UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S REPLY MEMORANDUM 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

REGULATIONS

OTHER MATERIALS

INTRODUCTION

As set forth in Defendant's Memorandum, Plaintiff Mackinac Tribe's claims should be dismissed because Plaintiff is not on the list of federally recognized tribes and has not exhausted the administrative process for obtaining acknowledgment as an Indian tribe. ECF No. 7-1. It is for Interior to determine in the first instance whether Plaintiff is entitled to a government-to-government relationship with the United States. Plaintiff's request for the court to determine its status as a federally recognized tribe therefore raises a non-justiciable political question and is unripe. In the alternative, this Court should defer to the Department of the Interior's ("Interior") primary jurisdiction because issues relating to the acknowledgment of Indian tribes are within Interior's special expertise. Finally, Interior was not required to call a Secretarial election for Plaintiff because Plaintiff does not fall within the statutory or regulatory definition of "Indian tribe."

ARGUMENT

I. PLAINTIFF IS NOT A FEDERALLY RECOGNIZED TRIBE AND SHOULD COMPLETE THE FEDERAL ACKNOWLEDGMENT PROCESS BEFORE ANY JUDICIAL REVIEW.

a. Plaintiff does not address Defendant's argument that the decision to recognize Indian tribes presents a non-justiciable political question.

As set forth in Defendant's Memorandum, the decision to recognize a government-to-government relationship is committed to the political branches of government. ECF 7-1 at 14-17. Plaintiff's arguments to the contrary are based upon a misunderstanding of, or failure to address, applicable precedent. Simply put, "recognition lies at the heart of the doctrine of 'political questions.'" *Miami Nation of Indians of Ind. v. U.S. Dep't of the Interior*, 255 F.3d 342, 347 (7th Cir. 2001). Only after Interior reaches a final decision on a properly-submitted petition under Interior's 25 C.F.R. Part 83 acknowledgment regulations can the courts review the

decision under the Administrative Procedure Act ("APA") - and even then the courts may only remand a decision to the agency if it was arbitrary, capricious, or contrary to law. *Id.* at 348-50.

As an initial matter, Plaintiff's reliance on caselaw that predates Interior's Part 83 acknowledgment regulations is misplaced. *See* ECF 10 at 31 (relying on *Montoya v. United States*, 180 U.S. 261 (1901) and *United States v. Sandoval*, 231 U.S. 28 (1913) for the proposition that there is a "long history of judicial determinations of Tribal status"). Interior's acknowledgment regulations were promulgated on September 5, 1978, following an "unprecedented" amount of consultation with tribes and other groups and State government officials. 43 Fed. Reg. 39,361 (1978) (describing, among other things, "400 meetings, discussions, and conversations about Federal acknowledgment"). *See also* 25 C.F.R. Part 83; 59 Fed. Reg. 9,280 (1994). Since that date, Courts have consistently recognized the primacy of the Part 83 acknowledgment procedures in establishing a government-to-government relationship between an Indian tribe and the United States.

For example, in *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132 (D.C. Cir. 1987), the D.C. Circuit explained the significance of Interior's Part 83 regulations. It explicitly rejected the argument, based upon cases predating the Part 83 regulations, "that the question whether a group of Indians constituted a tribe did not require deference to administrative expertise." *Id*. at 1138 (citing *Mashpee Tribe v. New Seabury Corp*., 592 F.2d 575, 580-81 (1st Cir. 1979)).[1] Instead, the D.C. Circuit held it was "time for a different conclusion" based upon Interior's implementation of its Part 83 regulations and required the exhaustion of Interior's acknowledgment procedures prior to allowing judicial involvement. *Id*. As the Tenth Circuit's

[1] Accordingly, the Court should disregard the cases Plaintiff relies upon because they predate Interior's Part 83 regulations. ECF 10 at 27 n.120 (citing *Mashpee*, 592 F.2d at 581-82 n.3-4 (citing *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 660 (D. Me. 1975), *Montoya*, 180 U.S. at 266, and *United States v. Candelaria*, 271 U.S. 432, 443 (1926)); ECF 10 at 27, 29.

opinion in *Western Shoshone Business Council v. Babbitt* explained, "the limited circumstances under which *ad hoc* judicial determinations of recognition were appropriate have been eclipsed by federal regulation." 1 F.3d 1052, 1056 (10th Cir. 1993). The Tenth Circuit explicitly distinguished many of the cases relied upon by Plaintiff here, explaining that "cases in which courts did not defer to the Department's acknowledgment procedures either predate the regulations entirely . . . or were decided only shortly after the regulations were promulgated[.]" *Id*. at 1057 (citations omitted) (noting that the court is "strongly persuaded" by *James*).

In addition to D.C. Circuit, Seventh Circuit, and Tenth Circuit precedent, we have cited recent precedent from two District Courts for the proposition that tribal recognition presents a non-justiciable political question. ECF 7-1 at 14-16 (citing *Shinnecock Indian Nation v. Kempthorne*, No. 06-cv-5013, 2008 WL 4455599 (E.D.N.Y. Sept. 30, 2008) and *Robinson v. Salazar*, 885 F.Supp. 2d 1002, 1031 (E.D. Cal. 2012)). Plaintiff's Opposition addresses none of these cases. Instead, Plaintiff claims that Defendant's "justiciability argument mischaracterizes the law" by omitting language from its citation to *Sandoval*. ECF 10 at 33 (citing *Sandoval*, 231 U.S. at 46 ("Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to that extent, and for what time they 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 the courts.")). The full citation that Plaintiff relies upon provides that there is some limit on Congressional authority to recognize tribes – not that the courts have the power to establish a government-to-government relationship between the United States and a tribe. Simply put, Plaintiff is incorrect that "for the last 113 years [] Courts have determined whether a group of Indian[s] constituted a tribe." ECF

10 at 32-34 (footnote omitted).

The remaining cases cited by Plaintiff fare no better. Plaintiff's citation to *Muwekma Ohlone Tribe v. Kempthorne*, 452 F.Supp. 2d 105 (2006), ECF 10 at 32,[2] is unavailing, particularly because the district court ultimately reached the opposite decision from the earlier decision cited by Plaintiff. *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 197 (D.D.C. 2011). Moreover, the D.C. Circuit's subsequent decision affirming the district court's 2011 decision supports Defendant's argument that Plaintiff's claim can only proceed after Plaintiff has exhausted the administrative acknowledgment process. The D.C. Circuit held that Muwekma's claim, which was based upon the allegedly illegal termination of plaintiff after 1927, was not barred by the statute of limitations because it "was subject to administrative exhaustion." *Muwekma*, 708 F.3d at 218. Plaintiff here similarly claims that it was illegally terminated in 1889. ECF 10 at 7, 22, 27 n.120, 30. Such an challenge to allegedly illegal termination would be precluded by the statute of limitations if not for Interior's Part 83 regulations, which allow "Interior to engage in factfinding bearing on [a] termination of recognition claim [and] provide[] Interior an opportunity to correct any error." *Muwekma*, 708 F.3d at 218. *Muwekma* illustrates that Interior's Part 83 regulations provide Plaintiff's avenue for challenging its allegedly illegal termination.

Nor does Interior's placement of Alaska Native villages on the list of federally recognized tribes establish that Plaintiff's claim is justiciable. Plaintiff argues that the Court should allow Plaintiff to bypass the Part 83 regulations because the Secretary "approved the reorganization of tribes that did not appear on the Secretary's list prior to . . . reorganization."

[2] Likewise, Plaintiff is incorrect to imply that Interior's addition of two California tribes to the list of federally recognized tribes was judicially-mandated. *Contra* ECF 10 at 32. Instead, Interior placed the tribes on the list through "summary approval." *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 214 (D.C. Cir. 2013).

ECF 10 at 17. Plaintiff bases this argument on the incorrect assertion that Interior allowed several Alaska Native villages to reorganize under the IRA even though, "[p]rior to 1993, no Alaskan Native tribes appeared on the . . . list of federally recognized tribes." ECF 10 at 17-18, 32. To the contrary, the villages identified by Plaintiff – Eagle, Circle, Seldovia, and Port Graham - appeared on prior versions of the list. 53 Fed. Reg. 52,829 (Dec. 29, 1988); 47 Fed. Reg. 53,130 (Nov. 24, 1982). *See also* 58 Fed. Reg. 54,364 (Oct. 21, 1993) (discussing treatment of Alaska Native entities on list since 1979). Regardless, Plaintiff is a Michigan entity and provides no persuasive basis for treating it similarly to Alaska Native villages. *See* pages 9-11, below.[3]

Moreover, Interior's inclusion of Alaska Native villages on the federal register list highlights the primacy of the political branches in tribal acknowledgment. Interior included Alaska Native villages on the 1993 list because "Congress's listing of specific villages in the Alaska Native Claims Settlement Act and the repeated inclusion of such villages within the definition of "tribe" . . . since the passage of ANCSA arguably constituted a congressional determination that the villages . . . are considered Indian tribes for purposes of Federal law." 58 Fed. Reg. 54,364, 54,365 (Oct. 21, 1993); 43 U.S.C. § 1610(b)(1); Thomas L. Sansonetti, Solicitor of Interior, Governmental Jurisdiction of Alaska Native Villages Over Land and NonMembers, Sol. Op. M-36975, 1993 WL 13801710, at *22-27 (1993) ("Sansonetti Opinion") (discussing interplay between statutes "bearing on the question of the tribal status of Native villages" and "principle of judicial deference to the political branches"). Indeed, the Sansonetti

[3] The 1936 Alaska amendment to the IRA, 49 Stat. 1250, provides that "Indians in Alaska *not heretofore recognized* as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under section [470, 476, and 477] of this [title]." (emphasis added); 25 U.S.C. § 473a. The Alaska amendment explicitly did not require prior recognition as a band or tribe. This Alaska provision contrasts with § 476, which is limited to "any Indian tribe," as further defined in § 479.

Opinion states that the "argument that Congress has recognized the existence of specific Native villages as tribes . . . starts with the definition of "Native village" in ANCSA." *Id*. at *34-35. Plaintiff is therefore simply incorrect that the Solicitor used a common law definition of "Indian tribe" to determine that Alaska Native villages should be added to the list of federally recognized tribes. ECF 10 at 17-20. The Solicitor actually criticized *Montoya*, 180 U.S. at 266, which Plaintiff claims is the basis for a common law definition of Indian tribes, ECF 10 at 29, as "simplistic." Sansonetti Opinion at *28. Moreover, the Solicitor's discussion of *Montoya* in a section of his opinion describing "[t]he key arguments against tribal status" belies Plaintiff's claim that Interior used *Montoya* as a basis for including Alaska Native villages on the list of federally recognized tribes. *Id.* Interior's inclusion of Alaska Native villages based upon Congressional recognition is fully consistent with Defendant's argument that the recognition of a government-to-government relationship between the United States and an Indian tribe presents a non-justiciable political question. *See* ECF 7-1 at 15 (citing *Miami Nation*, 255 F.3d at 347).

b. Plaintiff's claims are not ripe until Interior issues a final decision under its Part 83 regulations.

As set forth in Defendant's Memorandum and above, Plaintiff's failure to exhaust its administrative remedies also renders its claim unripe, requiring dismissal. ECF 7-1 at 18-20. Plaintiff's response did not address any of the factors for determining whether this case is ripe for review. ECF 10 at 28-30. In particular, Plaintiff does not counter that the Court would benefit from Interior's review of a documented petition submitted in accordance with Interior's Part 83 regulations. Plaintiff's complaint should be dismissed because Plaintiff provides no basis for this Court to depart from D.C. Circuit precedent requiring that Interior be given the opportunity to apply its acknowledgment expertise prior to judicial review under the APA. *See James*, 824 F.2d at 1137; ECF 7-1 at 18-20.

c. Plaintiff's claims should be dismissed because Plaintiff did not exhaust its administrative remedies.

Plaintiff's claims should be dismissed because Plaintiff failed to exhaust the administrative acknowledgment process. *See* ECF 7-1 at 21-25. Plaintiff does not address the wealth of caselaw requiring the exhaustion of administrative remedies under Interior's Part 83 regulations prior to bringing a claim under the APA for federal acknowledgment. *Compare* ECF 7-1 at 18-25 with ECF 10 at 28-30. In particular, Plaintiff does not address controlling D.C. Circuit precedent holding 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 (citation omitted). Plaintiff's first count, which seeks a declaratory judgment that Plaintiff is a federally recognized tribe, should therefore be dismissed.

Plaintiff's argument that it was not required to exhaust the acknowledgment process in order to obtain a Secretarial election under the IRA fares no better. Plaintiff's argument hinges on its assertion that it was entitled to a Secretarial election despite not being a federally recognized tribe. In fact, the one case that Plaintiff cites in its "Exhaustion and Ripeness" section actually supports Defendant's arguments that (1) Secretarial elections are only available to federally recognized tribes and (2) Plaintiff failed to exhaust its administrative remedies. ECF 10 at 28-29 (citing *Coyote Valley Band of Pomo Indians v. United States*, 639 F. Supp. 165 (E.D. Cal. 1986)). *Coyote Valley* addressed three tribes which, unlike Plaintiff, "are federally recognized tribal entities which have a government-to-government relationship with the United States and are eligible for programs administered by" BIA. 639 F. Supp. at 166. It interpreted the IRA to authorize "any **recognized Indian tribe** to organize for its common welfare and to adopt an appropriate constitution." *Id*. (emphasis added). Rather than supporting Plaintiff's

exhaustion argument, *Coyote Valley* therefore supports Defendant's argument that Plaintiff was not eligible for a Secretarial election prior to obtaining acknowledgment.

Coyote Valley illustrates an additional flaw with Plaintiff's exhaustion argument. Notably, Plaintiff's citation to *Coyote Valley* omits the final paragraph of footnote 5, which held that the case was ripe for review because Interior "issued a final decision." 639 F. Supp. at 168 n.5; ECF 10 at 28-29. Here, Plaintiff cannot point to similar final agency action because Plaintiff has not submitted the documented petition necessary to initiate the acknowledgment process. *See* ECF 7-1 at 25, citing Compl. at ¶¶ 26, 29. Moreover, Plaintiff does not argue that it exhausted the administrative remedies available to it under Interior's regulations. Therefore, Plaintiff's claim for a declaratory judgment that it is a federally recognized tribe should be dismissed because Plaintiff has not exhausted its available administrative remedies. *See* ECF 7-1 at 18-25. Plaintiff's claim for a Secretarial election should also be dismissed because, as discussed below, Plaintiff does not meet the statutory or regulatory definition of "Indian tribe."

d. Interior has primary jurisdiction over acknowledgment of Indian tribes.

Additionally, as discussed in Defendant's Memorandum, this lawsuit should be dismissed pursuant to the doctrine of primary jurisdiction because tribal acknowledgment implicates Interior's specialized expertise and delegated authority, and is better suited to Interior's capabilities than to the Court's. ECF 7-1 at 25-26. Plaintiff's response attempts to distinguish *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51 (2d Cir. 1994), a NonIntercourse Act case where the court deferred to Interior initially for 180 days, and then stayed the litigation until the administrative process was exhausted in 2005. *Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192, 196 (D. Conn. 2006). Plaintiff argues that the Court here should not defer to Interior because Interior "had time to exercise primary decision-making in the matter, and has

elected not to do so." ECF 10 at 31. There is a key distinction between *Golden Hill* and this case. The putative tribe in *Golden Hill* submitted a petition "for federal acknowledgment of its existence." *Golden Hill*, 39 F.3d at 55. Plaintiff, in contrast, has not followed its letter of intent to petition for acknowledgment with the actual documented petition necessary to move forward with the administrative process. Plaintiff has not provided Interior with the opportunity to "apply its developed expertise in the area of tribal recognition." *James*, 824 F.2d at 1138. Plaintiff's argument that this Court should not defer to Interior's expertise should therefore be rejected.

e. Plaintiff's arguments regarding its tribal status do not support a departure from the requirement that plaintiff complete the federal acknowledgment process.

As discussed above, Plaintiff's claims that it is a federally recognized Indian tribe should be dismissed because it presents a non-justiciable political question and is unripe until Plaintiff has exhausted Interior's acknowledgment process. While it is unnecessary for the Court's analysis to proceed beyond this point, Defendant notes that Plaintiff's claims in support of its tribal status are either legally flawed or highlight the appropriateness of deferring to Interior's expertise in evaluating tribal acknowledgment issues.

Plaintiff's reliance on the Michigan Indian Land Claims Settlement Act ("MILCSA") is misplaced. Plaintiff is incorrect that the MILCSA "recognized the Mackinac as being eligible for tribal recognition." ECF 10 at 21. As discussed in Defendant's Memorandum, the MILCSA identified five federally recognized tribes. ECF 7-1 at 16-17 (citing 105 Pub. L. 143, 111 Stat. 2652, §§ 104(a)(1), 104(b)(1), 104(d), 110 (1997)). MILCSA distinguished the recognized tribes from unnamed, potential newly recognized or reaffirmed tribes. *Id*. Indeed, Plaintiff admits that it was not "actively seeking federal recognition" at the time of MILCSA's passage and that it

failed to complete the procedure specified in the MILCSA for obtaining recognition. ECF No. 10 at 22-23. And the legislative history relied upon by Plaintiff does not identify the Mackinac as either a federally recognized tribe or eligible to become one. Judgment Funds of the Ottawa and Chippewa Indians of Michigan, Sen. Hrg. 105-413, 105 Cong., 1st Sess. (Nov. 3, 1997).[4] Plaintiff's attempt to analogize itself to Burt Lake Band is unavailing, as this Court rejected Burt Lake Band's argument that because it was previously-recognized as a signatory of the Treaty of Detroit, it could circumvent Interior's acknowledgment process. *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 79 (D.D.C. 2002).[5]

Plaintiff's reliance on ANCSA for the proposition that "recognition by Congress in . . . land claims settlement legislation was sufficient" to constitute recognition is similarly misplaced. ECF 10 at 23 (citing *Native Village of Noatak v. Hoffman*, 896 F.2d 1157, 1160 (9th Cir. 1988)). ANCSA explicitly listed villages such as Circle and provided that such villages were "Native villages subject to this [Act.]" 43 U.S.C. § 1610. ANCSA did not require these villages to submit a documented petition for recognition to Interior. Instead, ANCSA provided that named villages were eligible for benefits under ANCSA **unless** Interior determined that they were ineligible. 43 U.S.C. §1610(b)(2). In contrast, MILCSA 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*.

[4] Senator Kildee stated that "there are two tribes that are not federally-recognized. We put a provision in there that if they become federally-recognized" money that would otherwise go to individuals "would go to the tribal governments." *Id* at 28. The Prepared Statement of Burt Lake Band chairman Carl Frazier, which Plaintiff relies upon, establishes that neither of these two tribes was the Mackinac. *Id*. at 37 (stating that Burt Lake Band and Grand River Band were the entities seeking reaffirmation); ECF 10 at 22 nn.95, 96, 98, 99.

[5] As set forth in Defendants' Memorandum, Burt Lake Band is one of several cases supporting Defendant's argument that historical recognition provides no basis for departing from the Part 83 acknowledgment regulations because there is no presumption of continuous existence as an Indian tribe. ECF 7-1 at 5-6; 20; 23-24.

at § 110. In sum, MILCSA neither recognizes Plaintiff nor supports Plaintiff's claim that this Court should declare Plaintiff to have the same status and rights as the five recognized tribes enumerated in MILCSA. MILCSA provides no basis for deviating from the well-established requirement that putative tribes exhaust Interior's acknowledgment process.

Plaintiff's reliance on a 1928 report authored by Lewis Meriam is similarly misplaced. Plaintiff contends that the Meriam Report identifies "the Mackinac Bands as . . . the largest identifiable Indian tribe in Michigan with a population of 1,193" and argues that this "identification" was incorporated into the legislative history of the IRA. ECF 10 at 8-9, 24 (citing Lewis Meriam, The Problem of Indian Administration, Institute for Government Research, at 65 (1928)) (hereinafter "Meriam Report"). Contrary to Plaintiff's characterization, the Meriam Report stated only that of the 7,610 Indians "in Michigan 1193 [were] under the Indian Service and 6417 [we]re scattered." Meriam Report at 62 (attached as Exhibit 1).[6] Rather than provide a breakdown of the 1,193 Indians under the jurisdiction of the Michigan Bureau of Indian Affairs – a subset of the entire population of 7,610 Michigan Indians – the Meriam Report noted that its survey staff did not visit certain jurisdictions, including "Michigan, Mackinac." *Id*. at 65. The Meriam Report simply did not identify Plaintiff as within the 1,193 Indians under BIA jurisdiction in 1926, much less characterize Plaintiff as an "identifiable tribe." Instead, the Meriam Report illustrates that this case falls within the D.C. Circuit's requirement that the "agency should be given the opportunity to apply its expertise prior to judicial involvement." *James*, 824 F.2d at 1138 (citations omitted) (deferring to Interior's expert staff to resolve tribal recognition issues).

[6] While the Court should require Plaintiff to submit all evidence in support of its acknowledgment to Interior through the acknowledgment process, Defendant attaches the pages of the Meriam Report relied upon by Plaintiff solely to refute Plaintiff's characterization of that report.

II. PLAINTIFF IS INELIGIBLE FOR A SECRETARIAL ELECTION BECAUSE IT IS NOT A FEDERALLY RECOGNIZED TRIBE.

As set forth in Defendant's memorandum, 25 U.S.C. §§ 476, 479a, and 479a-1 limit Secretarial elections to federally recognized tribes. ECF 7-1 at 27-28. Plaintiff may obtain a Secretarial election based upon its argument that it was historically recognized only after successfully completing the Part 83 acknowledgment process. ECF 7-1 at 26-29. Plaintiff's argument to the contrary hinges on a misinterpretation of the IRA's definition of "tribe." Plaintiff is incorrect that the statutory framework relies upon the unworkably circular definition that "an Indian tribe means an Indian tribe." ECF 10 at 13, 17.

First, Congress cured any such alleged circularity through the List Act. The List Act clearly 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). 25 U.S.C. § 479a-1, in turn, limits special elections to "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." (emphasis added). This limitation is confirmed by the List Act's legislative history. H.R. Rep. 103-781, 103d Cong., 2nd Sess. (Oct. 3, 1994) ("'Recognized' is more than a simple adjective; it is a legal term of art. It means that the government acknowledges as a matter of law that a particular [N]ative American group is a tribe by conferring a specific legal status on that group, thus bringing it within Congress' legislative powers. This Federal recognition is no minor step. A formal, political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe . . . . In other words, unequivocal Federal recognition of tribal status is a prerequisite to receiving the services provided by . . . [BIA], and establishes

tribal status for all Federal purposes. . . . Appearing on [Interior's List of recognized Tribes] is a functional pre-condition to receipt of those services."); 140 Cong. Rec. H4180 at 27,246 (Oct. 3, 1994) (statement of Rep. Thomas) (proposing to require Interior to publish list annually because "inclusion on the list is a prerequisite to receipt of the services provided to Tribes by the BIA"). Indeed, Plaintiff appears to recognize that acknowledgment is a prerequisite to obtaining services such as Secretarial elections, as its first count seeks a declaratory judgment that it is a federally recognized tribe and its second count is based upon the allegation that Plaintiff is an Indian tribe. Compl. at ¶¶ 36-45. Plaintiff's argument that it is similarly situated to federally recognized tribes even though it is not a federally recognized tribe should be rejected.

Second, Plaintiff is incorrect that the definition of "tribe" in the IRA in 25 U.S.C. § 479 is more expansive than the definition of "Indian tribe" in 25 U.S.C. § 479a and it therefore is entitled to a Secretarial election. ECF 10 at 12-14. This argument is based on an erroneous reading of Section 479 because that section's definition of "Indian" is incorporated into the definition of "Indian tribe." As the Supreme Court recently held, "[t]here simply is no legitimate way to circumvent the definition of 'Indian' in delineating the Secretary's authority under §§ 465 and 479." *Carcieri v. Salazar*, 555 U.S. 379, 393 (2009) (footnote omitted). *Carcieri* based this holding on the definition Plaintiff relies upon – Section 479 of the IRA. It held that the IRA's definition of "any Indian tribe" incorporates the definition of "Indian," which is in turn defined as "members of any *recognized* Indian tribe now under Federal jurisdiction." *Id.* at 382 (emphasis added).

Plaintiff's argument that it should be treated as a federally recognized tribe because it is eligible to be a federally recognized tribe at some future point is similarly unavailing. Plaintiff's claim is based upon a misinterpretation of Interior's regulations implementing the Secretarial

election procedures. ECF 10 at 15-16. 25 C.F.R. § 81.1(w) defines "Tribe" as to include "[a]ny Indian entity . . . [that] is included, or is eligible to be included, among those tribes, bands, pueblos, groups, communities, or Alaska Native entities listed in the Federal Register pursuant to § 83.6(b) of this chapter as recognized and receiving services from the Bureau of Indian Affairs."[7] Plaintiff's argument that it is eligible to be included among the federally recognized Indian tribes listed by Interior in the Federal Register at best simply begs the question: "Should Interior make the initial determination whether a group is eligible for inclusion of this list of federally recognized tribes?" As discussed in Section I, above, such determinations "should be made in the first instance by the Department of the Interior" under the political question, ripeness, exhaustion, and primary jurisdiction doctrines. *James*, 824 F.2d at 1137.

The purpose behind Section 81.1's provision for elections for tribes that are "eligible to be included" in the Federal Register was to address an administrative issue by providing for the reality that tribes are not included on Section 479a-1's list of federally recognized tribes immediately upon recognition. Congress only requires Interior to publish the list of recognized tribes annually. 25 U.S.C § 479a-1.[8] There is therefore a lag between a tribe being recognized and that tribe's inclusion on the list of recognized tribes. Section 81.1(w)'s "eligible to be

[7] Plaintiff is correct that the 25 C.F.R. 81.1(w) provides for Secretarial elections for groups of Indians residing on the same reservation. ECF 10 at 15. This provision does not advance Plaintiff's argument for an expansive definition of "Indian tribe" because as Defendant noted in its memorandum, Plaintiff does not allege that it is a tribe by virtue of being composed of Indians residing on a reservation. ECF 7-1 at 27. Further, Plaintiff is incorrect that residence on a reservation "is not even a criteria consider [sic] in the acknowledgment process." Compare ECF 10 at 14 with 25 C.F.R. §§ 83.7(b)(2)(i) and 83.7(c)(2)(i).

[8] The Part 83 regulations were promulgated in 1978. 43 Fed. Reg. 39,361 (Sept. 5, 1978); 47 Fed. Reg. 13,326 (redesignating Part 54 regulations at Part 83). They provided for publication in the Federal Register of a list of federally recognized tribes, which was first published in 1979, when there was no requirement of annual publication. "Before the Tribe List Act, BIA since 1979 had published a list of eligible tribal entities approximately every three years." *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 38 n.6 (D.D.C. 2000) (citing 44 Fed. Reg. 7,325); *see also* ECF 7-1 at 8 n.4 for dates of such Federal Register lists. The Part 81 regulations, adopted in 1981, therefore addressed the possibility that eligible tribes would not be listed in the Federal Register for several years.

included" language ensures that this lag does not deprive such recognized tribes of federal benefits such as Secretarial elections. Plaintiff, however, is not currently eligible for inclusion on the list of recognized tribes because, as discussed above, it never exhausted the acknowledgment process. Plaintiff cannot use any potential "eligibility" to be included on the list of federally recognized tribes or to bypass the Part 83 process.

Plaintiff also incorrectly suggests that Defendant cited no legal authority in support of this position. *Cf*. ECF 10 at 25. In addition to the above-discussed statutes and regulations, Defendants relied upon several cases supporting its argument that IRA services such as Secretarial elections are only available to federally recognized tribes. ECF 7-1 at 27-28 (citing *Sandy Lake Band of Miss. Chippewa v. United States*, Civil No. 10-3801, 2011 WL 2601840, at * 4 (D. Minn. July 1, 2011)) (requiring "entity seeking an IRA election to first request federal acknowledgment"); *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 [of an election under Section 476] by organizing its government under the Act."); *See also W. Shoshone Bus. Council*, 1 F.3d at 1057 (rejecting "proposition that a tribe may not be included on the list of federally recognized tribes and yet still be recognized for purposes of 25 U.S.C. 81").[9]

Plaintiff's position is also practically unsupportable. Plaintiff contends that the IRA requires Interior to hold Secretarial elections for all unrecognized entities that are "entitled to be recognized" as federally recognized tribes within 180 days of a request. ECF 10 at 26. This timeframe does not allow for Interior to differentiate between putative tribes that are eligible to

[9] Plaintiff's reliance on the 2005 version of the Handbook of Federal Indian Law is misplaced. For example, Plaintiff cites to the 2005 treatise to support its argument that a common law definition of Indian tribe should be used to determine eligibility for tribal elections under the IRA. ECF 10 at 16 n.64 (citing Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 149, § 3.02[6][d] (LexisNexis 2005 Ed.)). The 2012 version of the Treatise updates this section to state the correct rule, that "under the IRA, a group has to be considered a tribe in order for it to hold a referendum on a proposed tribal constitution." Cohen, HANDBOOK OF FEDERAL INDIAN LAW 146, § 3.02[6][d] (LexisNexis 2012 Ed.).

be recognized and those that are not so eligible. In contrast, Plaintiff indicates that more than 180 days are necessary to determine whether Plaintiff is "eligible" to be federally recognized. *See* ECF 10 at 31 n.129 (claiming that discovery is needed in this case); ECF 7-1 at 28-29 (describing how Plaintiff's circumstances illustrate why Secretarial elections are only available to federally recognized tribes).

III. THE IRA DOES NOT WAIVE DEFENDANT'S SOVEREIGN IMMUNITY TO PLAINTIFF'S CLAIMS.

As set forth in Defendant's Memorandum, the United States has not waived its sovereign immunity to Plaintiff's claims. ECF 7-1 at 11-13. Plaintiff's argument to the contrary relies exclusively upon a provision of the IRA that addresses Secretarial elections, 25 U.S.C. § 476(d)(2). ECF 10 at 11. Plaintiff therefore effectively concedes that it has failed to identify a waiver of sovereign immunity for Court I of its Complaint, which (1) seeks a declaratory judgment that Plaintiff is an Indian tribe, and (2) neither seeks a Secretarial election nor is based upon 25 U.S.C. § 476(d)(2). Compl. at ¶¶ 36-38. As discussed above, Plaintiff is not currently considered an Indian tribe under the IRA. Because 25 U.S.C. § 476(d)(2) only applies to federally recognized tribes, it cannot provide a waiver of the United States' sovereign immunity.

IV. CONCLUSION

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

Date: July 18, 2014

Respectfully submitted,

SAM HIRSCH
Acting Assistant Attorney General
Environment & 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