

GLENN B. McCORMICK  
Acting United States Attorney  
District of Arizona

THEO NICKERSON  
Connecticut State Bar No. 429356  
Assistant United States Attorney  
Two Renaissance Square  
40 North Central Avenue, Suite 1800  
Phoenix, Arizona 85004-4408  
Telephone: (602) 514-7500  
Facsimile: (602) 514-7693  
E-Mail: Theo.Nickerson2@usdoj.gov  
*Attorneys for Defendants*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Chemehuevi Indian Tribe  
Plaintiff,

v.

United States of America, et al.,  
Defendants.

Case No. 2:20-cv-02308-ROS

**REPLY IN SUPPORT OF  
DEFENDANT’S MOTION TO DISMISS**

Defendant United States of America, hereby replies to Plaintiff’s Response opposing Defendant’s Motion to Dismiss. Doc. No. 13. As argued fully below, the Court should dismiss Plaintiff’s Complaint under Rule 12(b)(1) for lack of subject matter jurisdiction.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. Factual and Procedural Background**

Plaintiff, the Chemehuevi Indian Tribe (“Tribe”) seeks a Court order compelling the Bureau of Indian Affairs (“BIA”) to issue the Tribe an amended self-determination contract under the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975 (Public Law 93-638) (“638 Contract”) and a declaration that its failure to do so is in violation of the Administrative Procedures Act (“APA), the ISDEAA, and the BIA’s fiduciary duty to the Tribe. Doc. No. 1. The Tribe alleges it had an existing 638 Contract with the BIA which

1 allowed the Tribe to contract with the Agua Caliente Band of Indians to provide title status  
2 reports. Doc. No. 1 ¶¶16-17. These title status reports are required for the Tribe's Housing  
3 Department to procure necessary housing loans to provide housing on the reservation. Doc.  
4 No. 1 ¶¶ 12-14. Plaintiff asserts that, in order to contract with Agua Caliente Band of Indians,  
5 the Tribe must have a copy of the approved amended 638 Contract signed and executed by the  
6 BIA. Doc. No. 1 ¶¶ 17, 25.

7  
8 Plaintiff raises three causes of action in support of its claim: (1) that the BIA's failure  
9 to provide the Tribe with a signed and executed copy of the amended 638 Contract violated  
10 the ISDEAA, Doc. No. 1 at ¶¶ 28-36; (2) that the BIA's failure to approve, execute, and  
11 deliver a signed copy of the Tribe's amended 638 Contract violated the APA, Doc. No. 1 at  
12 ¶¶ 37-46; and (3) that the BIA's failure to deliver a signed and executed copy of the amended  
13 638 Contract violated its fiduciary duty to the Tribe. Doc. No. 1 at ¶¶ 37-52. In turn, the Tribe  
14 seeks a court order (1) declaring that the BIA acted contrary to the ISDEAA and the APA in  
15 failing to review, sign, and execute the amended 638 Contract within 90 days; (2) declaring  
16 that the BIA breached its fiduciary duty to the Tribe; (3) ordering the BIA to sign and execute  
17 the amended 638 Contract and deliver it to the Tribe; (4) declaring that the amended 638  
18 Contract was consistent with federal law, particularly 25 U.S.C. § 5321(a)(2)(A)-(E); (5) that  
19 the Court award reasonable attorney's fees pursuant to the Equal Access to Justice Act  
20 ("EAJA"); and finally, (6) that the Court grant any further relief it deemed appropriate. Doc.  
21 No. 1 at p. 14 (Prayer for Relief). Plaintiff is entitled to none of the relief it requests.

22 On January 22, 2021, the BIA issued Plaintiff a letter with a copy of the signed and  
23 executed amended 638 Contract and sent it to the Tribe on January 28, 2021. Doc. No. 10,  
24 Exhibit 1. On February 8, 2021, the Tribe signed and returned to BIA the amended 638  
25 Contract. Doc. No. 1, Exhibit 2. The United States therefore moved to dismiss the Complaint  
26 for lack of subject matter jurisdiction, arguing that the case no longer presents a live case or  
27 controversy under Article III of the Constitution because the Court cannot grant any further  
28

1 effective relief. Doc. 10. The United States argued Plaintiff's premature request for attorney  
2 fees under the EAJA should likewise be dismissed. *Id.*

3 Plaintiff's Response does nothing to rebut the Government's arguments in its Motion to  
4 Dismiss. Instead, Plaintiff improperly asserts new claims and requests for relief not presented  
5 in the Complaint. Doc. No. 13. The only relief requested by Plaintiff's Complaint was a  
6 declaration that the BIA's failure to approve, execute and deliver the 638 Contract violated the  
7 APA, the ISDEAA and breached the Government's fiduciary duties and an order that the  
8 Government issue, sign and deliver the 638 Contract. Doc. No. 1 at p. 14 (Prayer for Relief).  
9 Now that the Government has executed and delivered the 638 Contract at issue in this case—  
10 mooted Plaintiff's case—Plaintiff attempts to morph its suit into a money-damages claim for  
11 the Government's delay in executing, signing, and delivering the 638 Contract. Doc. No. 13.  
12 But, this was not the claim asserted nor the relief requested by the original Complaint. Doc.  
13 No. 1. Plaintiff cannot sidestep subject matter jurisdiction dismissal by simply reframing its  
14 arguments and requesting new relief in response to the United States' Motion to Dismiss. The  
15 Tribe must present a new complaint entirely.

16 Plaintiff argues that its claims are not moot because the "voluntary cessation" exception  
17 applies. Critically however, Plaintiff has failed to demonstrate that the alleged wrongful  
18 conduct in the Complaint can be reasonably expected to recur. In fact, because the amended  
19 638 Contract has been issued, signed, and delivered, the alleged wrongful conduct challenged  
20 in this case necessarily cannot recur. Plaintiff also argues that its claims are not moot because  
21 it asserted "stand alone" claims under the ISDEAA and for breach of trust. This argument  
22 ignores that the Government's Motion to Dismiss argued that all three causes of action asserted  
23 in the Complaint, under the APA, the ISDEAA, and for breach of trust are moot. Doc. No.  
24 13. That is because they all seek the same thing: a declaration that the BIA violated the law  
25 by not approving and issuing the 638 Contract and a signed and executed copy of the 638  
26 Contract. *Id.* The 638 Contract has been signed, executed, and delivered to the Tribe and  
27  
28

1 accordingly, any declaration that its failure to do so violated the law would constitute an  
 2 impermissible advisory opinion. *Id.* Accordingly, the Court has no power to grant any further  
 3 effective relief in this case and all three of the causes of action asserted in Plaintiff’s Complaint  
 4 are moot.

## 5 **II. ARGUMENT**

### 6 **A. The voluntary cessation exception does not apply.**

7  
 8 Plaintiff contends that the United States’ Motion to Dismiss “does not provide the  
 9 Court with grounds to dismiss this action for lack of Article III standing because the case fits  
 10 within the voluntary compliance/cession exception to the mootness doctrine.” Doc. No. 13  
 11 (citing *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167 (2000)).  
 12 The voluntary cessation exception does not apply to this case because the alleged wrongful  
 13 conduct in this case—the BIA’s failure to sign, execute and deliver the 638 Contract to  
 14 Plaintiff—cannot be reasonably expected to recur. *Id.* at 189.

15 In *Friends of the Earth, Inc.*, the Supreme Court found that the standard for  
 16 “determining whether a case has been mooted by the defendant’s voluntary conduct is  
 17 stringent.” *Friends of the Earth, Inc.*, 528 U.S. at 189. It held that “[a] case might become  
 18 moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could  
 19 not reasonably be expected to recur.” *Id.* (citing *United States v. Concentrated Phosphate*  
 20 *Export Assn.*, 393 U.S. 199, 203 (1968)). It further held that the “heavy burden of  
 21 persua[ding]” the court that the challenged conduct cannot reasonably be expected to start  
 22 up again lies with the party asserting mootness. *Id.* The United States easily meets this  
 23 burden.

24 Plaintiff challenges the BIA’s failure to approve, sign and execute its proposed  
 25 amended 638 Contract and deliver it to the Tribe. Doc. No. 1. That conduct has been  
 26 rectified. On January 22, 2021, the BIA issued Plaintiff a letter with a copy of the approved,  
 27 signed and executed amended 638 Contract and sent it to the Tribe on January 28, 2021.  
 28 Doc. No. 10, Exhibit 1. On February 8, 2021, the Tribe signed and returned to the BIA its

1 proposed amended 638 Contract. Doc. No. 10, Exhibit 2. Now that the 638 Contract is  
2 authorized, executed by both parties and in full effect for the length of its term, the BIA's  
3 conduct challenged in the Complaint of failing to sign and execute the Contract, simply  
4 cannot recur: it is completely moot. *Friends of the Earth, Inc.*, 528 U.S. at 189

5 Plaintiff asserts that the challenged conduct is reasonably likely to recur because it is  
6 possible that in the future it could propose another amended 638 Contract to the BIA and  
7 because the Tribe frequently seeks approved 638 Contracts from the BIA. Doc. No. 13 at p.  
8 8. That would be an entirely different, and hypothetical case. Neither of these assertions  
9 establish that the challenged conduct **in this case** is reasonably likely to recur. Whether  
10 Plaintiff will propose another amendment to the 638 Contract is entirely speculative, and  
11 mere speculation that Plaintiff could be in a similar position at a hypothetical period in the  
12 future does not by itself establish that the challenged conduct in the Complaint is reasonably  
13 likely to recur. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, (2013) (holding that the challenged  
14 conduct—pursuing a claim in court—was not reasonably likely to recur where it was  
15 “entirely speculative” that a claim would arise in the future). Further, the fact that the Tribe  
16 generally engages in seeking approval of 638 Contracts does not by itself establish that the  
17 conduct challenged in this case is reasonably likely to recur. *Id.* Rather, the Government's  
18 alleged wrongful conduct **in this case** is unlikely to recur because the 638 Contract at issue  
19 in this case has been signed and is in full effect. Doc. No. 1, Exhibits 1, 2. The voluntary  
20 cessation doctrine cannot apply here, and this case remains moot.

21 **B. Because the 638 Contract has been issued, all three causes of action**  
22 **asserted in the Complaint are now moot.**

23 Plaintiff asserts that “notwithstanding the fact that the 638 Contract was signed and  
24 returned to the Tribe, the Tribe has pled stand-alone claims for a violation of the ISDEAA  
25 and a breach of the Federal Government's trust duties that are actionable in their own right  
26 for money damages.” Doc. No. 13 at pp. 9-13. However, the relief requested with respect  
27 to all three causes of action asserted in the Complaint was the same: a declaration that the  
28 BIA's failure to sign, execute and deliver the 638 Contract violated the law and an order that

1 the BIA do so. *Id.* Thus, all of the claims asserted in the Complaint are moot because the  
 2 BIA’s execution of its 638 contract, countersigned by the Tribe, satisfies the relief requested  
 3 by all three of Plaintiff’s alternatively-pled legal theories.

4 Simply because Plaintiff chose to seek relief through alternative causes of action—  
 5 a right every plaintiff has under Rule 8—does not change that this Court now lacks the power  
 6 to order the BIA to issue the contract where Plaintiff has already received the signed and  
 7 executed the amended 638 Contract at issue in this case. Doc. No. 10, Exhibits 1, 2. It  
 8 simply doesn’t matter how Plaintiff pleads its claim, there is no relief to be afforded and the  
 9 entire Complaint is moot. Further, any declaration that the BIA violated the law by failing  
 10 to issue the 638 Contract, in light of the fact that it has now been issued and received by  
 11 Plaintiff, would constitute an impermissible advisory opinion. *See Hewitt v. Helms*, 482 U.S.  
 12 755, 761 (1987); *see also Green v. Mansour*, 474 U.S. 64, 74 (1985) (holding that “[a]  
 13 declaratory judgment merely adjudicating past violations of federal law—as opposed to  
 14 continuing or future violations of federal law—is not an appropriate exercise of federal  
 15 jurisdiction.”). Accordingly, the Court lacks the power to grant any further effective relief  
 16 in this case with respect to all three causes of action asserted in the Complaint and they are  
 17 all therefore moot. *Picrin-Peron v. Rison*, 930 F.2d 773, 775 (9th Cir. 1991) (“[I]f it appears  
 18 that [the court is] without power to grant the relief requested, then the case is moot.”);  
 19 *Feldman v. Bomar*, 518 F.3d 637, 642-43 (9th Cir. 2008) (holding that a case loses its quality  
 20 as a live controversy and becomes moot when the court can no longer issue effective relief).

21 Tacitly accepting this fact, Plaintiff attempts to morph its claim into a suit for money  
 22 damages based on the delay in the BIA’s approval and issuance of the amended 638 Contract.  
 23 Doc. No. 13 at pp. 9-13. Such a claim was never asserted in the Complaint. Doc. No. 1.  
 24 Plaintiff cannot plead new claims for the first time in response to the Government’s Motion  
 25 to Dismiss. *Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1211 (N.D. Cal. 2009),  
 26 *aff’d*, 646 F.3d 1240 (9th Cir. 2011); *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d  
 27 1044, 1050 n. 5 (9th Cir.1987) (a claim raised for the first time in briefing on a motion to  
 28

dismiss may not be considered). The claims that were pled in the Tribe's Complaint were all mooted when the BIA issued the 638 contract.

**C. The Court should dismiss Plaintiff's request for attorney's fees.**

Lastly, Plaintiff argues that the Court has jurisdiction to award the Tribe attorneys' fees. Doc. No. 13 at pp. 13-15. Yet notably, Plaintiff concedes that "the Tribe has not presented the Court with an application requesting attorney fees in accordance with the EAJA and it is not the appropriate time to submit such an application, as the Court has not yet ruled on the Tribe's claims for relief." Doc. No. 13 at p. 14. Plaintiff's concession establishes both that this Court lacks subject matter jurisdiction to consider the Complaint's request for attorney's fees and that Plaintiff is not entitled to them. *Id.*

Indeed, the fact that a final judgment on the merits of Plaintiff's claims has not been entered by this Court and Plaintiff has not submitted an EAJA fee petition deprives this Court of subject matter jurisdiction to consider the Complaint's requests for EAJA fees. 28 U.S.C. § 2412(d)(1)(B); *Scanlon v. Sullivan*, 974 F.2d 107, 108 (9th Cir. 1992) (holding that "because no final judgment has been entered designating the prevailing party, the district court had no jurisdiction to consider or rule upon Scanlon's fee petition under the law of this circuit").

Further, because there has been no final judgment in this case, and thus no court order that materially altered the legal relationship between the parties, Plaintiff is also not a prevailing party as required to be eligible for attorney's fees under EAJA. *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 610, (2001) (rejecting the "catalyst theory" of attorney's fees and holding that a prevailing party is one that obtains a judgment or consent decree that materially alters the legal relationship between the parties).

**III. CONCLUSION**

For the foregoing reasons, Defendant respectfully requests that the Court dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1).

1 Respectfully submitted this 10th day of May, 2021.

2  
3 GLENN B. McCORMICK  
4 Acting United States Attorney  
District of Arizona

5 s/ Theo Nickerson  
6 THEO NICKERSON  
7 Assistant United States Attorney  
8 *Attorneys for Defendant*  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



**CERTIFICATE OF SERVICE**

I hereby certify that on May 10, 2021, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

**Cooper Monroe DeMarse**  
**Rapport & Marston**  
**405 W Perkins St.**  
**Ukiah, CA 95482**  
**Phone: (707) 462-6846**  
**Fax: (707) 462-4235**  
**Email: cooper.demarse@gmail.com**

**Lester John Marston**  
**Rapport & Marston**  
**405 W Perkins St.**  
**Ukiah, CA 95482**  
**Phone: (707) 462-6846**  
**Fax: (707) 462-4235**  
**Email: ljmarston@rmlawoffice.net**

s/ Irene Millsaps  
United States Attorney's Office