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No. ________

Supreme Court, U.S.
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In The
Supreme Court of the United States

MACKINAC TRIBE,

Petitioner,

v.

SALLY JEWELL, U.S. SECRETARY OF THE INTERIOR,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals deviated from this Court's decision in *Carcieri v Salazar*, 555 U.S. 379 (2009) which held that the Secretary of Interior's Federal Acknowledgment Process (FAP) established in 25 C.F.R. Part 83 is not determinative as to whether Indian Tribe is "recognized" for the purposes of the Indian Reorganization Act (25 U.S.C. § 479)?

Whether the Secretary of Interior can avoid performing her mandatory non-discretionary duty under the Indian Reorganization Act (25 U.S.C. § 476) to call elections to ratify tribal constitutional documents within a reasonable time by requiring a tribe to exhaust administrative remedies estimated to require 30 years to complete?

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PETITION FOR A WRIT OF CERTIORARI

The Mackinac Tribe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals is reported at 829 F. 3d 745. (App. at 1-15) The Memorandum Opinion of the United States District Court for the District of Columbia is reported at 87 F. Supp. 3d 127. (App. at 20-55)

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 2016. (App. at 16-17) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces Article V- Treaty of July 31, 1855 with the Ottawa and Chippewa (11 Stat. 621), § 16 of the Indian Reorganization Act (25 U.S.C. § 476), § 19 of the Indian Reorganization Act (IRA) (25 U.S.C. § 479), § 104 of the Tribal List Act (25 U.S.C. § 479a-1), and selected provisions of the IRA

implementing regulations (25 C.F.R. Parts 81.1 and 81.5) (App. 56-64)

STATEMENT OF THE CASE

The relevant facts in this case are both simple and clear. The Mackinac Tribe was part of the larger Ottawa and Chippewa Nation, which entered into 29 treaties with the United States between 1785 and 1854.[1] *Mackinac Tribe v Jewell*, 829 F. 3d 754, 755 (D.C. Cir. 2016) (App. 2) The 1836 Treaty set aside five (5) temporary reservations in Michigan for the Mackinac, pending their removal to the west of the Mississippi. *See* Art. 3, Treaty with Ottawa and Chippewa, 7 Stat. 491 (Mar. 28, 1836). Removal was unsuccessful, and in an 1855 Treaty, two (2) reservations were set aside for the Mackinac in Michigan. *See* Art. 1, Treaty with the Ottawa and Chippewa, (11 Stat. 621) (July 31, 1855). Article V of the 1855 Treaty dissolved the Ottawa and Chippewa Nation by mutual agreement, and replaced it with a promise that the Federal government would, in the future, deal directly with the Mackinac in all matters related to the treaty. *Id.* (App. 56) Based upon this Treaty, the Mackinac assert that they are a federally recognized Indian Tribe.

In 1872, the government terminated federal services to the Michigan tribes, including the Mackinac. *Mackinac Tribe v Jewell*, 829 F. 3d, at 755 (D.C. Cir.

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[1] A full listing of the treaties may be found at Appellant's Opening Brief, footnote 2 before the Court of Appeals.

2016) (App. 3) That action has been characterized as administratively terminating federal recognition of the Michigan Tribes, which the Court's have held to be illegal. *Grand Traverse Band of Ottawa and Chippewa Indians v Office of U.S. Atty. for the Western District of Michigan*, 369 F. 3d 960, 968 (6th Cir. 2004). As a result of the illegal 1872 termination of the Mackinac, the Tribe does not appear on the Secretary's list of federally acknowledged tribes to this day.

In 2011, the Mackinac requested the Secretary of the Interior to convene an election to adopt a Tribal Constitution under the Indian Reorganization Act (IRA) [25 U.S.C. § 476] (App. 57-60) and implementing regulations found at 25 C.F.R. Part 81. *Mackinac Tribe v Jewell*, 829 F. 3d, at 755 (D.C. Cir. 2016) (App. 3) For three (3) years, the Secretary took no action, and in 2014 the Mackinac filed this lawsuit to compel the Secretary to hold an election under the IRA.

The Secretary argues that the Mackinac's omission from her list of federally acknowledged tribes – based upon the Tribe's illegal termination in 1872 – rendered the Mackinac ineligible for reorganization under the IRA. The Secretary contends that the Tribe must petition to be added to her tribal list through the Federal Acknowledgment Process (FAP) established in 25 C.F.R. Part 83. The FAP (Part 83) is a separate administrative process outside the IRA and the IRA's implementing regulations. *Compare* 25 C.F.R. Part 81 and 25 C.F.R. Part 83. As Judge Brown noted, the Bureau of Indian Affairs (BIA) estimates that the FAP

(Part 83) process takes 30 years and millions of dollars to complete. *Id.*, at 758 (App. 10)

The Court's below have declined to answer the legal question whether acknowledgment of tribal status under Part 83 is a necessary prerequisite to conducting an election under Part 81, but have held that the Tribe had to exhaust its administrative remedies by availing itself of the Part 83 process before it could seek an election under Part 81 regulations.

REASONS FOR GRANTING WRIT

I. The Court Of Appeals Decided An Important Federal Question In A Way That Conflicts With This Court's Decision In *Carcieri v Salazar*, And The Tribe's Treaty

The Court of Appeals held that the Federal Acknowledgment Process (FAP) established in 25 C.F.R. Part 83 is functionally determinative as to whether a tribe is "recognized" for the purposes of the Indian Reorganization Act (IRA) (25 U.S.C. § 476), which directly conflicts with this Court's decision in *Carcieri v Salazar*, 555 U.S. 379, 393 n. 8 (2009), which held that the Secretary's acknowledgment of a tribe under the FAP is not determinative of whether a group qualifies as a tribe under the IRA.

The IRA confers substantial benefits to Indian tribes. In addition to allowing Indian tribes the right to organize modern constitutional governments under

25 U.S.C. § 476, the IRA authorizes the Secretary to acquire land in trust for such tribes under 25 U.S.C. § 465. This latter benefit has been the subject of substantial litigation. *See Confederated Tribes of the Grand Ronde Cmty, v Jewell*, ___ F. 3d ___, 2016 WL 4056092 (D.C. Cir. July 29, 2016); *Stand Up for California v U.S. Dept. of Interior*, 2016 WL 4621065 (D.C. Cir. Sept. 6, 2016)

In *Carcieri v Salazar*, 555 U.S. 379 (2009), this Court held that the term "tribe" under the IRA [25 U.S.C. § 479] means a federally recognized tribe that was under federal jurisdiction on June 1, 1934. The case involved the Narragansett, a tribe acknowledged by the Secretary through the Federal Acknowledgment Process (FAP) established in 25 C.F.R. Part 83. Notwithstanding such acknowledgment by the Secretary, this Court held that the Secretary could not acquire land for the Narragansett because it was not a "tribe" for IRA purposes. *Carcieri v Salazar*, 555 U.S., at 391. The majority in *Carcieri v Salazar* specifically held that "the term 'Indians' as used in the IRA is not controlled by later enacted regulations governing the Secretary's recognition of tribes. . . ." (i.e. the FAP). *Carcieri v Salazar*, 555 U.S., at 393 n. 8.

In the present case, the Courts below declined to answer the legal question whether acknowledgment of tribal status under Part 83 is a necessary prerequisite to determining whether a tribe was "recognized" for IRA purposes under Part 81, but held that the Tribe had to exhaust its administrative remedies under the Part 83 process before it could seek an election under

the IRA and Part 81 regulations. The substance of the lower Courts' holdings are that the FAP (Part 83) process is a functional prerequisite of reorganization under the IRA. This holding is obviously inconsistent with this Court's holding in *Carcieri v Salazar* that a tribe's acknowledgment under the FAP (Part 83) process is not determinative of the tribe's eligibility for benefits under the IRA. *Compare Carcieri v Salazar*, 555 US, at 393 n. 8.

The IRA directs that "Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws." 25 U.S.C. § 476 (App. 57) The IRA defines "Indian" to "include all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction." 25 U.S.C. 479 (App. 61) It is well established that tribe status is established when "a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure." *U.S. v Washington*, 520 F. 2d 676, 693 (9th Cir. 1975) Tribes recognized through treaty require congressional termination before they legally lose their status. *See Menominee Tribe v United States*, 391 U.S. 404, 412-13 (1968); *Mashpee Tribe v New Seabury Corp.*, 427 F. Supp. 899, 902-03 (D. Mass. 1977), *aff'd in* 592 F. 2d 575; *U.S. v Washington*, 641 F. 2d 1368, 1373-74 (9th Cir. 1981); *Joint Tribal Council of Passamaquoddy Tribe v Morton*, 388 F. Supp. 649, 663 at n.15 (D. Maine, 1975). The Mackinac clearly fulfill this standard, and are a Tribe for the purposes of the IRA.

Unique to the Mackinac, however, is the treaty promise of continued future government-to-government relations contained in Art. 5 of Treaty with the Ottawa and Chippewa, 11 Stat. 621, (July 31, 1855) (App. 56) To conclude that the Tribe cannot avail itself of treaty rights before undertaking a 30-year administrative process is a clear violation of the Treaty, and the laws of the United States.

II. The D.C. Court of Appeals Application Of The Exhaustion Doctrine In This Case Conflicts With Decisions In Other Circuits And Expressed Congressional Intent

The D.C. Circuit Court decision in this matter conflicts with decisions in the Eighth, Ninth, Fourth and Sixth Circuits respecting the application of the exhaustion doctrine.

Judge Brown's concurring opinion below expressly notes the disagreement between the D.C. and Eighth Circuit respecting the application of exhaustion doctrine. As Judge Brown noted, the BIA estimates that the FAP (Part 83) process takes about 30 years, which imposes unwarranted and unreasonably long delays of decade and generational length. 829 F. 3d, at 759 (App. 10-15) Judge Brown observed that in the Eighth Circuit, "exhaustion is not required when unreasonable administrative delay would render the administrative remedy inadequate." 829 F. 3d, 759 n. 2 (App. 12 n. 2), *citing Southwest Bell Tel. Co. v FCC*, 138 F. 3d 746, 750 (8th Cir. 1988). However, Judge Brown went on to note

that this rule was applied differently in the D.C. circuit, *citing Mashpee Wampanoag Tribal Council v Norton*, 336 F. 3d 1094, 1100 (D.C. Cir. 2003). In the D.C. Circuit, unreasonable administrative delay does excuse exhaustion requirements.

Of particular applicability to the present case, however, is Ninth Circuit precedence recognizing that exhaustion is not required under the IRA when unreasonable administrative delay would render the administrative remedy inadequate. In *Coyote Valley Band of Pomo Indians v United States*, 639 F. Supp. 165 (E.D. Cal. 1986), the Secretary refused to hold an election requested by tribes for several years in a manner similar to the case at bar. The Court held that the Secretary had a mandatory non-discretionary duty to call elections to ratify IRA documents within a reasonable time after a request from a tribe. *Id.*, at 175. The Court in *Coyote Valley Band of Pomo Indians v United States*, applied the Ninth Circuit's rule that in such cases, exhaustion of administrative remedies is not required. *Id.* at 168 n. 5, *citing United Farm Workers v Arizona Agricultural Employment Relations Board*, 669 F. 2d 1249, 1253 (9th Cir. 1982) (exhaustion of administrative remedies is not required where the remedies are inadequate, inefficacious, or futile. . . .) and *Aleknagik Natives Ltd. v Andrus*, 648 F. 2d 496, 499-500 (9th Cir. 1980) (The general rule requiring exhaustion of remedies before an administrative agency is subject to an exception where the question is solely one of statutory interpretation.)

The Ninth Circuit test as applied in *Coyote Valley Band of Pomo Indians* is particularly important in light of this Court's statement in *Darby v Cisneros*, 509 U.S. 137, 144-45, 113 S. Ct. 2539 (1993) where this Court stated, "Whether courts are free to impose an exhaustion requirement as a matter of judicial discretion depends, at least in part, on whether Congress has provided otherwise, for of paramount importance to any exhaustion inquiry is congressional intent." *Darby* is relevant because Congress has clearly stated its intention on this matter.

In 1988, Congress amended the IRA to affirm the Ninth Circuit rule as applied to the IRA in *Coyote Valley Band of Pomo Indians*. Specifically, Congress amended the IRA to adopt strict timelines requiring Secretarial response within one hundred eighty (180) days after receipt of a tribal request for an election, and authorized direct access to federal court to enforce the provision of the IRA. *See* Pub. L. 100-581; 25 U.S.C. § 476(c) & (d). (App. 57-58) In doing so, Congress expressly confirmed its intention to affirm the holding in *Coyote Valley Band of Pomo Indians v United States*. *See S. Rep. No. 577*, 100th Cong., 2nd Sess. 2, p. 2 (1988). Congress's approval and reaffirmation of the *Coyote Valley Band of Pomo Indians* decision in the 1988 IRA Amendments confirmed Congressional intent that tribes should have direct access to federal court to enforce the IRA without having to exhaust illusionary administrative processes that delay decisions over multiple generations. In so doing, Congress

confirmed and endorsed the Ninth Circuit interpretation that exhaustion is not required when a tribe seeks to enforce the terms of the IRA authorizing tribal governments to reorganize under 25 U.S.C. § 476.

Equally, the Fourth and Sixth Circuits have confirmed that exhaustion is not required when unreasonable administrative delay would render the administrative remedy inadequate in non-Indian cases. *See Hodges v Shalala*, 121 F. Supp. 2d 854, 869 (Dist. S.C. 2000), *aff'd, Hodges v Thompson*, 311 F. 3d 316 (4th Cir. 2002); *Ruiz v Mukasey*, 552 F. 3d 269 (2d Cir. 2009); *Welsh v Wachovia Corp.*, 191 F. App'x 345, 356 (6th Cir. 2006)

The D.C. Circuit's holding regarding the application of exhaustion doctrine clearly conflicts with other Circuits and express Congressional intent respecting the IRA.

CONCLUSION

For the reasons and authorities set forth above, the Mackinac request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 7, 2016 Decided July 19, 2016

No. 15-5118

MACKINAC TRIBE,
APPELLANT

v.

SALLY JEWELL, U.S. SECRETARY
OF THE INTERIOR,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-00456)

Michael J. Walleri, *pro hac vice*, argued the cause for appellant. With him on the briefs was Ryan C. Posey.

Nicholas A. DiMascio, Trial Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief were John C. Cruden, Assistant Attorney General, Mary Gabrielle Sprague, Attorney, and Matthew Marinelli, Attorney.

Before: BROWN, GRIFFITH and PILLARD, *Circuit Judges.*

Opinion for the Court filed PER CURIAM.

Concurring opinion filed by *Circuit Judge* BROWN.

PER CURIAM: Plaintiff-Appellant Mackinac Tribe brought an action in federal district court to compel the Secretary of the Interior to convene an election allowing the Tribe to organize under the Indian Reorganization Act (IRA), 25 U.S.C. § 476(a). Although the Mackinac Tribe does not appear on the Secretary's list of federally acknowledged tribes and has not been acknowledged through the Secretary's Part 83 process, *see* 25 C.F.R. pt. 83, the group alleges it is federally recognized for IRA purposes because it is the historical successor to a tribe the federal government previously recognized via treaty. The district court reserved the question of whether acknowledgment through Part 83 is a necessary prerequisite for tribal organization under the IRA, finding instead that the Mackinac Tribe failed to exhaust its administrative remedies by first seeking acknowledgment through the Part 83 process. We agree and affirm the district court's grant of summary judgment.

I

To appreciate the Mackinac's claim, we must look far back into our Nation's history. Between 1785 and 1855, the United States entered into numerous treaties with a group of Native Americans known as the Ottawa and Chippewa Nation. These people were located in Michigan and comprised several autonomous tribes linked by similar culture and shared language – of which the Mackinac were one. For ease of administrability, the government referred to and negotiated with these tribes collectively as the "Ottawa and

Chippewa Nation of Indians." *See, e.g.*, Treaty with Ottawa and Chippewa, 7 Stat. 491 (Mar. 28, 1836). An 1836 treaty, however, singled out the Mackinac Tribe (then referred to as the Michilimackinac) to create a temporary five-year reservation for its bands. *See id.* Art. 3.

Two decades later, the federal government encountered resistance when it tried to negotiate collectively with this group of bands. The various groups insisted on negotiating independently and further demanded the government dissolve the Ottawa and Chippewa Nation. *See* Treaty with the Ottawa and Chippewa, 11 Stat. 621, Art. 5 (July 31, 1855). As part of an 1855 treaty, the government agreed to dissolve the Nation. *Id.* Relevant to this litigation, the government also purportedly set aside two land withdrawals for the exclusive use of the Mackinac Tribe. Twenty years later, though, the Secretary of the Interior terminated all federal services to the Mackinac.

Most recently, in 2011, several Mackinac groups consolidated to conduct an election under the IRA. To qualify for benefits under the IRA, tribes must meet certain conditions set by federal law. "The most important condition is federal recognition, which is a 'formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government.'" *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3], at 138 (2005 ed.)). The definition of

"recognition" has evolved over time but historically the United States recognized tribes through treaties, executive orders, and acts of Congress. *See* Harry S. Jackson III, Note, *The Incomplete Loom: Exploring the Checkered Past and Present of American Indian Sovereignty*, 64 RUTGERS L. REV. 471, 478 (2012). In 1871, Congress abolished the practice of treatymaking after several tribes allied themselves with the Confederacy during the Civil War and the military advantage of the treaties declined. *See id.* at 476 & n.28. However, treaties that had been entered into prior to 1871 were still recognized. *See* 25 U.S.C. § 71.

In 1934, Congress codified its treatment of Indian tribes through the IRA. The IRA defines the term "Indian," in part, to "include all persons of Indian descent who are members of any *recognized* Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479 (emphasis added). The Supreme Court has interpreted the phrase "now under Federal jurisdiction" to refer only to tribes that were under federal jurisdiction in 1934 – the time of the IRA's enactment. *See Carcieri v. Salazar*, 555 U.S. 379, 382-83 (2009). The Court has not analyzed the meaning of the word "recognized" nor has it determined whether recognition must have existed in 1934.

Recognition by the federal government proceeded in an ad hoc manner, even after the passage of the IRA, with the Bureau of Indian Affairs (BIA) reviewing petitions for federal recognition on a case-by-case basis. *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 211 (D.C. Cir. 2013). Finally, in 1978, Interior promulgated Part 83 of its regulations under the IRA (also known

as the Federal Acknowledgment Process), which set out uniform procedures through which Indian groups could seek formal recognition. A group seeking recognition under Part 83 must submit a petition to Interior documenting certain criteria, including whether it has been identified as an American Indian entity on a "substantially continuous basis" since 1900; whether it comprises a "distinct community;" whether it has historically maintained "political influence or authority over its members;" and whether its membership "consists of individuals who descend from a historical Indian tribe." *See* 25 C.F.R. § 83.11(a)-(c), (e). If a group successfully petitions, it is added to the list of federally recognized Indian tribes published by Interior. *See* 25 U.S.C. § 479a-1.

With respect to tribal organization, the IRA directs: "Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws." 25 U.S.C. § 476(a). In 1981, Interior promulgated specific regulations governing this process in Part 81 of its regulations. *See* 25 C.F.R. pt. 81. Part 81 states, in broad terms, that any Indian tribe "included on" the list of federally recognized tribes *or* "eligible to be included" on that list can call for an election under the IRA.[1] *See* 25 C.F.R. § 81.1(w)

[1] Notably, while this litigation was pending, Part 81 was amended to alter the definition of a "tribe" for election eligibility purposes. "Tribe" is now defined to mean any tribe "listed in the Federal Register . . . as recognized and receiving services" from BIA. 25 C.F.R. § 81.4. Both parties in their briefing rely on the old Part 81 definition – which was in effect at the time the Mackinac

(2014). Interior is obligated to hold such an election – assuming the tribe qualifies – within 180 days of receipt of a tribal request. 25 U.S.C. § 476(c)(1)(A). If a majority of the adult members of a tribe vote to ratify the constitution, then Interior must approve the document unless it violates federal law. *Id.* § 476(d)(1).

In August 2011, the Mackinac Tribe submitted a petition for a Part 81 election to the Secretary of Interior. The Secretary refused to conduct the election. The Tribe then brought an action in federal district court seeking declaratory and mandamus relief; specifically, it asked the court to declare it a federally recognized Indian tribe and to order the Secretary to conduct an election under the IRA. The Secretary filed a motion to dismiss, arguing (in relevant part) that the Mackinac were not a federally recognized tribe for IRA purposes because they had not gone through the Part 83 acknowledgment process and therefore had failed to exhaust their administrative remedies. The district court converted the motion to dismiss into a motion for summary judgment and ruled for the Secretary.

In doing so, the court below declined to answer whether recognition under Part 83 is a necessary precursor to receiving an election under Part 81. The district court instead found the Tribe had to exhaust its administrative remedies by availing itself of the Part 83 process first. We review *de novo* the district court's

petitioned the Secretary – so we cabin our discussion to the earlier provision.

grant of summary judgment, *Colbert v. Potter*, 471 F.3d 158, 164 (D.C. Cir. 2006), and we affirm.

II

The district court applied our closest precedent. In *James v. U.S. Department of Health and Human Services*, we held that, as a matter of prudential exhaustion, a group of Indians seeking to be acknowledged by the Secretary as a federally recognized tribe must first attempt to gain that acknowledgement through the Part 83 process. 824 F.2d 1132, 1136-37 (D.C. Cir. 1987). In *Muwekma Ohlone Tribe v. Salazar*, we followed *James* and made clear that a tribe seeking to be acknowledged by the Secretary must pursue the Part 83 process even if the tribe claims, as the Mackinac Tribe does here, that it has previously been recognized by the federal government. 708 F.3d 209, 218-19 (D.C. Cir. 2013).

The Mackinac Tribe seeks relief different from what the tribes in *James* and *Muwekma Ohlone* sought – a secretarial election under the IRA rather than inclusion on the Secretary's list of federally acknowledged tribes – but the rationale of those cases has persuasive force here as well. The Mackinac Tribe contends that, because it is a recognized tribe, it is eligible for a secretarial election. But no branch of government has determined whether the plaintiff Mackinac Tribe currently qualifies as a recognized tribe or as the tribe that was recognized in 1855.

Our decisions in *James* and *Muwekma Ohlone* teach that, when a court is asked to decide whether a group claiming to be a currently recognized tribe is entitled to be treated as such, the court should for prudential reasons refrain from deciding that question until the Department has received and evaluated a petition under Part 83. *James* gave good reasons for that restraint. Congress delegated to the Secretary the regulation of Indian relations and affairs, *see generally* 25 U.S.C. § 2, including authority to decide in the first instance whether groups have been federally recognized in the past or whether other circumstances support current recognition. *James*, 824 F.2d at 1137. The administrative exhaustion requirement honors that delegation. It also protects the autonomy of the agency that has the expertise to make (and correct) such determinations, preserves judicial resources, and better tees up disputes for eventual judicial review. *See id.* at 1137-38; *see also United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 550 (10th Cir. 2001) (following *James* to conclude 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."). Those prudential considerations apply to this case.

As the district court did, we reserve the question whether a group must be recognized to be eligible to organize under the IRA and whether that recognition must be marked by the group's appearance on the Secretary's list of federally recognized tribes. In view of that reservation, we must acknowledge that our

holding gives us some pause. If federal recognition is *not* a prerequisite to organization, requiring exhaustion via the lengthy and expensive Part 83 process unnecessarily imposes a potentially formidable hurdle on tribes seeking the Secretary's assistance to organize. We decline, however, to order the Secretary to call and conduct an election to ratify the Mackinac Tribe's constitution under § 476 of the IRA. We read the Mackinac Tribe's complaint as seeking a writ of mandamus. Mandamus is only available in extraordinary circumstances when the plaintiff has a "clear and indisputable" right, and review by other means is not possible. *Cheney v. US. District Court for the District of Columbia*, 542 U.S. 367, 380-81 (2004). Given the interplay of recognition, acknowledgment, and organization, there is some question whether the Mackinac Tribe has a right to a secretarial election. Even assuming the Mackinac Tribe has a "clear and indisputable right," we decline the requested mandamus because review will be possible after the Mackinac Tribe has completed the Part 83 procedure. *See W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1059 (10th Cir. 1993).

III

For the foregoing reasons, the district court's grant of summary judgment is

Affirmed.

BROWN, Circuit Judge, *concurring*: Patience may be a virtue but there's nothing virtuous about the administrative delays the BIA has routinely forced recognition-seeking Indian tribes to endure. "At present day, a federal acknowledgment petition can be over 100,000 pages long and cost over $5 million to assemble; the BIA estimate time for completion of the review is 30 years." *See* Harry S. Jackson III, Note, *The Incomplete Loom: Exploring the Checkered Past and Present of American Indian Sovereignty*, 64 RUTGERS L. REV. 471, 497 (2012). That means a case worker could start the review process her first day at BIA and retire with her full pension before ever completing it. That's appalling.

The Part 83 process begins when a tribe's governing body submits a letter of intent to the Assistant Secretary of the BIA. The agency then publishes the requisite public notices and begins an administrative file for the tribe – now considered a "petitioner." At this point, it is incumbent on the petitioning tribe "to provide enough historical documentation to satisfy the seven criteria established by [Part 83] to determine if the tribe is a 'political and social community that is descended from a historical tribe.'" *Id.* Answering this question is admittedly a nuanced and time-consuming process, requiring agency expertise. By the end, the administrative record tends to range "in excess of 30,000 pages to over 100,000 pages." Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 NEW ENG. L. REV. 491, 495 (2003).

Mindful of the intensity of this task – and the agency's unique capacity for completing it – I agree

that exhaustion should be required here, but I do so hesitantly. I believe we would be remiss to treat this as a run-of-the-mill case of administrative exhaustion. Exhaustion might reasonably take months – maybe years – but certainly not generations. For instance, the resolution of an IRS appeal may take "anywhere from 90 days to a year" depending on facts and circumstances. *What You Can Expect From Appeals?*, IRS (May 23, 2016), https://www.irs.gov/individuals/what-can-you-expect-from-appeals. An individual appealing the termination of her disability benefits can expect that appeal to be decided "in as little as four weeks or as long as twelve weeks." *How Long Does A Social Security Disability or SSI Appeal Take?*, SOC. SEC. DISABILITY RES. CTR., http://www. ssdrc.com/disability questions2-46.html (last viewed July 8, 2016). And in 2015, it took the EEOC, on average, "10 months to investigate a charge." *What You Can Expect After You File A Charge*, EQUAL EMP. OPP. COMM. (last viewed July 8, 2016), https://www.eeoc.gov/employees/process.cfm. Compare this with the Cowlitz Tribe of Washington's experience with the acknowledgment process: the tribe first petitioned the government for recognition in 1975 and only received it in 2000 – twenty five years later. *See* Sarah Washburn, Note, *Distinguishing* Carcieri v. Salazar: *Why the Supreme Court Got It Wrong and How Congress and Courts Should Respond to Preserve Tribal and Federal Interests in the IRA's Trust-Land Provisions*, 85 WASH. L. REV. 603, 629 (2010). Requiring exhaustion in this context asks far

more of tribes like the Mackinac than it does in our usual administrative cases.[2]

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[2] It is worth mentioning that "exhaustion is not required when unreasonable administrative delay would render the administrative remedy inadequate." *Sw. Bell Tel. Co. v. FCC*, 138 F.3d 746, 750 (8th Cir. 1998); *see also Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973) (nothing that when administrative remedies are deemed inadequate it is "[m]ost often . . . because of delay by the agency"); *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 591-92 (1926) (holding a petitioner "is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief"). Tribes languishing in the Part 83 process have occasionally sought relief under this "unreasonable delay" doctrine. For instance, in *Muwekma Tribe v. Babbitt*, the district court granted mandamus relief to the Muwekma Tribe – which entered into the Part 83 process in 1989 and had yet to receive a determination as of 2000. 133 F. Supp. 2d 30, 32-33 (D.D.C. 2000). In doing so, the court analyzed the factors we laid out for assessing unreasonable delay in *TRAC v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), and concluded that factors like the decision's slow pace and the nature and extent of the interests prejudiced warranted relief. *See Muwekma Tribe*, 133 F. Supp. 2d at 36-41. It may seem, then, that the Mackinac Tribe could avail itself of this judicial remedy once it enters into the Part 83 process, assuming it experiences a similar delay. However, a more recent case from our circuit calls even that potential avenue for relief into question. In *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, we emphasized that Part 83 delays were "attributable, at least for the most part, to a shortage of resources addressed to an extremely complex and labor-intensive task." 336 F.3d 1094, 1100 (D.C. Cir. 2003). We therefore remanded to the district court to consider whether such "competing priorities" rendered the delay reasonable in context, specifically whether the tribe was being treated differently than others and whether the agency was working on the matter. *See id.* at 1101-02. As the *Mashpee* court noted, a "problem stemm[ing] from a lack of resources" is "a problem for the political branches to work out." *Id.* at 1101. Unfortunately for the Mackinac Tribe, Congress has yet to heed this call.

The acknowledgement process also requires tribes to sacrifice more than just time. "Volumes of documentary support are required of petitioners chronicling the genealogy, ethno-history, and political life of the group seeking recognition." Gerald Carr, *Origins and Development of the Mandatory Criteria Within the Federal Acknowledgment Process*, 14 RUTGERS RACE & L. REV. 1 (2013). Indeed, "[t]he creation of the documents alone has been estimated to take between two-and-a-half and five years." Alva C. Mather, Comment, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. PA. L. REV. 1827, 1840 (2003). The burden falls to the tribe to "hire an array of experts: anthropologists to validate the existence of a current tribal community, genealogists to trace tribal ancestry, and lawyers to oversee the process." *Id.* "On average, tribes have paid between $300,000 and $500,000 for the creation of their petition" and some have paid "more than a million dollars for their documentation." *Id.*

Beyond tangible investments like time and money, the process is also emotionally draining. To be acknowledged, tribes must reveal "their members' personal stories and the community's history to a federal agency," with that information then becoming part of the public record. *Id.* at 1141. For some tribes, "disclosing information about their community life violates their traditions and results in considerable emotional loss when this information is revealed to individuals outside the tribe." *Id.* And the passage of time can ultimately preclude a tribe from obtaining necessary

documentation, particularly when important tribal leaders "who may have been able to provide necessary first-hand information to federal investigators" die while the tribe's petition is pending. *Id.*

One would hope, given the significant amount of resources required to navigate this bureaucratic morass, that the process itself would at least be sound. But the process has been criticized – including by a Government Accounting Office report – for its "lack of transparency," for the regulations' "vague[ness]," and for the "improper[] influence" that gaming concerns exert on the agency. Roberto Iraola, *The Administrative Tribal Recognition Process and the Courts*, 38 AKRON L. REV. 867, 892-83 (2005). What's more, it seems the vast majority of tribes that were already federally acknowledged would be unable to meet the current Part 83 standards. *See* Jackson, *supra*, at 507 (noting that, in 2010, the BIA recognized "72% . . . of currently recognized federal tribes could not successfully go through the [Part 83] process as it is being administered today").

Despite my significant concerns about both the length and the integrity of this process, I agree that the Mackinac Tribe must at least try to exhaust its administrative remedies in this context – which is far outside the judiciary's wheelhouse. Still, we are reminded today that Justice Douglas's words ring as true now as they did nearly half a century ago: "The bureaucracy of modern government . . . is slow, lumbering, and

oppressive." *Wyman v. James*, 400 U.S. 309, 335 (1971) (Douglas, J., dissenting).

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5118 **September Term, 2015**
FILED ON: JULY 19, 2016

MACKINAC TRIBE,
APPELLANT

V.

SALLY JEWELL, U.S. SECRETARY OF THE INTERIOR,
APPELLEE

Appeal from the United States District Court
for the District of Columbia (No. 1:14-cv-00456)

Before: BROWN, GRIFFITH and PILLARD, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

<u>Per Curiam</u>

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: July 19, 2016

Opinion *Per Curiam*

Concurring opinion filed by Circuit Judge Brown.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5118 **September Term, 2015**

1:14-cv-00456-KBJ

Filed On: July 19, 2016 [1625440]

Mackinac Tribe,

Appellant

v.

Sally Jewell, U.S. Secretary of the Interior,

Appellee

ORDER

It is **ORDERED**, on the courts own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken R. Meadows
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MACKINAC TRIBE, PLAINTIFF, v. SALLY JEWELL, DEFENDANT.	Civ. No. 14-cv-0456 (KBJ)

ORDER

This Court has considered Defendant Sally Jewell's motion to dismiss Plaintiff Mackinac Tribe's complaint, Plaintiff's opposition to that motion, and the entire record in this case. As explained in the accompanying Memorandum Opinion, the Court concludes that there is no genuine issue of material fact as to whether Plaintiff has failed to exhaust its administrative remedies for the claims raised in Plaintiff's complaint. Accordingly, it is hereby

ORDERED that Defendant's [7] Motion for Summary Judgment, as the Court has now construed Defendant's Motion to Dismiss, is **GRANTED**, and this case shall be **DISMISSED**.

DATE: March 31, 2015

/s/ Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MACKINAC TRIBE, PLAINTIFF, v. SALLY JEWELL, DEFENDANT.	Civ. No. 14-cv-0456 (KBJ)

MEMORANDUM OPINION

(Filed Mar. 31, 2015)

Indian tribes generally operate within a different legal framework than other political entities within the United States. Under federal law, tribes are entitled to certain benefits, including access to federal funding for healthcare, education, and other social programs, 25 U.S.C. § 13, and are also subject to certain restrictions, including a limited right to sell tribal land, 25 U.S.C. § 177. Moreover, because a tribe retains some "inherent sovereign authority" independent of the United States and the state in which it is located, *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991), Indian tribes enjoy a "government-to-government" relationship with the United States, *Cal. Valley Miwok Tribe v. Jewell*, No. 11-CV-00160 (BJR), 2013 WL 6524636, *97 (D.D.C. Dec. 13, 2013). Significantly, however, before an Indian tribe can qualify for this special status, it must be "recognized" by the United States and must organize a

tribal government. *See Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1264 (D.C. Cir. 2008).

Plaintiff Mackinac Tribe aspires to attain the legal status of a recognized Indian tribe. Plaintiff maintains that, although it has not sought formal recognition and reorganization through the administrative process that the Department of Interior prescribes, the United States government recognized the Mackinac Tribe in an 1855 treaty, and thus the Mackinac Tribe is entitled to the benefits that recognized Indian tribes enjoy under federal law. Plaintiff has filed the instant lawsuit against Interior Secretary Sally Jewell, asking this Court for both a declaration that the Mackinac Tribe is a federally recognized Indian tribe for the purpose of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 476, and an order directing the Secretary to aid Plaintiff in organizing a tribal government pursuant to that statute.

Before this Court at present is Defendant's motion to dismiss Plaintiff's compliant on various grounds, including sovereign immunity and the failure to exhaust administrative remedies. Plaintiff responds that Congress has waived sovereign immunity for actions of this nature, and also that the Mackinac Tribe need not follow the agency's formal administrative recognition process, which, according to Plaintiff, is not the exclusive path to reorganization under the IRA. As explained fully below, this Court concludes that Congress has waived the immunity of the United States with respect to Plaintiff's claims; however, the Court also holds that Plaintiff must exhaust its administrative

remedies by undergoing the administrative process for formal recognition before it may file a lawsuit seeking the benefits of the IRA. And because there is no genuine issue of material fact regarding the Mackinac Tribe's failure to exhaust its administrative remedies prior to bringing the instant action, the Secretary's Motion for Summary Judgment (as the Court has construed her Motion to Dismiss) will be **GRANTED**. A separate order consistent with this opinion will follow.

I. BACKGROUND

A. Federal Recognition And Its Statutory Benefits

Federal "recognition" of an Indian tribe is a term of art that conveys a tribe's legal status vis-à-vis the United States – it is *not* an anthropological determination of the authenticity of a Native American Indian group. *See* Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 Stan. L. & Pol'y Rev. 271, 271 (2001) ("Presently, the recognition process is widely misunderstood . . . as conferring legitimacy. Recognition is a certification and documentation process, not a transformative one; it is analogous to a citizen's obtaining a passport, not an alien's naturalization." (internal quotation marks and citation omitted)). Federal recognition specifically denotes "the federal government's decision to establish a government-to-government relationship by recognizing a group of Indians as a dependent tribe under its guardianship[,]" *id.* at 272, and such recognition "is a

prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes by virtue of their status as tribes," 25 C.F.R. § 83.2.

Notably, for hundreds of years, there was no uniform procedure for recognizing Indian tribes, and tribes were often recognized through treaties, legislation, and judicial decisions. *See* Felix Cohen, Handbook of Federal Indian Law § 3.02[4]-3.02[5] at 139-41. Consequently, tribal recognition law developed through centuries of disjointed theories, conflicting policies, and shifting attitudes of various branches of the United States government towards tribes. *See* William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 Am. Indian L. Rev. 37, 39-44 (1992). This system created "anomalies . . . in which Indian tribes could be [recognized] for some purposes (*e.g.*, depredations or takings claims) but not for others (*e.g.*, the provision of services and benefits to tribes by the United States)." *Id.* at 43. Fortunately, "Congress, the administration, the national Indian organization, and many tribal groups" worked together to resolve this "longstanding and very difficult problem," and in 1978, the Department of the Interior promulgated uniform procedures by which Indian tribes may obtain recognition and thereby establish a government-to-government relationship with the United States. 43 Fed. Reg. 39,361 (Sept. 5, 1978); *see also* 25 C.F.R. pt. 83, *Procedures for Establishing That an American Indian Group*

Exists as an Indian Tribe.[1] The procedures – called the "Part 83 Process" – allow any Indian group to apply for federal recognition by submitting a petition to the Department of the Interior with "detailed, specific evidence," 25 C.F.R. § 83.6, that proves the group is a "political and social community that is descended from a historic tribe," *U.S. Gov't Accountability Office, GAO-02-49, Indian Issues: Improvements Needed in Tribal Recognition Process* 1 (2001), and "comprises a distinct community at present," 25 C.F.R. § 83.7. *See also* Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 New Eng. L. Rev. 491, 496-97 (2003) ("The underlying premise of this requirement – to demonstrate continuous tribal existence of the group – is that a tribe is a political, not a racial, classification.").[2]

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[1] These regulations were revised in 1994, but the criteria for tribal recognition – sometimes referred to as "acknowledgment" of tribal status – remained the same. *See* 59 Fed. Reg. 9,280 (Feb. 25, 1994); *Miami Nation of Indians of Ind., Inc. v. Babbitt*, 112 F. Supp. 2d 742, 758 (N.D. Ind. 2000); 25 C.F.R. pt. 83.

[2] Under the Part 83 Process, a tribe that seeks recognition must establish that: (a) the tribe "has been identified as an American Indian entity on a substantially continuous basis[;]" (b) the tribe comprises a "distinct community" at present; (c) the tribe "has maintained political influence or authority over its members as an autonomous entity from historical times until the present[;]" (d) the tribe has submitted a "governing document including its membership criteria[;]" (e) the tribe's members "descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity[;]" (f) the tribe's membership "is composed principally of persons who are not members of any acknowledged North American Indian tribe[;]" and (g) that Congress has not "expressly

Once the Interior Department establishes that a tribe is a recognized political entity through the Part 83 Process, the tribe may seek to reorganize itself pursuant to the Indian Reorganization Act. *See* 25 U.S.C. § 476; *see also* 25 C.F.R. § 81, *Tribal Reorganization Under a Federal Statute*. In adopting the IRA's reorganization procedures, Congress "specifically intended to encourage Indian tribes to revitalize their self-government," *Fisher v. Dist. Court*, 424 U.S. 382, 387 (1976), thereby reversing prior policies of the federal government that had "destroyed Indian social and political institutions," Hearings on H.R. 7902 before the House Comm. on Indian Affairs, 78 Cong. Rec. 11,729 (1934). Thus, while tribal recognition is the establishment of a government-to-government relationship with the United States, reorganization is a separate process pursuant to which the United States government promotes the development of the governing structure of the newly recognized Indian tribe.

The IRA states that "[a]ny Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto[.]" 25 U.S.C. § 476(a). The statute further provides that the constitution a tribe so adopts "shall become effective" if it is

> (1) ratified by a majority vote of the adult members of the tribe or tribes at a special

terminated or forbidden" a federal relationship with the group. 25 C.F.R. § 83.7.

> election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and
>
> (2) approved by the Secretary [of the Interior Department] pursuant to subsection (d) of this section.

Id. Moreover, the IRA also specifically addresses the content of a tribal constitution, requiring the document to "vest in such tribe or tribal council" various "rights and powers[,]" including the right to "employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands . . . ; and to negotiate with the Federal, State, and local governments." 25 U.S.C. § 476(e).[3]

Significantly for present purposes, in addition to authorizing a tribal constitution and setting forth other various rights, powers, privileges and immunities of Indian tribes, the IRA also speaks directly to the duty of the Secretary of the Interior Department to

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[3] It is clear that Congress sought to promote effective tribal self-governance by emphasizing and authorizing the adoption of a tribal constitution that confers rights and powers – much like the constitutions of the United States and of the individual States are important foundational documents for the establishment and operation of those governments. *See* 25 C.F.R. § 81.1(g); *see also* Felix Cohen, Handbook of Federal Indian Law § 4.05[3] at 271-72 ("Tribal constitutions address basic tribal powers in such important areas as membership, boundaries, jurisdiction, land use, elections, and the allocation of authority within the tribal governing structure."). In this respect, then, a tribe's reorganization under the IRA can be viewed as the capstone of a tribe's formation of the separate government that the federal recognition process permits.

"call and hold an election" for ratification of the tribe's constitution. 25 U.S.C. § 476(c)(1); *see also Thomas v. United States*, 189 F.3d 662, 664 (7th Cir. 1999) ("Although these elections lay the very foundation for tribal self-governance, they must be called, held, and approved by the United States Secretary of the Interior." (citing 25 U.S.C. § 476)). The process begins with the tribe's submission to the Secretary of a request for an election to ratify its proposed constitution. *See* 25 U.S.C. § 476(c)(1)(A); 25 C.F.R. § 81.5(a). The Secretary's duty to hold the ratification election is nondiscretionary: once the Secretary receives such a request, the Secretary "shall" call an election within 180 days, 25 U.S.C. § 476(c)(1)(A), and in the meantime, the Secretary reviews the legality of the tribe's proposed constitution, *id.* § 476(c)(2)(B). The IRA provides that, if the tribe votes to adopt the proposed constitution, then the Secretary must approve the tribe's constitution within 45 days of the election "unless the Secretary finds that the proposed constitution . . . [is] contrary to applicable laws." *Id.* § 476(d)(1). Moreover, the statute clarifies that if the Secretary fails to act timely in response to the results of the ratification election – *i.e.*, "[i]f the Secretary does not approve or disapprove the constitution . . . within the forty-five days" – then "the Secretary's approval shall be considered as given." *Id.* § 476(d)(2). Furthermore and finally, the IRA states that "[a]ctions to enforce the provisions of this section may be brought in the appropriate Federal district court." *Id.*

B. The Instant Claims And Defenses

Plaintiff is the "modern historical successor" of the Mackinac Tribe, an Algonquin Indian people who lived in what is now the state of Michigan prior to European settlement of North America. (Compl. ¶¶ 1, 5, 15.)[4] In 2011, the Mackinac Tribe submitted to the Department of the Interior a request for the organization of a constitutional election pursuant to section 476(a) of the IRA. (*See id.* ¶ 34.) According to Plaintiff's complaint, the Interior Department not only failed to call the requested election, it did not even respond to the Mackinac's request. (*See id.* ¶ 35.)

Approximately three years later, on March 2, 2014, Plaintiff filed a two-count complaint in this Court seeking a declaration that the Mackinac Tribe is a federally recognized Indian tribe for IRA purposes and requesting an order directing the Interior Secretary to hold a constitutional election so that the Mackinac can organize a tribal government pursuant to the IRA. (*See* Compl. ¶¶ 36-45.) Although the complaint does not state that the Mackinac have undertaken the formal Part 83 recognition process, Plaintiff maintains that the federal government recognized the Mackinac Tribe in a treaty between the United States and several different groups of Michigan Indians in 1855, and as such,

[4] Because this Court considers Plaintiff's claims in the context of Defendant's motion to dismiss, the Court accepts the allegations in Plaintiff's complaint as true and grants Plaintiff the benefit of all inferences that can be derived from the facts alleged. *See Am. Nat. Ins. Co. v. F.D.I.C.*, 642 F.3d 1137, 1139 (D.C. Cir. 2011).

the tribe asserts that it is entitled to the benefits of the IRA. (*See* Pl.'s Opp. to Def.'s Mot. to Dismiss ("Pl.'s Opp."), ECF No. 10, at 32-33.)[5]

Instead of answering Plaintiff's complaint, Defendant has moved to dismiss it. (*See* Def.'s Mot. to Dismiss, ECF No. 7.) The primary thrust of Defendant's motion is the argument that this Court lacks subject matter jurisdiction over Plaintiff's claims because "Plaintiff has failed to set forth any waiver of the United States' sovereign immunity." (Def.'s Mem. of Points and Authorities in Supp. of its Mot. to Dismiss ("Def.'s Mem."), ECF No. 7-1, at 21; *see also* Def.'s Reply Mem. in Supp. of its Mot. to Dismiss ("Def.'s Reply"), ECF No. 12, at 21.) On this basis, Defendant maintains that Plaintiff's case should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1). (*See* Def.'s Mem. at 22.) Defendant also contends that, even if the Court moves beyond the threshold issue of sovereign immunity, the Court should dismiss Plaintiff's case pursuant to Rule 12(b)(6) because Plaintiff failed to exhaust the established administrative process for federal recognition – namely, the Part 83 Process. (*See id.* at 11 (citing Compl. ¶¶ 26, 29).) Moreover, according to Defendant, "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" because recognition

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[5] Citations to documents that the parties have filed refer to the page numbers that the Court's electronic filing system assigns.

through the Part 83 Process is a mandatory prerequisite to having the Secretary call a constitutional election under the IRA. (Def.'s Mem. at 35-36.)

With respect to the sovereign immunity issue, Plaintiff argues that subsection (d)(2) of the IRA specifically provides that actions to enforce provisions of the IRA may be brought in federal court, and insofar as Count II of the complaint seeks an order directing the Secretary to conduct an election pursuant to the IRA, Congress has clearly waived the United States' sovereign immunity with respect to this suit. (*See* Pl.'s Opp. at 19-20.) Responding to Defendant's argument that Plaintiff must nevertheless first seek formal recognition through the Part 83 process, Plaintiff asserts that "there is no requirement that a tribe need go through a Part 83 recognition process prior to applying for reorganization under the IRA." (*Id.* at 36.) Instead, Plaintiff contends that the Mackinac Tribe was previously recognized by the federal government in a treaty between the United States and various Michigan Indian groups (*see id.* at 28-31), and thus, the Mackinac Tribe has already satisfied the IRA's recognition requirement, so there is no need for it to undertake the administrative process for recognition (*see id.* at 31).

This Court held a hearing on Defendant's motion to dismiss Plaintiff's complaint on January 29, 2015.

II. ANALYSIS

As explained above, the Mackinac Tribe has filed suit against the Secretary of the Interior Department

in her official capacity, asking this Court to (1) declare that it is a federally recognized Indian tribe for the purpose of the IRA, and (2) order the Secretary to conduct a constitutional election for the Mackinac Tribe as part of its reorganization effort, pursuant to 25 U.S.C. § 476(a). (*See* Compl. ¶¶ 38, 41-43, 45.) The Interior Department insists that the Mackinac Tribe is not entitled to a constitutional election or any other reorganization benefits under the IRA because it has not been formally recognized through the agency's Part 83 Process (*see* Def.'s Mem. at 10-12; Def.'s Reply at 6); moreover, as a threshold matter, the agency contends that this Court cannot even address the merits of Plaintiff's claims regarding its status and entitlements because Plaintiff's lawsuit is barred by sovereign immunity.[6] For the reasons explained below, this Court finds that the Administrative Procedure Act's

[6] It is true that a claim brought against a federal official for acts performed within her official capacity qualifies as a suit against the sovereign. *See Dugan v. Rank*, 372 U.S. 609, 620 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 693 (1949). There is an exception to this general rule: a suit brought against an official for an action taken in her official capacity is *not* considered to be a suit against the sovereign if the plaintiff maintains that the official has performed acts that are unconstitutional or beyond statutory authority. *See Pollack v. Hogan*, 703 F.3d 117, 119-20 (D.C. Cir. 2012) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) (explaining that actions that transgressions of constitutional or statutory limitations are deemed individual and not sovereign actions); *see also Dugan v. Rank*, 372 U.S. 609 (1963)). Plaintiff does not allege that this exception applies here; thus, as Defendant asserts, the Mackinac Tribe's complaint against the Interior Secretary implicates the doctrine of sovereign immunity. *C.f. Pollack v. Hogan*, 703 F.3d 117, 119-20 (D.C. Cir. 2012).

waiver of sovereign immunity applies to permit Plaintiff's claims to proceed and thereby thwarts Defendant's motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). However, because Plaintiff has conceded that it has not exhausted its administrative remedies prior to filing this lawsuit, this Court concludes that summary judgment must be granted in Defendant's favor and this suit must be dismissed.

A. Applicable Legal Standards

1. The Sovereign Immunity Doctrine

"It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission." *Beers v. State*, 61 U.S. 527, 529 (1857). Consequently, the defense of sovereign immunity, if applicable, divests a federal court of jurisdiction over a plaintiff's suit against the sovereign. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 449 (D.C. Cir. 1990); *see also* 14 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3655 (3d ed.) ("Although the United States district courts have general subject matter jurisdiction over actions brought by federal agencies or officers who are authorized to sue, there is no corresponding general statutory jurisdiction to entertain suits against federal agencies and officers."). Notably, sovereign immunity is a privilege, not an imperative; therefore,

Congress "may, if it thinks proper, *waive* this privilege, and permit [the United States] to be made a defendant in a suit by individuals, or by another State." *Beers v. State*, 61 U.S. at 529 (emphasis added). A waiver of sovereign immunity is thus effectively a grant of jurisdiction in cases in which the sovereign has been sued; the waiver gives courts the power to hear a claim against the United States. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983).

It is by now well established that "[a] waiver of sovereign immunity cannot be implied but must be unequivocally expressed" in statutory text. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) (internal quotation marks and citation omitted). This means that "there can be no consent by implication or by use of ambiguous language." *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947). Nor can "[a] statute's legislative history [] supply a waiver that does not appear clearly in any statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996). "An Act of Congress is not unambiguous, and thus does not waive immunity, if it will bear any 'plausible' alternative interpretation." *Dep't of Army v. Fed. Labor Relations Auth.*, 56 F.3d 273, 277 (D.C. Cir. 1995) (citing *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992)); *see also Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006) ("Congress need not use magic words to waive sovereign immunity, but the language it chooses must be unequivocal and unambiguous."). Thus, any ambiguity as to whether or not a certain statutory provision constitutes a waiver of sovereign immunity must be

construed "in favor of immunity." *United States v. Williams*, 514 U.S. 527, 531 (1995). Additionally, even when there is an explicit waiver of sovereign immunity, "the Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarged beyond what the language requires." *Nordic Vill.*, 503 U.S. at 34 (citations and internal quotation marks and alterations omitted). Put another way, the government may have waived its sovereign immunity only under specified circumstances, and any "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981).

A plaintiff who files an action against the United States must demonstrate that there has been a waiver of sovereign immunity that is applicable to the claims plaintiff has brought in order to satisfy the plaintiff's burden of establishing that the court has jurisdiction over the complaint. *See Kelley v. Fed. Bureau of Investigation*, No. CV 13-0825 (ABJ), 2014 WL 4523650, at *19 (D.D.C. Sept. 15, 2014). Accordingly, "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) (citation omitted). "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) (citations omitted). In this regard, the procedures applicable to a motion brought under 12(b)(1) differ from those that apply to a Rule 12(b)(6) motion to dismiss, pursuant to which 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." *E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). Thus, "[P]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion" than in resolving a 12(b)(6) motion for failure to state a claim, because "subject-matter jurisdiction focuses on the court's power to hear the plaintiff's claim, [and] a Rule 12(b)(1) motion imposes on the court an affirmative obligation to ensure that it is acting within the scope of its judicial authority." *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13-14 (D.D.C. 2001) (citation omitted).

2. <u>The Exhaustion Doctrine</u>

Another "long-settled rule of judicial administration[,]" *Myers v. Bethlehem Shipbuilding Corp.*, 303

U.S. 41, 50 (1938), is the principle that a court that has been asked to compel an agency to act "will stay its hand until the plaintiff has exhausted whatever internal remedies the agency provides[.]" *Glisson v. Forest Service*, 55 F.3d 1325, 1326 (7th Cir. 1995); *see also Reiter v. Cooper*, 507 U.S. 258, 269 (1993) ("Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed.").[7] Under this doctrine, a plaintiff's failure to pursue an administrative process that could remedy plaintiff's claims will preclude judicial review of agency action, so long as the purposes of administrative exhaustion support such bar. *Wilbur v. C.I.A.*, 355 F.3d 675, 677 (D.C. Cir. 2004).

Exhaustion has three main purposes: "'giving agencies the opportunity to correct their own errors,

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[7] "The word 'exhaustion' now describes two distinct legal concepts," the first concept being "a judicially created doctrine requiring parties who seek to challenge agency action to exhaust available administrative remedies before bringing their case to court," and the second concept being a statutory requirement of "resort to the administrative process as a predicate to judicial review." *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004). Neither Plaintiff nor Defendant argues that exhaustion is jurisdictional here, and the IRA does not contain an express exhaustion provision. Therefore, this Court will only consider the prudential requirement. *See Vermont Dep't of Pub. Serv. v. United States*, 684 F.3d 149, 156 (D.C. Cir. 2012) ("We presume exhaustion is non-jurisdictional unless Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision." (internal quotation marks and citation omitted)).

affording parties and courts the benefits of agencies' expertise, [and] compiling a record adequate for judicial review[.]'" *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) ((quoting *Marine Mammal Conservancy, Inc. v. Dep't of Agric.*, 134 F.3d 409 (D.C. Cir. 1998)); *see also Benoit v. U.S. Dep't of Agric.*, 577 F. Supp. 2d 12, 23 (D.D.C. 2008) ("Even when, as in this case, exhaustion is not a jurisdictional prerequisite to judicial review, exhaustion of administrative remedies is generally required so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision." (internal quotation marks, alterations, and citation omitted)). In other words, the prudential exhaustion requirement ensures that plaintiffs do not file lawsuits against the United States in federal court as a means of bypassing the regulatory framework that the Executive has adopted to resolve disputes in the first instance. *See James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987) ("[W]here 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[.]"); *Shinnecock Indian Nation v. Kempthorne*, No. 06-CV-5013 JFB ARL, 2008 WL 4455599, at *18 (E.D.N.Y. Sept. 30, 2008) ("[A]fter passage of the regulations, it is abundantly clear that the judiciary should not intervene before exhaustion of the administrative procedures has taken place.").

a. Motions To Dismiss A Complaint On Exhaustion Grounds

"[T]he failure to exhaust administrative remedies is an affirmative defense that the defendant bears the burden of pleading and proving." *Howard v. Gutierrez*, 474 F. Supp. 2d 41, 49 (D.D.C. 2007). However, 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." *St. Francis Xavier Parochial Sch.*, 117 F.3d at 624. Therefore, "a defendant may raise an affirmative defense (such as exhaustion of administrative remedies) under Rule 12(b)(6) only 'when the facts that give rise to the defense are clear from the face of the complaint.'" *Shane v. United States*, No. CIV.A.07-577(RBW), 2008 WL 101739, at *6 (D.D.C. Jan. 9, 2008) (quoting *Smith-Haynie v. Dist. of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998)). This means, then, that a court can only dismiss a complaint under Rule 12(b)(6) on the grounds that a plaintiff has failed to exhaust its administrative remedies if the complaint itself states that the plaintiff has failed to exhaust its administrative remedies. *See Jones v. Bock*, 549 U.S. 199, 216 (2007).

b. Conversion To A Motion For Summary Judgment

If the complaint does not contain an allegation that the plaintiff has failed to exhaust available administrative remedies, "the appropriate procedural

mechanism for bringing a case to closure when there is no evidence in the record that the plaintiff exhausted the administrative remedies available to him is a motion for summary judgment under Federal Rule of Civil Procedure 56, not a motion to dismiss under Rule 12[.]" *Shane*, 2008 WL 101739, at *7. This is because reaching the exhaustion question for the purpose of resolving a Rule 12(b)(6) motion to dismiss would require the court "to refer to materials outside the pleadings[,]" which courts may do, but only if it "also convert[s] the motion to dismiss into one for summary judgment[.]" *Kim v. United States*, 632 F.3d 713, 719 (D.C. Cir. 2011).

"The decision to convert a motion to dismiss into a motion for summary judgment . . . is committed to the sound discretion of the trial court." *Flynn v. Tiede-Zoeller, Inc.*, 412 F. Supp. 2d 46, 50 (D.D.C. 2006) (citation omitted). And "[i]n exercising this discretion, the 'reviewing court must assure itself that summary judgment treatment would be fair to both parties.'" *Bowe-Connor v. Shinseki*, 845 F. Supp. 2d 77, 85-86 (D.D.C. 2012) (quoting *Tele-Commc'ns of Key West, Inc. v. United States*, 757 F.2d 1330, 1334 (D.C. Cir. 1985)). One means of providing the necessary assurance would be to give the parties notice of the potential conversion and provide them with an opportunity to present evidence in support of their respective positions. *See Taylor v. FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997). "However, such notice need not be given where the court is satisfied that the parties are not taken by surprise or deprived of a reasonable opportunity to contest

facts averred outside the pleadings and the issues involved are discrete and dispositive." *Smith v. United States*, 518 F. Supp. 2d 139, 154 (D.D.C. 2007) (internal quotation marks and citation omitted). Thus, even if neither party has moved for summary judgment, where "both parties have cited documents or provided evidence outside the pleadings with respect to the issue of exhaustion," a court may fairly convert a motion to dismiss for lack of exhaustion to a motion for summary judgment under Rule 56. *Cost v. Soc. Sec. Admin.*, 770 F. Supp. 2d 45, 49 (D.D.C. 2011); *see also, e.g., Munsell v. Dep't of Agric.*, 509 F.3d 572, 592 (D.C. Cir. 2007) (district court grant of 12(b)(6) motion to dismiss upheld as a grant of summary judgment because exhaustion was raised in the Government's motion to dismiss and then fully addressed by the parties).

c. Motions For Summary Judgment On Exhaustion Grounds

Once a court has converted a motion to dismiss into a motion for summary judgment, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and [thus] the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Talavera v. Shah*, 638 F.3d 303, 308 (D.C. Cir. 2011). "A fact is material if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Steele v. Schafer*, 535

F.3d 689, 692 (D.C. Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). While the Court must view this evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor, *see, e.g.*, *Grosdidier v. Broad. Bd. of Governors, Chairman*, 709 F.3d 19, 23 (D.C. Cir. 2013), the non-moving party must show more than "[t]he mere existence of a scintilla of evidence in support of" his or her position – "there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson*, 477 U.S. at 252. Moreover, the non-moving party "may not rest upon mere allegation or denials of his pleading but must present affirmative evidence showing a genuine issue for trial." *Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987) (internal quotation marks and citation omitted).

B. The United States Has Waived Its Immunity To Plaintiff's Lawsuit

The applicable legal standards require this Court to determine at the outset whether the United States has waived the defense of sovereign immunity in this context, thereby consenting to suit, and if so, whether the Mackinac Tribe's claims fit within the scope of any such waiver. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). In this regard, the parties have trained their focus on the IRA (*see, e.g.*, Pl.'s Opp. at 19 (asserting that the required express waiver of sovereign immunity appears in that statute); Def.'s Reply at 21 (arguing that the IRA

waives sovereign immunity only for federally recognized tribes), but this Court finds that the IRA does not itself contain language that amounts to a waiver of sovereign immunity. Instead, Plaintiff's claims fall within the scope of the express waiver of sovereign immunity in the Administrative Procedure Act.

1. The Indian Reorganization Act Does Not Contain An Express Waiver Of Sovereign Immunity

Plaintiff points to section 476(d)(2) of the IRA – which specifically states that "[a]ctions to enforce the provisions of this section may be brought in the appropriate Federal district court[,]" 25 U.S.C. § 476(d)(2) – and based on that statutory verbiage, argues that "[t]here is no serious question that Congress has waived sovereign immunity to allow tribes to bring suit to compel the Secretary to hold an election under the IRA." (Pl.'s Opp. at 20.) Plaintiff is correct that subsection (d)(2) of section 476 authorizes Indian tribes to bring lawsuits "to enforce the provisions" of the IRA in federal court; however, this language alone does not a sovereign immunity waiver make. Indeed, as this Court reads subsection (d)(2), Congress is speaking to the power of a federal court to consider cases of this nature (actions to enforce the provisions of the IRA), and does not mention who may properly be named as a defendant in any such suit, much less expressly permit such enforcement actions to proceed against the United States. Consequently, subsection (d)(2) is, at

most, ambiguous as far as the defense of sovereign immunity is concerned, and that section therefore fails to qualify as the type of unequivocal and explicit waiver of sovereign immunity that Plaintiff needs in order to maintain this action. *See Nordic Vill.*, 503 U.S. at 33 ("Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed." (internal quotation marks and citation omitted)).

Significantly, courts have long held that the mere fact that Congress expressly permits a certain claim to be brought in federal court does not suffice to show that Congress has abrogated the defense of sovereign immunity to that claim. *See Munaco v. United States*, 522 F.3d 651, 653 n.3 (6th Cir. 2008) ("[J]urisdictional statutes . . . do not operate as waivers of sovereign immunity." (citation omitted)); *see also, e.g.*, *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996) (holding that 28 U.S.C. § 1331, which states that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States[,]" does not constitute a waiver of sovereign immunity); *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 901 (D.C. Cir. 1996) (holding that 28 U.S.C. § 1361, which provides that "district courts shall have original jurisdiction . . . to compel an officer or employee of the United States . . . to perform a duty owed to the plaintiff[,]" does not constitute a waiver of sovereign immunity). Instead, courts considering whether a statutory grant of jurisdiction qualifies as a waiver of sovereign immunity must look for a clear and unequivocal statement that the United States – or its

agencies or officers – can be sued as a defendant in the permissible action.

For example, the Administrative Procedure Act ("APA") specifically states that certain actions brought against the United States "shall not be dismissed nor relief therein be denied on the ground that it is against the United States" and that "the United States may be named as a defendant in any such action." 5 U.S.C. § 702; *see Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2204 (2012) (noting that this section of the APA is a waiver of sovereign immunity). Similarly, the Federal Tort Claims Act ("FTCA") proclaims that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances[.]" 28 U.S.C. § 2674; *see Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 485 (2006) (noting this section of the FTCA supplies a waiver of sovereign immunity). The Tucker Act, too, expressly permits "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1); *see Mitchell*, 463 U.S. at 215 (1983) (noting that this section of the Tucker Act provides a waiver of sovereign immunity).

By contrast, a statute that says nothing about whether the United States can be sued under its provisions and instead generally authorizes the filing in federal court of an action to enforce provisions of the

statute merely connotes a grant of federal jurisdiction that does not rise to the level of an express sovereign immunity waiver. *See, e.g.*, *Al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 850-55 (9th Cir. 2012) (finding no waiver of sovereign immunity under the civil liability provision of Foreign Intelligence Surveillance Act, where that provision expressly permitted suit against "any person who committed such violation" and the statutory definition of "person" did not include the United States); *In re Al Fayed*, 91 F. Supp. 2d 137 (D.D.C. 2000) (similar). In *Geronimo v. Obama*, 725 F. Supp. 2d 182 (D.D.C. 2010), the district court considered statutory language in the Native American Graves Protection and Repatriation Act ("NAGPRA") that is substantially similar to the provision Plaintiff relies on here, and rejected the plaintiff's contention that a NAGPRA provision authorizing "an action in district court to seek 'such orders as may be necessary to enforce the provisions of th[e] Act'" constituted a waiver of sovereign immunity, concluding instead that this language merely "provides for a private right of action[.]" *Id.* at 185; *see also id.* ("NAGPRA does not provide a waiver of sovereign immunity.").

So it is here. Again, subsection (d)(2) of the IRA says only that "[a]ctions to enforce the provisions of this section may be brought in the appropriate Federal district court." 25 U.S.C. § 476(d)(2). Unlike the language that Congress used in the APA, the FTCA, or the Tucker Act, subsection (d)(2) does not state that the United States can be made a defendant in any such action; in fact, subsection (d)(2) makes no mention of

the United States at all. And without such a clear statement abrogating the sovereign immunity of the United States, this Court cannot conclude that a waiver of sovereign immunity is "unequivocally expressed in the statutory text" of subsection (d)(2). *Lane*, 518 U.S. at 192; *see also Brown v. Sec'y of Army*, 78 F.3d 645, 650 (D.C. Cir. 1996) ("[W]e must presume that a Congress that intends to waive sovereign immunity is aware of the principles that will govern our reading of the waiver. Therefore, having said that we would take the legislature strictly at its word when it specifies whether and to what extent it waives sovereign immunity, we are bound to infer that it intended no more than it said.").

2. The Administrative Procedure Act Waives Defendant's Sovereign Immunity And Applies To Plaintiff's Action

The absence of an express sovereign immunity waiver in subsection (d)(2) of the IRA means that the Mackinac Tribe "must look beyond the jurisdictional statute for a waiver of sovereign immunity with respect to [its] claim." *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Plaintiff has not done any such thing in its briefing and argument, but Defendant briefly suggests – and then quickly dismisses – the possibility that the APA might supply the necessary sovereign immunity waiver. (*See* Def.'s Mem. at 22 n.5 (noting with respect to 5 U.S.C. §§ 701-06 that "[t]he APA provides a limited waiver of the United States' sovereign immunity[,]" but asserting that Plaintiff "is precluded

from relying on" this waiver due to its failure to exhaust administrative remedies). The APA expressly and unequivocally provides that, where a plaintiff alleges that "an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority," the case "shall not be dismissed nor relief therein be denied on the ground that it is against the United States[.]" 5 U.S.C. § 702.[8] And this Court has carefully considered whether the APA's unequivocal sovereign immunity waiver is available to the Mackinac Tribe with respect to the claims it seeks

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[8] The relevant statutory provision states in full:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702.

to advance in this instant action. The Court has concluded that the APA's waiver applies to the Mackinac Tribe's action for at least two reasons.

First, because the APA's waiver of sovereign immunity is available to all who satisfy the applicable statutory criteria, even when a plaintiff has not brought its claim against the United States under, or pursuant to, the APA. *See Z Street, Inc. v. Koskinen*, No. 12-CV-0401 (KBJ), 2014 WL 2195492, at *10 (D.D.C., May 27, 2014) ("[A] suit need not have been brought pursuant to the APA in order to receive the benefit of that statute's sovereign immunity waiver; indeed, the 'APA's waiver of sovereign immunity applies to any suit whether under the APA or not.'" (quoting *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996)) (emphasis omitted)). By its own terms, the waiver applies (1) when a plaintiff claims that "an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority," and (2) when the plaintiff "seek[s] relief other than money damages." 5 U.S.C. § 702. Such is the case here, given that Plaintiff Mackinac Tribe alleges that in the instant complaint, the Secretary failed to fulfill her statutory duty to call a constitutional election for Plaintiff when requested, and the complaint requests a judgment ordering the Secretary to conduct that election. (*See* Compl. ¶¶ 40-45.)

Second, although Defendant argues that Plaintiff needs to fulfill an *additional* requirement in order to be able to rely on the APA's sovereign immunity waiver – namely, that the agency action that Plaintiff seeks to

challenge must be a "final" agency action (*see* Def.'s Mem. at 22 n.5 ("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.'" (quoting *Bennett v. Spear*, 520 U.S. 154, 175 (1997)[9] – the D.C. Circuit rejected this very argument in *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178 (D.C. Cir. 2006). *See id.* at 187 (holding that APA § 702's waiver of sovereign immunity "applies regardless of whether [the challenged agency action] constitutes 'final agency action'").

Plaintiff Mackinac Tribe is here seeking to proceed under the IRA, and it is sufficient that its complaint alleges that the agency has failed to act where the law provides it must; Plaintiff need not identify a final agency action in order to avail itself of APA's sovereign immunity waiver, despite Defendant's assertions to the contrary. The Court is mindful, however, that "other limitations on judicial review or the power or duty of the court to dismiss any action or deny any relief on any other appropriate legal or equitable ground" may nevertheless preclude this action. 5 U.S.C. § 702. The

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[9] In referencing "final agency action," Defendant refers to Section 704 of the APA, which states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Thus, in Defendant's view, "[p]laintiff 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." (Def.'s Mem. at 22 n.5.)

Court therefore must proceed to consider Defendant's alternative assertion that the complaint must be dismissed because Plaintiff has not exhausted its administrative remedies. (*See* Def.'s Mem. at 30 ("Plaintiff's complaint should be dismissed because Plaintiff has not exhausted its administrative remedies by obtaining a final determination regarding its recognition.").)

C. Plaintiff Needed To Exhaust Its Administrative Remedies Prior To Bringing This Lawsuit And Has Indisputably Failed To Do So

The administrative path to receiving the recognition and reorganization assistance that Plaintiff Mackinac Tribe seeks is clear: the Interior Department requires Indian groups to apply for these benefits pursuant to the Part 83 Process. *See* 25 C.F.R. pt. 83, *Procedures for Establishing That an American Indian Group Exists as an Indian Tribe*; *see also* 25 C.F.R. pt. 81, *Tribal Reorganization Under a Federal Statute*. Plaintiffs do not dispute that the Part 83 Process is the mechanism by which Secretary now recognizes tribes and consequently determines whether Indian groups are eligible for federal benefits such as reorganization, yet Plaintiff concedes that it has not pursued those regulatory procedures. (*See* Hr'g Tr. at 49:8). Instead, Plaintiff appears to assert that it has exhausted its administrative remedies because the complaint specifies that the tribe approached the Secretary to request an election pursuant to the IRA and "the Secretary did

nothing." (*See* Pl.'s Opp. at 35 (noting that "[t]he Secretary didn't even make a formal decision that the tribe was ineligible to reorganize under the statute, nor informally respond to the tribe"); *but see* Hr'g Tr. At 36:2-4 (noting that "when we asked the status of that petition, the department sent a letter saying that the group is inactive now primarily because the guy [who sent the letter] died").)

To the extent that Plaintiff maintains that its election request was sufficient exhaustion and that it need not have undertaken the Part 83 Process under the circumstances presented here (*i.e.*, because it believes that the tribe already has been federally recognized pursuant to a treaty or otherwise), no less an authority than the D.C. Circuit has strongly suggested otherwise. In *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132 (D.C. Cir. 1987), a group of Gay Head Indians sued for a declaratory judgment that the Interior Department's failure to include the Gay Heads on its list of federally recognized Indian tribes was contrary to law, as well as an order directing the Secretary to place the Gay Heads on the list of recognized tribes. *See id.* at 1135. The Secretary moved to dismiss the complaint on the ground that the Gay Heads had not pursued the Part 83 Process and thus had failed to exhaust their administrative remedies for receiving the federal recognition the lawsuit requested. *See id.* Much like the Plaintiffs before this Court, the Gay Heads argued that "it would be redundant for them to exhaust administrative channels in an attempt to obtain federal recognition" because the Gay Heads had already

been recognized in a report that a Presidential Commission had prepared in 1822. *See id.* at 1133, 1136-37. (*See also* Pl.'s Opp. at 28-29.) The D.C. Circuit disagreed, affirming the district court's dismissal of the Gay Heads' complaint, because the Gay Heads had not exhausted their administrative remedies by pursuing the administrative recognition process. *See id.* at 1138. In so holding, the *James* Court explained that "requiring exhaustion of the Department of the Interior's procedures for tribal recognition[] before permitting judicial involvement" serves the purposes of the exhaustion doctrine in that "requiring exhaustion allows the Department of the Interior the opportunity to apply its developed expertise in the area of tribal recognition[,]" and "the factual record developed at the administrative level would most assuredly aid in judicial review should the parties be unsuccessful in resolving the matter[.]" *Id*; *see also Avocados Plus*, 370 F.3d at 1247 (noting that the exhaustion doctrine serves the functions of "affording parties and courts the benefits of agencies' expertise, [and] compiling a record adequate for judicial review." (internal quotation marks and citation omitted).

The Circuit's reasoning in *James* clearly applies to the circumstances presented here. Although Plaintiff Mackinac Tribe may have approached the Secretary to ask for an election pursuant to the IRA, and thereby invoked the administrative process to some extent, it did not ask the agency the *relevant* question for the purpose of the administrative process – *i.e.*, whether the Mackinac Tribe satisfies the Part 83 requirements

for federal recognition – which, according to the agency, is an indispensible precursor to any request that the Secretary call an election for reorganization of the tribe.[10] It is precisely because there is no genuine dispute that the Mackinac Tribe failed to seek an agency decision regarding recognition before it filed its lawsuit in federal court that this Court concludes summary judgment must be entered for Defendant. Indeed, the Interior Department's unique expertise in Indian affairs makes the agency better suited than the courts to determine whether or not Plaintiff should be federally recognized as an Indian tribe in the first instance, and the factual record that would be developed during the agency's review of plaintiff's claim would be useful to the court in reviewing of the agency's decision, *see James*, 824 F.2d at 113. Therefore, in this Court's view, "the policies underlying the exhaustion doctrine dictate" this result. *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 550 (10th Cir. 2001); *see also Sandy Lake Band*, 2011 WL 2601840, at * 4 (noting that "requiring an entity seeking an IRA election to first request federal acknowledgment" ensures that the evidence the tribe offers in support of its claim "will

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[10] This Court need not, and does not, reach the merits of the agency's contention that recognition through the Part 83 process is the *only* vehicle by which an Indian group is entitled to the benefits of reorganization under the IRA. (*See* Def.'s Mot. at 25-34.) Instead, the Court here holds only that a group such as the Mackinac Tribe must *first* proceed through the administrative process for formal recognition before it can bring a lawsuit that requests recognition and reorganization by court order. *See infra* note 11.

be presented to the appropriate agency with the requisite expertise and established regulatory process.").[11]

III. CONCLUSION

Although sovereign immunity poses no bar to the instant action, the Mackinac Tribe has admittedly failed to request recognition through the Department of Interior's Part 83 Process. Exhaustion of existing administrative remedies must be accomplished prior to filing a suit of this nature. *See James*, 824 F.2d at 1138.

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[11] It bears repeating that this Court is not suggesting that the agency necessarily is correct when it argues that the sole means of recognition that is cognizable under the IRA is the recognition that results from the Part 83 Process. *See* Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, Section 103 (1994) (codified at 25 U.S.C. § 479a) ("Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;' or by a decision of a United States court."). Instead, the Court merely holds that before a plaintiff may file a lawsuit seeking to compel the Secretary to call a constitutional election pursuant to the IRA, the plaintiff must first pursue the Secretary's recognition process. If the recognition process results in a decision adverse to Plaintiff's position, Plaintiff may challenge the Secretary's decision – as well as the method by which she reached that decision – in federal court, *see* 5 U.S.C. § 706 (a court shall "compel agency action unlawfully withheld" and "hold unlawful and set aside agency action, findings and conclusions" that the court finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"), and in such a case, the administrative record will undoubtedly aid the Court's review of the agency's decision. Thus, by requiring "exhaustion" this Court refers only to Plaintiff's obligation to *seek* recognition through the Part 83 Process, not to any obligation to *receive* such recognition.

Consequently, as set forth in the accompanying order, Defendant's Motion for Summary Judgment (as this Court has now construed its Motion to Dismiss) will be **GRANTED**.

DATE: March 31, 2015

/s/ Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

Article V – Treaty of July 31,1855 with the Ottawa and Chippewa (11 Stat. 621)

The tribal organization of said Ottawa and Chippewa Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this agreement, is hereby dissolved; and if at any time hereafter, further negotiations with the United States, in reference to any matters contained herein, should become necessary, no general convention of the Indians shall be called; but such as reside in the vicinity of any usual place of payment, or those only who are immediately interested in the questions involved, may arrange all matters between themselves and the United States, without the concurrence of other portions of their people, and as fully and conclusively, and with the same effect in every respect, as if all were represented.

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25 U.S.C. § 476

(a) Adoption; effective date

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.

(b) Revocation

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings

(1) The Secretary shall call and hold an election as required by subsection (a) of this section –

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall –

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C.461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to

the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

(h) Tribal sovereignty

Notwithstanding any other provision of this Act –

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

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25 U.S.C. § 479

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

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25 U.S.C. § 479a-1

(a) Publication of list

The Secretary shall publish in the Federal Register 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.

(b) Frequency of publication

The list shall be published within 60 days of November 2, 1994, and annually on or before every January 30 thereafter.

Regulations

25 CFR Part 81.1(w) (2013) – Definitions As used in this part . . .

Tribe means: (1) Any Indian entity that has not voted to exclude itself from the Indian Reorganization Act and 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; and (2) any group of Indians whose members each have at least one- half degree of Indian blood for whom a reservation is established and who each reside on that reservation. Such tribes may consist of any consolidation of one or more tribes or parts of tribes.

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25 CFR Part 81.5 (2013) – Request to call election.

(a) The 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.

(b) The Secretary shall authorize the calling of an election to adopt a constitution and bylaws pursuant to a Federal Statute upon receipt of a petition bearing the signatures of at least 60 percent of the tribe's adult members.

(c) The Secretary shall authorize the calling of an election to ratify a charter at the time the charter is issued, but he/she may issue a charter to a reservation-based tribe only upon petition by at least one-third of the adult members of the tribe. No ratification, however, shall be valid unless the tribe has a constitution adopted and approved pursuant to the relevant Federal Statute.

(d) The Secretary shall authorize the calling of an election on the adoption of amendments to a constitution and bylaws or a charter when requested pursuant to the amendment article of those documents. The election shall be conducted as prescribed in this part unless the amendment article of the constitution and bylaws or the charter provides otherwise, in which case the provisions of those documents shall rule where applicable.

(e) If the amendment provisions of a tribal constitution or charter have become outdated and amendment can not be effected pursuant to them, the Secretary may authorize an election under this part to amend the documents when the recognized tribal government so requests.

(f) Any authorization not acted upon within 90 days (tribes in Alaska shall be granted 120 days) from the date of issuance will be considered void. Notification of the election date as provided for in § 81.14 shall constitute the action envisioned in this section. Extension of an authorization may be granted upon a valid and reasonable request from the election board. Copies of

authorizations shall be furnished the requesting tribe or petitioners.

(g) In those instances where conflicting proposals to amend a single constitutional or charter provision are submitted, that proposal first received by the officer in charge, if found valid, shall be placed before the voters before any consideration is given other proposals. Other proposals shall be considered in order of their receipt; provided, they are resubmitted following final action on the initial submission. This procedure shall also apply in those instances where new or revised constitutions are at issue.