UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

FELIX J. BRUETTE, JR.,

Plaintiff,

v. Case No.: 17-cv-286

U.S. SECRETARY OF THE INTERIOR, and
STOCKBRIDGE-MUNSEE COMMUNITY,

Defendants.

SECRETARY OF THE INTERIOR'S MEMORANDUM
IN SUPPORT OF AMENDED MOTION TO DISMISS

INTRODUCTION

On February 28, 2017, plaintiff Felix J. Bruette, Jr. filed a pro se complaint against the United States Secretary of the Interior and the Stockbridge-Munsee Community. ECF 1. In his "Statement of Claim," Bruette alleges that the Interior Department: (1) improperly conveyed property and treaty rights belonging to the Stockbridge-Munsee Tribe to the Stockbridge-Munsee Indian Community without congressional authority; and (2) deprived Bruette and others of rights they are entitled to as lineal descendants of members of the Stockbridge-Munsee Tribe. ECF 1, at pp. 2-3 (¶ B). In the "Relief Wanted" section of his complaint, Bruette asks the Court to:

1. Stop the "[Department] of the Interior and Indian community in conveying, allocating treaty property and rights in the state of Wisconsin and New York";

2. Reaffirm "due process under article 3 of the [Stockbridge-Munsee] constitution"; and

3. Assess punitive and compensatory damages, and grant declaratory relief.

ECF 1, at p. 4 (¶ D). The defendant respectfully submits that the complaint should be dismissed as barred by the doctrine of res judicata and the applicable statute of limitations, and for want of jurisdiction.

MOTION TO DISMISS STANDARD

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief can be granted. *Ferrill v. City of Milwaukee*, 295 F. Supp. 2d 920, 922 (E.D. Wis. 2003)(citations omitted). *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)(repudiating the general notice-pleading regime of prior cases, and holding that to survive dismissal the complaint must set forth a plausible claim for relief); *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). The standard of review for a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction is similar. Where, as here, the defendant asserts that the complaint is facially insufficient to establish subject matter jurisdiction, the dismissal standard mirrors the Rule 12(b)(6) standard. *See Royal Towing, Inc. v. City of Harvey*, 350 F.Supp.2d 750, 752 (N.D. Ill. 2004). Moreover, the party asserting the existence of subject matter jurisdiction bears the burden of proof on a Rule 12(b)(1) motion. *Sprint Spectrum L.P. v. City of Carmel, Indiana*, 361 F.3d 998, 1001 (7th Cir. 2004).

The Seventh Circuit has taken an expansive view of the documents that a district court may properly consider in disposing of a motion to dismiss. A motion under Rule 12(b)(6) can be based on the complaint itself, documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice. *Scholz v United States*, 2017 WL 375651 at * 2 (E.D. Wis. 2017) (citing *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013)).

In the complaint, plaintiff refers to public record treaties between the United States and the Stockbridge-Munsee Indian Tribe (see ECF 1, pgs. 2-3), and those documents appear central to the complaint. In addition, the defendant has cited to public pleadings from Mr. Bruette's previous federal lawsuit, as they are relevant to the defense of claim preclusion asserted by the defendant. Accordingly, the Court may properly consider these documents (which are attached to this brief) without converting the Government's motion into a motion for summary judgment. *See Geinosky v. City of Chicago*, 675 F.3d 743, 745 n. 1 (7th Cir. 2012); *Palay v. United States*, 349 F.3d 418, 425 n. 5 (7th Cir. 2003) (stating that "in resolving a motion to dismiss, the district court is entitled to take judicial notice of matters in the public record"); *Feistel v. United States Postal Service*, 2008 WL 2048278 (E.D. Wis. 2008) (taking judicial notice of exhaustion defects and dismissing plaintiffs' claim under Rule 12(b)(6)); *Davis v. Potter*, 301 F.Supp. 2d 850, 856 (N.D. Ill. 2004) (taking judicial notice of the record of Equal Employment Opportunity Commission administrative proceedings in considering a motion to dismiss) (citing *Fornalik v. Perryman*, 223 F.3d 523, 529 (7th Cir. 2000)). *But see Schamberger v. United States*, 2007 WL 1521502 (E.D. Wis. 2007) (converting a motion to dismiss into a motion for summary judgment before dismissing for failure to exhaust administrative remedies).

HISTORICAL BACKGROUND

The Stockbridge and Munsee Indians are comprised of descendants of the Mohican Tribe. *See State of Wisconsin v. The Stockbridge-Munsee Community and Robert Chicks*, 366 F. Supp. 2d 698, (E.D. Wis. 2004), *aff'd*, 554 F.3d 657 (7th Cir. 2009). The Tribe settled in Stockbridge, Massachusetts and New York before relocating to Wisconsin. 366 F. Supp. 2d at 704. In 1856, the United States both entered into a treaty with the tribe, and created a reservation for them in Shawano County, Wisconsin. *See* Treaty with the Stockbridge and Munsees (February 5, 1856),

11 Stat. 663 (Exhibit A). Under provisions of the Treaty, the United States provided parcels of land for the heads of families and agreed to provide the Tribe money to help them pay their debts, purchase stock animals, and construct improvements on their land.[1] Later, in 1871, Congress passed an Act that provided for the public sale of most of the land provided for in the 1856 Treaty, with the proceeds from the sale of the land to be distributed or held in trust for Tribal members. Act of February 6, 1871, chapter 38, 16. Stat. 404 (Exhibit B). The Act also reserved eighteen contiguous sections of land best suited for agricultural purposes to be allotted to members of the Tribe. Id. The lands that remained after the public sale were to be offered at public auction "at not less than one dollar and twenty-five cents per acre." Id. If lands remained unsold after the public auction, the government agreed to credit the Tribe at "sixty cents per acre", for the remaining unsold acres. Id. The 1871 Act also called for the creation of a new Tribal Roll. Id. Those entrusted with creating the new Tribal Roll, however, excluded half of the Tribal members from the new Roll, and questions regarding proper enrollment of Tribal members would plague the tribe from 1871 through the early 1900s.

In 1893, Congress passed an Act in an attempt to restore Tribal membership to those individuals who were improperly left off of the 1871 Roll. Act of March 3, 1893, 27 Stat. 744 (Exhibit C). The 1893 Act required Interior to create a new roll and include all those who were or who became Tribal members at the time of the Treaty of 1856 and all of their descendants who had not separated from the Tribe. Id. The Act also provided that members who had entered into possession of lands under the 1856 or 1871 land allotments and had continuously resided on the land were to become owners of that land in fee simple. Id. This, however, became problematic

[1] The 1856 Treaty provided, "[e]ach single male person above eighteen years of age shall be entitled to eighty acres; and each female person above eighteen years of age, not belonging to any family, and each orphan child, to forty acres; and sufficient land shall be reserved for the rising generation." 11 Stat. 663, Article 3.

because there was not enough land for those who had claims under the 1893 Act. The tribal allotment process was eventually suspended pursuant to a Senate resolution. *See* Exhibit D.

In 1900, with approval from Interior, the Tribe sent a proposal to Congress to settle all of the United States obligations to the Tribe. *See Stockbridge Munsee Community*, 366 F. Supp. 2d at 720. The Tribe requested that the United States provide allotments to Tribal members of the unsold portion of the reservation, to purchase additional lands for allotments if not enough land was available, or to provide cash compensation if additional lands were not purchased. *Id*. Congress failed to act on the proposal for several years because of questions on how to fund the proposal. Id. Congress eventually enacted the Tribe's proposal into law in 1906, although funding came from the Tribe's treasury. 34 Stat. 325, 382-83 (Exhibit E). The understanding was that following enactment of this legislation, federal supervision of the Tribe would cease. Many Tribal members understood that in exchange for the allotments they would become citizens of the United States. *See Stockbridge Munsee Community*, 366 F. Supp. 2d at 710.

Following the allotment period, the Federal Government continued to have limited dealings with the Stockbridge-Munsee Tribe. The Government: (1) continued to resolve financial claims against tribal funds held by the United States; (2) ran a government school for tribal members; (3) promoted public health for the Indians; and (4) enforced liquor law violations involving Stockbridge Indians. *Id*. at 725. In 1934, members of the Stockbridge Munsee Tribe undertook efforts to reestablish the Stockbridge-Munsee Reservation. *Id*. at 731. Later in that same year Congress enacted the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461 *et. seq*. The IRA authorized Interior to expand the land base of Indian tribes and to proclaim new reservations. Id. The IRA also provided tribes with a means for reorganizing their governmental and economic structures. Id.

On October 3, 1934, Tribal leaders from the Stockbridge-Munsee Indians submitted a letter requesting that federal officials acquire lands "formerly in the old Stockbridge Reservation" to form a new reservation. *See Stockbridge Munsee Community*, 366 F. Supp. 2d at 732. In 1937, acting pursuant to the IRA, Interior acquired 1,049.88 acres of land located within the original Stockbridge-Munsee reservation to be placed in trust for the "Stockbridge and Munsee Band of the Mohican Indians." *Id*. at 733. On November 18, 1937, under the IRA, the Tribe was formally reorganized and its Constitution was approved by Interior. *Id*. at 734. The new Constitution provided that the name of the Tribe was the "Stockbridge-Munsee Community." Interior interpreted the term community to include "all persons whose named appeared on the Stockbridge Allotment Roll of 1910 and who were residing within the original confines of the Stockbridge Reservation… on the date of the adoption of [the] Constitution." *Stockbridge Munsee Community*, 366 F. Supp. 2d at 735. The Stockbridge-Munsee Community is a federally recognized Indian tribe and resides today on what remains of its 1856 reservation in Shawano County, Wisconsin. 81 Federal Register 5019 (Exhibit F).

BRUETTE'S PRIOR LAWSUIT

Almost three years ago, on July 24, 2014, Bruette and his three siblings brought a pro se lawsuit against Sally Jewell, then Secretary of the Interior Department, hereafter referred to as "*Bruette I*." *See Bruette v. Jewell*, Case No. 14-cv-876 (E.D. Wis.) (ECF 1) (Exhibit G). After a series of proceedings designed to ascertain the precise relief Bruette was requesting, it became apparent he was seeking federal recognition of an Indian tribe in order to vindicate rights granted to him and other beneficiaries of the 1856 Treaty and the 1893 Act of Congress. *See Bruette I* (ECF 27) (Exhibit H) (Decision and Order Granting Motion to Dismiss). In the end, the district court dismissed Bruette's suit, holding that: (1) neither party pointed to a statute creating a federal

cause of action that engaged the court's jurisdiction; (2) even if the court had jurisdiction, the catch-all six year statute of limitations for federal claims would bar Bruette's suit; and (3) to the extent Bruette was seeking tribal recognition, the court had no authority to grant such relief because it was a political question and Bruette had not completed the DOI's internal process for seeking recognition. *Bruette I,* ECF 27. The Seventh Circuit Court of Appeals dismissed Bruette's appeal for failing to develop an argument to disturb the district court's ruling. *Bruette I,* 638 Fed. Appx. 528 (7th Cir. 2016).

Although the precise relief requested in the 2014 lawsuit differs from the relief requested in this case (hereafter referred to as "*Bruette II*"), both lawsuits proceed from the same premise—that the Interior Department has been failing to follow the 1856 treaty and the 1893 law, which Bruette says impacts property and other rights of lineal descendants under the 1856 Treaty. *Compare Bruette I,* 638 Fed. Appx. 528 (7th Cir. 2016)("In his complaint Bruette sought an order requiring that the Department of the Interior follow an 1893 law involving the Stockbridge Indians") with the complaint in *Bruette II,* Case No. 17-cv-286 (ECF 1) (alleging that the DOI and Stockbridge-Munsee Community are violating property rights granted under the March 3, 1893 Act of Congress, which reaffirmed the Treaty of 1856). Under these circumstances, the doctrine of res judicata—otherwise known as claim preclusion—bars his present claims.

ARGUMENT

A. The doctrine of res judicata bars Bruette's claims.

Under the doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v McCurry*, 449 U.S. 90, 94, (1980). "The three requirements for res judicata under federal law are: (1) an identity of the parties or their privies; (2) an identity of the causes of actions;

and (3) a final judgment on the merits." *Cent. States, S.E. & S.W. Areas Pension Fund v. Hunt Truck Lines, Inc.*, 296 F.3d 624, 628 (7th Cir. 2002). If these requirements are met, res judicata "bars not only those issues which were actually decided in a prior suit, but also all issues which could have been raised in that action." *Brzostowski v. Laidlaw Waste Systems, Inc.*, 49 F.3d 337, 338 (7th Cir. 1995). "Simply put, the doctrine of *res judicata* provides that, when a final judgment has been entered on the merits of a case, it is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Nevada v United States*, 463 U.S. 110, 129-30 (1983) (internal quotation marks omitted).

In this case, there is no question that *Bruette I* resulted in a final judgment, and that there is an identity of parties and their privies (*Bruette I* named Sally Jewel in her official capacity as Secretary of the DOI, and *Bruette II* names the Secretary of the Interior as defendant). In addition, there is identity of causes of action. A claim has "identity with a previously litigated matter if it emerges from the same core of operative facts as that earlier action." *Brzostowski*, 49 F.3d at 338-39 (internal quotation marks omitted). As noted above, both *Bruette I* and *Bruette II* proceed from the same set of historical facts and argument. In both, Bruette asserts that he (and other similarly situated persons) are being deprived of property rights by virtue of alleged violations of the 1856 treaty and a subsequent Act of Congress in 1893.

The fact that *Bruette I* asserted a claim to tribal recognition, whereas *Bruette II* seeks to stop the allocation of property rights, and asserts claims for damages and for violations of due process under the Stockbridge-Munsee constitution, is of no moment. Res judicata bars not only litigated issues, "but also all issues which *could have been raised* in that action." *Brzostowski*, 49

F.3d 337 at 338 (emphasis added). To determine "whether the plaintiff could have raised the [current] issue[s] in the first suit," the Seventh Circuit employs a "same transaction" test. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 913 (7th Cir. 1993). Under this test:

> A cause of action consist of a single core of operative facts giving rise to a remedy. . . . Once a transaction has caused injury, all claims arising from that transaction must be brought in one suit or lost. A plaintiff may not avoid an earlier judgment on the merits by merely concocting a new legal theory.

Id. (internal citations and quotation marks omitted). Here, although the legal elements of each claim may be different, the underlying factual transaction is the same—in both lawsuits, Bruette claims that the Interior Department has not properly allocated property rights under the Government's 1856 Treaty with the Stockbridge-Munsee Tribe and the subsequent 1893 Act of Congress. Under these circumstances, res judicata bars Bruette from pursuing further challenges to the allotment of property rights under these provisions. As the Supreme Court has observed, "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered settled as between the parties." *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522, 525 (1931).

B. This Court lacks jurisdiction over the subject matter of Bruette's claims.

Even assuming *arguendo* that res judicata does not bar the present suit, this Court lacks jurisdiction over Bruette's claims. Federal Courts are courts of limited jurisdiction; thus, they can only hear and decide the kinds of cases the Constitution and Congress authorize them to hear. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The United States enjoys sovereign immunity from suit, and without a clear statement from the Government waiving this immunity, with a claim falling within the terms of the waiver, a suit cannot be heard or decided by

a federal court. *United States v. White Mountain Apache*, 537 U.S. 465, 472 (2003). Because the United States defines the terms and conditions upon which it may be sued, the plaintiff must identify a specific statute that expressly waives the federal government's sovereign immunity. *Macklin v. United States*, 300 F.3d 814, 819 (7th Cir. 2002). Here, as in *Bruette I*, Bruette fails to allege any basis for this Court's jurisdiction.

One possible basis for jurisdiction over Bruette's monetary claims might be the Little Tucker Act. 28 U.S.C. § 1346. Subject to certain exceptions, the Little Tucker Act provides that district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of a civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the United States Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. *Id.* The Little Tucker Act and its companion statute, the Tucker Act, 28 U.S.C.S. § 1491(a)(1), do not themselves create substantive rights, but are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law. See *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009). In this case, even if we assume the Little Tucker Act waives sovereign immunity, Bruette has failed to identify a statute or law granting him the right to recover compensatory or punitive damages.

For instance, Bruette cites the Indian Reorganization Act of 1934, the 1856 Treaty and an 1893 Congressional Act, but he does not allege they serve as substantive sources of law to invoke a waiver of sovereign immunity. Section 476(d)(2) of the Indian Reorganization Act provides that "actions to enforce the provisions of this section may be brought in the appropriate Federal district court." Under this section, Congress waived the United States' sovereign immunity and consented to suit for actions to enforce the Act's provisions in federal district court. *Thomas v. United States*,

141 F. Supp. 2d 1185, 1204 (W.D. Wis. 2001) (holding that the IRA does not itself constitute a waiver of sovereign immunity). But Bruette does not appear to seek enforcement of the Indian Reorganization Act, nor does he allege that the Act is a money-mandating statute, so as to waive the Government's immunity under the Little Tucker Act.

Another possible source of jurisdiction is the Administrative Procedures Act ("APA"), 5 U.S.C. § 702. The APA provides a conditional, limited waiver of sovereign immunity. Under the APA, a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute "is entitled to judicial review thereof." Id. Section 702 gives the courts the power to "compel agency action "unlawfully withheld" within the meaning of a relevant statute." In other words, "[t]he only agency action that can be compelled under the APA is action legally required." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). Here, Plaintiff has not identified any particular "agency action" that might be subject to judicial review under the APA.

C. The statute of limitations bars Bruette's claims.

Mr. Bruette's complaint is also subject to dismissal as barred by the applicable statute of limitations. Civil actions against the United States are barred unless the complaint is filed within six years after the cause of action accrues. 28 U.S.C. § 2401 (a). *See also John R. Sand & Gravel v. United States*, 552 U.S. 130, 132-36 (2008); *c.f.* 5 U.S.C. § 704 (six year statute of limitations under the Administrative Procedure Act for reviewing final federal agency actions). In general, a cause of action accrues when a plaintiff knew or should have known of the wrong and was able to commence an action based upon that wrong. *Richards v. Mitcheff*, 549 Fed. App'x. 572, 573-574 (7th Cir. 2014). Here, plaintiff's claims involve Department of Interior activities that took place in the 1800's and early 1900's. These activities, moreover, were the subject of Congressional Acts

and public record reports issued by the Interior Department. Hence, Mr. Bruette or any descendants of the original Stockbridge and Munsee Indian Tribe should have known about any alleged wrong many decades ago. Therefore, in addition to the jurisdictional and other issues discussed above, this case is properly dismissed on statute of limitations grounds as well.

CONCLUSION

For the reasons set forth above, defendant United States Secretary of the Interior respectfully requests that the Court dismiss this action with prejudice.

Dated this 25th day July 2017.

Respectfully submitted,

GREGORY J. HAANSTAD
United States Attorney

By: /s/ Chris R. Larsen

CHRIS R. LARSEN
Assistant United States Attorney
Wisconsin Bar No. 1005336
Attorneys for Defendant
Office of the United States Attorney
Federal Building, Room 530
517 East Wisconsin Avenue
Milwaukee, WI 53202
Telephone: (414) 297-1700
Fax: (414) 297-4394
Chris.larsen@usdoj.gov

Of Counsel:
Dondrae Maiden
U.S. Department of the Interior
Office of the Solicitor
Washington, D.C.