IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BURT LAKE BAND OF OTTAWA AND CHIPPEWA INDIANS,

Plaintiff,

v.

THE HONORABLE RYAN ZINKE in his official capacity as Secretary of the Interior, THE HONORABLE MICHAEL S. BLACK in his official capacity as Acting Assistant Secretary – Indian Affairs, and UNITED STATES DEPARTMENT OF INTERIOR,

Defendants,

Case No. 1:17-cv-00038-ABJ

MOTION TO DISMISS

Federal Defendants hereby move for dismissal of Plaintiff's Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. This Court lacks jurisdiction over Plaintiff's Complaint and Plaintiff has failed to state a claim upon which relief can be granted. The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities in Support of Motion to Dismiss.

Respectfully submitted this 14th day of July, 2017.

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IN THE UNITED STATES DISTRICT COURT
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BURT LAKE BAND OF OTTAWA AND CHIPPEWA INDIANS, Plaintiff, v. THE HONORABLE RYAN ZINKE in his official capacity as Secretary of the Interior, THE HONORABLE MICHAEL S. BLACK in his official capacity as Acting Assistant Secretary – Indian Affairs, and UNITED STATES DEPARTMENT OF INTERIOR, Defendants,	)	Case No. 1:17-cv-00038-ABJ

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Defendants Ryan Zinke, Michael S. Black, and the United States Department of the Interior (the "Department") hereby submit this Memorandum of Points and Authorities in Support of their Motion to Dismiss Plaintiff's claims. Plaintiff Burt Lake Band of Ottawa and Chippewa Indians ("Plaintiff" or "Burt Lake Band") was denied federal acknowledgment or recognition as an Indian tribe in 2006 through the Department's regulatory procedures in 25 C.F.R. Part 83 ("Part 83"). The Department concluded that Plaintiff did not meet three of the seven mandatory criteria for federal acknowledgment as an Indian tribe: it did not maintain tribal political influence or other authority over its members as an autonomous entity from 1917 to the present; it was not a community at present; and only sixty-eight percent of its members demonstrated descent from the historical band. The Department issued a Final Determination finding that Plaintiff is not entitled to recognition by the United States as an Indian tribe.

Plaintiff did not appeal any aspect of this 2006 decision either to the Interior Board of Indian Appeals or to a district court.

Having failed to challenge within the six-year statute of limitations the Department's reasoned conclusion that Plaintiff does not meet the criteria for federal acknowledgment as an Indian tribe, Plaintiff now brings suit arguing that it is entitled to federal recognition nonetheless because it submitted a petition to organize under the Indian Reorganization Act ("IRA") in 1935, over eighty years ago. The Department hereby moves for dismissal of Plaintiff's Amended Complaint (ECF No. 11) pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[1] Plaintiff's Counts I through III, asserting that the Department failed to act on its IRA petition, should be dismissed because this Court lacks jurisdiction over Plaintiff's claims. Specifically, the Administrative Procedure Act ("APA") was not passed until after the IRA petition was submitted and does not apply to proceedings initiated before that date. In addition, Plaintiff cannot state a valid APA claim for failure to act or undue delay because it has not established a mandatory duty that the Department is required to take. And even if Plaintiff could establish a valid claim, the time to challenge lack of action on the 1935 petition has long since passed. Accordingly, this Court lacks jurisdiction over Plaintiff's Counts I, II, and III.

Further, Plaintiff lacks standing on its challenge to the regulatory provision preventing re-petitioning under the Part 83 regulations, Counts IV, V, and VI. Plaintiff has never had a right to re-petition, as the previous regulations did not allow for re-petitioning. Plaintiff thus is not injured by the 2015 regulations' continued bar on re-petitioning. In addition, the 2015 changes

[1] Federal Defendants respectfully submit that no administrative record is necessary for the Court to resolve the issues of law raised by this motion. Accordingly, Federal Defendants have not submitted an index of the administrative record with this motion. *See* Local Rule 7(n). In addition, as argued below, Plaintiff has no claim for judicial review, whether on an administrative record or otherwise.

to the 1994 regulations did not change the criteria, except in two instances that would not cure the defects in Plaintiff's petition. Accordingly, the changes to the regulations would not lead to a different result for Plaintiff's petition. As such, Plaintiff lacks standing to challenge the regulations' bar on re-petitioning.

And finally, Plaintiff fails to state a claim for relief under the the Federally Recognized Indian Tribe List Act of 1994 ("List Act"). It does not assert any violation of the List Act by the Department, but instead asks the Court to order the Department to put it on the list of federally recognized Indian tribes pursuant to language in the List Act's congressional findings based on past treaties. In light of the facts that the Department has already determined that Plaintiff is not entitled to recognition despite the treaties and that this Court, along with other Circuit Courts of Appeals, have recognized that historical recognition is insufficient for recognition today, this claim presents a non-justiciable political question and should be dismissed.

II. BACKGROUND

A. LEGAL BACKGROUND

1. The Indian Reorganization Act

The IRA, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–5144, formerly 25 U.S.C. §§ 461–494a), was enacted in 1934 to revitalize tribal governments following the decades when federal policy promoted allotment and sale of tribal lands and assimilation of tribal members. *See Cty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992). The IRA marked a turn away from federal policies designed to assimilate Indian tribes and a return to "the principles of tribal self-determination and self-governance." *Id.* The "overriding purpose" of the IRA is to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

Under the IRA as enacted in 1934, "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare. . . ." 48 Stat. at 987 § 16. Thus, organization under the IRA required a group to reside on a reservation or have land acquired for it and then reside on it. *Id.* at 986 § 7, 987 § 16.

2. The Federal Acknowledgment Process

a. The Acknowledgment Process Generally

Federal acknowledgment of groups as Indian tribes establishes a government-to-government relationship with the United States and is a prerequisite to nearly all of the protection, services, and benefits of the federal government available to Indian tribes. 25 C.F.R. § 83.2 (2015). The power to recognize Indian tribes lies with Congress and the Executive and is essentially committed to the political branches. *See United States v. Holliday*, 70 U.S. 407, 419 (1865) (noting that if executive and other political departments recognize Indians as a tribe, courts must do the same); *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1496 (D.C. Cir. 1997) (same). Historically, Indian tribes were granted federal recognition through treaties approved by Congress, congressional statute, or *ad hoc* decisions within the Executive branch. In 1978, the Department established a comprehensive regulatory process for the review and evaluation of petitions for acknowledgment of Indian tribes. *See* 25 C.F.R. pt. 83; *see also* 43 Fed. Reg. 39,361 (Aug. 24, 1978); 59 Fed. Reg. 9280 (Feb. 25, 1994). The regulations establish uniform standards and procedures to answer the question "what is an Indian tribe?" *Miami Nation of Indians v. Babbitt,* 887 F. Supp. 1158, 1167 (N.D. Ind. 1995). The Office of Federal Acknowledgment ("OFA") evaluates petitions for acknowledgment and is composed of experts in anthropology, genealogy, and history. OFA reports to the Assistant Secretary – Indian Affairs ("AS-IA"), the decision-maker. The Department revised the Part 83 regulations in 1994 and 2015.

Part 83 has seven mandatory criteria that a petitioner must meet to be acknowledged as a federally recognized Indian tribe.[2] These criteria are designed to demonstrate continuous existence as a social and political community from the historical Indian tribe. Failure to meet any one of the criteria will result in a determination that the group is not entitled to a government-to-government relationship with the United States. 25 C.F.R. § 83.43(b). As applied under the 1978 regulations and made explicit in the 1994 and 2015 regulations, a criterion is considered met "if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion." *Id.* § 83.10. Neither the 1994 nor the 2015 regulations permit a group to re-petition if they have been denied previously through the Part 83 process.

b. The 2015 Revisions to the Federal Acknowledgment Regulations

In 2015, the Department issued a final rule revising the Part 83 federal acknowledgment regulations. Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37,862 (July 1, 2015). "The revisions seek to make the process and criteria more transparent, promote consistent implementation, and increase timeliness and efficiency, while maintaining the integrity and substantive rigor of the process." *Id.* The rule maintained a two-pronged system based on whether a petitioner can demonstrate previous federal acknowledgment. Petitioners that have

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[2] These seven criteria, delineated in 25 C.F.R. § 83.11, require the petitioner to demonstrate that sources identify the petitioner as an American Indian entity on a substantially continuous basis since 1900; the petitioner is a distinct community from 1900 until the present; the petitioner maintains political influence or authority over its members as an autonomous entity from 1900 until the present; the petitioner has a governing document with membership criteria; the petitioner has a membership that descends from a historical Indian tribe; the petitioner is composed principally of persons who are not members of any federally recognized tribe; and, the petitioner is not subject to congressional legislation that terminated or forbids a Federal relationship. 25 C.F.R. § 83.11.

established that they have previous federal acknowledgment need to demonstrate that they meet the "Community" criterion at the present time (instead of from 1900 to present) and the "Indian Entity Identification" and "Political Authority" criteria since 1900 or the time of previous federal acknowledgment, whichever is later (instead of from 1900). 25 C.F.R. § 83.12. Petitioners that cannot demonstrate previous federal acknowledgment must meet the criteria in § 83.11.

This rule clarifies the criteria by codifying past Departmental practice in implementing the criteria, but "does not substantively change the Part 83 criteria, except in two instances." 80 Fed. Reg. at 37,863. The first instance is that criterion 83.11(a), which requires evidence of identification of the petitioner as an Indian entity, now may be satisfied by contemporaneous self-identification. *Id.* The second instance relates to how marriages are counted and considered as evidence of distinct community. *Id.* The rule maintained previous Department precedent that required that at least 80% of the membership descend from the historical Indian tribe. *Id.* at 37,866. The rule also maintains "the current standard of proof as 'reasonable likelihood.'" *Id.* at 37,863, 37,875.

Both the 1994 regulations and the 2015 regulations ban re-petitioning by groups that have received negative determinations. *Id.* at 37,874–75; *see* 25 C.F.R. § 83.4(d) (2015) (stating that the Department will not acknowledge an entity "that previously petitioned and was denied Federal acknowledgment under . . . previous regulations in part 83 of this title"), § 83.3(f) (1994) (stating that "groups that previously petitioned and were denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title, may not be acknowledged under these regulations"); *Miami Nation of Indians of Ind. v. Babbitt*, 112 F. Supp. 2d 742, 759 (N.D. Ind. 2000) (noting that group "had no right to any reevaluation under the 1994 regulations, because the 1994 regulations don't apply to a petitioner that was denied acknowledgment under

the 1978 regulations"). As the Department explained in the final rule adopting the 2015 regulations, there are petitions pending that have never been reviewed. "Allowing for re-petitioning by denied petitioners would be unfair to petitioners who have not yet had a review, and would hinder the goals of increasing efficiency and timeliness by imposing the additional workload associated with re-petitions on the Department, and OFA in particular." 80 Fed. Reg. at 37,875.

3. The List Act

The Department has the duty of publishing 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 of Indians." 25 C.F.R. § 83.6(a); 25 U.S.C. § 5131 (1994). The most recent list, published January 17, 2017, is found at 82 Fed. Reg. 4915. The list published in the Federal Register is ordinarily dispositive evidence of whether an Indian tribe is federally recognized. *See Cherokee Nation*, 117 F.3d at 1499 (noting that inclusion of a group of Indians on the list ordinarily suffices to establish that group is a sovereign power and thus entitled to immunity from suit); *see also LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993) (finding that for purposes of 25 U.S.C. § 1321, the term "Indian" includes only those persons who are members of a tribe that the Bureau of Indian Affairs has formally acknowledged).

B. FACTUAL BACKGROUND

Plaintiff Burt Lake Band alleges that it was formerly called the Cheboygan Band of Ottawa and Chippewa Indians. Compl. ¶ 1, ECF No. 11 (hereinafter "Am. Compl."). It alleges that it petitioned the Bureau of Indian Affairs ("BIA") to reorganize under the IRA in 1935, and the Department "fail[ed] to issue a final decision" on that petition. *Id.* ¶¶ 13, 17, 167–75.

According to Plaintiff, this failure "denied the heirs and descendants of the members of the Band their vested right to be federally recognized just like every other 'landless' Michigan tribe," in violation of the IRA, acknowledgment regulations, the APA, and the Fifth Amendment's constitutional requirements of due process and equal protection." *Id.* ¶¶ 12, 17, 167–75.

Plaintiff claims that the United States has twice recognized the Cheboygan Band as a sovereign and autonomous Indian nation through the Treaty of Washington in 1836 and the Treaty of Detroit in 1855.[3] *Id.* ¶¶ 1, 10, 66. Plaintiff alleges that "[t]he federal government last recognized its fiduciary obligations to the Burt Lake Band in 1917." *Id.* ¶ 11.

Plaintiff asserts that after Congress enacted the IRA in 1934, forty-one of Plaintiff's members submitted a petition to John Collier, the then-Commissioner of Indian Affairs of the Department, "asking for financial assistance, permission to organize their tribal government under the IRA, and land in trust." *Id.* ¶ 66. According to Plaintiff, the BIA has never issued a formal decision officially granting or denying the petition, but made "an informal, internal decision that was treated as a conclusive resolution of the Band's rights within the [Department] for all practical purposes." *Id.* ¶¶ 68–69.

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[3] A number of Michigan groups have asserted that they are the historical descendants of the Indian bands that entered into the 1855 treaty. Some of those groups have successfully petitioned the Department for acknowledgment and thus appear on the list of federally recognized Indian tribes. *See, e.g., Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Attorney*, 369 F.3d 960, 962 (6th Cir. 2004). Some have been recognized through congressional acts. *See* Am. Compl. ¶ 129 (noting the recognition of the Lac Vieux Desert Band of Lake Superior Chippewa Indians, Little Traverse Bay Bands of Odawa Indians, Little River Band of Ottawa Indians, and Pokagon Indian Nation through congressional action). Others, like Plaintiff, have been unsuccessful in gaining acknowledgment because they no longer exist as a distinct community or no longer maintain political authority. The federally recognized Little Traverse Bay Bands includes the Burt Lake Band as one of its nine component bands, Preamble, LTBB Constitution (2005), found at http://www.ltbbodawa-nsn.gov/OdawaRegister/LTBB%20Constitution.pdf last visited on July 13, 2017.

The Burt Lake Band later petitioned the Department for federal acknowledgment in 1985. *Id.* ¶ 99. In 2001, while its acknowledgment petition was still pending, Plaintiff sued the Department in this Court, requesting that the Court declare it unnecessary for it to proceed under the federal acknowledgment regulations and require the Department to place the Burt Lake Band on the list of Indian tribes published in the Federal Register pursuant to the List Act. *Burt Lake Band of Ottawa & Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 77 (D.D.C. 2002). Both the federally recognized Sault Ste. Marie Tribe of Chippewa Indians and the Little Traverse Bay Bands of Ottawa Indians participated in the briefing before the Court in support of the Department's opposition to these claims. *Id.* at 76. This Court dismissed Plaintiff's claims, finding that the Court lacked jurisdiction because Plaintiff had failed to exhaust its administrative remedies. *Id.* at 80.

The Department issued a Proposed Finding against acknowledgment of Plaintiff as a federally recognized Indian tribe on March 25, 2004. 69 Fed. Reg. 20,027 (Apr. 15, 2004). Plaintiff then had the opportunity to supplement the record and address the areas of concern identified in the Proposed Finding. In 2006, the Department issued a Final Determination denying Plaintiff's petition, finding that it was not entitled to federal recognition as an Indian tribe. 71 Fed. Reg. 57,995 (Oct. 2, 2006), Am. Compl. ¶¶ 14, 107. The Department found that Plaintiff was not a continuation of a historical Indian tribe and did not meet the mandatory criteria for federal acknowledgment as an Indian tribe.

The Department examined the May 1935 petition to organize under the IRA in the Proposed Finding and Final Determination. The Department found that the petition itself did not mention the Cheboygan band, the Burt Lake Band, or any other "such identifying names or terms." *Summary under the Criteria and Evidence for Final Determination Against*

Acknowledgment of the Burt Lake Band of Ottawa and Chippewa Indians, Inc., Department of Interior, Petition 101, at 75, 76. (found at https://www.bia.gov/WhoWeAre/AS-IA/OFA/DecidedCases/index.htm, last visited May 9, 2017) (hereinafter "Final Determination" or "FD").[4] The "evidence suggests that the petition was submitted as part of an effort of a group larger than a single band." *Id.* at 75. The Department found also that the petition mirrored other IRA petitions and was not unique to a particular group, and that Plaintiff as a group did not sign the petition but was itself divided, a fact which Plaintiff acknowledged. *Id.* at 75–76. In its submission in response to the Proposed Finding, Plaintiff noted that "more likely than not that there was clear controversy within the Band over the IRA." *Id.* at 76. The Department determined this internal controversy was a further indication that the petition was not a "Cheboygan or Burt Lake band" petition. *Id.*

The Final Determination became final and effective in January 2007, when Plaintiff did not seek reconsideration before the Interior Board of Indian Appeals. Plaintiff also did not appeal the Department's decision to this Court, and the time for doing so has since expired.

Plaintiff filed its Complaint in the current litigation on January 9, 2017, and filed an Amended Complaint on June 1, 2017. Plaintiff asks this Court to (1) order the Department to adjudicate the 1935 IRA petition on the merits and issue a formal decision granting

[4] The facts are drawn from Plaintiff's Amended Complaint and from the documents attached to the Amended Complaint. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) (noting general rule that when deciding a Rule 12(b)(6) motion, a 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"). "Additionally, 'the Court may consider documents specifically referenced in the complaint where the authenticity of the document is not questioned.'" *Williams v. Amalgamated Transit Union Local 689*, No. 15-CV-596 (TSC), 2017 WL 1185173, at *2 (D.D.C. Mar. 29, 2017) (quoting *United Mine Workers of Am., Int'l Union v. Dye*, No. 06-1053(JDB), 2006 WL 2460717 (Aug. 23, 2006)). Plaintiff has specifically referenced the Final Determination and its authenticity is not in question. Accordingly, this Court may consider the Final Determination.

reorganization and federal recognition, (2) declare the portion of the regulations prohibiting re-petitioning to be unconstitutional, (3) order the Department to consider and adjudicate a new petition from Plaintiff, and (4) order that Plaintiff be placed on the list of federally recognized tribes. Am. Compl., Prayer for Relief.

III. STANDARD OF REVIEW

A. MOTION TO DISMISS UNDER RULE 12(B)(1) FOR LACK OF SUBJECT MATTER JURISDICTION

Jurisdiction is a threshold issue that must be addressed before considering the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–96 (1998). Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of a claim for lack of subject matter jurisdiction. The burden of proving subject matter jurisdiction rests with plaintiff, the "party invoking the federal court's jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Rempfer v. Sharfstein*, 583 F.3d 860, 868–69 (D.C. Cir. 2009). Federal courts are courts of "limited jurisdiction," and are presumed to lack jurisdiction unless a plaintiff establishes its existence. *Kokkonen*, 511 U.S. at 377.

Where, as here, a motion to dismiss makes a facial attack on the complaint, the reviewing court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Ord v. District of Columbia*, 587 F.3d 1136, 1140 (D.C. Cir. 2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). "The court may look beyond the allegations contained in the complaint to decide a facial challenge, 'as long as it still accepts the factual allegations in the complaint as true.'" *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 539 F. Supp. 2d 331, 337–38 (D.D.C. 2008) (quoting *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253–54 (D.C. Cir. 2005)).

The elements of standing are "an indispensable part of the plaintiff's case," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). At the pleading stage, a plaintiff's factual allegations must be more than merely conclusory legal statements to the effect that standing exists or that the plaintiff was injured. As the Supreme Court has stated, "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth*, 422 U.S. at 518.

B. MOTION TO DISMISS UNDER RULE 12(B)(6) FOR FAILURE TO STATE A CLAIM

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). A court considering a Rule 12(b)(6) motion presumes the factual allegations of the complaint to be true. *See, e.g., United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 135 (D.D.C. 2000). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007). The court need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004); *Browning*, 292 F.3d at 242. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

IV. ARGUMENT

Plaintiff's claims should be dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted. Plaintiff's first three claims, based on BIA's purported "non-decision" on the IRA petition, should be dismissed for lack of jurisdiction: the APA does not apply to the petition, which was filed before the APA was passed; Plaintiff has not alleged a discrete agency action the Department is legally required to take; and the statute of limitations has long since expired. Plaintiff's second three claims, based on the 2015 regulations' bar on re-petitioning, should also be dismissed for lack of standing and failure to state a claim. The 1994 regulations did not allow groups denied recognition to re-petition, and thus Plaintiff was not injured by the 2015 regulations that retained this prohibition. As such, it is not injured and has failed to state a claim for relief. And Plaintiff's final claim fails to state a claim upon which relief can be granted because it does not allege a violation of the List Act and seeks to have this Court decide a non-justiciable political question in a way that would ignore the Department's decision on federal recognition and this Court's prior ruling.

A. PLAINTIFF'S FIRST THREE CLAIMS FOR RELIEF SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

1. Plaintiff's First Claim Should be Dismissed Because the APA Does Not Apply, Plaintiff Does Not Identify a Discrete Action the Department is Required to Take, and the Statute of Limitations Bars this Claim.

Plaintiff's first claim asserts that the Department violated the APA by failing to issue a final public decision providing a statement of grounds for its rejection of the 1935 petition. Am. Compl. ¶¶ 162–68. This claim fails for several reasons.[5] First, the APA was not passed until

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[5] As discussed above in Section II.B, in its Final Determination, the Department determined that Plaintiff did not submit the IRA petition; instead the submission was by a larger group that included some, but not all, of Plaintiff's members. Courts have found that factual federal acknowledgment findings have collateral estoppel effect. *United States v. 43.47 Acres of Land,*

1946, eleven years after the petition was filed, and provides that "no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement." 60 Stat. 237, 244 § 12 (1946). Given that the IRA petition was filed in 1935, it was "initiated" before the effective date of the APA. Thus, by its own terms, the APA is not applicable to the BIA's purported failure to issue a public denial of the IRA petition with a statement of grounds.

This Court also cannot compel the Department to issue a final decision on the IRA petition. *See* Am. Compl. ¶ 167. An unreasonable delay claim "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All. ("SUWA")*, 542 U.S. 55, 64 (2004). Put differently, "the only agency action that can be compelled under the APA is action legally *required*." *Id*. at 63. Like mandamus, the APA "empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter without directing *how* it shall act.'" *Id.* at 64 (citation omitted). A court cannot direct agency action that is not dictated by law. 5 U.S.C. § 701(a)(2). Accordingly, "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *SUWA*, 542 U.S. at 65.

Here, particularly when the APA did not even apply at the time the IRA petition was submitted, there is no legal requirement for the Department to issue a written decision on the IRA petition. Plaintiff points to no requirement in a statute or regulation that would require the Department to issue a decision on the IRA petition, much less a "final, public decision." Thus,

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896 F. Supp. 2d 151 (D. Conn. 2012). For the purposes of this motion, however, the Department assumes that the allegations in the Amended Complaint that Plaintiff submitted an IRA petition are true.

its claim for agency action unlawfully withheld cannot be sustained under the APA. *See SUWA*, 542 U.S. at 63.

In any event, all Plaintiff's claims based on the Department's alleged failure to issue a formal, written decision on the IRA petition are barred by the statute of limitations. 28 U.S.C. § 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." "Section 2401 is a general catchall statute that applies to all civil actions against the government." *W. Va. Highlands Conservancy v. Johnson*, 540 F. Supp. 2d 125, 138 (D.D.C. 2008) (quoting *Felter v. Norton*, 412 F.Supp.2d 118, 124 (D.D.C. 2006)). "Unlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed." *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987). Because section 2401(a) is jurisdictional, equitable tolling is not available. *See id.* at 60; *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (affirming *Spannaus*); *W. Va. Highlands Conservancy*, 540 F. Supp. 2d at 138 ("Moreover, when a statute of limitations has been regarded as jurisdictional, 'it has acted as an absolute bar [that cannot] be overcome by the application of judicially recognized exceptions . . . such as waiver, estoppel, equitable tolling [,] . . . fraudulent concealment, the discovery rule, . . . and the continuing violations doctrine.'" (quoting *Felter*, 412 F. Supp. at 122)).[6]

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[6] This Court recognized the "longstanding precedent in our Circuit" holding that § 2401(a) is jurisdictional, *Alaska v. U.S. Dep't of Agric.*, 932 F. Supp. 2d 30, 33 (D.D.C. 2013) (collecting cases), *rev'd on other grounds*, 772 F.3d 899 (D.C. Cir. 2014). Although a recent Supreme Court case has ruled that the statute of limitations in 28 U.S.C. § 2401(b), applicable to Federal Tort Claims Act suits, is not jurisdictional, *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015), this Circuit has thus far not applied that analysis to the limitations provision of 28 U.S.C. § 2401(a). *In re Navy Chaplaincy*, No. 1:07-mc-269 (GK), 2016 U.S. Dist. LEXIS 15294, at *8 (D.D.C. Feb. 9, 2016). But even if the limitations period of section 2401(a) were a

"[A] cause of action accrues when the injured party discovers — or in the exercise of due diligence should have discovered — that it has been injured." *Sprint Commc'ns Co. v. FCC*, 76 F.3d 1221, 1228 (D.C. Cir. 1996) (citations omitted). Actual knowledge of facts supporting a claim is not required; constructive or inquiry notice is sufficient, absent evidence that the facts underlying the plaintiff's claims were fraudulently concealed. *Id.* Section 2401(a) also applies to claims of agency inaction. *See, e.g.*, *Alaska Cmty. Action on Toxics v. EPA*, 943 F. Supp. 2d, 96, 107 (D.D.C. 2013); *W. Va. Highlands Conservancy*, 540 F. Supp. 2d at 138.

Plaintiff's claim is clearly barred here because "under any formulation" of the specific accrual date, it is "beyond dispute that the six-year limitations period expired well before plaintiffs instituted the present action." *Alaska Cmty. Action*, 943 F. Supp. 2d at 107 (quoting *W. Va. Highlands Conservancy*, 540 F. Supp. 2d at 139). Plaintiff's Amended Complaint states that the lack of decision was not communicated to the Plaintiff, but Plaintiff admittedly had knowledge of the purported lack of decision and of the correspondence between BIA officials determining that the Plaintiff was not entitled to organize under the IRA by the 1980s, at the latest. Am. Compl. ¶ 85. Plaintiff also must have known about its lack of federal recognition before then, given that it asserts it learned of the Department's internal correspondence while compiling documentation to support "another petition for federal recognition." *Id.* As such, its claim ran long ago.

Further, the Department explicitly discussed the IRA petition. *See* FD at 75–76. It found that the IRA petition was submitted by a larger group that included some but not all members of

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"run-of-the-mill statute of limitations," *Wong*, 135 S. Ct. at 1633, and thus not jurisdictional, Plaintiff's claims would still be untimely and subject to dismissal under Rule 12(b)(6). *See Smith-Haynie v. District of Columbia*, 155 F.3d 575, 577–78 (D.C. Cir. 1998) (statute of limitations defense properly raised by dispositive motion under Rule 12(b)(6)).

the Burt Lake Band in 1935. *Id.* Plaintiff could have challenged that finding by appealing the Department's final determination on its petition, but did not do so. Plaintiff itself describes the 2006 decision denying acknowledgment as an effective denial of the Plaintiff's 1935 petition for reorganization. Am. Compl. ¶ 163. Thus, even assuming all facts in favor of Plaintiff, the statute of limitations on Plaintiff's first three claims has run.

B. PLAINTIFF LACKS STANDING TO CHALLENGE THE 2015 REGULATIONS BECAUSE IT IS NOT INJURED BY THE BAN ON RE-PETITIONING.

Plaintiff next argues that the 2015 provision of the regulations that prohibits re-petitioning is in violation of the APA and the Due Process Clause and Equal Protection Clause of the Fifth Amendment. Am. Compl. ¶¶ 176–98. Plaintiff did not have a right to re-petition under the previous regulations, and thus the continuation of this prohibition in the 2015 regulations did not injure Plaintiff. In addition, the only substantive changes to the criteria would not lead to a different result on Plaintiff's petition. Plaintiff thus lacks standing because it is not injured by not being able to re-petition, nor could this Court redress any asserted injury.

A plaintiff challenging the legality of government action bears the burden of establishing that it has standing to challenge the action. *Lujan*, 504 U.S. at 561. "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth*, 422 U.S. at 499.

Plaintiff lacks standing because it did not have a right to re-petition under the prior regulations. The 1978 regulations were silent on the issue of re-petitioning, and the 1994 regulations specifically stated that re-petitioning was banned for groups that were denied acknowledgment under the regulations. *See* 59 Fed. Reg. at 9291 (noting the Department's position "that there should be an eventual end to the present administrative process"); 25 C.F.R. § 83.10 (1994). Thus, when Plaintiff's petition was decided, it had no right to re-petition under Part 83. The 2015 regulations did not change the restriction on re-petitioning. 25 C.F.R. § 83.4(d) (2015). Thus, the 2015 regulations did not injure Plaintiff as they merely continued the pre-existing bar on re-petitioning.

In addition, re-petitioning under the 2015 regulations would not benefit Plaintiff because they made only two substantive changes in the criteria, and neither would benefit Plaintiff. These substantive changes between the 1994 and 2015 criteria are to the identification criterion and the way to count marriages for the community criterion. Plaintiff met the identification criterion and so the changes in the regulations would not impact its petition. In addition, the 2015 regulations count the number of members who are married to others in the group for the community criterion, whereas the 1994 regulations focused on the number of marriages between members. *Compare* 25 C.F.R. § 83.7(b)(2)(ii) (1994) *with* § 83.11(b)(2)(ii) (2015). But the Final Determination for the Burt Lake Band petitioner included an analysis that counted members, not marriages, as the Burt Lake Band proposed. FD at 64–65. The Final Determination found that whether counting marriages or counting members, the petitioner's marriage rates did not satisfy criterion 83.7(b). *Id.* at 67. Thus, allowing re-petitioning would

not help Plaintiff because the only two substantive changes to the criteria do not affect its petition. As such, Plaintiff is not injured by the bar on re-petitioning.[7]

In *Miami Nation of Indians of Indiana v. Babbitt*, the court dealt with a petitioner who was denied acknowledgment under the 1978 regulations and sought to have its petition reviewed under the 1994 regulations. 112 F. Supp. 2d 742. The Miami argued that the 1994 regulations presented a lighter burden and thus it had a right to re-evaluation under those regulations. The court disagreed, finding that "a clarifying regulation ordinarily is not retroactive." It noted that the drafters "said the new regulations were meant simply to codify existing practice concerning standards of evidence" and "disclaimed any [intent] to make substantive modifications that would change outcomes." *Id.* at 760. The court also found that the Miami would fail even under the 1994 regulations, "perhaps precisely because the 1994 regulations clarified the law rather than changing it," citing the need to prove "political authority," which the Miami had failed under the 1978 regulations. *Id.* The same conclusion should be reached here where the amended regulations are meant to clarify and codify existing practices rather than make substantive modifications, except in the two specified instances that do not help Plaintiff.

Plaintiff had ample opportunity to make its case for recognition through the acknowledgment process. Plaintiff presented evidence and had a chance to submit additional evidence following the Department's Proposed Finding. It had the opportunity to modify its membership to its now "current members" in response to the Proposed Finding in order the meet

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[7] Plaintiff states that the 2015 regulations established a "re-affirmation" process (§ 83.12) for petitioners that had previous federal recognition and that it should be able to apply under it for the "first time." Am. Compl. ¶¶ 16, 154, 191. This process is not new to the 2015 regulations — it existed in the 1994 regulations as § 83.8, and was applied to Plaintiff in the Proposed Finding and Final Determination, which concluded that the petitioner had previous recognition to 1917. Am. Compl. ¶¶ 109, 113.

the criteria as other petitioners have done.[8] It also had an opportunity to challenge the Department's Final Determination either before the agency or in federal court, and it chose not to do so. In addition, when adopting the 1994 regulations, the Department considered that "undiscovered evidence which might change the outcome of decisions could come to light in the future." 59 Fed. Reg. at 9291. It determined that "there should be an eventual end to the present administrative process. Those petitioners who were denied went through several stages of review with multiple opportunities to develop and submit evidence." *Id.* Finally, the Department noted that "[d]enied petitioners still have the opportunity to seek legislative recognition if substantial new evidence develops." *Id.* This logic applies here.

In sum, Plaintiff has failed to demonstrate injury from the bar on re-petitioning in the 2015 regulations, and thus lacks standing to raise its claims. As such, Plaintiff's fourth through sixth claims for relief should be dismissed.

C. PLAINTIFF'S LIST ACT CLAIM FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Finally, Plaintiff argues that the Court should order the Department to place Plaintiff on the Federal Register list of federally recognized tribes. The List Act does not provide an independent cause of action and review must therefore proceed under the APA. *See, e.g., Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1028 (E.D. Cal. 2012) (noting that APA provides

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[8] *See, e.g.*, Final Determination for Federal Acknowledgment of the Mohegan Tribe of Indians of the State of Connecticut at 172–73, removing 15 percent of its members, found at https://www.bia.gov/cs/groups/xofa/documents/text/idc-001435.pdf , last visited July 12, 2017. In contrast, here, Plaintiff updated its membership roll *after* the FD and now asserts that this new group of "current members" can meet the criteria. Am. Compl. ¶¶ 150-151. This assertion, however, even if presumed accurate for the criteria *at present*, it is inapplicable to address historical political authority from 1917 to the present. Such "current members" are barred from re-petitioning under both the 1994 and 2015 regulations, as the bar applies to reorganized or reconstituted petitioners previously denied, and to splinter groups, spin-offs, or component groups who were once part of petitioners previously denied. § 83.3(f) (1994); § 83.4(d) (2015).

waiver of sovereign immunity for claims that United States violated List Act). Notably, this claim is purportedly brought pursuant to 25 U.S.C. § 5130, but does not allege any violation of the List Act by the Department. Instead, the claim asserts that the Court has the power to place Plaintiff on the list, citing the congressional findings in the List Act for the proposition that Indian tribes may be recognized by Congress, through Part 83 of the C.F.R., or a decision of a United States Court. Am. Compl. ¶ 202 (citing Pub. L. 103-454, § 103(3) (Congressional findings)). Plaintiff asserts that it is a party to two treaties with the federal government and no congressional termination caused Plaintiff to lose its status as a federally recognized Indian tribe. *Id.* ¶ 204. Consequently, and in light of the "tortured history of the Band" and the two treaties, Plaintiff requests this Court place it on the list. *Id.* ¶ 205.

Plaintiff has failed to state a claim upon which relief may be granted. This claim does not assert that the Department violated the List Act, but merely that the Court should order the Department to place Plaintiff on the list of Indian tribes. This allegation is insufficient to state a claim for relief. To the extent that Plaintiff is challenging the Department's decision that it is not entitled to federal acknowledgment as an Indian tribe, that decision was made more than six years ago and any challenge is thus time-barred.

To the extent that Plaintiff is arguing that the two treaties signed by the Cheboygan Band entitle it to federal recognition, that claim must be dismissed. First, the Department explicitly found in its Final Determination that Plaintiff is not a continuation of the historical Cheboygan Band. 71 Fed. Reg. at 57,996. That decision is no longer subject to judicial review in this Court because the statute of limitations has expired. Second, this Court has already held in Plaintiff's previous litigation that "historical recognition by the Executive Branch does not allow a defendant to bypass BIA, even if the recognition occurred in a treaty." 217 F. Supp. 2d at 79.

"Accordingly, neither the Treaty of Washington nor the Treaty of Detroit excuses plaintiff from exhausting its administrative remedies." *Id.* In short, the Court recognized that the existence of the treaties alone was insufficient to conclude that Plaintiff should be federally recognized.[9] The doctrine of issue preclusion prevents Plaintiff from relitigating this question here. *See Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 41 (D.C. Cir. 2015) (holding that issue preclusion applies to jurisdictional dismissals as well as issues going to the case's merits).

In any event, the question of whether to recognize an Indian tribe is a political question and is traditionally an executive function. *Cherokee Nation of Okla.*, 117 F.3d at 1496 ("Whether a group constitutes a 'tribe' is a matter that is ordinarily committed to the discretion of Congress and the Executive Branch, and courts will defer to their judgment." (citing *Holliday*, 70 U.S. (3 Wall.) at 419; *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987))); s*ee also Miami Nation*, 255 F.3d at 347 (noting that "recognition lies at the heart of the doctrine of 'political questions.'"). A final decision by the Department on a group's petition for acknowledgment is reviewable under the APA under the arbitrary and capricious standard, but here Plaintiff is asking for the Court to create a government-to-government relationship between Plaintiff and the United States based on its alleged authority under the List Act findings. Such a request implicates the political question doctrine directly, particularly when the Department examined Plaintiff's request for acknowledgment as an Indian tribe and determined that the evidence did not support such a request. Plaintiff failed to appeal that ruling

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[9] In addition, there is no presumption of continuous existence as an Indian tribe. *United States v. Washington*, 641 F.2d 1368, 1374 (9th Cir. 1981); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 (10th Cir. 2001); *Miami Nation of Indians of Ind. v. U.S. Dep't of the Interior*, 255 F.3d 342, 350 (7th Cir. 2001).

and should not be permitted to use the List Act as an end run around the Department's decision. As such, Plaintiff's claim is a non-justiciable political question and should be dismissed.

V. CONCLUSION

Plaintiff ultimately seeks federal recognition as an Indian tribe. The Department underwent a thorough analysis of the evidence and determined that Plaintiff is not entitled to be federally recognized. Having failed to appeal that ruling, Plaintiff tries to revive a petition to organize under the IRA filed in 1935, before Congress even enacted the APA. This Court lacks jurisdiction over Plaintiff's claims because the APA does not provide jurisdiction and the statute of limitations has long since passed. In addition, Plaintiff is not injured by the 2015 regulations' ban on re-petitioning and its petition would fail under the new regulations as well. As such, Plaintiff lacks standing. And Plaintiff has failed to state a claim under the List Act.

For the foregoing reasons, the Department respectfully requests that Plaintiff's claims be dismissed.

Respectfully submitted this 14th day of July, 2017.

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