IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PERSIMMON RIDGE, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 4:17-CV-00025-TCK-TLW**
	)	
RYAN ZINKE, *et al.*,	)	
	)	
Defendants.	)	
	)	
	)	

FEDERAL DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM AND SUPPORTING MEMORANDUM

Federal Defendants, Ryan Zinke, in his official capacity as Secretary of the United States Department of the Interior ("Interior"); the United States Bureau of Indian Affairs ("BIA"); and Weldon Loudermilk, in his official capacity as Director of the BIA (collectively "Federal Defendants") hereby move, pursuant to Rule 12 of the Federal Rules of Civil Procedure, 10th Circuit Rule 27.21[1], and Local Civil Rule 7.2, for an order dismissing Plaintiff's claims against Federal Defendants in the First Amended Complaint, ECF No. 18, for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. This motion is supported by the memorandum of points and authorities below and all arguments that may be presented in reply, at argument, or by leave of Court.

[1] "Reviews of agency action in the district court must proceed as appeals. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994) (emphasis omitted).

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I. INTRODUCTION

In the Amended Complaint, Plaintiff files suit under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.* The Amended Complaint revises the legal description of Plaintiff's lands and eschews the original challenges to specific lease and drilling permit approvals, instead setting forth a sweeping, generic challenge to the BIA's approval of all leases (including assignments thereof) and drilling permits covering the subsurface mineral estate underlying Plaintiff's lands since January 1, 1970. Specifically, Plaintiff claims that the BIA failed to comply with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321, *et seq.*, in its issuance of all such approvals. As a result, Plaintiff seeks a declaratory judgment invalidating the leases, lease assignments, and drilling permits, as well as an order requiring the BIA to eject or remove lessees from Plaintiff's lands until valid leases and permits are obtained.

Plaintiff's Amended Complaint does not identify a single final agency action necessary to state a plausible claim under the APA, and should be dismissed for failure to state a claim upon which relief may be granted. Further, the Amended Complaint suffers from the same fatal flaws as the original complaint. Accordingly, like other nearly identical matters filed in the Northern District of Oklahoma, including *Chance v. Zinke*, No. 16-cv-00549-JHP-FHM, 2017 WL 1404323 (N.D. Okla. Apr. 18, 2017), this Court should dismiss the Amended Complaint for lack of subject matter jurisdiction.

Indeed, in addition to failing to properly state a claim for which relief can be granted, Plaintiff's Amended Complaint suffers from four defects that are equally dispositive. First, Plaintiff fails to identify any specific final agency action under the APA with respect to its claims, and therefore fails to satisfy the statutory standing requirements of the APA. Second,

Plaintiff's claims are barred by the applicable six-year statute of limitations set forth in 28 U.S.C. § 2401(a). Plaintiff is challenging decisions on leases and applications for a permit to drill ("APD") since January 1, 1970.[2] To the extent that these decisions occurred before January 17, 2011, those claims are time-barred and not subject to equitable tolling. Third, Plaintiff fails to establish a waiver of sovereign immunity sufficient to provide this Court with jurisdiction. Fourth, Plaintiff failed to exhaust administrative remedies and therefore judicial review is not available pursuant to the APA. For the foregoing reasons, this Court should dismiss this case in its entirety under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. STANDARD OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(1)

Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). When considering a motion to dismiss under Rule 12(b)(1), the burden of establishing the court's jurisdiction is placed on the party seeking to invoke it, and that party must establish jurisdiction by a preponderance of the evidence. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936). Federal subject matter jurisdiction "cannot be consented to or waived, and its presence must be established in every case under review in the federal courts." *Firstenberg v. City of Santa Fe*, 696 F.3d 1018, 1022 (10th Cir. 2012). If the Court, at any time, determines that it lacks subject-matter jurisdiction, the case should be dismissed. Fed. R. Civ. P. 12(h)(3).

Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction can take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject

[2] NEPA was enacted on January 1, 1970. Plaintiff challenges all approvals related to its property since that date. Am. Compl. ¶ 14, ECF No. 18.

matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based." *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002). This motion presents a facial attack on the sufficiency of the Amended Complaint's allegations regarding the Court's subject matter jurisdiction. Thus, the factual allegations advanced in the Amended Complaint are assumed to be true for purposes of this motion. *Id.* This motion also presents a challenge to the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a court may not presume the truthfulness of the complaint's factual allegations. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). A court has wide discretion to allow other documents to resolve disputed jurisdictional facts under Rule 12(b)(1). In such instances, a court's reference to evidence outside the pleadings does not convert a Rule 12(b)(1) motion to a Rule 56 motion. *Id.* at 1003.

B. Federal Rule of Civil Procedure 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss is properly granted when a complaint provides no "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *see also Twombly*, 550 U.S. at 562-63. A claim is facially plausible if the plaintiff pleaded enough factual content to allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Vogt v. City of Hays*, 844 F.3d 1235, 1238 (10th Cir. 2017) (internal quotation marks and citations omitted); *see also Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). The plausibility requirement serves to weed out claims without a probability of success and "to inform the

defendants of the actual grounds of the claim against them." *Robbins v. Okla. ex rel. Okla. Dep't of Human Servs.*, 519 F.3d 1242, 1248 (10th Cir. 2008). "[C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

III. BACKGROUND

Plaintiff is the owner of subsurface lands in Osage County, Oklahoma. Am. Compl. ¶ 3. The subsurface mineral estate in Osage County ("Osage Mineral Estate") is held in trust by the United States for the benefit of the Osage Nation. Act of June 28, 1906, Pub. L. No. 59-321, § 3, 34 Stat. 539, 543-44, as amended ("1906 Act"); Am. Compl. ¶¶17-18. Under the 1906 Act, the Osage Nation is authorized to lease the Osage Mineral Estate for oil and gas exploration and development "with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe." 1906 Act § 3. The Secretary has delegated this authority to the Superintendent of the Osage Agency. *See* 25 C.F.R. § 226.4, 226.5; *see also* 209 DM 8.1(A); Am. Compl. ¶ 19. Regulations governing leasing of the Osage Mineral Estate for oil and gas mining are set forth in 25 C.F.R. Part 226.[3]

"No operations shall be permitted upon any tract of land until a lease covering such tract is approved by the Superintendent." 25 C.F.R. § 226.16(a). Each oil and/or gas lease and the related operations thereon are governed by the regulations in 25 C.F.R. Part 226, and must be assessed for its environmental impact prior to its approval by the Superintendent. 25 C.F.R. § 226.16(a). Each oil lease, gas lease, or oil and gas lease and the lease's related operations are

[3] From 1957 until 1982, the regulations governing leasing of the Osage Mineral Estate were codified at 25 C.F.R. Part 183. In 1982, the regulations were re-designated as 25 C.F.R. Part 226. *See* Redesignation Table for Chapter I of Title 25-Indians, 47 Fed. Reg. 13,327 (Mar. 30, 1982).

governed by the regulations in 25 C.F.R. Part 226, and must be assessed for its environmental impact prior to its approval by the Superintendent. 25 C.F.R. § 226.2(c); *Davis v. Morton*, 469 F.2d 593, 596-97 (10th Cir. 1972). Upon receipt of an approved lease, lessees have the right to use so much of the surface of the land within the Osage Mineral Estate as may be reasonable for operations and marketing. 25 C.F.R. § 226.19(a). However, except for the surveying and staking of a well, no operations of any kind shall commence until the lessee meets with the surface owner to discuss lease access and the settlement of surface damages. 25 C.F.R. § 226.18. Prior to commencing drilling operations, a lessee must submit an APD and obtain the Superintendent's approval thereof, 25 C.F.R. § 226.16 (b), and pay the surface owner a commencement fee, 25 C.F.R. § 226.19(b).

Plaintiff filed its Complaint on January 17, 2017, challenging the Osage Agency's compliance with NEPA in its approval of two oil leases and ten APD's allegedly affecting Plaintiff's property. ECF No. 2. On April 24, 2017, Federal Defendants moved to dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim. ECF No. 14, 15. On May 5, 2017, Plaintiff filed its First Amended Complaint. ECF No. 18. The amendments to the Complaint include, *inter alia*, changes to the legal description of the real property owned by Plaintiff and replacement of the claims relating to specific leases and permits with a broad challenge to all of BIA's lease, lease assignment, and drilling permits approvals since the inception of NEPA. *Id.* ¶¶ 3, 14, 67. In addition, Plaintiff now states that it does not possess information concerning "all approvals . . . authorizing oil and gas related activities on the Property," noting that such information was requested from the Osage Agency but that inaccurate information was received. *Id.* ¶ 60. Plaintiff's counsel's actual request for records

relating to Plaintiff's lands, and the documents Federal Defendants provided in response, are attached as Exhibit 1.

IV. ARGUMENT

A. Plaintiff has not alleged sufficient facts to state a plausible claim for relief.

Plaintiff's broad and ambiguous Amended Complaint fails to allege sufficient facts to state a plausible claim for relief. As noted above, a complaint must contain sufficient factual matter to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 562-63.

Instead of identifying and challenging specific leases, lease assignments, or drilling permits, Plaintiff blindly challenges all such approvals since January 1, 1970. Because of this blind challenge, Federal Defendants have not received fair notice, or any notice for that matter, of Plaintiff's claims. "Federal pleading requirements function to give notice to the opposing party of the nature of the claim or defense." *Duran v. Ashcroft*, 114 Fed. Appx. 368, 371 (10th Cir. 2004) (finding that plaintiff sufficiently alleged discrimination claims by pointing to specific occasions). A defendant is entitled to "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. As it stands, the Amended Complaint – because of its lack of specificity – gives Federal Defendants no notice as to what approvals, if any, are relevant to Plaintiff's property. Because the Amended Complaint is devoid of any specific approvals, Federal Defendants are left in the dark as to what the nature of Plaintiff's claims are, what approvals are being challenged, and what specific defenses they may have to each specific approval. Without fair notice, Plaintiff fails to meet the federal requirements noted above, and the Amended Complaint should be dismissed for failure to state a claim.

Rather than meet the standards spelled out in *Iqbal* and *Twombly*, Plaintiff attempts to shift the burden to the government to determine Plaintiff's claims. Plaintiff implies that its reason for doing so is because Plaintiff submitted a request for records relating to its property to

the Osage Agency prior to filing this suit, and the Osage Agency provided inaccurate information in response thereto. Am. Compl. ¶ 60. Plaintiff's assertion that the Osage Agency failed to provide the records requested or provided inaccurate information is wholly unsupported. To begin, Plaintiff requested copies of leases and permits approved since January 1, 2008, not Plaintiff all possible approvals dating back to January 1, 1970. *See* Exhibit 1 at 4. Further, Federal Defendants provided Plaintiff with the documents relevant to the request submitted, including relevant leases and APDs to Plaintiff's property. *Id.* at 5-51.

In any event, it is not a defendant's burden to decipher, research or plead a plaintiff's facts for it. Rather, the plaintiff has the burden of pleading enough facts to state a plausible claim for relief. *Iqbal*, 556 U.S. at 678. Plaintiff has failed to meet that burden here, and therefore the Amended Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

B. Plaintiff lacks statutory standing under the APA because Plaintiff fails to identify a specific final agency action or injury.

In the instant matter, Plaintiff seeks review pursuant to the general review provisions of the APA, and therefore, the agency actions in question must be final agency actions. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (citing 5 U.S.C. § 704). As previously noted, Plaintiff's Amended Complaint sets forth a wholesale attack on all leases, lease assignments, and APDs relating to Plaintiff's property and seeks declaratory judgments that the Federal Defendants have failed to comply with NEPA in issuing all such approvals for over four decades. Am. Compl. ¶¶ 55-67. Plaintiff, however, does not identify a specific, discrete agency action but instead makes a blanket challenge to all approvals.

This blanket challenge does not satisfy the statutory standing requirements of the APA. *See Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir. 1998) ("plaintiffs must show there has been

some 'final agency action,'" demonstrate that its claims fall within the relevant statute's zone of interest, and show they are "aggrieved" within the meaning of the APA). Plaintiff has the burden of identifying *specific federal conduct* and explaining how such conduct constitutes final agency action within the meaning of the APA. *See Colorado Farm Bureau Fed. v. U.S. Forest Serv.*, 220 F.3d 1171, 1174 (10th Cir. 2000) (emphasis added); *see also Lujan*, 497 U.S. at 882; *Catron Cty. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996). An overbroad claim for essentially any potential unknown or unidentified approval since January 1, 1970 fails to satisfy this burden.

Further, to meet the prudential requirements of standing under the APA, Plaintiff "must establish that [it has] suffered a legal wrong because of the challenged agency action, or [is] adversely affected or 'aggrieved by agency action within the meaning of a relevant statute.'" *Mount Evans v. Madigan*, 14 F.3d 1444, 1452 (10th Cir. 1994) (citing *Air Courier Conference of Am. v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 523 (1991)). Plaintiff has not done so. Plaintiff's bare conclusory allegation that it has suffered "actual harm," that is not tied to the approval of any particular lease, lease assignment, or APD is patently insufficient. *Babbitt,* 137 F.3d at 1203. Put simply, Plaintiff's failure to identify a discrete final agency action under the APA (as opposed to challenging every approval since 1970 that affects its property) coupled with Plaintiff's failure to identify a concrete particularized injury renders its Amended Complaint defective.

C. Plaintiff's claims are barred by the six-year statute of limitations.

1. Challenges to any approvals made before January 17, 2011 are untimely.

Plaintiff challenges the approvals of all leases, lease assignments, and APDs since January 1, 1970 but any challenge to an approval made before January 17, 2011 is untimely.

"Limitations periods in statutes waiving sovereign immunity are jurisdictional, and a court exercising its equitable authority may not expand its jurisdiction beyond the limits established by Congress." *Ramming v. United States*, 281 F.3d 158, 165 (5th Cir. 2001). "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). Claims brought pursuant to the APA, such as Plaintiff's claims in the instant matter, are subject to the six-year statute of limitations set forth in 28 U.S.C. § 2401(a). *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1245-46 (10th Cir. 2012); *Nagahi v. Immigration & Naturalization Serv.*, 219 F.3d 1166, 1171 (10th Cir. 2000). "Unlike an ordinary statute of limitations, [28 U.S.C.] § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity. . . ." *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987); *see also Ute Distrib. Corp. v. Sec'y of Interior*, 584 F.3d 1275, 1282 (10th Cir. 2009) (suggesting that § 2401(a) is jurisdictional).

APA claims covered by 28 U.S.C. § 2401(a) "must be brought within six-years of the claims accrual." *Wild Horse Observers Ass'n v. Jewell*, 550 Fed. Appx. 638, 641 (10th Cir. 2013) (citing *Impact Energy Res.*, 693 F.3d at 1245-46). "A claim against the United States first accrues on the date when all events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Id.* (citing *Ute Distrib. Corp.*, 584 F.3d at 1282); *see also Phillips Petroleum Co. v. Lujan*, 4 F.3d 858, 861 (10th Cir. 1993). A plaintiff need not know the full extent of his injuries before the statute of limitations begins to run. *Indus. Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 969 (10th Cir. 1994). "A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." *Id.*

In *Chance* , the Court dismissed a similar matter as barred by the statute of limitations where the challenged approvals occurred outside of the six-year limitation period in 28 U.S.C. § 2401(a). No. 4:16-cv-549-JHP-PJC (N.D. Okla. Apr. 18, 2017), ECF No 48 (slip op.). The *Chance* court held that 28 U.S.C. § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity. *Id.* at 6. Further, the Court found that "any suit under the APA relating to the approval and issuance of [leases and drilling permits] is barred by the statute of limitations," where a plaintiff "through reasonable diligence, could have learned of the existence of the subject lease and drilling permits at any time following their submission by the lessee simply by contacting the Osage Agency." *Id.* at 7.

Plaintiff filed the present case challenging the BIA's approval of leases, lease assignments, and APDs, on January 17, 2017. Accordingly, this Court does not have subject matter jurisdiction over any challenge to an approval related to Plaintiff's property, issued before January 17, 2011. All challenges to approvals made before January 17, 2011 have expired because Plaintiff is deemed to have notice – and therefore the claim began to accrue – on the relevant approval date. To the extent that leases, lease assignments, and APDs were approved for portions of the Osage Mineral Estate underlying Plaintiff's property, all such approvals would have been available, upon request, at the Osage Agency since the dates they were approved.[4] Like in *Chance* , Plaintiff here, through reasonable diligence, could have learned of

[4] Additionally, prior to commencement of drilling operations on any lease, the lessee is required to meet with the surface owner to discuss well locations, routes of ingress/egress, and the procedure for settlement of surface damages. 25 C.F.R. § 226.18. Lessees are also required to pay a commencement fee to the surface owner for each well, prior to being drilled. 25 C.F.R. § 226.19(b). Eight of the APDs challenged in Plaintiff's original complaint list Plaintiff, Persimmon Ridge, LLC, as the recipient of the commencement fees. *See* Compl. ¶ 64, ECF No. 2; *see also* Def. Mot. to Dismiss, exhibit no. 4-12, ECF No. 14. Thus, Plaintiff had actual notice of many approvals it now challenges (as part of its broader unspecific challenge).

the existence of leases, lease assignments, and APDs at any time following their submission by the lessee, simply by contacting the Osage Agency. *See Chance*, slip op. at 7. That constructive knowledge means the statute of limitations on any approval related to Plaintiff's property began to run on the approval date. "Accordingly, . . . any suit under the APA relating to the approval and issuance of these documents is barred by the statute of limitations." *Id; see also Chemical Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1494 (10th Cir. 1997).

2. The Statute of Limitations is not subject to equitable tolling.

Plaintiff attempts to avoid the clear time bar by arguing that the limitations period should be equitably tolled. Plaintiff claims that Federal Defendants failed to provide Plaintiff, or the public, with notice that they approved leases, lease assignments, or APDs on Plaintiff's property. Am. Compl. ¶¶ 69-70. However, "equitable tolling is unavailable if the statutory time limit is a 'jurisdictional' restriction on a court's power to adjudicate the case." *Chance* , slip op. at 8 (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008)). Courts do not have the authority "to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). The six-year statute of limitations set forth in 28 U.S.C. § 2401(a), like its Court of Federal Claims counterpart, 28 U.S.C. § 2501, is jurisdictional. *See Chance* , slip op. at 9 ("Given that section 2501 is jurisdictional, so too section 2401(a) is jurisdictional. . . To hold otherwise would result in different rules applying to the same substantive claims depending on venue."). Because section 2401(a) is jurisdictional, Plaintiff's equitable tolling assertion is unavailing.

Even if this Court were to assume that equitable doctrines could toll the running of 28 U.S.C. § 2401(a) – which they cannot – tolling is not appropriate in this case. Equitable tolling is extended sparingly and limited to "rare and exceptional circumstance." *Garcia v. Shanks*, 351

F.3d 468, 473 n.2 (10th Cir. 2003). A plaintiff is entitled to equitable tolling only if he shows that he has diligently pursued his rights by filing a defective pleading during the statutory period, or where he has been induced or tricked by the defendant's conduct in allowing the filing deadline to pass. *United States v. Clymore*, 245 F.3d 1195, 1199 (10th Cir. 2001) (citation omitted); *see also Holland v. Florida*, 560 U.S. 631, 649 (2010).

The Tenth Circuit "has applied equitable tolling when the defendant's conduct rises to the level of active deception; where a plaintiff has been lulled into inaction by a defendant, and 'likewise, if a plaintiff is actively misled or has in some extraordinary way been prevented from asserting his or her rights.'" *Clymore*, 245 F.3d at 1199 (alterations and citations omitted). However, equitable tolling "is not available to a tardy plaintiff who, notwithstanding the alleged concealment, had actual [] or constructive knowledge of the facts constituting his claim for relief." *Chance* , slip op. at 11; *see also, Urabazo v. United States*, 1991 U.S. App. LEXIS 26074, at *4 (10th Cir. Oct. 21, 1991) (28 U.S.C. §2401(a) is a "jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed."). Accordingly, because section 2401(a) is jurisdictional, Plaintiff's equitable tolling assertion is unavailing.

Chance sheds additional light in the context of challenges to Osage Agency approvals. The *Chance* court noted that equitable tolling has been found unavailable to a plaintiff who fails to allege facts regarding any steps taken to diligently pursue his rights or who fails to plead facts demonstrating he was actively misled from pursuing his rights. *Chance*, slip op. at 11-12. Moreover, any allegations of concealment are immaterial when a plaintiff knew, or reasonably should have known, of the existence of his causes of action at the time of their accrual or shortly thereafter. *Id.* at 12-13.

Here, Plaintiff alleges no facts indicating that it has taken any steps to diligently pursue its rights, nor did it file any pleading during the applicable statutory period for approvals made (to the extent any approvals were made) between 1970 and 2011. Instead, Plaintiff's basis for equitable tolling relies on its allegations that the BIA concealed from the public its approval of leases, lease assignments, and APDs without performing site-specific environmental analysis and misled Plaintiff to believe it had complied with NEPA in approving leases and permits by failing to provide it with notice of their approval. Am. Compl. ¶ 70. Plaintiff cites no authority for the proposition that Defendants are required to provide Plaintiff, or the public, with notice each time that it approves a lease, lease assignment, or drilling permit. Moreover, no such requirement appears in the regulations in 25 C.F.R. Part 226. These allegations are nearly identical to those in *Chance*. *Chance* , slip op. at 12. As *Chance* noted, such allegations are unsupported. *Id.* Plaintiff's allegation that it was intentionally misled by the BIA is similarly unavailing. Accordingly, such notice cannot serve as the basis for Plaintiff's claim that it was intentionally misled.

Ultimately, Plaintiff's allegations of concealment are immaterial because Plaintiff had constructive knowledge of the facts constituting its claim for relief. Plaintiff reasonably should have known of the existence of its causes of action at the time of their accrual or shortly thereafter. Accordingly, Plaintiff had constructive knowledge of its claims at the time they accrued, and failed to diligently pursue its rights during the statutory period. Those facts, coupled with Plaintiff's failure to properly allege concealment by Defendants, clearly demonstrate that equitable tolling is not appropriate here.

Plaintiff finally contends that the filing in this Court of *Donelson v. United States*, No. 4:14-cv-316-JHP-FHM (N.D. Okla. 2016), a "class action," tolls the statute of limitations for its

claims in the instant case during the pendency of the *Donelson* litigation. Am. Compl. ¶ 72. The *Donelson* litigation has no bearing on Plaintiff's claims in this matter. In *Donelson*, two Osage County surface owners filed suit on behalf of themselves and all surface owners and lessees in Osage County whose property is subject to an oil and gas mining lease, concession agreement, or drilling permit, alleging that such instruments are "*void ab initio*" due to BIA's failure to comply with NEPA. On March 31, 2016, the Court issued an Opinion and Order in *Donelson* dismissing the claims against the Federal Defendants for lack of subject matter jurisdiction. 2016 WL 1301169.

In support of the contention that *Donelson* tolls the statute of limitations set forth in 28 U.S.C. § 2401(a), Plaintiff cites *American Pipe Construction Co. v. Utah*, 414 U.S. 538 (1974). Am. Compl. ¶ 72. However, *American Pipe* is inapplicable to the facts of this case. *American Pipe* is an antitrust case in which the Supreme Court held that where class certification was denied solely because of failure to demonstrate the impracticability of joinder, it was appropriate to toll the statute of limitations set forth in the Clayton Act for purported members of the denied class since such tolling was consistent with the legislative intent thereof.[5] Despite Plaintiff's assertion to the contrary, the *Donelson* case was not a class action. As opposed to the plaintiffs in *American Pipe*, the *Donelson* plaintiffs never filed a motion for class certification pursuant to Federal Rule of Civil Procedure 23, and therefore, no such motion was ever denied. This Court confirmed the lack of any such filing in its Opinion and Order issued March 24, 2016, ECF No. 228, denying the *Donelson* plaintiffs' Motion for Leave to Conduct Discovery, stating

[5] The Supreme Court specifically noted the importance of the basis for denial of class certification to this holding, stating that "in the present case, maintenance of the class action was not denied for failure of the complaint to state a claim on behalf of members of the class, . . . not for lack of standing of the representative, or for reasons of bad faith or frivolity." *Am. Pipe Constr. Co.*, 414 U.S. at 766 (citation omitted).

definitively that "[t]here is no motion pending for class certification." *Id.* at 1. Accordingly, since the *Donelson* case was not a class action and the *Donelson* plaintiffs never filed a motion for class certification, let alone had a motion for class certification denied, Plaintiff's argument fails.

Moreover, even if the class action tolling doctrine were to apply, it cannot revive long stale claims. This lawsuit was filed on January 17, 2017. *Donelson* was filed on August 11, 2014. Plaintiff challenges all approvals since January 1, 1970. *Donelson* cannot revive claims that already expired. In any event, all claims that could be tolled under the class action doctrine fail for other reasons explained below.

For the foregoing reasons, any claims that Plaintiff alleges regarding Osage Agency approvals issued before January 17, 2011 are barred by the six-year statute of limitations set forth in 28 U.S.C. § 2401(a) and are not saved by equitable tolling and should be dismissed. To the extent that Plaintiff challenges any approvals issued after January 17, 2011, those claims – along with any challenge to pre-January 17, 2011 approvals – should all be dismissed because, as noted below, Plaintiff fails to establish a waiver of sovereign immunity, has not exhausted its administrative remedies, and fails to allege a specific final agency action.[6]

D. Plaintiff fails to establish a waiver of sovereign immunity.

This Court should also dismiss Plaintiff's Complaint because Plaintiff fails to meet its burden of showing that sovereign immunity has been waived. The United States, as sovereign, is immune from suit, unless it consents to be sued. *United States v. Testan*, 424 U.S. 392, 399 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jacks*, 960 F.2d 911, 913 (10th Cir. 1992)

[6] Additionally, to the extent Plaintiff's Amended Complaint may be read as a broad challenge to the approval of APDs, such challenges could implicate claims that are moot because the leases were terminated or the APDs expired.

(same). "Thus, if the [United States] has not consented to suit, the courts have no jurisdiction to either 'restrain the government from acting or to compel it to act.'" *United States v. Murdock Mach. & Eng'g Co. of Utah*, 81 F.3d 922, 929-30 (10th Cir. 1996) (citation omitted). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text," and will not be implied. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). Statutory text purporting to waive governmental immunity is strictly construed in favor of the sovereign. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992); *see also United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547 (10th Cir. 2001).

None of the authorities that Plaintiff alleges to vest this Court with jurisdiction are sufficient to establish a waiver of the United States' sovereign immunity. First, Plaintiff cites the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. Am. Compl. ¶ 7. However, the Declaratory Judgment Act does not confer jurisdiction on a federal court where none otherwise exists. *Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002) (citing *New Mexico v. Regan*, 745 F.2d 1318, 1323 (10th Cir. 1984)). Accordingly, the Declaratory Judgment Act does not waive sovereign immunity. *Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 1290, 1295 (10th Cir. 2009); *see also Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961 (10th Cir. 2004) (Sections 2201 and 2202 do not waive sovereign immunity), *abrogated by Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012).

Next, Plaintiff asserts the Court's jurisdiction pursuant to 28 U.S.C. § 1331. Am. Compl. ¶ 8. However, "[28 U.S.C.] § 1331 cannot be used as a basis for jurisdiction over a suit against the United States, because . . . § 1331 does not waive sovereign immunity." *Cheyenne-Arapaho*

Gaming Comm'n v. Nat'l Indian Gaming Comm'n, 214 F. Supp. 2d 1155, 1167 (N.D. Okla. 2002). The "defense of sovereign immunity is jurisdictional in nature, depriving courts of subject-matter jurisdiction where applicable." *Normandy Apartments, Ltd.*, 554 F.3d at 1295. Thus, "[b]ecause general jurisdictional statutes, such as 28 U.S.C. § 1331, do not waive the Government's sovereign immunity, a party seeking to assert a claim against the government under such statute must also point to a specific waiver of immunity in order to establish jurisdiction." *Id.*; *see also City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 906-07 (10th Cir. 2004).

Plaintiff also asserts jurisdiction pursuant to sections 702 and 704 of the APA. Am. Compl. ¶ 9. However, section 702 of the APA only contains a limited waiver of sovereign immunity for two distinct types of claims against the United States: (1) claims where a person is aggrieved by agency action "within the meaning of a relevant statute;" and (2) claims where a "person suffer[s] legal wrong because of agency action." 5 U.S.C. § 702. The first type of waiver applies when judicial review is sought pursuant to a statutory cause of action arising separate and apart from the APA. Plaintiff cites no such cause of action. The second type of waiver, relevant in the present case, applies when judicial review is sought pursuant only to the general provisions of the APA. Such is the case here, because NEPA provides no private right of action. *See Lujan*, 497 U.S. 871 (1990).

"When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under general review provisions of the APA, the 'agency action' in question must be 'final agency action.' *Lujan*, 497 U.S. at 882 (citing 5 U.S.C. § 704); *see also Chance*, slip op. at 15. "Agency action is not 'final' for purposes of § 704 until 'an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule.'" *Simmat*

v. U.S. Bureau of Prisons, 413 F.3d 1225, 1233 n.9 (10th Cir. 2005) (quoting *Darby v. Cisneros*, 509 U.S. 137, 146 (1993)). Therefore, pursuant to section 704 of the APA, "the federal courts may not assert jurisdiction to review agency action until the administrative appeals are complete." *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988) (citation omitted). As discussed in detail in the following section, Plaintiff has not exhausted administrative remedies as required, and therefore, the challenged agency action is not "final" for the purposes of APA jurisdiction. Since Plaintiff failed to identify any statute other than the APA that provides a cause of action against the United States, and since there has been no final agency action, the APA does not waive sovereign immunity for Plaintiff's claims.

The party seeking to invoke the court's jurisdiction bears the burden of showing that sovereign immunity has been waived. *Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005); *Kokkonen*, 511 U.S. at 377. Plaintiff failed to meet this burden. As set forth above, none of the authorities Plaintiff cites establish a waiver of sovereign immunity sufficient to vest this Court with jurisdiction, and therefore, the Amended Complaint should be dismissed.

E. Plaintiff has not exhausted administrative remedies as required by Interior regulations, and therefore, judicial review is not available under the APA.

Under the doctrine of exhaustion of administrative remedies, a party is not "entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *McKart v. United States*, 395 U.S. 185, 193 (1969) (citation omitted). Thus, exhaustion of administrative remedies is a necessary jurisdictional prerequisite to judicial review. *Davis v. United States*, 343 F.3d 1282, 1295-96 (10th Cir. 2003). "A party must exhaust administrative remedies when a statute or agency rule dictates that exhaustion is required." *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 924 (10th Cir. 1994) (citing *White Mountain Apache Tribe*, 840 F.2d at 677).

The exhaustion requirement "recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." *United Tribe of Shawnee Indians*, 253 F.3d at 550 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). As explained by the Tenth Circuit, "[t]he purposes of the doctrine of exhaustion of administrative remedies include avoidance of premature interruption of administrative process, allowing the agency to develop the necessary factual background on which to decide the case, giving the agency a chance to apply its expertise or discretion and possibility of avoiding the need for the court to intervene." *Franks v. Nimmo*, 683 F.2d 1290, 1294 (10th Cir. 1982) (citation omitted); *see also St. Regis Paper Co. v. Marshall*, 591 F.2d 612, 613-14 (10th Cir. 1979).

Plaintiff asserts claims regarding the alleged actions of the BIA pursuant to the APA. A party is required to exhaust administrative remedies under the APA when expressly required by statute, or "when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby*, 509 U.S. at 154. In the present case, exhaustion is mandated by Interior regulations found in 25 C.F.R. Part 2 and 43 C.F.R. Part 4. Under these regulations, if an agency decision is subject to appeal to a superior authority within the Department, a party must appeal the decision to the highest authority within the agency before judicial review is available. *Coosewoon*, 25 F.3d at 924-25 (citing 25 C.F.R. § 2.6(a)); 43 C.F.R. § 4.314(a) ("No decision of [a]… BIA official that at the time of its rendition is subject to appeal to the Board, will be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. [§]704 . . . ."). The BIA regulations for Leasing of Osage Reservation Lands for

Oil and Gas Mining, 25 C.F.R. Part 226, provide that decisions of the Superintendent may be appealed pursuant to 25 C.F.R. Part 2.[7] 25 C.F.R. § 226.44.

Chance is again relevant here. In *Chance*, the Northern District of Oklahoma dismissed a complaint involving nearly identical facts for lack of subject matter jurisdiction because of, *inter alia*, a failure to exhaust administrative remedies available under the same BIA regulations. *Chance*, slip op. at 15-18. *Chance* held that 25 C.F.R. § 226.44 is intended to allow for appeal of any decision made by the Superintendent and therefore plaintiff's argument that the Superintendent's decisions to approve leases and drilling permits are final is "contrary to the plaint text of the regulations." *Chance*, slip op. at 17. *Chance* further stated a "plaintiff must exhaust his administrative remedies by fully availing himself of the BIA's appeal procedure before he may bring suit under the APA." *Id.* at 18. Because the *Chance* plaintiff did not exhaust his administrative remedies, the Court held that his claims should be dismissed for lack of subject matter jurisdiction. *Id.*

To the extent that any leases, lease assignments, or APDs affecting Plaintiff's property were approved since January 1, 1970, those approvals are not final agency actions for the purpose of judicial review under the APA as Plaintiff asserts. In requesting review of all such unidentified leases, lease assignments, and APDs, Plaintiff cites 5 U.S.C. § 706(2)(A), alleging that the Osage Agency's actions were arbitrary and capricious. *Id.* ¶¶ 66-67. Plaintiff requests declaratory relief vacating all approvals, declaring all approvals invalid, and ordering Federal Defendants to eject or otherwise prevent any operators from entering onto Plaintiff's land until

[7] Use of the term "may" in 25 C.F.R. § 226 regarding appeal is not dispositive. The optional "may" refers to the ability of an aggrieved party to appeal—a party is not required to appeal simply because it is aggrieved by agency action. *See Gilmore v. Weatherford*, 694 F.3d 1160, 1169 (10th Cir. 2012) (quoting *Jones v. Bock*, 549 U.S. 199, 218 (2007)).

they have obtained a "valid" lease. *Id.* ¶ 68, Prayer for Relief ¶¶ A-B. However, Plaintiff does not assert that it has exhausted administrative remedies for any of the agency's alleged actions for which it seeks to review. Accordingly, since BIA's approval of leases, lease assignments, and APDs does not constitute final agency action and Plaintiff alleges no facts indicating that it has availed itself of BIA's appeal procedures, the challenged actions, to the extent any exist, are not "final" and thus are not subject to review under the APA. Accordingly, as in *Chance*, the Amended Complaint should be dismissed.

V. CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court dismiss Plaintiff's Amended Complaint for a lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and that this action be dismissed with prejudice.

Dated this 16th day of June, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filings to the parties entitled to receive notice.

/s/ Amarveer S. Brar
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