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' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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Plaintiff's response brief cannot cure the Complaint's failure to state a claim. Plaintiff acknowledges that while its Complaint did not allege the requisite waiver of sovereign immunity, the D.C. Circuit has found that the Administrative Procedure Act's ("APA") waiver of sovereign immunity applies to any suit whether under the APA or not. But Plaintiff still must state a valid claim, which it does not. Plaintiff's allegations center on its argument that treaties entered into between the United States and the Creek Nation provide it with jurisdiction over lands located within the Creek Nation's former reservation as a signatory to those treaties. This assertion, however, creates no cause of action that may be heard by this Court. Plaintiff must still assert that Federal Defendants have taken an action violative of those treaties. Although Plaintiff cited to no instances in its Complaint, in its response, Plaintiff discusses instances in which it asserts Federal Defendants have taken agency actions contrary to its alleged treaty rights. These examples, however, cannot support any claim for judicial review in this case, because they are either untimely or not yet final. As such, Plaintiff's Complaint should be dismissed.

I. ARGUMENT

As Plaintiff concedes, the only waiver of sovereign immunity for its claims that Federal Defendants have taken the position – or will take the position – that it cannot exercise jurisdiction over lands within the former boundaries of the Creek Nation Reservation is the APA. *See* Pl.'s Mem. of P. & A. in Opp'n to Fed. Defs.' Mot. to Dismiss Pl.'s Am. Compl. 9, ECF No. 30 ("Pl.'s Br." or "Response"). The APA waives the United States' sovereign immunity in either one of two ways, under 5 U.S.C. § 702, (1) the claimant "must identify some 'agency action,'" and (2) the claimant "must show that he has 'suffer[ed] a legal wrong' . . . or is 'adversely affected or aggrieved' by that action within the 'meaning of a relevant statute.'" *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990) (first alteration in original). While the APA waives

the United States' sovereign immunity, the claimant must still identify a valid cause of action for its claim to proceed. Plaintiff has made clear it is not alleging an APA cause of action, but now relies on violations of 25 U.S.C. §5123 and treaties with the Creek Nation. Plaintiffs have failed to state a valid claim under either theory.

To bring a suit against the United States, a plaintiff must identify 1) a cause of action; 2) a source of subject matter jurisdiction; and 3) a waiver of sovereign immunity. *United Am., Inc. v. N.B.C.-U.S.A. Hous., Inc. Twenty Seven,* 400 F. Supp. 2d 59, 61 (D.D.C. 2005); *see also Am. Rd. & Transp. Builders Ass'n v. E.P.A.*, 865 F. Supp. 2d 72, 80 (D.D.C. 2012) aff'd, 12-5244, 2013 WL 599474 (D.C. Cir. Jan. 28, 2013) ("The government responds that neither [statute] waives the sovereign immunity of the United States nor gives the plaintiff a cause of action. It might have added—and this court is obliged to note—that ARTBA must also identify a source of statutory jurisdiction."). Plaintiff relies on the APA for its waiver of sovereign immunity, and relies on 28 U.S.C. § 1331 and § 1362 to establish jurisdiction, but fails to identify a valid cause of action.

Plaintiff expressly disclaims that it is relying on the APA for a cause of action.[1]

[1] Although Plaintiff alleges that it is not asserting a cause of action under the APA, the Court, however, need not accept Plaintiff's legal conclusions as true. *See Artis v. Greenspan*, 158 F.3d 1301, 1306 (D.C. Cir. 1998). Thus, even if the Court were to interpret Plaintiff's Complaint as alleging an APA cause of action, Plaintiff's Complaint would still fail because it is impossible to determine if Plaintiff's claims may be subject to administrative review requirements before it may seek judicial review. Under 5 U.S.C. § 702, exhaustion of administrative remedies sometimes must be complied with. *See Fredericks v. United States*, 125 Fed. Cl. 404, 411-12 (Fed. Cl. 2016) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). Independently, the APA does not require that a claimant comply with exhaustion doctrine. Exhaustion is required under the APA only when necessitated by an applicable statute or agency regulation. *See Darby v. Cisneros*, 509 U.S. 137, 154 (1993) ("[W]here the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review."); *Conservation Force v. Salazar,* 919 F. Supp. 2d 85, 89-90 (D.D.C. 2013). Here, it is more than likely that Department of the Interior ("Interior") regulations require

Response at 12 ("But Kialegee is not invoking the APA as a cause of action, and it need not, as explained above."). Plaintiff then argues that it has plead a valid cause of action under 28 U.S.C. § 1331 and 1362. Response at 10. Neither of those statutes provide a cause of action. "[S]ection 1331 requires that the plaintiffs allege another basis for jurisdiction in addition to section 1331, i.e. a cause of action created by a substantive federal statute. *McGuirl v. United States*, 360 F. Supp. 2d 129, 131 (D.D.C. 2004), *aff'd*, 167 F. App'x 808 (D.C. Cir. 2005) (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494–495 (1983). Similarly, section 1362 "does not alone provide a right of entry into federal courts." *Little River Band of Ottawa Indians v. Nat'l Labor Relations Bd.*, 747 F. Supp. 2d 872, 883 (W.D. Mich. 2010). Section 1362, like section 1331, requires that a plaintiff-tribe show that its complaint raises a cause of action created by a substantive federal statute. *Sac & Fox Nation of Okla. v. Cuomo*, 193 F.3d 1162, 1165 (10th Cir. 1999); *see, Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1142 (10th Cir. 2004); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1077 (9th Cir. 1990); *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1470 (9th Cir. 1989); *see also Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661, 667 (1974).

Plaintiff also appears to argue that treaties give rise to a cause of action. However, it has made no attempt to show in its Complaint or in its Response whether the Creek Nation treaties provide a private cause of action. Treaties, "even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 489 (D.C. Cir. 2008). Here, Plaintiff has only vaguely invoked its "treaty rights" but has made no attempt to demonstrate that the treaty creates a private cause of action. *Id.* at 488 ("To determine whether a treaty creates a

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Plaintiff to exhaust administrative remedies before seeking judicial review of any claim that Federal Defendants have taken an action. See 25 C.F.R. § 2.6(a).

cause of action, we look to its text.") (citing *United States v. Alvarez–Machain*, 504 U.S. 655, 663 (1992)). Plaintiff has therefore failed to state a valid cause of action pursuant to its vague and undefined treaty rights.

Finally, in its Response, Plaintiff alleges a cause of action under 25 U.S.C. § 5123. Pl's. Br. at 11. Although Plaintiff's Complaint contains no allegations of any specific action taken by Federal Defendants that support its claims, in its Response, Plaintiff cites to three instances it argues support its overall assertion that Federal Defendants refuse to acknowledge its rights as a Creek Nation successor: (1) Plaintiff's current appeal before the Interior Board of Indian Appeals ("IBIA") from an April 26, 2017, decision of the Bureau of Indian Affairs, Eastern Oklahoma Regional Director declining to approve a resolution of the Kialegee Tribal Town Business Committee on the grounds that Plaintiff lacks jurisdiction over any area of Indian Country over which it could enact and apply a liquor ordinance; (2) a 1991 IBIA decision, *Kialegee Tribal Town of Okla. v. Muskogee Area Dir., Bureau of Indian Affairs*, 19 IBIA 296, 303 (1991), upholding a decision of the Regional Director finding that Plaintiff did not exercise jurisdiction over Muscogee (Creek) Nation lands; and (3) a May 24, 2012 memorandum from the National Indian Gaming Commission ("NIGC") ("2012 Memorandum"), providing the NIGC's legal review as to whether a proposed gaming facility was on Indian lands eligible for gaming as defined by the Indian Gaming Regulatory Act ("IGRA") and applicable regulations. Pl.'s Br. 13-15. These instances, however, cannot serve as the grounds for an actionable APA challenge in this Court. First, the Regional Director's April 26, 2017, decision is currently being appealed before the IBIA. As Federal Defendants provide in their memorandum in support of their motion to dismiss, Plaintiff must exhaust its administrative remedies in order to consummate Interior's decision-making process before it may seek judicial review. Fed. Defs.' Mem. of P. & A. in

Supp. of their Mot. to Dismiss Pl.'s Am. Compl. 14 n.6, ECF No. 28-1.

Second, Plaintiff is precluded from challenging the IBIA's 1991 decision because any challenge to that decision – more than twenty-five years after issued – is untimely. "Specifically, under 28 U.S.C. § 2401(a) 'every 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.'" *Historic E. Pequots v. Salazar*, 934 F. Supp. 2d 272, 278-799 (D.D.C. 2013). "Limitations and conditions upon which the federal government consents to be sued will be strictly construed in favor of the sovereign." *Id.* at 279 (citations omitted). Here, the Court would not have subject matter jurisdiction over Plaintiff's claim because it was not brought within the six year statute of limitations. A cause of action against an agency first accrues as soon as the plaintiff may institute and maintain an action in court. *Id.* (citing *Impro Prods., Inc. v. Block*, 722 F.2d 845, 850 (D.C. Cir. 1983); *Spannaus v. Dep't of Justice*, 824 F.2d 52, 56 (D.C. Cir. 1987) ("A cause of action . . . 'first accrues,' within the meaning of § 2401(a), as soon as . . . the person challenging the agency action can institute and maintain a suit in court." (alterations in original))). The IBIA's decision was final for Interior, *see* 43 C.F.R. § 4.314(b), and Plaintiff was required to file any action seeking judicial review of that decision within six years of its issuance, or April 17, 1997.

Third, Plaintiff's reference to the 2012 Memorandum likewise fails to provide Plaintiff a lodestone for its current Complaint. The 2012 Memorandum, which provided NIGC's General Counsel's legal review, is not an agency action for which Plaintiff may seek judicial review. Plaintiff has failed to show how the 2012 Memorandum violates the IRA in any way. The relevant statute here, IGRA, enumerates four specific categories of actions that are "final agency actions" reviewable under the APA:

> Decisions made by the Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5.

25 U.S.C. § 2714. The 2012 Memorandum does not fall under any of these categories and does not constitute final agency action under IGRA.[2] *See Oklahoma v. Hobia*, 775 F.3d 1204, 1210 (10th Cir. 2014) (holding that a letter issued by the NIGC Chair (adopting a General Counsel's opinion letter) determining that a tribe lacked jurisdiction to conduct gaming on particular property did not constitute final agency action under IGRA). *See also Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Ashcroft*, 360 F. Supp. 2d 64, 67 (D.D.C. 2004) ("[T]he legislative history of the [IGRA] reflects an intent to limit judicial review only to certain agency decisions, thereby overcoming the APA's presumption of judicial review."); *Neighbors of Casino San Pablo v. Salazar*, 773 F. Supp. 2d 141, 150 (D.D.C. 2011) ("Judicial review of the NIGC's decisions is restricted to final decisions under 25 U.S.C. §§ 2710-13."), *aff'd*, 442 F. App'x 579 (D.C. Cir. 2011) (per curiam). Therefore, the 2012 Memorandum is not final agency action as a matter of law and is not challengeable whether under the APA or under § 5123.

The above discussion serves to highlight the fatal flaws with Plaintiff's Complaint. It is not enough to state that Federal Defendants have violated a statute. Plaintiff has to allege with some specificity the actions that it alleges Federal Defendants took that give rise to a valid cause of action. Relying on *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186-87 (D.C. Cir. 2006), Plaintiff argues that it doesn't have to plead any cause of action and can make a base allegation that Federal Defendants have violated the IRA and Creek Nation treaties. Pl.'s Br. at 10. *Trudeau* does not support this position. While *Trudeau* held that section 702's waiver of sovereign immunity applied to give the court jurisdiction over all of the plaintiff's claims, he still

[2] Interior's concurrence in the 2012 Memorandum does not change this fact.

had to state a claim upon which relief could be granted. *Trudeau*, 456 F.3d at 189-91. This is what Plaintiff fails to do. The vague allegations in Plaintiff's Complaint that Federal Defendants have taken a position or may take a position does not establish a cause of action under either the IRA or Plaintiff's treaties.

Here, although Plaintiff argues that it "has set forth the actions of Defendants, explained why it violates that law and how this had deprived and harmed Kialegee," Pl.'s Br. at 13, Plaintiff has done no such thing. In its Complaint, Plaintiff alleges that it has constructed a restaurant facility located on land within the Creek reservation and for which it claims jurisdiction, Pl.'s Am. Compl. for Declaratory & Injunctive Relief ¶¶ 56-57, ECF No. 27, but those allegations, standing alone, fail to allege that Federal Defendants have taken any action for which Plaintiff may seek judicial review. Rather, Plaintiff appears to seek to use this complaint as a vehicle to avoid the fact that Federal Defendants have not taken action that Plaintiff may seek to challenge in this lawsuit. It may be that in the future, after the IBIA issues its final decision on Plaintiff's challenge to the Regional Director's April 26, 2017, decision, Plaintiff will have an action for which it may want to seek judicial review; that time is not now. Plaintiff's Complaint should therefore be dismissed for failure to state a claim.

II. CONCLUSION

Plaintiff fails to state a claim for which this Court may grant relief. Plaintiff's only waiver of sovereign immunity is the APA. Rather, Plaintiff's Complaint only asserts unspecified allegations and speculation as to what Federal Defendants' position may be without challenging any concrete action. Although Plaintiff's Response discusses positions Federal Defendants have taken in the past of that are currently the subject of administrative appeal, these actions fail to state any claim for which Plaintiff may seek judicial review in this lawsuit whether under the

APA, 25 U.S.C § 5123, or under its unspecified treaty rights. Federal Defendants therefore respectfully request that this Court dismiss Plaintiff's Amended Complaint.

Respectfully submitted this 12th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 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