IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BURT LAKE BAND OF OTTAWA AND CHIPPEWA INDIANS,	*	
Plaintiff,	*	
	*	Case No. 1:17-cv-00038-ABJ
v.	*	
THE HONORABLE RYAN ZINKE, In her official capacity as Secretary of the Interior,	*	Judge Amy Berman Jackson
THE HONORABLE MICHAEL S. BLACK, In his official capacity as Acting Assistant Secretary – Indian Affairs, Department of the Interior, and	*	
UNITED STATES DEPARTMENT OF INTERIOR,	*	
Defendants.	*	

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Burt Lake Band of Ottawa and Chippewa Indians hereby files this Opposition to Defendants' Motion to Dismiss and states as follows:

INTRODUCTION

This case arises out of two formal petitions by the Burt Lake Band (the "Band") to obtain the federal acknowledgement it has long deserved, and Defendants' failure to make agency decisions and apply regulations that comport with basic constitutional principles. Counts I through III arise out of the Band's 1935 petition submitted under the Indian Reorganization Act of 1934 (hereinafter "IRA Petition"), which sought to restore the Band's treaty-obligated lands and achieve recognition as an independent entity "under [f]ederal jurisdiction." Am. Compl. ¶¶ 60-68 (citing 25 U.S.C. § 479). To this day, Defendants have yet to decide the Band's IRA Petition, and refused

to do so over 80 years earlier due to economic constraints rather than the merits of the Petition (the "non-decision"). *Id*. ¶¶ 74-85 & Exhibit E to the Amended Complaint.

Counts IV through VI are based upon 2015 amendments to the Part 83 regulations by which a tribe currently applies for federal acknowledgement, and which were promulgated and are enforced by the Department of Interior ("DOI") and the Bureau of Indian Affairs ("BIA"). *Id*. ¶¶ 2-4, 136-148. In 1985, the Band submitted a petition to the BIA for federal acknowledgement under Part 83 ("Part 83 Petition"). *Id*. ¶¶ 95-99. In 2006, over twenty years later, the BIA denied the Band acknowledgement, leaving the Band as the only unrecognized "landless" Michigan tribe. *Id.* ¶¶ 100, 128-130. In 2015, Defendants amended the Part 83 process. They expressly considered and refused to adopt a proposal set forth in the Notice of Proposed Rulemaking, which would have allowed limited re-petitioning and included, among other things, a "consistent baseline" approach. Under this approach, a current petitioner could satisfy one of the seven criteria "if a particular amount of evidence or a particular methodology was sufficient to satisfy a criterion in a decision made in 1980, 1990, or 2000." *Id.* ¶¶ 140-145. Since the 2006 denial, the Band has developed and discovered supplemental data and evidence that would satisfy the three criteria it failed to meet in 2006; however, it is permanently banned by the terms of Part 83 from submitting a new petition. *Id.* ¶ 141. By this act, Defendants denied the Band its Due Process right to petition the government for redress of grievances.

In Count VII, the Band pleads in the alternative, and requests that the Court apply its mandamus jurisdiction and compel Defendant Zinke—pursuant to his duties set forth in the Indian Tribe List Act (25 U.S.C. § 5130)—to place the Burt Lake Band on the Federal Register's list of acknowledged tribes. *Id.* ¶¶ 199-205.

Defendants make three principal arguments in their Motion to Dismiss. First, Defendants contend that Counts I-III are time-barred because the Band had constructive knowledge of Defendants' "non-decision" as late as 2006 when the Part 83 Petition was denied. ECF No. 13 at 17-19. Defendants also assert that Counts IV-VI must be dismissed for lack of constitutional standing because the Band allegedly has not been injured by the BIA's refusal in 2015 to allow re-petitioning. *Id.* at 19-22. Finally, Defendants argue that Count VII fails to state a claim upon which relief can be granted. *Id.* at 22-24.

The Band agrees with Defendants that the APA lacks retroactive effect and, therefore, withdraws Count I.[1] Nevertheless, the Band maintains that the Amended Complaint sets forth viable causes of action in Counts II through VII, and for the reasons set forth below, this Motion to Dismiss must be denied:

1. Counts II and III are not time-barred. Rather, they have yet to accrue because Defendants have failed to make a decision on the 1935 IRA Petition from which the Band can seek redress from this Court.

2. Counts IV-VI satisfy Article III standing. The Band has suffered concrete injury in two ways. First, the Band seeks relief under the APA on the grounds that the 2015 decision to reject the proposal in the notice of proposed rulemaking (NPRM) to permit limited re-petitioning, such as where a previously denied petition could be supplemented with new facts and data, is contrary to law, denies the Band the constitutional right to due process, and is arbitrary and capricious. The BIA's rejection of the proposal denied the Band their basic constitutional right to petition the government for redress of grievances because it has permanently precluded the Band from achieving its century-old quest for acknowledgment. Second, pursuant to the 2015 amended regulations' "consistent baseline" approach, the Band claims that it has been discriminated against by being prohibited from attempting to show how their petition is similar to that of recognized tribes who successfully satisfied criterion that the Band purportedly failed to meet.

[1] The Band's IRA Petition was "initiated" in 1935 (Am. Compl. ¶ 66), and the APA was not enacted until 1946. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 583, n. 4 (1952) ("However, § 12 of the [APA]… provides that no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement. The proceedings against Harisiades and Coleman were instituted before the effective date of the Act.") (internal quotations omitted).

3. Count VII sets forth a plausible claim pursuant to this Court's mandamus jurisdiction. In the event that its APA claim for injunctive relief fails, the Band pleads in the alternative this claim for injunctive relief, in which the Court could find that the Constitution requires that Defendant Zinke be compelled to place the Band on the Federal Register's list.

STANDARD OF REVIEW

A plaintiff defeats a motion to dismiss pursuant to Rule 12(b)(1) where the plaintiff establishes that the court has subject matter jurisdiction over its claim. *See Rempfer v. Sharfstein*, 583 F.3d 860, 868-69 (D.C. Cir. 2009); *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007). "At the motion to dismiss stage, counseled complaints, as well as pro se complaints, are to be construed with sufficient liberality to afford all possible inferences favorable to the pleader on allegations of fact." *In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp. 3d 46, 54 (D.D.C. 2016) (quoting *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1106 (D.C. Cir. 2005)).

A dispute regarding the statute of limitations is "[p]roperly considered under the rubric of Rule 12(b)(6)." *United States v. Newman,* CV 16-1169 (CKK), 2017 WL 3575848, at *6 (D.D.C. Aug. 17, 2017). The "D.C. Circuit has 'repeatedly held [that] courts should hesitate to dismiss a complaint on statute of limitations grounds based solely on the face of the complaint.'" *Id.* (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208-09 (D.C. Cir. 1996)). In order for the court to meet this standard, "the factual allegations in the complaint must clearly demonstrate all elements of the statute of limitations defense and that the plaintiff has no viable response to the defense." *United States ex rel. Landis v. Tailwind Sports Corp.*, 51 F. Supp. 3d 9, 38 (D.D.C. 2014).

A Rule 12(b)(6) motion for failure to state a claim "tests the legal sufficiency of a complaint." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). Courts considering Rule 12(b)(6) motions must presume all factual allegations in a complaint to be true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "While the plaintiff must demonstrate 'more than a sheer possibility that a defendant has acted unlawfully,' he need not show a probability that such

unlawful conduct occurred." *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d. 75, 86 (D.D.C. 2014) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. Counts II and III Are Timely Because The Band's Claims Have Yet to Accrue

Defendants incorrectly contend that Counts II and III, violations of the Due Process and Equal Protection clauses of the Fifth Amendment, respectively, must be dismissed because the statute of limitations under 28 U.S.C. § 2401(a) (six years) has expired. ECF No. 13 at 2. Defendants' argument is based on the flawed premise that the Band's claims began to run when it received "knowledge of the purported lack of decision," which could have occurred either in 1980, when the Band gathered correspondence between BIA officials and submitted them to the Defendants in its Part 83 Petition, or, at the latest, in 2006, when the BIA "discussed" the IRA Petition in its denial of the Part 83 Petition. *Id.* at 16, 18. Defendants' arguments fail for two reasons.

A. The Band's claims will not accrue until Defendants decide its IRA Petition

First, the Band's knowledge of this non-decision or "*lack* of decision"—as the Defendants put it—does not commence the limitations period. *Id.* Rather, the claims accrue only when Defendants actually deny (or grant) the IRA Petition, which has yet to even be considered, let alone ruled upon. Am. Compl. ¶ 69. The Fifth Amendment requires that the IRA Petition be, at the least, squarely addressed by the government to comport with procedural due process. *Liff v. Office of the Inspector Gen. for the U.S. Dep't of Labor*, 156 F. Supp. 3d 1, 10 (D.D.C. 2016) ("To state a claim for the denial of procedural due process, a plaintiff must allege that the government deprived her of a 'liberty or property interest' to which she had a 'legitimate claim of entitlement,' and that 'the procedures attendant upon that deprivation were constitutionally [in]sufficient.'") (internal citation omitted). It is engrained in our Constitution that one of the two "core

requirements" of procedural due process is "adequate notice." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 6 (D.C. Cir. 1998).

Here, the government has not "deprived the Band] of a liberty or property interest to which" it is entitled because there has been no decision on the IRA petition in over 80 years. Am. Compl. ¶¶ 74-85. Moreover, even if the government has, in secret, decided the IRA Petition, the government has yet to provide any sort of "adequate notice" that would allow the Band to understand its IRA Petition has officially been denied. *See id.* To this day, the Band believes that the Defendants concluded in the late 1930s that the BIA would not rule on outstanding Michigan IRA petitions until it received further funding and have never revisited the Band's pending Petition. *Id.* ¶¶ 74, 78-82. Exhibit E to the Amended Complaint, a July 20, 2016 letter from the Chairperson of the Band to then-Secretary of Interior Sally Jewell, demonstrates the Band's understanding as recently as last year. Defendants have not responded in any way to this letter, which requests that the BIA finally review and grant the IRA Petition. *Id.* ¶¶ 156, 158.

The IRA remains an operative federal statute and there is nothing preventing the BIA from issuing a decision. *See Carcieri v. Salazar*, 555 U.S. 379, 381–82 (2009) ("The Indian Reorganization Act (IRA or Act) authorizes the Secretary of the Interior . . . to acquire land and hold it in trust 'for the purpose of providing land for Indians.'") (quoting § 5, 48 Stat. 985, 25 U.S.C. § 465); The Meaning of "Under Federal Jurisdiction" for the Purposes of the Indian Reorganization Act, Memo. M-37029 at 26 (United States Dep't of Interior Mar. 12, 2014) ("The Department will continue to take land into trust on behalf of tribes . . . to advance Congress' stated goals of the IRA to provide land for Indians."). Because the government has failed to ever render a decision on the Band's IRA Petition (Am. Compl. ¶ 69), and therefore has not deprived the Band of any interests, the Band is stuck in a limbo space created by the Defendants themselves. Thus,

the Band's Fifth Amendment claims in Counts II and III do not begin to toll until the Defendants actually render a decision. *See Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 219 (D.C. Cir. 2013) (claims did not accrue until the "[Department of] Interior issued its Final Determination"); *Havens v. Mabus*, 759 F.3d 91, 97 (D.C. Cir. 2014) ("Havens's APA claims challenging those decisions accrued when the decisions issued in 2006 and 2007."); *Thalasinos v. Harvey*, 479 F. Supp. 2d 45, 50 (D.D.C. 2007) (APA and Due Process claims not time-barred under § 2401(a) because they "first accrued . . . when the Board of Officers' decision was complete").

Furthermore, it is well-established in other areas of governmental affairs that a "lack of decision" is not equivalent to the denial of a decision. *See, e.g., Paunescu v. INS*, 76 F. Supp. 2d 896, 901 (N.D. Ill. 1999) (granting plaintiffs' summary judgment against the INS for failing to process their visa and concluding the court had mandamus jurisdiction to compel the INS to process the petitions, in part, because "the failure to adjudicate an application is different from the denial of an application"); *Andrews v. McDonald*, 646 Fed. App'x 1001, 1006 (Fed. Cir. 2016) ("The government cannot, as a legal matter, argue that there was no claim in need of adjudication, but if there had been, then it was implicitly denied. Failure to adjudicate [a veteran's petition] cannot be shielded by claims of implicit denial."); *Iddir v. INS*, 166 F. Supp. 2d 1250, 1256 (N.D. Ill. 2001) ("A 'denial,' based on the INS' failure to adjudicate the application until it is too late to do so meaningfully, is not an "adjudication.") (internal citation omitted).

In an attempt to avoid this fatal omission, Defendants argue that the BIA's reference to the IRA Petition in the 2006 Final Determination should trigger the limitations period. ECF No. 13 at 16. This brief allusion to the IRA Petition does not constitute an actual, effective denial that the Band can challenge because it was discussed tangentially in the context of the Part 83 Petition. In

the Final Determination, the BIA "determined" *in dicta* that the IRA Petition was "not a Cheboygan or Burt Lake Band petition" because it was submitted by an unlabeled group of people. *Id.* at 18-19 (citing 71 Fed. Reg. 57,995 (Oct. 2, 2006) (hereinafter "FD") at 75-76). First, this is patently false.[2] But, even if true, this conclusion applied *only* to the analysis of the Part 83 Petition, not the merits of the IRA Petition: "The evidence available about the IRA issue does not demonstrate the petitioning group maintained political influence over its members at that time." FD at 76.

Moreover, the BIA's conclusion that the IRA Petition could not apply to the Band as a whole also plainly misapplied the law and therefore, did not squarely decide the IRA Petition. Am. Compl. ¶ 63. The IRA does not require a tribe or band in its entirety to successfully file a petition but, instead, allows even a half-blooded Indian individual to apply. *Id.* (quoting 25 U.S.C. § 479); *see, e.g.*, *Stand Up for California! v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 68 (D.D.C. 2013) (concluding that "a formal tribal government is not necessary to be considered a "tribe" for purposes of the IRA. The fact that the ["landless"] North Fork people were, at least as early as 1916, an organized band of individual Indians is sufficient to conclude that the North Fork people were a 'tribe' under the IRA."). Moreover, both this Court and the D.C. Circuit have agreed with the Secretary of Interior (who takes the opposite approach in this case) that a determination whether a tribe was "under Federal jurisdiction" as of 1934 for purposes of the IRA is a different analysis than whether the Band met the Part 83 criteria. *See Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 565 (D.C. Cir. 2016) (upholding the Secretary of Interior's interpretation that the plaintiff was a 'tribe' under the IRA by applying a flexible

[2] On July 23, 1935, after receiving the IRA Petition, Commissioner of Indian Affairs John Collier asked a BIA official working in Michigan for information regarding the "Cheboygan Band of Indians." Am. Compl. ¶ 74, Exhibit C.

approach; "[s]uch contextual analysis takes into account the diversity of kinds of evidence a tribe might be able to produce, as well as evolving agency practice in administering Indian affairs and implementing the statute. It is a reasonable one in light of the remedial purposes of the IRA and applicable canons of statutory construction."). Thus, the mere fact that the Final Determination recognized the IRA Petition's existence has no significance as to whether the 41 Band members who were signatories to the Petition—and who could directly trace their lineage back to either the 1855 Treaty of Detroit or the 1909 Durant Roll—constituted a "tribe" under the IRA in 1935 when the Band applied. Neither the BIA's reference to the IRA Petition nor the Band's knowledge of this reference tolls the Band's claims. ECF No. 13 at 18. The Band has a right as a matter of law to challenge the IRA Petition, once decided, and tolling of those claims will not begin to run until the government actually deprives the Band of its "claim of entitlement." *Liff*, 156 F. Supp. 3d at 10.

Finally, this is the exact argument that Defendants used *against* the Band in 2002 when the Band had waited almost two decades for a decision on its Part 83 Petition. This Court, ruling in the government's favor, found that the Band had no avenue of relief until it exhausted its administrative remedies and until the government decided the Part 83 Petition. *See* Am. Compl. ¶¶ 106-107 (citing *Burt Lake Band of Ottawa & Chippewa Indians v.* Norton, 217 F. Suppl. 2d 76, 79 (D.D.C. 2002)). The Defendants cannot use this argument both as a shield and a sword. In other words, Defendants cannot prevent the Band from filing one suit until a decision is made and do the same by arguing they need not make a decision at all. Like the plaintiffs in *Paunescu*, the Band's members have been the "victims of a bureaucratic nightmare" who "should not be penalized for the government's misfeasance" and therefore, the Defendants must perform a "non-discretionary duty within a reasonable time." *Paunescu*, 76 F. Supp. 2d at 901-902; *see also*

Totonchi v. Gonzalez, No. 1:07 CV 0256, 2007 WL 2331937, at *4 (N.D. Ohio Aug. 13, 2007) (an agency's failure to adjudicate an application does not invoke a "judgment" or "decision" and "in the absence of a final decision from [the agency], he has no other means by which to challenge [the agency's] alleged failure to timely adjudicate his petition.").

The Band has no other means of challenging the merits of the IRA Petition if there is no petition to challenge. By failing to squarely address the IRA Petition, Defendants have precluded the tolling of § 2401(a). The D.C. Circuit has routinely held that "[t]here is an inherent problem" granting motions to dismiss based on statute of limitations defenses because it is "more than likely that the plaintiff can raise factual setoffs to such an affirmative defense." *Richards v. Mileski*, 662 F.2d 65, 73 (D.C. Cir. 1981) ("The filing of an answer [and] raising the statute of limitations, allows both parties to make a record adequate to measure the applicability of such a defense, to the benefit of both the trial court and any reviewing tribunal."). For these reasons, Counts II and III are not time-barred and should not be dismissed.

B. Even if the tolling period on Counts II and III has begun to run, this Court should apply equitable principles

The second reason the Band's claims are not time-barred is because the statute of limitations under 28 U.S.C. § 2401(a) should no longer constitute a "jurisdictional condition" that prohibits equitable principles. Defendants rely on *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) for the proposition that "§ 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity" and thus, bars equitable doctrines. The D.C. Circuit, however, has not weighed in on this issue since the Supreme Court suggested otherwise in 2015. As Defendants mentioned in footnote 6 of their Motion, the Supreme Court held in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015) that § 2401(b) was not jurisdictional. *Kwai Fun Wong*, 135 S. Ct. at 1632-33 ("We have made plain that most time bars are nonjurisdictional" and "section

2401(b) 'reads like an ordinary, run-of-the-mill statute of limitations,' spelling out a litigant's filing obligations without restricting a court's authority.") (quoting *Holland v. Florida*, 560 U.S. 631, 647 (2010)).

In fact, the Sixth Circuit, armed with the Supreme Court's decision, applied the reasoning in *Wong* to section 2401(a) and criticized the D.C. Circuit, among others, for failing to follow suit. *See Herr v. United States Forest Serv.*, 803 F.3d 809, 818 (6th Cir. 2015). The Sixth Circuit in *Herr* criticized the D.C. Circuit and its sister circuits that have found section 2401 to be jurisdictional, but also recognized that even those courts that refused to make section 2401(a) a jurisdictional requirement had not yet taken into account the *Wong* decision. *See id*. ("Many of these cases, however, have not grappled with the Supreme Court's recent cases limiting the concept of jurisdiction. None has considered the impact of *Kwai Fun Wong*, decided just this year. When the D.C. Circuit has noted the apparent conflict between its decision and [other cases], it has acknowledged the point each time yet steered the basis for decision to other grounds."); *see also Hill v. Cecala*, No. CV 16-0659 (CKK), 2016 WL 4099056, at *1 (D.D.C. Aug. 2, 2016) ("The D.C. Circuit has not revisited the precedent binding this Court on the presentment requirement in light of *Wong*, and the occasion is not presented here where the motion to dismiss is uncontested.").

"[T]he Government must clear a high bar to establish that a statute of limitations is jurisdictional." *Kwai Fun Wong*, 135 S. Ct. at 1632. Congress is required to "clearly state" that a court should treat a statute of limitations as jurisdictional. *See U.S. ex rel. Heath v. AT & T, Inc.*, 791 F.3d 112, 120 (D.C. Cir. 2015) ("Absent such a clear statement, courts should treat the restriction as nonjurisdictional in character."); *Montes v. Janitorial Partners, Inc.*, 859 F.3d 1079, 1084 (D.C. Cir. 2017) (finding an FTCA limitations period nonjurisdictional where no explicit

statement existed). Otherwise, "time limitations for filings in statutes are presumptively non-jurisdictional." *Montford & Co. v. S.E.C.*, 793 F.3d 76, 83 (D.C. Cir. 2015); *see also Owens v. Republic of Sudan*, No. 14-5105, 2017 WL 3203263, at *34 (D.C. Cir. July 28, 2017) ("[T]he Court 'made plain that most time bars are nonjurisdictional.'") (quoting *Kwai Fun Wong*, 135 S. Ct. at 1632).

The federal "catch-all statute of limitations" in section 2401(a) reads "like an ordinary, run-of-the-mill statute of limitations." *Price v. Bernanke*, 470 F.3d 384, 387 (D.C. Cir. 2006); *Kawi Fun* Wong, 135 S. Ct. at 1632-33; *see* 28 U.S.C. § 2401. Section 2401(a) says nothing about requiring the statute to be jurisdictional in nature. In light of the Supreme Court's decision, this Court should conclude that section 2401(a), just like subsection (b), does not serve as a jurisdictional bar. On that basis, the Band contends that even if this Court were to conclude that the Band's claims arising from the 1935 IRA Petition did begin to toll, equitable principles such as estoppel and equitable tolling should apply.

"Equitable estoppel precludes a defendant, because of his own inequitable conduct — such as promising not to raise the statute of limitations defense — from invoking the statute of limitations." *Chung v. U.S. Dep't of Justice*, 333 F.3d 273, 278–79 (D.C. Cir. 2003) (internal citations omitted). Equitable estoppel "prevents a defendant from asserting untimeliness where the defendant has taken active steps to prevent the plaintiff from litigating in time." *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1367 (D.C. Cir. 1998).

The "core purpose" of equitable tolling is to "prevent a plaintiff from being disadvantaged by the expiration of the limitations period when it ran through no fault of his or her own." *Dove v. Washington Metro. Area Transit Auth.*, 402 F. Supp. 2d 91, 98 (D.D.C. 2005), *aff'd*, 2006 WL 7136123 (D.C. Cir. Mar. 13, 2006). Equitable tolling has been applied by this Court where a

plaintiff's "untenable choice" between waiting to exhaust administrative remedies and filing within the statute of limitations "is manifestly unfair, absent the applicability of equitable tolling where appropriate." *Pettaway v. Teachers Ins. & Annuity Ass'n of Am.*, 547 F. Supp. 2d 1, 6 (D.D.C. 2008) (applying equitable tolling to an ERISA claim; 'the circumstances' that prevented her from filing her complaint in a timely manner; *i.e.*, this Circuit's administrative exhaustion requirement and the SBA's delay in processing her internal appeal, were insuperable and therefore 'extraordinary'") (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

The Amended Complaint demonstrates that the Band has faced "extraordinary" circumstances that warrant application of these principles, which would allow the Band to proceed on its claims. *See Pace*, 544 U.S. at 418. After filing the 1935 IRA Petition, the Band did not receive any notice of correspondence among BIA officials about their deliberate inaction for decades. Am. Compl. ¶¶ 66, 81-84. It was not until around 1980, when the Band began to compile records and historical documents for its Part 83 Petition that it learned of these letters and the Defendants' "non-decision." *Id.* ¶¶ 85, 93, 97. Nevertheless, even if the Band were to file within six years after learning of the non-decision, it would have been futile. At the time, the Band was preparing its Part 83 Petition, which it believed to be its only avenue to acknowledgement once the Part 83 was created, and in 1985, filed its Part 83 Petition. *Id*. ¶¶ 85-86, 95-97, 99, 100, 106. Had the Band filed suit on the non-decision right before it filed its Part 83 Petition, the BIA would have claimed it would not have had any consequence. And, when the Band did file suit in 2001 after the Petition was filed, Defendants unsurprisingly prohibited the Band from seeking redress for the non-decision. *Id.* ¶ 106 (citing *Burt Lake Band v. Norton*, 217 F. Supp. 2d 76, 79 (D.D.C. 2002) (granting the government's motion to dismiss and requiring the Band first exhaust its administrative remedies before litigating these issues on the merits). Consequently, the Band

received its Final Determination in 2006, which did not squarely address the IRA Petition, and still, no decision has been made on it. *Id*. ¶¶ 107, 69. Had the IRA Petition been granted at any time before the Final Determination, it may have positively affected the Band's Part 83 Petition.

Applying the facts at hand, equitable estoppel must apply because Defendants' actions, by "preventing" the Band from litigating the issue before 2006, and their inactions, by deliberately refusing to make a determination, require an extension of the limitations period. *See Currier,* 159 F.3d at 1367. Similarly, this Court must apply equitable tolling to Counts II and III because it would be "manifestly unfair" for the Band to have to make a choice between filing a lawsuit within the limitations period and waiting for Defendants to make a final determination. *See Pettaway*, 547 F. Supp. 2d at 6.

II. The Band Has Established Article III Standing For Counts IV – VI

Counts IV through VI are based upon the DOI's 2015 amended regulations to Part 83 (hereinafter "2015 Amendments") and the Band's ability to seek recognition through that process. Defendants move to dismiss these claims for lack of Article III standing. To satisfy standing, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1541 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Defendants only challenge the first element (injury-in-fact) of the tripartite test. (ECF No. 13 at 20-22).

A. The Band has suffered a concrete injury in fact

To establish injury in fact, a plaintiff must show that it suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc.*, 136 S. Ct. at 1548 (quoting *Lujan,* 504 U.S. at 560). For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Id.*; *see also*

Valley Forge Christian College v. Am. United For Sep. of Church and State, Inc., 454 U.S. 464, 472 (1982) (standing requires that a plaintiff "personally has suffered some actual or threatened injury"). "A 'concrete' injury must . . . actually exist." *Spokeo Inc.*, 136 S. Ct. at 1548 (quoting Black's Law Dictionary 479 (9th ed. 2009)).

The Amended Complaint demonstrates two main injuries as a result of the 2015 Amendments: the Band suffered irrevocable harm (1) by the BIA's decision to deny a tribe in the Band's position the ability to submit a new petition seeking recognition; and (2) the creation of a "consistent baseline" approach by which a current petitioner (but not the Band) could satisfy one of the seven criteria "if a particular amount of evidence or a particular methodology was sufficient to satisfy a criterion in a decision made in 1980, 1990, or 2000." Am. Compl. ¶¶ 140-145.

Defendants offer two main challenges to the Band's well-pled injuries resulting from the ban on re-petitioning: (1) the Band was prohibited from re-petitioning even before the 2015 Amendments, which "merely continued the pre-existing bar"; and (2) the substantive changes to the Part 83 criteria would not affect the Band's petition, and therefore, even if the Band were able to re-petition, it would still not be able to satisfy all seven criteria. ECF No. 13 at 19-20.

Defendants mischaracterize the Band's position: the Band is neither appealing the 2006 Final Determination nor does it seek to re-petition on the same facts. Since 2006, the Band has developed and discovered additional, material evidence and updated its membership rolls. Am. Compl. ¶¶ 149-155. Therefore, the Band seeks the opportunity to submit a new petition based on *new* facts and data. *Id.* This distinction is critical. As to Defendants' first argument, it does not matter whether the 2015 Amendments first created a prohibition on re-petitioning or continued the practice: the current Part 83 regulations, which considered public comments and rejected the option set forth in the proposed rule on limited re-petitioning in 2015, prevent the Band from

submitting a new petition based on new facts and circumstances. Thus, the Amended Complaint makes clear that the original creation of the ban on re-petitioning (1994 or 2015) is irrelevant to the Band's injury; it is the agency's action to deny such a rule in 2015 that is operative, and this APA challenge to that decision falls within the applicable statute of limitations. *Id.* ¶ 152. For the same reasons, it is also of no import that the 2015 Amendments did not substantively alter the Part 83 criteria in a way that would change the Band's *original* Part 83 Petition because—even if that were true—it is the evidence the Band seeks to submit in a new petition, not the criteria, that has materially changed.

1. The Band has suffered an injury resulting from the BIA's 2015 decision to deny limited re-petitioning

First, in Count IV, the Band asserts a claim under the APA for unlawful and arbitrary and capricious agency action. *See* 5 U.S.C. § 706(2). The claim is premised on the allegation that in 2015, the BIA fully considered and rejected a proposed amendment to its Part 83 process, on which public comment was expressly sought, that would have eliminated an unlawful provision previously included in the regulations that permanently prevented an unsuccessful petitioner from submitting a new petition for recognition. *See* Am. Compl. ¶¶ 141-146.

In 2009, three years after the Band received its Final Determination, the BIA considered amending the "broken" Part 83 process. *Id.* ¶¶ 136-138. During the BIA's rulemaking process, it solicited comments and feedback on proposed rules, including a rule which would recognize the right to "limited re-petitioning." *Id.* ¶ 142. Opponents of limited re-petitioning objected on grounds that it was "unnecessary," "inefficient," "unfair to *other* tribes" and most remarkably, because re-petitioning "could result in acknowledgment of previously denied petitioners." *Id.* (quoting Final Rule, Department of Interior, 80 FR 37861, 37874, codified at 25 C.F.R. Part 83 (July 1, 2015) (hereinafter "Final Rule")). The Band itself participated in the notice-and-comment

rulemaking when it submitted comments and endorsed the proposed rule for limited re-petitioning. *Id.* ¶ 144, Exhibit D. The BIA ultimately refused to adopt this aspect of the proposed rule, rejecting arguments in support of limited re-petitioning which reasoned that a complete ban would "treat petitioners unequally" and was "based on an invalid justification that fails to consider petitioners' interests." *Id.* ¶ 143. The BIA's justification was premised on its need for greater administrative efficiency and less of a workload. *See* ECF No. 13 at 7; *see also Hansen v. Salazar*, No. C08-0717-JCC, 2013 WL 1192607, at *7 (W.D. Wash. Mar. 22, 2013) ("An agency decision will be upheld 'only on the basis of the reasoning articulated therein.'") (quoting *Cal. Energy Comm'n v. Dep't of Energy*, 585 F.3d 1143, 1150 (9th Cir. 2009)).

The Band has standing to raise this APA claim because it has been aggrieved by the BIA's action in 2015 where it rejected a proposed rule that would have permitted tribes to submit a new petition after previously having been denied. *See Patchak v. Salazar*, 632 F.3d 702, 704 (D.C. Cir. 2011) ("Section 702 allows judicial review of agency action by a 'person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'") (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 395–96 (1987)). That decision, a permanent denial of the Band's rights, is unlawful under the APA—as a violation of Due Process and arbitrary and capricious for the reasons alleged in the Amended Complaint—and the claim is clearly within the statute of limitations period.[3] The BIA's decision became "final" when the BIA officially rejected this aspect of the proposed rule and codified its new regulations on June 19, 2015. *See* Am. Compl. ¶ 136. Fundamentally, the fact that the law *demands* that the

[3] An action brought under the APA "carries a six-year statute of limitations." *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1094 (D.C. Cir. 1996). For an APA claim, the "right of action generally accrues at the time the agency action becomes final." *Aguayo v. Jewell*, 827 F.3d 1213, 1226 (9th Cir. 2016).

Band's APA claim not accrue until "final agency action" occurs proves the Band's injury: the 2015 Amendments were not a "mere continuation" of the 1994 regulations, but constitute a new "final agency action," taken after notice and comment on this specific issue, that is needed to bring this claim. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (agency action is "final" when it marks "the consummation of the agency's decision-making process"). The Band's injuries based on the face of the Amended Complaint are self-evident: the BIA's decision to prevent re-petitioning harms the Band, both as a participant in the rulemaking procedure that endorsed the rejected proposal, and a previously-denied petitioner who is permanently affected by this decision "in a personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

Other Indian tribes have demonstrated Article III standing when similarly challenging the BIA's actions. In *Cherokee Nation of Oklahama v. Babbitt*, the D.C. Circuit held that the Cherokees had standing because "the [BIA's] Final Decision affects the authority of the Cherokee Nation over the Delawares and may affect its eligibility for certain federal funds. Thus, the Cherokee Nation has suffered an injury-in-fact that is fairly traceable to the Department's action and that can be redressed by an order invalidating the Final Decision." 117 F.3d 1489, 1496 n.9 (D.C. Cir. 1997) (emphasis added). Courts have also found standing where, as is the case here, a petitioner challenges the procedures that the BIA applied. In *Hansen v. Salazar*, for example, the Duwamish tribe challenged the BIA's final determination, which rejected their petition for federal acknowledgement under the 1978 regulations (as opposed to the 1994 regulations). *See* 2013 WL 1192607, at *10. As in this case, the DOI in *Hansen* argued that the final determination of the petition "would be the same under either version of the rules." *Id.* at *9. The court disagreed, because "it is **at least possible** that [its] application . . . would result in a different decision." *Id.* (emphasis added). The resolution of *Hansen* on the merits necessarily proves that the court

considered and determined that standing had been satisfied.[4] The *Hansen* court also found that even if the resolution of the petition is the same, "the Duwamish will have received the benefit of a more transparent decision making process." *Id.* at *10. Ultimately, the court remanded the decision to the BIA for reconsideration, holding that the decision to apply the 1978 regulations and the Department's failure to "explain why the Duwamish petition was being treated differently than the [similarly-situated] Chinook petition" was arbitrary and capricious. *Id.* at *9.

The same reasoning applies here. The Band has been injured by virtue of being permanently denied the right to apply for federal recognition. The fact that a new, independent review on a new record could result in denial of a new petition again is not a legally valid reason to dismiss these claims. *See Banner Health v. Price*, No. 16-5129, 2017 WL 3568294, at *6 (D.C. Cir. Aug. 18, 2017) ("For purposes of standing, this court is to 'assume' that a plaintiff is 'correct on the merits,' and that the court will grant the relief sought.") (quoting *Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012)). If the Band were permitted to submit a new petition based on new data and evidence, it is "at least possible" that the BIA's review could "result in a different decision." *Hansen*, 2013 WL 1192607, at *10. To Defendants' point, denial of the right to have the *same* facts reviewed under the *same* process would not show an injury-in-fact. The Amended Complaint, however, does not plead such an injury.

Moreover, the Band "will have [at least] received the benefit of a more transparent decision making process" under the 2015 Amendments. *Id.* To be sure, the very purpose of the 2015 Amendments was to make the Part 83 process more efficient and more transparent. *See* Final Rule, at 37862 ("The [2015] revisions seek to make the process and criteria more transparent, promote

[4] *See Stand Up for California!*, 919 F. Supp. 2d at 56 ("The defendants do not challenge the standing of the plaintiffs in this action, but 'federal courts, being courts of limited jurisdiction, must assure themselves of jurisdiction over any controversy they hear, regardless of the parties' failure to assert any jurisdictional question.'") (quoting *Canning v. NLRB*, 705 F.3d 490, 498 (D.C. Cir. 2013)).

consistent implementation, and increase timeliness and efficiency . . . ."); 25 C.F.R. § 83.10(b)(5) (amended in 2015 to codify the practice that the Department will apply the "criteria in context with the history, regional differences, culture, and social organization of the petitioner").

Count V asserts a claim alleging a violation of the Due Process Clause of the Fifth Amendment based on the BIA's decision to deny a right to submit a new petition in the 2015 Amendments. The BIA's decision, which was justified on administrative efficiency concerns, denied the Band the basic, constitutional right to petition the government for redress of grievances under the Due Process Clause. *See Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 664 (1986) ("Agency deference has not come so far that we will uphold regulations whenever it is possible to conceive a basis for administrative action" and must still "withstand analysis under the Due Process Clause"). Nowhere in the Defendants' motion to dismiss do they cite to a statute that purportedly grants the BIA authority to refuse to accept or consider a new petition. *See Bowen v. Georgetown Univ. hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.") *Contra Broudy v. Mather*, 460 F.3d 106, 122 (D.C. Cir. 2006) ("VA regulations allow petitioners to 'reopen a finally adjudicated claim by submitting new and material evidence.'") (quoting 38 C.F.R. § 3.156(a)). This ban on re-petitioning was created by the BIA for the sole purpose of reducing its own workload (Am. Compl. ¶¶ 136, 145-46), notwithstanding that it deprived those adversely affected by the agency's actions to exercise their constitutional right to seek redress.

2. The Band has suffered an injury resulting from the 2015 Amendment's denial of its ability to take advantage of the "consistent baseline" approach that is available to other tribes

The Band also has been unlawfully discriminated against by Defendants' denial of the ability to have its right to recognition decided under the new "consistent baseline" approach, which allows current petitioners to satisfy any of the Part 83 criterion by demonstrating that the BIA had

previously met the same criterion under similar facts. Count VI asserts that Defendants violated the Equal Protection Clause by failing to consider the Band's Part 83 Petition in the same manner as similarly-situated tribes who were granted recognition, despite the fact that they all have intertwined histories. Am. Compl. ¶¶ 128-130. The 2015 Amendments now intend to treat similarly-situated petitioners equally to the detriment of previously-denied petitioners. *See Id*. ¶¶ 196-98. Given the opportunity to submit a new petition, the Band would be able to show that new evidence and data supports their right to acknowledgement. The Band could also show how the BIA has found certain criterion to have been satisfied in the past on other petitions, and that the similarities between those petitions and the Band's petition would require Defendants to grant acknowledgment in this way as well. *Id*. ¶¶ 129, 140.

The injuries that the Band alleges in Counts IV through VI are not "conjectural or hypothetical." *See Lujan*, 504 U.S. at 560. Rather, because the governing regulations—the 2015 Amendments—prohibit submitting a petition based on new evidence, the Band has been and will continue to be harmed by the federal government's denial of federal funding and benefits when the Band has a legally protected interest in receiving it. This is a permanent and tangible injury.

Defendants do not challenge the second and third elements of standing and are precluded from raising such a challenge for the first time in their reply brief. *See McBride v. Merrell Dow & Pharm.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) ("Considering an argument advanced for the first time in a reply brief . . . is not only unfair to an appellee, but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered.") (internal citation omitted); *Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 343 (D.D.C. 2011) ("[B]ecause this argument was raised for the first time in reply, depriving Plaintiffs of an

opportunity to render a meaningful response, the Court declines to consider it on the merits."). Therefore, constitutional standing has been met.

B. Defendants' remaining arguments challenging the Band's standing have no merit

Defendants claim that the 2015 Amendments to Part 83 constitute a "clarifying" regulation, which carries no significance to the standing analysis. But, even if it were significant, the amendments are not "clarifying." Defendants rely on *Miami Nation of Indians of Indiana v. Babbitt* for its holding that a "clarifying regulation ordinarily is not retroactive." 112 F. Supp. 2d 742, 760 (N.D. Ind. 2000). In *Miami Nation*, the tribe sought to re-petition under the 1994 regulations after its petition had been denied under the 1978 regulations, which the court ultimately rejected. *See id.* at 759-60. This case, however, is materially distinguishable for two reasons.

First, unlike the 1994 regulations, the 2015 Amendments are <u>not</u> merely clarifying. The *Miami Nation* court determined the 1994 regulations were clarifying because the drafters explicitly stated as much in the preamble to the 1994 Part 83 regulations. *Id.* No such language exists within the preamble or anywhere else in the 2015 Amendments. In fact, the Executive Summary of the Final Rule states: "This rule updates Part 83 to improve the processing of petition for Federal acknowledgement of Indian tribes . . . The rule does not substantively changed the Part 83 criteria, **except in two instances**." Final Rule, at 37862-63 (emphasis added).

Second, Miami Nation was not seeking a petition based on new facts like the Band does now. "Rather, [petitioner sought] the Department's reevaluation of its data under the 1994 provisions for previously acknowledged tribes." *Miami Nation*, 112 F. Supp. 2d at 760. The distinction is, once again, critical. In *Miami Nation*, a tribe sought a "reevaluation" of the same data under a "clarifying" regulation. *See id.* By contrast, the Band seeks a *new* petition under a different set of facts and data based on a regulation that was substantively amended and intended to overhaul the Part 83 process. *See* Final Rule at 37862 ("This rule revises . . . the process [which]

has been criticized as 'broken' and in need of reform."). Thus, the reasoning Defendants rely on in *Miami Nation* is inapposite.

Defendants also contend that allowing the Band to submit a new petition would be unfair to other petitioners whose claims have not been resolved and would hinder the effort to increase timeliness by increasing the BIA's workload. (ECF No. 13 at 6-7). The Band is not seeking to be placed at the front of the line ahead of other petitioners who have also waited decades for answers; rather, it only seeks to have an opportunity to submit a new petition considered in the BIA's normal order. Additionally, as explained above, the agency's desire to reduce its own workload cannot justify a decision to deny a party the right to petition the government for redress of grievances under a statute adopted by Congress. *See Beverly Health & Rehab. Servs., Inc. v. Thompson*, 223 F. Supp. 2d 73, 90 (D.D.C. 2002) ("Courts often have invalidated agency action because it simply did not comport with standards of rational decision making given the agency's uncontested goals."); *see also James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1138 (D.C. Cir. 1987) ("The Department of the Interior's Branch of Acknowledgment and Research was established for determining whether groups seeking tribal recognition actually constitute Indian tribes."). That motivation, which was the justification for banning re-petitioning is, in fact, the very reason the Band has suffered injury and brought these claims.

Finally, Defendants claim that even if re-petitioning were allowed, there is no injury now because the Band had "ample opportunity" to "submit additional evidence," "to modify its membership" and to "challenge the Final Determination." ECF No. 13 at 21-22. As support, Defendants rely on the 1994 regulations, which contemplated future, "undiscovered evidence which might change the outcome of decisions." *Id.* at 22 (quoting 29 Fed. Reg. at 9291). The regulations state, in the event of new evidence, (1) Part 83's "several stages of review with multiple

opportunities to develop and submit evidence" are sufficient; and (2) at worst, "denied petitioners still have the opportunity to seek legislative recognition if substantial new evidence develops." *Id.*

This in no way refutes the Band's showing of injury or standing, and further demonstrates the regulations' flaws as it relates to re-petitioning. First, the Department's "stages of review" would require that the Band's "undiscovered evidence" be discovered during the time between a Proposed Finding and a Final Determination. The Band does not possess a crystal ball: it could not predict when the Little Traverse Bay Band would decide to reverse course and support (rather than oppose) its neighboring tribe's quest for recognition; nor could it predict when the Band could accurately (and affordably) update its membership rolls. Am. Compl. ¶¶ 150, 153. Moreover, no reasonable petitioner would risk asking the BIA to pause its review while it waits for *potentially* undiscovered evidence in the event the BIA turns to other petitions. It took Defendants more than twenty years just to begin reviewing the Band's Part 83 Petition as it is. *Id*. ¶ 107. Second, the fact that a petitioner can seek redress from Congress for grievances does not excuse the BIA for creating unlawful regulations, violating the Band's Due Process rights, and acting beyond its scope of authority. *See supra* 14-19. Defendants only advance this argument, which is immaterial to the harm the Band has suffered at Defendants' hands, because they do not want to reconsider a new petition from the Band that it is obligated to hear.

This is evidenced by the government's blatant contradictions in its Motion. On the one hand, Defendants claim that if a situation arises where new evidence could change the outcome of a final determination, like the case at issue, a petitioner could always seek legislative relief due to the ban on re-petitioning. On the other hand, Defendants argue in this same Motion that "recognition by the Executive branch **does not allow** a defendant to bypass the BIA, even if the recognition occurred in a treaty" . . . and recognition is "traditionally an executive function." ECF

No. 13 at 23-24 (emphasis added). The government cannot have it both ways, and it cannot contort its position to ensure this Court does not second-guess the BIA's decisions and properly administer justice. In sum, the BIA cannot dodge their administrative responsibility.

Defendants' above-mentioned arguments are made to no avail. They do not preclude the Band from demonstrating that it has pled an injury-in-fact arising from Defendants' conduct and the 2015 Amendments. As a result, the Band has satisfied that it has suffered a concrete and particularized injury and has demonstrated that it has standing to pursue Counts IV through VI.

III. Count VII States A Claim Upon Which Relief Can Be Granted

Count VII seeks this Court to order Defendants to place the Burt Lake Band on the Federal Register list of federally recognized tribes. Am. Compl. ¶¶ 200-05. The Secretary of Interior has an obligation to regularly update that list pursuant to the Federally Recognized Indian Tribe List Act. *See* 25 U.S.C. § 5130 *et seq.* One of the three ways in which a tribe may achieve federal recognition, which Defendants continue to ignore, is "by a decision of a United states court." Am. Compl. ¶ 202 (quoting Pub. L. 103-454, § 103(3)). *Cf. Cherokee Nation of Oklahoma v. Norton*, 389 F.3d 1074, 1087 (10th Cir. 2004) (a court may review the DOI's actions recognizing or refusing to recognize a tribe: "The DOI's recognition . . . violated § 103(3) of the Federally Recognized Indian Tribe List Act.").

Defendants claim that the List Act itself "does not provide an independent cause of action," and because a decision for recognition is only reviewable under the APA, this claim must be dismissed. ECF No. 13 at 22-23. Contrary to Defendants' assertions, the Band has the ability to plead in the alternative a writ of mandamus claim should its APA claim fail. *See Wyandotte Nation v. Salazar*, 939 F. Supp. 2d 1137, 1148 (D. Kan. 2013) ("The availability of a remedy under the APA technically precludes [an] alternative request for a writ of mandamus. The available remedy under both statutes . . . is essentially the same—a mandatory injunction."). "The primary purpose

of the writ . . . is to ensure that an agency does not thwart our jurisdiction by withholding a reviewable decision." *Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). "Where an administrative agency unlawfully withholds an action," this "signals the 'breakdown of regulatory processes'" and establishes a claim for injunctive relief. *See id.* at 418 (quoting *Cutler v. Hayes*, 818 F.2d 879, 897 n. 156 (D.C. Cir. 1987)).

The Band has already alleged a violation of the APA for its arbitrary and capricious action related to the 2015 Amendments in Count IV. Thus, in the event that the Band is unsuccessful as to Count IV on APA grounds, the Band has pled in the alternative a request for injunctive relief under the Mandamus Act to compel the Secretary of Interior to place the Band on the list. *See* 28 U.S.C. § 1361 ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."). Count VII relies on the exact same allegations as Counts IV. Because Defendants do not similarly challenge Count IV for failure to state a claim, Defendants have no basis to claim the alternatively pled Count VII is insufficient.

CONCLUSION

WHEREFORE, The Burt Lake Band respectfully requests that the Court deny Defendants' Motion to Dismiss with respect to Counts II through VII.

ORAL HEARING REQUESTED

Pursuant to LCvR 7(f) and 78.1, Plaintiff requests an oral hearing on this Motion.

Dated: August 31, 2017

Respectfully submitted,

/s/ Moxila A. Upadhyaya

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