaintiff obtains a final decision from Interior on the question of recognition and an APA claim ripens, Plaintiff cannot challenge its status as not federally recognized.

Plaintiff's failure to engage in the federal acknowledgment process and to obtain a final decision from Interior renders its challenge to its status as not federally recognized unripe because several factual issues remain undecided. For example, even if a historic Mackinac tribe was federally recognized in 1855, as Plaintiff alleges, Compl. at ¶¶14-15, 37, Plaintiff would still need to demonstrate, among other things, (a) that it has been identified as an American Indian entity on a substantially continuous basis since the point of last federal recognition as the same entity that was previously acknowledged; (b) that the group comprises a distinct community at present; (c) under a relaxed evidentiary standard, that the petitioner maintained political influence or authority over its members as an autonomous entity from the last point for federal acknowledgment to the present. 25 C.F.R. §§ 83.7, 83.8.

Simply put, Plaintiff's apparent claim that it is the present embodiment of a historically-recognized Mackinac tribe does not allow them to sidestep the administrative process. Historic recognition does not establish that such recognition was maintained from 1855 to the present.

---

[10] Courts, in contrast, are not well situated, in terms of resources, experience, and expertise, to resolve the complex historic and factual questions raised by tribal recognition requests. *See Id.*; *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 550 (10th Cir. 2001); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 839 F. Supp. 130, 135 (D. Conn. 1993).

*Miami Nation*, 255 F.3d at 350 ("If a nation doesn't exist, it can't be recognized."); *United Tribe*, 253 F.3d at 548 ("[Descent] says nothing about whether [plaintiff] has maintained its identity with the Shawnee tribe and has continued to exercise that tribe's sovereign authority up to the present day."), *Washington*, 641 F.2d at 1373-74; *Burt Lake Band*, 217 F. Supp. 2d at 79. Any claim that Plaintiff is the present-day embodiment of a previously-recognized tribe therefore assumes the very facts that should be investigated and determined by Interior. *See James*, 824 F.2d at 1138; *United Tribe*, 253 F.3d at 548, *Burt Lake Band*, 217 F. Supp. 2d at 79. Allowing Interior to develop a factual record regarding these potentially-complicated issues will aid in any subsequent judicial review.[11]

Moreover, requiring Plaintiff to engage in the administrative process may ultimately result in Plaintiff becoming federally recognized and thus may avoid the need for judicial intervention in this dispute altogether. *See James*, 824 F.2d at 1138 ("in the event that the dispute is resolved at the administrative level, judicial economy will be served"); *Ohio Forestry*, 523 U.S. at 736 ("depending upon the agency's future actions . . . review now may turn out to have been unnecessary"); *Texas v. United States*, 523 U.S. 296, 300 (1998) (claim is not ripe when it rests "upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (quotation marks and citation omitted). Plaintiff's challenge to its status as not federally recognized is therefore unripe until it participates in the federal acknowledgment process and obtains a final decision from Interior.

[11] For example, it appears that members of the putative Mackinac Tribe are also members of the Sault Ste. Marie Tribe, which is federally-recognized. *Adams & Hanson*, 50 IBIA at 357 n.5. Such membership overlap raises questions regarding whether Plaintiff is a distinct tribal community. *See* 25 C.F.R. 83.7(f) (generally requiring that "[t]he membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe."). Such questions are more efficiently resolved through the administrative process conducted by the branch and agency with relevant expertise.

### C. Judicial review is precluded because Plaintiff failed to exhaust its administrative remedies and obtain a final decision from Interior on recognition.

"In cases such as this, where Congress has delegated certain initial decisions to the Executive Branch, exhaustion of available administrative remedies is generally a prerequisite to obtaining judicial relief for an actual or threatened injury," *James*, 824 F.2d at 1137. As the D.C. Circuit held, putative tribes are required to exhaust administrative remedies in tribal recognition cases in part because Interior has expertise in "determining whether groups seeking tribal recognition actually constitute Indian tribes and presumably to determin[ing] which tribes have previously obtained federal recognition." *Id*. (citing 25 C.F.R. § 83.6(b)). Plaintiff's complaint should be dismissed because Plaintiff has not exhausted its administrative remedies by obtaining a final determination regarding its recognition.

Under the doctrine of administrative exhaustion, "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)); *Roberts v. D.C. Dep't of Corr.*, 855 F. Supp. 417, 419 (D.D.C. 1994) ("The U.S. Supreme Court has further established the need to exhaust administrative remedies before seeking review from the courts.") (citations omitted). "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have the opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

Plaintiff's claim is barred by its failure to exhaust its administrative remedies. Finality is a requirement for judicial review unless Congress provides otherwise. *See Carter/Mondale*

*Presidential Committee, Inc. v. FEC*, 711 F.2d 279, 284 n.9 (D.C. Cir. 1983). Were this Court to find that Plaintiff's Complaint could proceed under some basis other than the APA (for the reasons stated above, Defendant submits it may not), Plaintiff might argue that application of the exhaustion doctrine is a matter of judicial discretion. *Committee of Blind Vendors v. District of Columbia*, 28 F.3d 130, 134 (D.C. Cir. 1994) (citing *Darby v. Cisneros*, 113 S. Ct. 2539, 2548 (1993)) (exhaustion doctrine applies as a matter of judicial discretion in cases not governed by the APA).[12] As discussed above, however, for cases like this one in which a putative tribe seeks acknowledgment, the D.C. Circuit requires exhaustion. *James*, 824 F.2d at 1137-38; *Burt Lake Band*, 217 F. Supp. 2d at 79 ("where Congress has allocated decision-making responsibility to the Executive branch, petitioning parties are required to exhaust all available administrative remedies before seeking judicial relief.") (citing *James*, 824 F.2d at 1137).

The administrative process Interior prescribes for petitioners such as Plaintiff is based upon, and cannot proceed without, a petition for acknowledgment. *James*, 824 F.2d at 1136 ("A petition for federal recognition is required as a prerequisite to acknowledgment.") (citing 25 C.F.R. §§ 83.5, 83.7). The documented petition must contain "detailed, specific evidence in support of a request to the Secretary to acknowledge tribal existence" that includes "thorough explanations and supporting documentation in response to all" acknowledgment criteria. 25 C.F.R. § 83.6. This evidence allows Interior to commence the administrative process for determining whether a petitioner is a tribe entitled to a government-to-government relationship, and provides a basis for that determination. Plaintiff could, as part of this process, challenge or support Interior's proposed findings evaluating the evidence and any public comments on those

[12] Under the APA, agency action is only reviewable when it constitutes "final agency action for which there is no other adequate remedy in a court." *See United Tribe*, 253 F.3d at 549 (quoting 5 U.S.C. § 704).

findings. *Id.* § 83.10(i), (k). And Plaintiff could seek reconsideration of any adverse decision by the IBIA. *Id.* § 83.11. Only at the conclusion of this administrative process will there be a final agency decision subject to judicial review under the APA. *See W. Shoshone*, 1 F.3d at 1055 n.3 (recognition "decisions are not final for purposes of § 704 review if they are subject to appeal to a higher authority within the department").

Plaintiff must exhaust these administrative remedies even though it seeks recognition based upon its claim that it is the successor to a historic Mackinac Tribe that was recognized in the Treaties of 1836 and 1855, Compl. at ¶¶ 11-15. Indeed, the federal acknowledgment process specifically provides for tribal recognition claims premised on *previous federal recognition.* Previous Federal acknowledgment, 25 C.F.R. § 83.8.[13] Under Section 83.8, petitioners who demonstrate previous federal acknowledgment enjoy special "fast tracking provisions." *Burt Lake Band*, 217 F. Supp. 2d at 79. These provisions relax the burden placed upon the petitioner to satisfy the criteria for recognition. 25 C.F.R. §§ 83.8(d)(1-4).

Courts have consistently required putative tribes to submit recognition claims, including claims based on previous recognition, to Interior and exhaust their administrative remedies prior to challenging any denial of recognition. In *James*, the D.C. Circuit rejected a claim for modern recognition based upon alleged recognition by the Executive branch in the nineteenth century. 824 F.2d at 1137. The Court held that documents purporting to establish that the putative tribe was previously recognized should be evaluated in the first instance by Interior. *Id*. Similarly, in *Muwekma*, the D.C. Circuit found that a petitioner's claim that Interior had illegally terminated

[13] The federal acknowledgment regulations were revised in 1994 to address demonstrations of previous federal acknowledgment. 59 Fed. Reg. 9,280, 9,282 (Feb. 25, 1994) (codified at 25 C.F.R. § 83.8) ("Provision is made for a reduced burden of proof for petitioners demonstrating previous Federal acknowledgment.").

its recognition "was subject to administrative exhaustion." 708 F.3d at 218-19.

In *Burt Lake Band*, this Court rejected a putative tribe's effort to circumvent Interior's acknowledgment process by arguing, like Plaintiff, that it was a previously-recognized signatory of the Treaty of Detroit. 217 F. Supp. 2d at 79 ("historical recognition by the Executive Branch does not allow a [tribe] to bypass BIA, even if the recognition occurred in a treaty"). *Cf.* Compl. at ¶¶ 1, 13-16. The court granted Interior's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), finding that the Court lacked subject matter jurisdiction because the plaintiff failed to exhaust available administrative remedies under 25 C.F.R. Part 83. Notably, the Court held 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." *Burt Lake Band*, 217 F. Supp. 2d at 79. Any evidence regarding Plaintiff's alleged previous federal acknowledgment should be submitted to Interior's Office of Federal Acknowledgment, the appropriate agency with the requisite expertise to evaluate any such evidence. As the Court held, "A direct suit in federal court seeking federal recognition . . . is not appropriate relief." *Id.*

The Tenth Circuit similarly rejected an attempt to bypass the acknowledgment process by a group claiming to be the historically-recognized Shawnee Tribe. The putative tribe sought a judicial ruling that it was a recognized tribe by virtue of: 1) an 1854 treaty between Congress and the Shawnee Tribe; and 2) recognition by the Supreme Court in *The Kansas Indians*, 72 U.S. 737, 756 (1866). *United Tribe*, 253 F.3d at 546. The Tenth Circuit rejected the plaintiff's 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.

Plaintiff has not pursued or exhausted the federal acknowledgment process. Indeed, Plaintiff alleges only that it "filed a letter of intent to file a petition seeking federal acknowledgment." Compl. at ¶¶ 26, 29. Plaintiff does not allege that it filed a documented petition, received a proposed finding or final determination, or that it requested reconsideration of a final determination before the IBIA. Plaintiff's failure to file a documented petition and pursue that petition through to a final determination is fatal to its claim here. Plaintiff's request that the Court determine that it is a federally recognized Indian tribe must be dismissed for failure to exhaust administrative remedies.

**D. Interior has primary jurisdiction over the decision to acknowledge Indian tribes.**

Even if this lawsuit presently is justiciable, it still should be dismissed pursuant to the doctrine of primary jurisdiction. Primary jurisdiction "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956) (citation omitted). In applying the doctrine of primary jurisdiction, "courts traditionally have considered four factors: (1) whether the question at issue is within the conventional expertise of judges; (2) whether the question at issue lies particularly within the agency's discretion or requires the exercise of agency expertise; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made." *Himmelman v. MCI Commc'ns Corp.*, 104 F. Supp. 2d 1, 4 (D.D.C. 2000) (citation omitted). The D.C. Circuit's analysis of tribal recognition decisions establishes

that these factors weigh in favor of deferring such decisions to Interior. *See James*, 824 F.2d at 1137-38.

As noted above, tribal recognition directly implicates Interior's specialized expertise and delegated authority, and is better suited to the agency's capabilities than to the Court's. *See James*, 824 F.2d at 1138 (discussing agency expertise). Likewise, the political nature of recognition decisions places them within the agency's discretion, rather than that of the courts. *W. Shoshone*, 1 F.3d at 1057-58 (discussing judicial deference to Interior's recognition rulings and noting that initial determinations of tribal status by courts would interfere with Congress' delegation of Indian affairs to Interior). Finally, without the "uniform standards and procedures" provided by the Part 83 regulations, there exists a substantial danger of inconsistent rulings. *Miami Nation*, 887 F. Supp. at 1167. Therefore, if this case were "properly cognizable in court," the primary jurisdiction doctrine would be applicable because the issue of tribal acknowledgment is "within the special competence" of Interior. *See Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60 (2d Cir. 1994) ("Interior's creation of a structured administrative process to acknowledge 'nonrecognized' Indian tribes using uniform criteria, and its experience and expertise in applying these standards, has now made deference to the primary jurisdiction of the agency appropriate."). Thus, if this Court rejects the arguments that the doctrines of political question, ripeness, and administrative exhaustion preclude this lawsuit, it nevertheless should dismiss this matter pursuant to the doctrine of primary jurisdiction.

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

Plaintiff's failure to exhaust the administrative acknowledgment process is also fatal to Plaintiff's claim that it is entitled to an election conducted by the Secretary of the Interior – a benefit accorded to Indian tribes under the IRA. 25 U.S.C. § 476. Plaintiff claims that Interior

was required to conduct an election for it because of Plaintiff's status as an Indian tribe. Compl. at ¶¶ 39-45. As discussed above, Interior does not recognize Plaintiff as an Indian tribe. Plaintiff is not on the Federal Register list of federally recognized tribal entities. Nor does Plaintiff allege that it is a tribe by virtue of being composed of Indians residing on a reservation. 25 U.S.C. § 479. Plaintiff therefore fails to state a claim for a secretarial election. Simply put, Plaintiff is not entitled to benefits, such as secretarial elections that are accorded only to federally recognized Indian tribes, because Plaintiff has not completed the administrative acknowledgment process.

Title 25 of the United States Code 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*." 25 U.S.C. § 479a(2) (emphasis added). Section 479a(3) also defines "list" to mean "the list of recognized tribes published by the Secretary pursuant to" 25 U.S.C. § 479a-1. Section 479a-1, in turn, provides that the "Secretary shall publish . . . a 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." Secretarial elections are limited to such recognized Indian tribes. 25 U.S.C. § 476. Therefore, Plaintiff can only obtain an election on a proposed tribal constitution if it first obtains recognition. *Cal. Valley Miwok*, 515 F.3d at 1264 ("Once recognized, a tribe may qualify for additional federal benefits [of an election under Section 476] by organizing its government under the Act."); *Sandy Lake Band of Miss. Chippewa v. United States*, 2011 WL 2601840, at * 4 (D. Minn. July 1, 2011) ("[B]y requiring an entity seeking an IRA election to first request federal acknowledgment, the regulations ensure that the evidence the . . . Band offers in support of its claim that it qualifies as an Indian tribe under Section 479 will be presented to the appropriate agency with the requisite

expertise and established regulatory process."). It is unnecessary for the Court's analysis to proceed beyond the clear statutory limitation of Indian tribes to those tribes recognized by Interior.

Regardless, the acknowledgment procedures governing federal recognition "are binding on the [Interior Department] as to which Indian entities may be considered Indian tribes under statutes and regulations which do not define the term 'Indian tribe.'" *W. Shoshone*, 1 F.3d at 1057 (citing *Edwards, McCoy & Kennedy v. Acting Phoenix Area Dir.*, 18 IBIA 454, 457 (1990)). Thus, even assuming *arguendo* that "Indian tribe" under Section 476 was not defined, Interior was not required to call a Secretarial election because Plaintiff never completed the acknowledgment process. Plaintiff's request for an election fails because Plaintiff is not considered an Indian tribe at this time.

Indeed, Plaintiff's circumstances illustrate why a secretarial election is only available to tribes that are federally recognized. For example, Plaintiff appears to invoke 25 C.F.R. § 81.5(a), which provides that "[t]he Secretary shall authorize the calling of an election to adopt a constitution and bylaws or to revoke a constitution and bylaws, upon a request from the tribal government." *See* Compl. at ¶¶ 31-34. But Interior is unable to determine whether Section 81.5(a) applies until it determines 1) whether any "Coalition Tribal Government" formed pursuant to "a Compact of Association to Form a Coalition Tribal Government with Limited Powers," Compl. at ¶ 31, constitutes a tribal government, 2) who is represented by any such government, and 3) whether that government is seeking an election. *See Cal. Valley Miwok*, 515 F.3d at 1267 (Interior may ensure prior to calling an election that "the will of tribal members is not thwarted by rogue leaders"). *Cf.* Compl. at ¶ 29 (relying on letter sent by "Mackinac Bands of Chippewa and Ottawa Indians . . . seeking federal acknowledgment of the Mackinac").

Identifying the group and its leaders are fundamental questions that are, and must be, addressed through the 25 C.F.R. Part 83 process. Simply put, the Part 83 process allows Interior to determine whether a party that requested an election is in fact a tribal government. *See Seminole Nation of Okla. v. Norton*, 223 F. Supp. 2d 122, 140 (D.D.C. 2002) ("DOI has the authority . . . to ensure that the Nation's representatives . . . are the valid representatives of the Nation as a whole.").

Finally, Interior cannot effectively call or conduct Secretarial elections without information regarding a tribe's membership. 25 C.F.R. § 81.5(b) (providing for election "upon receipt of a petition bearing the signatures of at least 60 percent of the tribe's adult members."); 25 C.F.R. § 81.11 (notice of a secretarial election must be sent to the address for each qualified tribal member maintained by BIA). A petitioning group's documented petition for acknowledgment as an Indian tribe provides this necessary information by requiring the petitioner to "provide an official membership list . . . of all known current members." 25 C.F.R. §83.7(e)(2). In short, Plaintiff cannot obtain a secretarial election available only to federally recognized Indian tribes, prior to obtaining acknowledgment through the administrative process.

**CONCLUSION**

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

Date: May 27, 2014

Respectfully submitted,

SAM HIRSCH
Acting Assistant Attorney General
Environment and Natural Resources Division

/s/ Matthew Marinelli
MATTHEW MARINELLI
United States Department of Justice

Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 305-0293
Fax: (202) 305-2021
Illinois Bar No.: 6277967
E-mail: matthew.marinelli@usdoj.gov

**Of counsel:**

Barbara Coen
Senior Attorney
Department of the Interior
Office of the Solicitor
1849 C Street N.W. MS-6513
Washington, DC 20240
Phone: (202) 208-6060
Email: barbara.coen@sol.doi.gov