UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KIALEGEE TRIBAL TOWN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:17-cv-01670-CKK
	)	
	)	Judge Kollar-Kotelly
RYAN K. ZINKE, in his official capacity as SECRETARY of the UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	)	
	)	
Defendants.	)	
_____	)	

FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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I. INTRODUCTION

Federal Defendants, Ryan K. Zinke, in his official capacity as Secretary of the United States Department of the Interior; John Tahsuda, III, in his official capacity as Acting Assistant Secretary – Indian Affairs; and the United States Department of the Interior ("Interior") (collectively "Federal Defendants") respectfully move to dismiss Kialegee Tribal Town's ("Plaintiff") Amended Complaint for Declaratory and Injunctive Relief ("Am. Compl."), ECF No. 20, under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff petitions the Court to declare that it is a successor to the historic Creek Confederacy, and as such, has treaty protected rights of shared jurisdiction over land within the boundaries of the historic Creek Nation reservation.[1] Plaintiff's claim must be dismissed for several reasons.

First, Plaintiff identifies no waiver of the United States' sovereign immunity to Plaintiff's claims. Although Plaintiff argues that this case concerns only treaty rights, Plaintiff first must demonstrate that Federal Defendants have waived their sovereign immunity. Plaintiff fails to allege any statute that supplies the express waiver of sovereign immunity for the Court to consider its claim. Second, to the extent Plaintiff adequately alleges that the Administrative Procedure Act ("APA") provides the necessary waiver of sovereign immunity, Plaintiff fails to state a claim.[2] Plaintiff's Complaint contains generalized allegations of what it believes Federal

[1] Recently, the Tenth Circuit in *Murphy v. Warden*, --- F.3d ---, 2017 WL 5181711 (10th Cir. Nov. 9, 2017), concluded that the Creek Reservation was not disestablished. Accordingly, the "former" and "historic" modifiers for the Creek Reservation may no longer be appropriate. However, the decision may still be appealed to the Supreme Court. Regardless, the opinion provided in this memorandum does not hinge on the Creek Reservation's status as a *former* or *historic* reservation or an *existing* reservation. For continuity, this memorandum refers to the reservation as the "former Creek Reservation" or "former Muscogee (Creek) Reservation."

[2] Although Plaintiff does not rely upon the APA, to the extent the Court determines that Plaintiff's cause of action is one under the APA, because the administrative record for any challenged agency action or inaction is unnecessary to resolve the threshold legal arguments presented in this motion, Federal Defendants are not required to file a certified index of the

Defendants' positions to be, but fails to plead any specific action or inaction by Federal Defendants.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. History of the Muscogee (Creek) Nation and Kialegee Tribal Town

The Creek Nation once exercised domain over much of present day Alabama and Georgia. *See Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 971 (10th Cir. 1987). "In the 1820's, the federal government adopted a policy to forcibly remove the Five Civilized Tribes[, which included the Creek Nation,] from the southeastern United States and relocate them west of the Mississippi River, in what is today Oklahoma." *Id.* (citation omitted); *see also Woodward v. De Graffenried*, 238 U.S. 284, 293 (1915) ("The history of the removal of the Muskogee or Creek Nation from their original homes to lands purchased and set apart for them by the government of the United States in the territory west of the Mississippi river does not differ greatly from that of the others of the Five Civilized Tribes . . . .").

As the court in *Harjo v. Andrus* described, "[t]he Creek Nation, historically and traditionally, is actually a confederacy of autonomous tribal towns, or Talwa, each with their own political organization and leadership." 581 F.2d 949, 951 n.7 (D.C. Cir. 1978). In *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), the court provided a comprehensive legal history of the Creek Nation. The court found:

> On October 12, 1867, the Creeks adopted a constitution and a code of laws for the "Muskogee Nation." The constitution was modeled on American federalism, with executive, legislative, and judicial branches. Legislative power was lodged in a National Council, a bi-cameral body in which each tribal town or "Talwa" was entitled to one delegate in the House of Kings and one in the House of Warriors, plus an additional delegate in the House of Warriors for every two hundred people.

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administrative record contemporaneously with this dispositive motion under Local Rule 7(n). *See* United States District Court for the District of Columbia Local Rule 7(n).

Harjo v. Kleppe at 1120. "The Creek Nation has always been a confederacy of tribal towns." *Id.* at 1118. But, since the removal of the Creeks in 1832 to what is now Oklahoma, federal treaties and federal legislation pertaining to the Creek Reservation[3] in Oklahoma have been exclusively with the Muscogee (Creek) Nation, not the tribal towns. *See Indian Country*, 829 F.2d at 971-74. For example, in 1866, the Creek Nation entered into a treaty with the United State that "provided that the 'reduced . . . reservation' retained by the Creeks was 'forever set apart as a home for the Creek Nation.'" *Id.* at 974 (citation omitted).

"In 1893, reflecting federal policies to forcibly assimilate Indians into the non-Indian culture and to eventually create a new state in the Indian Territory, Congress created the Dawes Commission to negotiate with the Five Civilized Tribes . . . ." *Id.* at 977 (citation omitted). This period of federal policy was known as the allotment period. In 1898, Congress enacted the Curtis Act, which allotted lands of the Five Civilized Tribes and provided for the allotment of "lands owned by the Muscogee of Creek Indians in the Indian Territory to each citizen of said nation." Act of June 28, 1898, Pub. L. No. 55-514, 30 Stat. 495, 500. The Creek Nation confirmed this understanding when it adopted a new Constitution in 1979 that provided that the "political jurisdiction of The Muscogee (Creek) Nation shall be as it geographically appeared in 1900 which is based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America[.]" Const. of the Muscogee (Creek) Nation, art. 1, § 2 (1979).

[3] The jurisdictional area of the Five Civilized Tribes were generally not termed "reservations" nor "reserves" in the treaties that set them apart for the use and occupation of the respective tribes. Rather, they were referenced in treaties as the relevant tribe's "country," "territory," or "domain." *See, e.g.*, Treaty with the Creeks, Feb. 14, 1833, 7 Stat. 417. Nevertheless, the areas were set apart by the Federal Government for the use and occupation of these tribes by treaty. As such, the lands of the Five Civilized Tribes were "reservations" as that term has been defined by the Secretary for purposes of land acquisitions and for certain purposes in the Indian Gaming Regulatory Act.

B. The Kialegee Tribal Town

In 1936, Congress passed the Oklahoma Indian Welfare Act ("OIWA"), ch. 831, 49 Stat. 1967 (codified at 25 U.S.C. §§ 501-509 (1982)). Section 3 of the OIWA allowed "any recognized tribe or band of Indians residing in Oklahoma . . . to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe." In 1937, the Acting Solicitor for Interior concluded that the Creek Tribal Towns could organize as bands within the meaning of Section 3 of the OIWA, separate and distinct from the Muscogee (Creek) Nation. Plaintiff is a federally recognized Indian tribe, organized under Section 3 of the OIWA. Am. Compl. ¶ 6. Plaintiff, headquartered in Wetumka, Oklahoma, first received federal recognition in 1936. *Oklahoma v. Hobia*, 775 F.3d 1204, 1205 (10th Cir. 2014). Plaintiff is governed in accordance with a constitution and by-laws that were approved by the Secretary of the Interior ("Secretary") on April 14, 1941, and ratified by the Tribe on June 12, 1941. Am. Compl. ¶ 41. On July 23, 1942, the Secretary approved Plaintiff's corporate charter under Section 3 of the OIWA, and on September 17, 1942, Plaintiff ratified the charter. *Id.* Plaintiff has no reservation or lands held in trust by the United States. *See Kialegee Tribal Town of Okla. v. Muskogee Area Dir., Bureau of Indian Affairs*, 19 IBIA 296, 298 (Apr. 17, 1991).

C. The Present Lawsuit

Plaintiff filed its original complaint on August 17, 2017, against Federal Defendants and the Chairman of the National Indian Gaming Commission. Compl., ECF No. 1. Plaintiff sought declaratory judgment that it exercises concurrent jurisdiction over the Creek Reservation in Oklahoma with all Creek tribes and an injunction that all lands within the Creek Reservation are Plaintiff's "Indian lands" for purposes of the Indian Gaming Regulatory Act ("IGRA"). Compl.

¶¶ 38, 40, 42, 44. On November 1, 2017, the Court granted Plaintiff's motion for leave to file its Amended Complaint for Declaratory and Injunctive Relief. ECF No. 20. In its amended complaint, Plaintiff alleges that as a signatory to the Treaty of 1833 establishing the Creek Reservation, it is also Plaintiff's reservation and as such, it may exercise shared jurisdiction within the boundaries of the historic Creek reservation. Am. Compl. at ¶¶ 2, 46-48, 56. Plaintiff alleges that Federal Defendants have not recognized it as part of the "whole Creek Nation." *Id.* at ¶ 2. Plaintiff also alleges that Federal Defendants have taken the position that it does not have treaty rights to exercise jurisdiction over lands located within the boundaries of the historic Creek reservation, *id.* at ¶¶ 51, 64-65, and have violated 25 U.S.C. § 5123(f) by blocking Plaintiff from exercising jurisdiction on lands located within the Creek reservation, Am. Compl. ¶ 68.

Plaintiff alleges that it has constructed a restaurant facility, which is located on an Indian allotment within the Creek reservation and also within the city limits of Broken Arrow, Oklahoma. *Id.* at ¶ 56. Plaintiff alleges that the allotment is owned by Bim Stephen Bruner, who is an enrolled member of the Kialegee Tribal Town. *Id.* Plaintiff asserts that it claims jurisdiction over the land on which it is constructing the restaurant, as well as all lands within the Creek Reservation, in common with other recognized Creek tribes in Oklahoma. *Id.* at ¶ 57.

Plaintiff seeks a declaration that it has treaty-protected rights of shared jurisdiction within the boundaries of the historic Creek Reservation that exists in common with all other Creek tribes tracing to the Creek Confederacy within the State of Oklahoma. It also seeks an injunction against Federal Defendants requiring them to recognize Plaintiff's status as a tribe that enjoys all full treaty rights by the Creek treaties relevant to the litigation. Am. Compl., Requested Relief.

III. STATUTORY BACKGROUND

A. The Indian Reorganization Act

In 1934, Congress passed the Indian Reorganization Act ("IRA"), Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101- *et seq.*).[4] The IRA "was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains." *Cohen's Handbook of Federal Indian Law* § 1.05, at 81 (Nell Jessup ed., 2012). It authorized the acquisition of land for Indians, promulgated conservation regulations, and declared newly acquired lands to be Indian reservations or added to existing reservations. *Id.* at 82. The Act provided for tribal self-government pursuant to tribally adopted constitutions. 25 U.S.C. § 5123. And it permitted Indian tribes to organize for economic purposes pursuant to corporate charters, which could "convey to the incorporated tribe" the power to acquire or otherwise hold "property of every description . . . ." *Id.* § 5124. The "capstone" of the IRA is section 5108, which authorized the Secretary of the Interior "to acquire . . . any interest in lands . . . for the purpose of providing land for Indians." *Id.* § 5108; *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2211 (2012) (recognizing that "[l]and forms the basis of [tribal] economic life, providing the foundation for tourism, manufacturing, mining, logging, . . . and gaming") (internal quotation marks and citations omitted).

Although the IRA as originally introduced applied to Oklahoma, it was amended at the suggestion of Oklahoma Senator Elmer Thomas to make certain provisions inapplicable to Oklahoma tribes. *Cohen's Handbook of Federal Indian Law* at 455. Thomas believed that

[4] Effective September 1, 2016, Congress reclassified and renumbered certain sections of the IRA to Chapter 45 of Title 25 as 25 U.S.C. §§ 5101-5144 (formerly 25 U.S.C. §§461 – 494(a)). In several instances, Plaintiff's Complaint refers to the IRA's former classification and numbering and many cases cited by Federal Defendants also refer to the IRA's previous numbering.

Congress enacted the IRA with a "view" to "the large Indian reservations located in the western and southwestern States," in contrast with the Oklahoma Indians who had "made progress beyond the reservation plan" and whom the government should discourage from "return[ing] to reservation life." S. Rep. No. 74-1232, at 6 (1935) (Rep. of Sen. Elmer Thomas, Chairman, S. Comm. on Indian Affairs). Thus, sections of the IRA that limit alienation of restricted land, authorize the establishment of new reservations, and sanction tribal organization are inapplicable to tribes in Oklahoma. *See* 25 U.S.C. § 5118.

B. The Oklahoma Indian Welfare Act of 1936

In 1936, two years after the enactment of the IRA, Congress enacted the OIWA to extend similar benefits of the IRA to the Oklahoma tribes. The purpose of the OIWA was to rebuild Indian tribal societies, return land to the tribes, enable tribes to rebuild their governments, and emphasize Native culture. The OIWA provided that any recognized tribe residing within Oklahoma may receive a charter of incorporation from the Secretary, and shall have the right to self-determination, including the right to make their own bylaws.

IV. STANDARDS OF REVIEW FOR A MOTION TO DISMISS

A. Subject Matter Jurisdiction

Subject matter jurisdiction is a threshold issue, which should be addressed prior to any consideration of the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Federal courts presumptively lack jurisdiction "unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal quotation marks and citation omitted). Furthermore, because "[f]ederal courts are courts of limited jurisdiction . . . . [i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*,

511 U.S. 375, 377 (1994) (citations omitted). Therefore, to survive a motion to dismiss under Rule 12(b)(1), a plaintiff bears the burden of establishing that the court has subject matter jurisdiction over its claims. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936); *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007); *El Paso Nat. Gas Co. v. United States*, 605 F. Supp. 2d 224, 227 (D.D.C. 2009) ("When evaluating subject matter jurisdiction, plaintiffs bear the burden of proof."), *aff'd*, 632 F.3d 1272 (D.C. Cir. 2011). When the United States is the defendant, "a plaintiff must overcome the defense of sovereign immunity in order to establish the jurisdiction necessary to survive a Rule 12(b)(1) motion to dismiss." *Jackson v. Bush*, 448 F. Supp. 2d 198, 200 (D.D.C. 2006) (citing *Tri State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003)).

"In ruling upon a motion to dismiss brought under Rule 12(b)(1), a court must construe the allegations in the complaint in the light most favorable to the plaintiff." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000), *aff'd*, No. 00-7176, 2001 WL 135857 (D.C. Cir. 2001). "But where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992) (citation omitted).

B. Failure to State a Claim

"A Rule 12(b)(6) motion tests the legal sufficiency of a complaint[.]" *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). "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.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw [a] reasonable

inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

Legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," and "'naked assertion[s]' devoid of 'further factual enhancement'" do not suffice to state a cause of action and must be disregarded. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557). Thus, claims should be dismissed under Rule 12(b)(6) where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In evaluating a Rule 12(b)(6) motion, the court "may consider only the facts alleged in the complaint, any documents ether attached to or incorporated in the complaint and matters of which [the court] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) (citation omitted).

V. ARGUMENT

A. This Court lacks Jurisdiction Because Plaintiff fails to provide an Express, Unequivocal Waiver of the United States' Sovereign Immunity

The United States is immune from suit unless it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). In suits against the government, subject matter jurisdiction turns on at least "two different jurisdictional questions." *Yee v. Jewell*, 228 F. Supp. 3d 48, 53 (D.D.C. 2017) (quoting *Trudeau v. FTC*, 456 F.3d 178, 183 (D.C. Cir. 2006)). First, a court must consider whether Congress has provided an affirmative grant of subject matter jurisdiction and second, a court must consider whether Congress has waived the United States' immunity to suit. *Yee*, 228 F. Supp. 3d at 53. Here, for the first consideration, Plaintiff pleads that 28 U.S.C. § 1331, the federal question jurisdictional statute, 28 U.S.C. § 1362, and section § 5123 of the

IRA provide the grounds for the Court's subject matter jurisdiction over its Complaint. Am. Compl. ¶ 6. These statutes, however, do not waive Federal Defendants' sovereign immunity.

Under the doctrine of sovereign immunity, the United States is immune to suit unless Congress has expressly waived the defense of sovereign immunity by statute. *United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). This immunity extends to federal agencies, including Interior. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.") (citation omitted); *see also Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 607 (D.C. Cir. 1992). Sovereign immunity also applies to a federal official sued in his official capacity. *Jackson v. Donovan*, 844 F. Supp. 2d 74, 75-76 (D.D.C. 2012) (citing *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985)), *aff'd sub nom., Jackson v. Todman*, 516 F. App'x 3 (D.C. Cir. 2013). Plaintiff bears the burden of establishing that sovereign immunity has been abrogated. "[A] plaintiff must overcome the defense of sovereign immunity in order to establish the jurisdiction necessary to survive a Rule 12(b)(1) motion to dismiss." *Bush*, 448 F. Supp. 2d at 200 (citing *Tri–State Hosp. Supply Corp.*, 341 F.3d at 575). "[T]he Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (internal citations and quotation marks omitted). Plaintiff fails to establish that sovereign immunity has been waived.

1. 28 U.S.C. § 1331 and 28 U.S.C. § 1362 do not provide a waiver of Sovereign Immunity

The federal question statute, 28 U.S.C. § 1331, does not provide the necessary waiver of sovereign immunity. *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996) (the general federal

question statute by itself does not waive sovereign immunity). Section 1331 is merely a jurisdictional statute that does not create any substantive rights that may be enforced against the United States. *See Walton v. Fed. Bureau of Prisons*, 533 F. Supp. 2d 107, 114 (D.D.C. 2008).

Plaintiff's reliance on 28 U.S.C. § 1362 is also misplaced. Section 1362 grants district courts "original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362. Congress passed section 1362 to permit Indian tribes to bring suits in federal court to protect their federally derived property rights when the United States has declined to act on the tribe's behalf. Section 1362 in effect eliminates the $10,000 jurisdictional requirement for Indian tribes, and permits tribes to bring claims that the United States could have brought but chose not to. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472 (1976); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974). Section 1362, however, is not a waiver of sovereign immunity in a suit against the United States. *Scholder v. United States*, 428 F.2d 1123, 1125 (9th Cir.1970) (finding that section 1362 creates jurisdiction but does not waive the United States' sovereign immunity); *Pueblo of Taos v. Andrus*, 475 F. Supp. 359, 364 (D.D.C. 1979) (same).

2. The IRA does not contain an Express Waiver of Sovereign Immunity

Plaintiff also premises jurisdiction on 25 U.S.C. § 5123, asserting that this section of the IRA provides a cause of action against Federal Defendants. Am. Compl. ¶ 6. The IRA, however, does not contain the necessary waiver of sovereign immunity for Plaintiffs to advance this suit.

Although IRA section 5123(d)(2) states that "[a]ctions to enforce the provisions of this section may be brought in the appropriate Federal district court[,]" 25 U.S.C. § 5123(d)(2), this section "fails to qualify as the type of unequivocal and explicit waiver of sovereign immunity that Plaintiff needs in order to maintain this action." *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127, 140 (D.D.C. 2015) (citing *Nordic Vill.*, 503 U.S. at 33-34 ("Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed." (internal quotation marks and citation omitted))), *aff'd*, 829 F.3d 754 (D.C. Cir. 2016). In considering the very same statute, the court in *Mackinac Tribe* determined that the IRA does not provide a waiver of the United States' sovereign immunity. *Id.* Plaintiff therefore does not cite to any statute that waives the sovereign immunity of the United States and therefore this Court is without jurisdiction over Federal Defendants.

B. Plaintiff fails to State a Claim under the Administrative Procedure Act

While Plaintiff does not invoke the APA as a basis for its claims against Federal Defendants, courts in this circuit have overlooked this pleading failure to consider whether the APA's waiver of sovereign immunity applies. *See Z Street, Inc. v. Koskinen*, 44 F. Supp. 3d 48, 64 (D.D.C. 2014) ("[A] suit need not have been brought pursuant to the APA in order to receive the benefit of that statute's sovereign immunity waiver; indeed, the 'APA's waiver of sovereign immunity applies to any suit whether under the APA or not.'" (quoting *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996)) (emphasis omitted)), *aff'd*, 791 F.3d 24 (D.C. Cir. 2015). However, even if properly pled, Plaintiff still fails to state a claim because Plaintiff fails to allege any action that Federal Defendants took or failed to take giving rise to its lawsuit.

The APA provides that where a plaintiff alleges that "an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority,"

the case "shall not be dismissed nor relief therein be denied on the ground that it is against the United States[.]" *Mackinac Tribe*, 87 F. Supp. 3d at 142 (quoting 5 U.S.C. § 702). Section 702 waives sovereign immunity when a plaintiff alleges wrongful inaction by an agency or its officer in a suit for nonmonetary damages. *Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 103 F. Supp. 3d 113, 118 (D.D.C. 2015) (citing *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) ("[T]here is no doubt Congress lifted the bar of sovereign immunity in actions not seeking money damages.")); *Clark v. Library of Cong.*, 750 F.2d 89, 102 (D.C. Cir. 1984) (stating that the APA "eliminated the sovereign immunity defense in virtually all actions for non-monetary relief against a U.S. agency or officer acting in an official capacity" (citation omitted)). Here, Plaintiff fails to state a claim under the APA because it fails to challenge any final discrete agency action.[5]

The APA limits those agency actions that are subject to judicial review:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

5 U.S.C. § 704. An agency action is final when (1) the action marks the "consummation of the agency's decisionmaking process" and (2) the action is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted). Final agency actions may include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or

[5] The APA supplies a party's cause of action and is not, as is sometimes stated, a source of jurisdiction. *See, e.g., Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1298 (D.C. Cir. 2007) (citing *Trudeau*, 456 F.3d at 184) ("the APA's final agency action requirement is not jurisdictional")); *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 ("The judicial review provisions of the APA are not jurisdictional" (citing *Califano v. Sanders*, 430 U.S. 99 (1977)). A dismissal for failure to satisfy the APA's requirements for judicial review of agency action is thus a dismissal for failure to state a claim under Rule 12(b)(6).

denial thereof, or failure to act[.]" 5 U.S.C. § 551(13). The Court, however, cannot review the alleged decisions at issue in Plaintiff's complaint because Plaintiff has not identified any discrete agency action that it asks the Court to review.[6]

"A sure sign that a complaint fails the 'final agency action' requirement is when 'it is not at all clear what agency action [plaintiff] purports to challenge.'" *Friends of the Earth, Bluewater Network Div. v. U.S. Dep't of Interior*, 478 F. Supp. 2d 11, 25 (D.D.C. 2007) (quoting *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 595 (D.C. Cir. 2001)). A plaintiff "must direct its attack against some particular 'agency action' that causes it harm, because if a court does not limit its review to 'discrete' agency actions, it risks embarking on the kind of wholesale, programmatic review of general agency conduct for which courts are ill-suited, and for which they lack authority." *Bluewater*, 478 F. Supp. 2d at 25 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)). In *Bluewater*, the plaintiffs challenged authorizations regarding off road vehicle uses ("ORV") at various parks operated by the National Park Service. In finding that plaintiffs failed to challenge discrete final agency actions when they asserted general challenges to ORV authorizations, the court noted that in addition to each park's separate

[6] Plaintiff currently has pending before the Indian Board of Indian Appeals an appeal from an April 26, 2017, decision of the Bureau of Indian Affairs, Eastern Oklahoma Regional Director ("RD"), declining to approve TR-2017-02-22, a Resolution of the Kialegee Tribal Town Business Committee Enacting the Kialegee Tribal Town Liquor Control Ordinance ("Ordinance"). *Kialegee Tribal Town v. E. Okla. Reg. Dir., BIA*, IBIA 17-094. The RD found that Plaintiff lacks jurisdiction over any area of Indian Country over which it could enact and apply a liquor ordinance and, therefore, the Secretary is not authorized to certify the Ordinance or publish it in the Federal Register. Plaintiff does not challenge the RD's denial in its Complaint – nor could it – because Plaintiff must exhaust its administrative remedies that are necessary to consummate Interior's decision-making process. *See Mackinac Tribe*, 87 F. Supp. 3d at 137 (citing *Reiter v. Cooper*, 507 U.S. 258, 269 (1993) ("Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed.")); *see also* 25 C.F.R. § 2.6(a) ("No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department [of Interior], shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. § 704[.]").

decisions to authorize ORV use, it was quite possible that some, if not all, of the parks at issue made multiple decisions to authorize different specific uses in different specific parts of their territory at different times. Each of these discrete agency decisions were based on different competing factors and considerations. The court found that the plaintiffs did not identify any discrete, historical agency action that resulted in the existing authorization of ORV use at a specific park unit. As the court stated, "'[t]he federal courts are not authorized to review agency policy choices in the abstract.'" *Bluewater*, 478 F. Supp. 2d at 24 (quoting *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006)). The court found that "without any direction, the Court cannot tell which agency actions are at issue—and, importantly, which agency actions related to the use of ORVs in relevant park units may not be at issue." *Bluewater*, 478 F. Supp. 2d at 26.

Likewise, the Court here cannot review agency action on the merits, let alone make the necessary threshold evaluations of an APA case, such as finality, if it does not know what agency action is being challenged. Although Plaintiff asserts that Federal Defendants have not recognized it as part of the "whole Creek Nation," Am. Compl. ¶ 2, Plaintiff fails to cite to any discrete final decision made by Federal Defendants. Plaintiff instead cites to positions it believes Federal Defendants will take or arguments Federal Defendants may assert. *See* Am. Compl. ¶ 19 ("[t]he foregoing reference alone puts to rest any and all arguments made or that could be made against Kialegee's existence as part of the Creek Nation."); *id.* at ¶ 39 ("[h]ere, the Defendants are denying the existence of the Kialegee Tribal Town"); *id.* at ¶ 49 ("Defendants' position turns on one argument: that the treaties entered into by the Creeks do not pertain to Kialegee and that the Kialegee have no 'treaty rights'. . . . Solely on this false premise, Defendants conclude that Plaintiff therefore does not properly exercise 'jurisdiction' over its own lands . . . ."); *id.* at ¶ 50

("it is Defendants' position that the treaties render Plaintiff without jurisdiction."); *id.* at ¶ 51 ("[y]et the Defendants' position is that the Muskogee Tribe alone exercises jurisdiction over the entirety of those lands that were explicitly reserved for the "whole Creek Nation."); *id.* at ¶ 64 ("Defendants contend that there is no multi-tribal jurisdiction over the former reservation lands and argue that the federally-recognized Muskogee Creek Nation ("MCN") is the only recognized Creek tribe with any jurisdiction over those lands."); *id.* at ¶ 65 ("The only purported authority that Defendants can argue is that the Muskogee (Creek) Constitution [bases jurisdiction as it appeared geographically in 1900]); *id.* at ¶ 68 ("Defendants have repeatedly violated 25 U.S.C. § 476(f) by blocking the Kialegee from jurisdiction on lands located within the Creek Reservation."); *id.* at ¶ 73 ("The position asserted against Kialegee happens to be based on the viewpoint that only the "Muskogee (Creek) Nation" has jurisdiction over lands in Oklahoma."). Yet for all these allegations, Plaintiff fails to identify the specific discrete agency action from which these positions arise.

While "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, *Twombly*, 550 U.S. at 555, Plaintiff must put forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). Plaintiff's allegations about positions the Federal Defendants will take, or a generalized allegation that Federal Defendants have violated a statute without stating specifically how and when Federal Defendants allegedly violated that statute, fall short of identifying a discrete agency decision. These types of claims do not suffice to adequately assert that this Court has jurisdiction to hear Plaintiff's claim under the APA. Plaintiffs' Complaint should therefore be dismissed for failure to state a claim.

VI. CONCLUSION

Because Plaintiff has failed to establish that Federal Defendants waived their sovereign immunity, Plaintiff has failed to establish this Court's subject matter jurisdiction over its complaint. Plaintiff does not cite to any statute that waives Federal Defendants' sovereign immunity. Although Plaintiff has not pled a cause of action under the APA, to the extent the Court determines that the APA's waiver of sovereign immunity applies to Plaintiff's suit, Plaintiff fails to identify any discrete final agency action for the Court to review. Instead, Plaintiff's complaint only asserts unspecified allegations speculation as to what Federal Defendants' position may be. These base allegations do not provide the information necessary to know what discrete final agency actions are being challenged and can be reviewed. Federal Defendants therefore respectfully request that this Court dismiss Plaintiff's Complaint.

Respectfully submitted this 1st day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 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/ Jody H. Schwarz