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, et al., Defendants.	)	Case No. 1:17-cv-00038-ABJ

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Plaintiff Burt Lake Band of Ottawa and Chippewa Indians ("Plaintiff" or "Burt Lake Band") maintains that it has an outstanding claim from a petition filed under the Indian Reorganization Act ("IRA") in 1935, over eighty years ago, by forty-one Indians that did not represent Plaintiff. Plaintiff's claims asserting that the Department of the Interior ("Department") failed to make a formal decision on an IRA petition, Counts II and III,[1] have no statutory basis and are clearly barred by the statute of limitations. Plaintiff argues in response that its claims have not yet accrued and will not accrue until the Department makes a decision on the IRA petition, but even if true, then Plaintiff's claims are not ripe and Plaintiff has failed to state a claim upon which relief can be granted.

[1] Plaintiff acknowledged that the Administrative Procedure Act did not apply retroactively to the IRA petition and subsequently withdrew Count I. Opp'n to Defs.' Mot. to Dismiss at 3, ECF No. 14 ("Pl.'s Opp'n").

Plaintiff also lacks standing on its challenge to the regulatory provision preventing re-petitioning under 25 C.F.R. Part 83, Counts IV, V, and VI. The 2015 regulations continued the bar on re-petitioning that had been in place at least since the 1994 regulations. Thus, if Plaintiff was injured by this bar, the injury occurred in 2006 when its acknowledgment petition was denied. Plaintiff did not appeal the denial, nor did Plaintiff challenge the 1994 regulations' bar on re-petitioning. The 2015 regulations considered, but did not adopt, a proposal that would have allowed a previously rejected petition to be reconsidered under the new regulations if several factors were met. The Department's consideration of such a proposal is insufficient to show that the 2015 regulations injured Plaintiff because Plaintiff neither asserts that it would have met the factors for reconsideration nor seeks to have its previous petition reconsidered under the 2015 regulations. Instead, Plaintiff seeks to file a new petition based on alleged new data and evidence. The Department did not consider allowing this type of re-petitioning, and Plaintiff thus is not newly injured by the 2015 regulations.

Finally, Plaintiff fails to state a claim for relief under the the Federally Recognized Indian Tribe List Act of 1994 ("List Act"). Plaintiff does not assert that the Department violated the List Act, but instead asks the Court to order the Department to put it on the Federal Register list of federally recognized Indian tribes pursuant to the Court's mandamus powers. Plaintiff failed to plead mandamus in its Amended Complaint, and also fails to show a non-discretionary duty that this Court should compel. Plaintiff has not stated a claim upon which relief can be granted on its List Act claim.

II. ARGUMENT

A. PLAINTIFF'S COUNTS II AND III ARE UNTIMELY.

1. Even if Plaintiff had a Valid Claim, it Accrued Outside the Statute of Limitations Period.

Having conceded that the APA is not retroactive to the 1935 petition, Plaintiff's Counts II and III that the Department's "non-decision" violated its due process and equal protection rights fail to state a claim and, even if true, are barred by the statute of limitations and should be dismissed. This Court should reject Plaintiff's assertion that the statute of limitations will not begin to run until the government actually decides the IRA petition. The claims either accrued long ago and are out of time, or if, Plaintiff is correct that it has not yet been deprived of a liberty or property interest to which it is entitled, Plaintiff's claims are not ripe and Plaintiff has failed to state a claim upon which relief can be granted. In any event, the law in this Circuit is well-settled, and 28 U.S.C. § 2401(a) is jurisdictional.

The Federal Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss, ECF No. 13 ("Defendants' Memorandum"), demonstrated that at the very latest Plaintiff was aware in 2006 of the 1935 IRA petition and alleged failure to act on it when the Department issued its Final Determination on Plaintiff's acknowledgment petition. Defs.' Mem. at 16–17; Am. Compl. ¶ 85 (admitting Plaintiff knew of alleged inaction in the 1980s). As part of that decision, the Department concluded that the petition did not represent a Cheboygan or Burt Lake Band petition. *Id.* at 10. To the extent that Plaintiff is injured by a lack of ruling on the IRA petition, that injury occurred no later than 2006, more than ten years before this case was brought. The cause of action therefore accrued outside the statute of limitations. *Sprint Commc'ns Co. v. FCC*, 76 F.3d 1221, 1228 (D.C. Cir. 1996) (citations omitted) (noting that cause of action accrues when the injured party discovers — or in the exercise of due diligence should have discovered — that it has been injured").

Plaintiff does not dispute that it knew more than six years ago of BIA documents in the 1930's studying the reorganization of Michigan Indians under the IRA, Amended Complaint ¶¶ 74, 78–79, ECF No. 11, the "non-decision" on the IRA petition, but now argues that its claims have not accrued and will not accrue until the Federal Defendants decide its IRA petition. *See* Pl.'s Opp'n at 5. If Plaintiff's argument is correct, Plaintiff cannot sustain its claims at this time. "As a general rule, 'a claim normally accrues when the factual and legal prerequisites for filing suit are in place.'" *Earle v. Dist. of Columbia*, 707 F.3d 299, 306 (D.C. Cir. 2012) (citations omitted); *see also Impro Prods., Inc. v. Block*, 722 F.2d 845, 850 (1983) ("Plainly, the cause of action accrues when the 'right to resort to federal court is perfected.'" (citation omitted)); *Aftergood v. CIA*, 225 F. Supp. 2d 27, 29 (D.D.C. 2002) ("Generally, a cause of action accrues as soon as the claimant can institute and maintain a suit in court."). If Plaintiff's claims have not yet accrued, Plaintiff cannot maintain a suit in this Court and the claims should be dismissed. Likewise, Plaintiff admits that the government has not deprived it of a property interest to which it is entitled because, it asserts, the 1935 IRA petition has not been denied. Pl.'s Opp'n at 6. If Plaintiff has not been deprived of property interest to which it is entitled, it has not properly asserted a claim in this Court. If this Court accepts Plaintiff's theory, it must also conclude that Plaintiff's claims are not ripe or Plaintiff has not stated a claim upon which relief can be granted.

Plaintiff's argument amounts to a theory that the statute of limitations will never run on their claims until the agency issues a formal decision. But courts in this district have held that agency inaction does not extend the statute of limitations. *See Alaska Cmty. Action on Toxics v. EPA*, 943 F. Supp. 2d 96, 109 (D.D.C. 2013) (holding that statute of limitations did not extend because claims "are based solely on the agency's persistent inaction, about which nothing has changed since the claims first accrued"); *AKM LLC dba Volks Constr. v. Sec'y of Labor*, 675

F.3d 752, 758 (D.C. Cir. 2012) ("While we held that continued actions may extend the statute of limitations, nothing in that case suggests that *inaction* has the same effect, and this case is about inactions. . . .").

To be clear, Federal Defendants are not arguing here that a response to a petition to reorganize under the IRA is the same determination as whether a group meets the Part 83 federal acknowledgment criteria. Instead, the Federal Defendants have demonstrated that in the decision on Plaintiff's Part 83 petition, Federal Defendants found that Plaintiff did not file the 1935 IRA petition. Thus, at the latest, Plaintiff knew in 2006 that the Department did not consider the IRA petition to have been submitted on behalf of Plaintiff. The time for challenge has passed.

2. The Statute of Limitations is Jurisdictional, but Would not be Tolled in any Event.

Further, the controlling circuit law holds that 28 U.S.C. § 2401(a) is jurisdictional. *See Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987). "[U]ntil action by the Supreme Court or an *en banc* panel of this court supervenes, we must adhere to the law of the circuit." *Id.* While Plaintiff argues that the Supreme Court's ruling in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) — finding that a different section, 28 U.S.C. § 2401(b), is not jurisdictional — should compel a finding that 28 U.S.C. § 2401(a) is also not jurisdictional, this Court is bound to follow the law of the circuit. *See Agolli v. Office of Inspector Gen., U.S. Dep't of Justice*, 125 F. Supp. 3d 274, 281 n.4 (D.D.C. 2015), *aff'd*, No. 15-5273, 2016 WL 6238495 (D.C. Cir. Sept. 22, 2016), *cert. denied sub nom.*, 137 S. Ct. 1105 (2017) ("[B]ecause the D.C. Circuit of Appeals has explicitly held that section 2401(a) is jurisdictional, *see Spannaus*, 824 F.2d at 52, and because the Supreme Court's holding in *Wong* is limited to the section 2401(b), Circuit precedent deeming the statute of limitations for FOIA jurisdiction

remains binding on this Court."). Accordingly, this Court lacks jurisdiction over Plaintiff's claim.

Even if the statute of limitations is not a jurisdictional bar, equitable tolling would not apply here. Statutes of limitations

> are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Scott v. Weinberger, 416 F. Supp. 221, 224 (D.D.C. 1976) (citing *Order of Railroad Tels. v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944)). The Final Determination shows how difficult it would be to decide the IRA petition at this point. Given that the filers had to be twenty-one at the time of filing in 1935, they would be at least one hundred and three years old today.[2] It simply defies logic to think that a claim could lie fallow for more than eighty years, even though Plaintiff admittedly knew (a) of the alleged "non-decision" on the IRA petition, and (b) that the Department considered that the petition was not submitted by Plaintiff. *See* Defs.' Mem. at 15–17; Am. Compl. ¶ 85. Even if the statute of limitations is not jurisdictional, this Court should find that Plaintiff's claim is time-barred.

Finally, there is no merit to Plaintiff's contention that the Department used the same reasoning against it in 2002 when Plaintiff sought to have the Court recognize it as an Indian tribe before the Department issued a decision on the Part 83 petition. In that case, Plaintiff was going through the acknowledgment process before the Department and sought to shortcut the

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[2] The Amended Complaint, ¶¶ 64–66, alleges that the 1935 petition was filed under the IRA "third category of eligibility," *i.e.*, Indians of one-half or more Indian blood, who could reorganize if land were acquired for them. The complaint does not allege that any members of Plaintiff fall into this category.

process by going straight to the district court. The regulations set forth the process to be followed, and Plaintiff was thus required to exhaust its administrative remedies. *Burt Lake Band of Ottawa & Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 79 (D.D.C. 2002) ("Plaintiff, however, cites no authority to support the proposition that a party can forego administrative remedies simply because it believes the process is taking unreasonably long."). Here, in contrast, Plaintiff is trying to revive a claim that, if it ever existed, expired well outside the six-year statute of limitations. This Court should, therefore, dismiss Plaintiff's Counts II and III.

3. Without an APA Claim, Plaintiff Does not Demonstrate a Mandatory Duty to Issue a Decision on the IRA Petition or Deprivation of a Property Right.

Having dropped its APA claim,[3] Plaintiff offers no basis on which this Court could compel action. As discussed in Defendants' Memorandum, whether under the APA or the Court's mandamus powers, the Court can only compel action that is legally required. Defs.' Mem. at 14; *see S. Utah Wilderness All. v. Norton*, 542 U.S. 55, 62 (2004) (holding that a court cannot compel action under the APA unless there is a discrete action that the agency is required to take); *Pittson Coal Grp. v. Sebben*, 488 U.S. 105, 121 (1988) ("The extraordinary remedy of mandamus under 28 U.S.C. § 1361 will issue only to compel the performance of 'a clear nondiscretionary duty.'" (citing *Heckler v. Ringer*, 466 U.S. 602, 616 (1984))). Plaintiff has not identified any non-discretionary duty on the part of the agency to act upon an IRA petition, much less issue a formal decision. Plaintiff only references a "non-discretionary duty" that must be performed "within a reasonable time" without specifying the source of this duty. Pl.'s Opp'n at 6–7, 9. This allegation without referencing a statute is insufficient to prevent dismissal of Plaintiff's claims regarding the IRA petition.

[3] The APA provides a means to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), but Plaintiff withdrew its APA claim. Pl.'s Opp'n at 3.

According to Plaintiff, the Fifth Amendment requires adequate notice of a deprivation of a liberty or property interest to which it is entitled. Pl.'s Opp'n at 6. Beyond the fact that Plaintiff asserts that this deprivation has not yet occurred, *id*. at 5, Plaintiff does not possess the necessary "legitimate claim of entitlement." Tribal status is not a property right. *See Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 887 F. Supp. 1158, 1175 (N.D. Ind. 1995) (holding that acknowledgment regulations "do not create a legitimate claim to entitlement protected by due process"). Even assuming that Plaintiff submitted the 1935 IRA petition, Plaintiff would merely be a petitioner for acknowledgment and its attendant benefits, not a recipient of specific benefits and services that flow from acknowledgment. "The Constitution's 'procedural protection of property is a safeguard of the security of interests that a person *has already acquired* in specific benefits.'" *C&E Servs., Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 200 (D.C. Cir. 2002) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576 (1972)); *see also Greenlee v. Bd. of Med. of D.C.*, 813 F. Supp. 48, 56 (D.D.C. 1993) ("[C]ourts generally have held that present enjoyment is integral to the existence of a property entitlement."). Indeed, the Supreme Court has explicitly stated: "We have never held that applicants for benefits, as distinct from those already receiving them have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment." *Lyng v. Payne*, 476 U.S. 926, 942 (1986) (citation omitted). Thus, Plaintiff is akin to an applicant for benefits, "as distinct from [one] already receiving" benefits and possessing a "legitimate claim of entitlement protected by the Due Process Clause." *Id*.

Plaintiff also argues that a lack of decision is not the equivalent to the denial of a decision, but the cases it cites in support are not applicable here. *See* Pl.'s Opp'n at 7. Plaintiff relies on cases where the underlying statutes and regulations establish a mandatory duty to issue

a decision. For example, Plaintiff cites two cases dealing with the Immigration and Naturalization Service's failure to process visa applications, *see* Pl.'s Opp'n at 7 (citing *Iddir v. INS*, 166 F. Supp. 2d 1250 (N.D. Ill. 2001) and *Paunescu v. INS*, 76 F. Supp. 2d 896 (N.D. Ill. 1999)), but courts have found that the statutes at issue in those cases "provide a right to an adjudication," which "by necessary implication . . . must occur within a reasonable time, *see, e.g., Agbemaple v. INS*, No. 97 C 8547,1998 WL 292441, at *2 (N.D. Ill. May 18, 1998). INS thus has a mandatory duty to adjudicate the applications in a reasonable time based on the statutes at issue. *Iddir*, 166 F. Supp. 2d at 1258; *Paunescu*, 76 F. Supp. 2d at 901 ("Defendants nevertheless had a non-discretionary duty to issue a decision on plaintiffs' applications within a reasonable time."). Here, Plaintiff identifies no such mandatory duty.

Plaintiff also cites *Andrews v. McDonald*, 646 F. App'x 1001 (Fed. Cir. 2010), an unpublished Federal Circuit case which deals with a veteran's claim for benefits. There, the Court noted that the statute provides that "the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of" the Secretary's decision. *Id.* at 1006. In addition, the applicable regulations provide that claims for benefits remain pending until they are finally adjudicated. *See* 38 C.F.R. § 3.160(c); *Adams v. Shinseki*, 568 F.3d 956, 960 (Fed. Cir. 2009). Thus, the statute and the regulations required the agency to make a decision and provide the claimant with notice of that decision. Again, Plaintiff identifies no such requirement here.

B. PLAINTIFF LACKS STANDING TO CHALLENGE THE 2015 REGULATIONS.

In Defendants' Memorandum, Federal Defendants showed that Plaintiff lacks standing to challenge the 2015 regulations' bar on re-petitioning because the regulations merely maintained the existing bar on re-petitioning and thus did not injure Plaintiff. Federal Defendants also showed that the only substantive changes in the regulations would not lead to a different result

on Plaintiff's petition. In response, Plaintiff argues that it seeks not to have its previous petition considered under the new regulations, but to file a new petition based on alleged new facts and data, even though it had ample opportunity to raise new facts or change its membership during the acknowledgment process. It also argues that even though the bar on re-petitioning had been in place at least since 1994, it was injured by the continued bar on re-petitioning because the Department considered and rejected a proposal that would have allowed a limited means for petitioners denied acknowledgment to have those petitions reconsidered under certain circumstances. These arguments should be rejected.

Plaintiff lacks standing because it is not injured by the continued bar on re-petitioning that has been in place since at least 1994. Plaintiff asserts that "[i]n 2015, the BIA amended Part 83, to prohibit any tribe from ever re-petitioning for acknowledgment under that process," Am. Compl. ¶ 15, and that the 2015 regulations were "a permanent denial of the Band's rights," Pl.'s Opp'n at 17. But, the 2015 regulations did not amend that particular provision; the 1994 regulations also prevented groups who had already been denied acknowledgment from re-petitioning. If Plaintiff was injured by this provision, its injury occurred in 2006, when its petition for acknowledgment was denied and it became ineligible to be acknowledged under the regulations. Thus, Plaintiff simply cannot demonstrate injury sufficient for standing based on the 2015 regulations' provision preventing previously decided groups from applying for federal acknowledgment. *See Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 112 F. Supp. 2d 742, 759 (N.D. Ind. 2000) (holding that group did not have a right to repetition under the 1994 regulations because the regulations explicitly did not apply to a petitioner that had already been denied recognition).

Plaintiff also cannot show injury from the 2015 regulations based on the Department's consideration of a proposal that would have allowed re-petitioning in limited circumstances. As Plaintiff asserts, "[d]uring consideration of the amended Part 83 process, the [Department] considered a proposal that would allow 'limited re-petitioning' based on the condition that the opponents of the original petition consented (known as a 'third-party veto')." Am. Compl. ¶ 142. Beyond showing the required consent, the proposal also would have required that the petitioner prove by a preponderance of the evidence that either the change in regulations "warrants reconsideration of the final determination" or that the "'reasonable likelihood' standard was misapplied in the final determination." *See* Fed. Acknowledgment of Am. Indian Tribes (Proposed Rule), 79 Fed. Reg. 30,766, 30,774 (May 29, 2014). But Plaintiff cannot show injury from the 2015 decision not to adopt the proposal for limited re-petitioning. First, a *proposed* revision to regulations does not vest a right in the public or in Plaintiff to have the proposal adopted, and Plaintiff cites to no case law to support such a proposition. Second, Plaintiff does not assert that it would have been entitled to re-petition under the proposed amendment. It does not assert that the provision would apply to a petitioner that did not avail itself of the administrative or judicial review processes, or that all such third parties[4] would consent to its petition, beyond asserting that the Little Traverse Bay Band would now support its re-petition. Pl.'s Opp'n at 24. Third, Plaintiff does not assert that the changes in regulations warrant reconsideration of its petition. Finally, Federal Defendants demonstrated that Plaintiff's petition would fail even under the new regulations. Defs.' Mem. at 18. In other words,

[4] The Sault Ste. Marie tribe was an interested party and moved to intervene on the Department's side (as did Little Traverse Bay Band) in the lawsuit brought by Plaintiff in this Court. Plaintiff, however, did not seek review of the Final Determination before the Interior Board of Indian Appeals or United States District Court as would have been required by the proposal.

Plaintiff's alleged injury from the Department's decision not to adopt such a proposal is conjectural and hypothetical, not actual. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

In addition, the proposed provision would not allow an entirely new petition, but only reconsideration of the previously submitted petition with supplementation, upon a showing that the new regulations might compel a different result. Here, Plaintiff seeks to submit "a *new* petition based on new facts and circumstances." Pl.'s Opp'n at 16, 19 (emphasis added). Plaintiff thus asserts not that the Final Determination should be reconsidered under the new regulations, but that it is entitled to a "new, independent review on a new record." *Id.* at 19. Plaintiff admits that it does not seek "to have the *same* facts reviewed under the *same* process." *Id.* But the proposal for limited re-petitioning would only have allowed a group to show that the new regulations might compel a different decision or that the wrong standard was applied previously. Thus, Plaintiff was not injured by the fact that the Department considered and rejected a limited re-petitioning proposal that would not in any event have allowed Plaintiff's present request.

Plaintiff cites cases where other groups demonstrated Article III standing when challenging the BIA's actions. *Id.* at 18–19. Those cases, however, show the unremarkable proposition that groups may have standing to challenge the agency's final determination. *See Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1495 (D.C. Cir. 1997) (noting that Cherokee was seeking review of the decision recognizing a direct relationship with the Delaware Tribe of Indians separate from that with Cherokee Nation with "the same legal rights and responsibilities as other tribes, consistent with federal law, both as to jurisdiction and as to its right to define its membership"); *Hansen v. Salazar*, No. C08-0717-JCC, 2013 WL 1192607, at

*10 (W.D. Wash. Mar. 22, 2013) (finding that group had standing to challenge the Final Determination finding that it was not entitled to recognition as an Indian tribe). In *Cherokee*, the court found that the Cherokee Nation had standing to challenge the decision to deal directly with the Delaware Tribe because it affected "the authority of the Cherokee Nation over the Delawares and may affect [the Cherokee Nation's] eligibility for certain federal funds." 117 F.3d 1489, 1496 n.9. Thus, the Cherokee Nation was injured by the agency action and had standing to challenge it. The *Cherokee Nation* situation thus is entirely unrelated to the situation here where a group previously denied recognition under the regulations seeks to challenge regulations that maintain a bar on re-petitioning.

The *Hansen* case is also distinguishable. In *Hansen*, the Department revised the acknowledgment regulations while the group's petition for federal acknowledgment was pending before the agency. 2013 WL 1192607, at *3. The group elected to proceed under the 1978 regulations, and the Department accordingly analyzed the petition under the 1978 regulations and determined that the group was not entitled to recognition. *Id.* at *4. The administrative record, however, contained a draft decision from the previous administration (signed three days after the change of administration, but post-dated to the last day of the previous administration) that considered the petition under both the 1978 and 1994 regulations and concluded that the group was entitled to recognition. Based on that fact, the court remanded the Final Determination to the Department to analyze the petition under both sets of regulations or explain why it declined to do so. *Id.* at *11. Standing was not an issue in *Hansen*, both because the plaintiff challenged the Department's Final Determination, not the regulations themselves, and there was reason to believe that the decision might have been different under the new regulations because of the draft decision. *Id.* No such evidence exists here, and *Hansen* does not apply.

Plaintiff also argues that it is harmed by the regulations' adoption of a "'consistent baseline approach,' which allows current petitioners to satisfy any of the Part 83 criterion [sic] by demonstrating that the BIA had previously met the same criterion under similar facts." Pl.'s Opp'n at 20–21. But Plaintiff could have challenged its Final Determination based on an argument that the decision was contrary to the Department's precedent. *See Hansen*, 2013 WL 1192607, at *2 (noting the plaintiff's argument that its petition was analyzed different than another tribe's); *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 198 (D.D.C. 2011) (rejecting the plaintiff's claim that the Department treated it differently than other similarly situated groups); *Evans v. Salazar*, 2011 WL 1219228, at *14 (W.D. Wash. Mar. 31, 2011) (same). The APA standard of review requires that the Department articulate a reason to depart from its precedent or be found to have acted in an arbitrary and capricious manner. *See Nat'l Treasury Emp. Union v. Fed. Labor Relations Auth.*, 404 F.3d 454, 457–48 (D.C. Cir. 2005) ("The Authority's failure to follow its own well-established precedent without explanation is the very essence of arbitrariness."). Plaintiff also does not articulate any way in which this consistent baseline approach would differ from APA review of the decision on its petition. This injury is entirely too conjectural and hypothetical to meet standing requirements.

C. PLAINTIFF'S LIST ACT COUNT MUST BE DISMISSED.

Finally, Plaintiff does not state a claim for relief under the List Act. Plaintiff does not assert that the Department violated the List Act, but argues only that it can plead a writ of mandamus claim should its APA claim fail. Further, Plaintiff argues that if it is unsuccessful as to its APA Count IV challenge to the 2015 regulations' re-petitioning bar, this Court could nonetheless compel the Secretary of the Interior to place Plaintiff on the list of federally recognized Indian tribes. Setting aside the fact that Plaintiff has not pled the mandamus statute, 28 U.S.C. § 1361, in its Amended Complaint, the Court can use its mandamus powers only to

"compel the performance of 'a clear nondiscretionary duty.'" *Pittson Coal*, 488 U.S. at 121 (citing *Heckler*, 466 U.S. at 616). Given that Plaintiff's Count IV asserts that it should be able to file a new petition for federal acknowledgment before the Department, the proper remedy would *not* be to order the Secretary to place Plaintiff on the list of federally recognized tribes, but to remand the case back to the Department. Further, even if Plaintiff succeeds on its Counts II or III, the Court could at most order the Department to consider the 1935 IRA petition, but could not dictate that the Department establish a political, government-to-government relationship with Plaintiff, *see* Defs.' Mem. at 22–23, or place Plaintiff on the list. Plaintiff has failed to state a claim upon which relief can be granted.

III. CONCLUSION

Plaintiff seeks to resurrect a claim that, if it ever existed, expired long ago. But Plaintiff can show no mandatory duty requiring the Department to issue a ruling on a 1935 IRA petition, nor any deprivation of property rights. Nor can Plaintiff demonstrate that it has standing to challenge the 2015 regulations. In addition, Plaintiff has failed to state a claim for relief under the List Act. For the foregoing reasons as well as those in Defendants' Memorandum in support of their motion to dismiss, Plaintiff's claims should be dismissed.

Respectfully submitted this 22nd day of September, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2017, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Devon Lehman McCune
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