

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

MENOMINEE INDIAN TRIBE OF
WISCONSIN,

Case No. 1:18-cv-108

Hon. William C. Griesbach

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY, SCOTT PRUITT, Administrator,
U.S. Environmental Protection Agency, U.S.
ARMY CORPS OF ENGINEERS, MARK T.
ESPER, Secretary, U.S. Army,

Defendants,

and

AQUILA RESOURCES INC.,

Intervenor-Defendant.

**AQUILA RESOURCES INC.'S SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION TO DISMISS**

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INTRODUCTION

This Court asked the parties at oral argument to submit supplemental briefing on the distinction between “navigable waters” under Section 10 of the Rivers and Harbors Act (“RHA”) and “retained waters” under Section 404(g) under the Clean Water Act (“CWA”). Also at oral argument, counsel for the Menominee Tribe asserted for the first time that the Tribe was raising an “as applied” Administrative Procedures Act (“APA”) challenge to the Federal Defendants’ refusal to exercise jurisdiction over the Section 404 permitting process. (8/1/18 Hr’g Tr. at 82.) At the conclusion of the hearing, this Court also allowed the parties to submit supplemental briefing regarding the appropriateness of such a challenge.

For the reasons explained below, the definition of “retained waters” in Section 404(g), though closely related, is different from “navigable waters” as used in Section 10 of the RHA. Further, the Tribe cannot evade the APA’s final agency action requirement simply by labeling its claim an as-applied challenge. The Tribe has not identified a cognizable final agency action, so, at its core, its challenge is nothing more than a direct challenge to Michigan’s 1984 assumption of jurisdiction under Section 404(g). The Tribe should not be allowed to upend Michigan’s Section 404 permitting program 34 years after it was assumed and 2½ years after Aquila applied for (and ultimately obtained) a permit under the existing program.

At the end of the day, not only is there no legal basis for EPA and the Corps to assert federal jurisdiction over Aquila’s state Section 404 permit, but it is also unnecessary. The state permitting process played out the way it was supposed to, with considerable federal oversight and input. And the Tribe’s substantive challenges to the state 404 permit will be fully addressed through Michigan’s contested case hearing process and any subsequent state court appeals. The motions to dismiss should be granted.

ARGUMENT

I. Waters retained by the Corps under Section 404(g) are not coextensive with navigable waters under Section 10 of the Rivers and Harbors Act.

As noted above, at oral argument, this Court asked the parties to address the distinction between “navigable waters” as defined in Section 10 of the RHA—which governs waters the Corps can regulate in the first instance—and “retained waters” as defined in Section 404(g) of the CWA—which governs waters over which the Corps retains permitting authority when a state assumes the Section 404 program. Given that courts afford great deference to an agency’s interpretation of a statutory scheme it is entitled to administer, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), Aquila will briefly address the statutory language at issue, but will otherwise defer to the government’s explanation of these definitions.

Under Section 404(g) of the CWA, “retained waters” are defined as “those waters which *are presently used, or are susceptible to use* in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto.” 33 U.S.C. § 1344(g)(1) (emphasis added). Though closely related, this definition is different from “navigable waters” as used in Section 10 of the RHA, which are defined as “those waters that are subject to the ebb and flow of the tide and/or are presently used, *or have been used in the past*, or may be susceptible for use to transport interstate or foreign commerce.” 33 C.F.R. § 329.4 (emphasis added). As is made clear by these definitions, the Section 10 definition uses similar language to Section 404(g), but also includes waters that *have been used in the past* for interstate or foreign commerce. *Id.* As a result, the Tribe’s reliance on the 1979 consultant’s report and the associated opinion of District Counsel—which addressed only RHA Section 10

navigability—to demonstrate that permitting authority for the Menominee River could not be assumed by Michigan under Section 404(g) is inapposite. The issue of retained waters was necessarily encompassed in the 1984 assumption of the 404 program by the State of Michigan. As explained in prior briefing, that was a final agency action and the time to challenge it expired six years after it was made.¹

II. The Tribe cannot solve its timing problem by characterizing its APA claim as an “as-applied” challenge to the Federal Defendants’ 2017 letters reiterating their 34 year old decision regarding Michigan’s assumption of the Section 404 program.

Counsel for the Tribe asserted for the first time at oral argument that the Tribe was raising an “as-applied” APA challenge to EPA and the Corps’ refusal to exercise jurisdiction over the Section 404 permitting process. (8/1/18 Hr’g Tr. at 82.) In support of its argument, the Tribe cited to *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795 (7th Cir. 2016) and *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010). But these cases are inapplicable, as they address the standard for an as-applied *constitutional* claim, which has no bearing on an APA claim. *See Six Star Holdings*, 821 F.3d at 795 (alleging that licensing ordinances for businesses offering nude or partially nude entertainment violated First Amendment); *Citizens United*, 558 U.S. at 331 (alleging that statute barring corporate expenditures for electioneering communications violated First Amendment).

Notwithstanding the Tribe’s failure to cite to any as-applied cases in the APA context in its brief or at oral argument, some courts do, in fact, distinguish between “facial” and “as-applied”

¹ Further, contrary to the Tribe’s implication at oral argument, the mere fact that the Menominee River is an interstate river does not mean that it is per se “navigable” under Section 404(g). Rather, to be retained by the Corps, the water body must meet the requirements set forth in Section 404(g)(1) of being presently used or susceptible to use as a means to transport interstate or foreign commerce. Moreover, federal regulations and the MOA between Michigan and EPA require Michigan to provide notice of a Section 404 permit application that has the potential to impact the waters of a neighboring state and request and consider comments from that state, and allow EPA to object to a Section 404 permit based on unaddressed concerns of another state. 40 C.F.R. § 233.32; 40 C.F.R. § 233.31(a); Dkt. 21-6, 2011 MOA at 4. Thus, the assumed permitting program expressly contemplates that permitting responsibility over interstate waters could be assumed by the State of Michigan.

challenges under the APA, although the Seventh Circuit and the Eastern District of Wisconsin have not recognized this distinction in the context of an APA claim. *See, e.g., Dunn-McCampbell Royalty Int. Inc. v. Nat'l Park Service*, 112 F.3d 1283, 1287 (5th Cir. 1997); *Wind River Min. Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991); *State v. Nat'l Indian Gaming Comm'n*, 151 F. Supp. 3d 1199, 1219 (D. Kan. 2015), *aff'd sub nom. Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024 (10th Cir. 2017). Here, the Tribe's claim does not fall within the narrow category of as-applied APA challenges that allow a party to reach back and challenge agency decisions that are otherwise outside of the six year statute of limitations under 28 U.S.C. § 2401(a).

And importantly, regardless of whether a party raises a facial or as-applied challenge, the party must still demonstrate some direct, final agency action involving the particular plaintiff within six years of filing suit; a party cannot evade the final agency action requirement simply by labeling the claim an as-applied APA challenge. *Dunn-McCampbell*, 112 F.3d at 1288. As discussed in the Federal Defendants' and Aquila's motions to dismiss, the Tribe still cannot demonstrate that the 2017 letters from EPA and the Corps reiterating their 34 year old position regarding the scope of Michigan's assumption are "final agency actions" reviewable under the APA. (Dkt. 19, Aquila's Mot. at 8-9; Dkt. 7, Fed. Defs.' Mot. at 11-13; Dkt. 22, Aquila's Reply at 7-11; Dkt. 23, Fed. Defs.' Reply at 13-14.)

A. The Tribe's APA claim does not fall within the narrow scope of an "as-applied" challenge.

Challenges to agency rulings under the APA are governed by the statute of limitations provided for in 28 U.S.C. § 2401(a), and must be brought within six years of publication in the Federal Register. *Bennett v. U.S. Dep't of Labor*, 717 F.2d 1167, 1169 (7th Cir. 1983). In some circumstances, it is possible to challenge an agency's authority for promulgating a regulation after the limitations period has expired; however, such review is very limited and may occur in only one

of two ways. First, in the context of an APA claim, a party can assert an “as applied” challenge requesting judicial review of the agency’s adverse application of the rule to the particular challenger. *See, e.g., Dunn-McCampbell*, 112 F.3d at 1287; *Wind River*, 946 F.2d at 715; *Indian Gaming Comm’n*, 151 F. Supp. 3d at 1219. Second, a party can petition the agency for amendment or rescission of the rule and then appeal the agency’s decision. *See, e.g., Dunn-McCampbell*, 112 F.3d at 1287; *Wind River*, 946 F.2d at 714; *see also* 5 U.S.C. § 553(e). Because neither of these situations applies to the present action, the Tribe’s APA claim is nothing more than a direct challenge to the validity of Michigan’s 1984 assumption of jurisdiction under Section 404(g). The Tribe cannot escape the applicable statute of limitations by trying to couch its facial challenge as an as-applied challenge. *See Env’t Protection Info. Ctr. v. Pacific Lumber Co.*, 266 F. Supp. 2d 1101, 1121 (N.D. Cal. 2003); *Indian Gaming Comm’n*, 151 F. Supp. 3d at 1219.

1. The Tribe is not challenging the agencies’ adverse application of a rule to the Tribe.

Despite the Tribe’s belated attempt to re-characterize its facial APA claim as an as-applied challenge, EPA and the Corps have not adversely applied any rule or regulation to the Tribe. To sustain an as-applied APA challenge, “the claimant must show some direct, final agency action *involving the particular plaintiff* [that occurred] within six years of filing suit.” *Dunn-McCampbell*, 112 F.3d at 1287 (emphasis added). In other words, where an agency adversely applies a rule or regulation *to the particular challenger*, the challenger may contest the agencies’ statutory authority for promulgating the rule within the context of challenging the rule’s application to the particular challenger. *See, e.g., P & V Enterprises v. U.S. Army Corps of Engineers*, 516 F.3d 1021, 1026 (D.C. Cir. 2008). This is true even if the statute of limitations for directly challenging the rule has expired. *Id.*

The quintessential example of a challenge of this nature is when an agency applies a regulation to a defendant in an enforcement proceeding. *Alaska Legislative Council v. Babbitt*, 15 F. Supp. 2d 19, 25 (D.D.C. 1998), *aff'd*, 181 F.3d 1333 (D.C. Cir. 1999). In such cases, even if the regulation itself was promulgated more than six years before the action, the challenger may file a complaint for review of the adverse application of the regulation to the particular challenger and may, as part of that challenge, contest the agency's authority for promulgating that rule. For instance, in *P & V Enterprises*, the court held that "[i]f the Corps applies the rule to P & V's property . . . then P & V would be able to challenge the rule notwithstanding that the limitations period has run." 516 F.3d at 1026.

Here, the Tribe has not been the object of any enforcement proceeding by EPA or the Corps. Nor could it be since Aquila—not the Tribe—is the regulated entity. *See Env't Protection Info. Ctr.*, 266 F. Supp. 2d at 1120 (holding that plaintiff could not assert an as-applied challenge because it was not the regulated entity). Neither have EPA or the Corps taken any action that demands immediate compliance from the Tribe as it relates to Michigan's assumption of the permitting program. *See Dunn-McCampbell*, 112 F.3d at 1288 (holding that the fact that the National Park Service had taken no action demanding immediate compliance by the owner of a mineral estate located under a national park precluded an as-applied challenge under the APA). Again, they could not, since 33 U.S.C. § 1344(g) and its regulations set forth the requirements that a *state* must meet to assume permitting authority.

As the Ninth Circuit has stated, as-applied challenges requesting judicial review of an agency's adverse application of a rule to a particular challenger "by their nature, will often require a more 'interested' person than generally will be found in the public at large." *Wind River*, 946 F.2d at 715-16 (holding that "a substantive challenge to an agency decision alleging lack of agency

authority may be brought within six years of the agency's application of that decision *to the specific challenger*” (emphasis added)).² A contrary rule would undermine the government’s interest in finality by allowing third parties to challenge the agency’s authority for promulgating that rule, even if there was no direct, adverse action against that party. Because this situation does not involve an adverse application of a rule to the Tribe, and instead amounts to an untimely challenge to the original assumption of permitting authority,³ the Tribe’s APA claim should be dismissed.

2. *The Tribe is not challenging the denial of a petition for amendment or rescission of the 1984 assumption.*

As the Federal Defendants’ counsel correctly noted at oral argument, the Tribe also has the ability to petition EPA for amendment or rescission of the 1984 assumption of jurisdiction by Michigan, and to appeal a denial of that decision. (8/1/18 Hr’g Tr. at 74; *see also* 5 U.S.C. § 553(e).) It is undisputed that the Tribe has not done so, as the Tribe’s letters to EPA and the Corps do not satisfy the requirement of formally petitioning the agencies. *Env’t Protection Info. Ctr.*, 266 F. Supp. 2d at 1121. Because the Tribe has not petitioned the agencies to amend or rescind Michigan’s assumption of the 404 program, it cannot seek judicial review on this basis either.

² The Tribe, like the rest of the public, was provided notice of Michigan’s application to assume the Section 404 program, the specific waters that would be assumed by Michigan (including the Menominee River), and the federal agencies’ approval of Michigan’s program. 49 Fed. Reg. 14,185-02 (Apr. 10, 1984); 49 Fed. Reg. 38,947, 38,948-2 (Oct. 2, 1984). And the Tribe’s long-standing interest in the Menominee River and the maintenance of federal jurisdiction over the river under the Clean Water Act is clear from the Tribe’s Complaint. Thus, any harm the Tribe claims it will suffer if this case is dismissed is self-created, and runs contrary to the narrow basis for allowing an as-applied challenge. *See Wind River*, 946 F.2d at 715 (noting that the government’s interest in finality outweighs a challenger’s interest in protesting an agency action where the grounds for such challenges are apparent to an interested citizen within a six-year period following promulgation of the decision); *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1292 (11th Cir. 2015).

³ Indeed, the Tribe really appears to be challenging EPA’s and the Corps’ *failure to act*—namely its alleged failure to assert jurisdiction over the permitting program. Of course, this is problematic because “[a] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*,” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004), and as *Aquila* has discussed in relation to the Tribe’s citizen’s suit claim, the Federal Defendants have no mandatory duty to assert federal jurisdiction here. Moreover, a claim alleging a failure to act does not lend itself to an as-applied challenge. *See Citizens Legal Enforcement & Restoration v. Connor*, 762 F. Supp. 2d 1214, 1225 (S.D. Cal. 2011) (considering the question of whether the agency “adversely applied” the failure to obtain a permit to the plaintiff and stating: “This question implies its own answer; obviously there can be no decision that adversely applies a failure to act”).

B. There is no final agency action on which to base an “as-applied” APA challenge.

But even if the Tribe’s APA claim could be considered an as-applied challenge, it still fails because the Tribe has not identified a final agency action that is reviewable under the APA. Indeed, even an “as applied challenge must rest on final agency action.” *Indian Gaming Comm’n*, 151 F. Supp. 3d at 1219. In other words, a plaintiff cannot re-characterize an APA challenge as “as-applied” to circumvent the final agency action requirement; the claimant still must demonstrate some direct, final agency action involving the particular plaintiff within six years of filing suit. *Dunn-McCampbell*, 112 F.3d at 1288. This is because as-applied challenges “do[] not create an exception from the general rule that the limitations period begins to run from the date of publication in the Federal Register. They merely stand for the proposition that an agency’s application of a rule to a party creates a new, six-year cause of action to challenge to the agency’s constitutional or statutory authority. *Id.*

As noted in Aquila’s and the Federal Defendants’ motions to dismiss, the letters from EPA and the Corps cannot constitute a “final agency action” because they do not reflect the consummation of a decision-making process concerning the jurisdictional issue. *See Home Builders Ass’n of Greater Chicago v. U.S. Army Corps of Eng’rs*, 335 F.3d 607, 614 (7th Cir. 2003). At most, these letters *reiterated* the decision the Federal Defendants made over thirty years earlier, rather than serving as a separate, final decision on the issue of jurisdiction.⁴ *See Indep. Equip. Dealers Ass’n v. E.P.A.*, 372 F.3d 420, 427 (D.C. Cir. 2004); *Golden and Zimmerman, L.L.C. v. Domenech*, 599 F. Supp. 2d 702, 710 (E.D. Va. 2009) (*quoting Harris v. FAA*, 215 F. Supp. 2d 209, 213 (D.D.C. 2002)); *Impro Prods., Inc. v. Block*, 722 F.2d 845, 851 (D.C. Cir. 1983).

⁴ In fact, as the Tribe itself acknowledges, EPA’s letter did not even go that far and instead “simply refused to respond on this specific issue, instead broadly offering to ‘consult’ with the Menominee Tribe.” (Dkt. 21, Tribe’s Resp. at 21.)

Consequently, they mirror the decision in *Citizens Alert Regarding the Environment v. EPA*, where the D.C. district court held that a plaintiff's claim that EPA continually allowed a state to apply an allegedly impermissible state environmental review program "simply restates the claim that the agency acted arbitrarily and capriciously in approving the SERP in the first place" and was thus time-barred. 259 F. Supp. 2d 9, 25 (D.D.C. 2003), *aff'd* 102 F. App'x 167 (D.C. Cir. 2004) ; *see also Citizens Legal Enforcement & Restoration*, 762 F. Supp. 2d at 1226 (rejecting the plaintiff's APA claim against the Bureau of Reclamation for allegedly violating the RHA and holding that the agency's letter—which noted that it was "not responsible to maintain the . . . water quality issues identified"—was not a final agency action). For the same reason, the Tribe has failed to identify a final agency action within six years of filing this lawsuit. Regardless of whether the Tribe's APA claim is couched as facial or as-applied, because the agency letters do not constitute a "final agency action" reviewable under the APA, Count II should be dismissed.

C. Allowing the Tribe's belated APA claim would undermine the government's interest in finality and would cause uncertainty and unfairness to both Michigan and Aquila.

Adopting the Tribe's overly expansive approach to as-applied challenges and final agency actions under the APA would upend Michigan's 404 permitting program. It would, in effect, allow third parties to reach back and challenge Michigan's 1984 assumption of the permitting program any time someone applies for a Section 404 permit for waters over which Michigan has assumed permitting authority. While the Tribe claims that its challenge applies only to this project and this portion of the Menominee River, every state 404 permit would be subject to the same sort of challenge regarding the state's assumption 34 years ago. Permittees in Michigan who determine that they need a Section 404 permit must be able to rely on the well-established regulations and MOAs governing Michigan's assumption decades ago to know where to submit their permit applications and how they are going to be processed. If a third party can come in at any time during

the state permitting process, challenge these regulations, and argue that permittees should be required to reapply with the Corps and start the permitting process anew, Michigan's 404 program would be thrown into chaos and the state's authority over the Section 404 permitting process would be rendered effectively meaningless.⁵

Allowing APA challenges of this nature would significantly prejudice both regulated entities—such as Aquila, who, for nearly three years, has proceeded properly under a permitting process that is explicitly authorized by 33 U.S.C. § 1344(g) and 40 C.F.R. Part 233—and states—such as Michigan, which has properly exercised permitting authority under the assumed program for the past 34 years, and, on June 4, 2018, issued Aquila a permit under that program. This is especially concerning in this matter because, even though the Tribe was well aware of Aquila's plans to submit a Section 404 permit application to the State of Michigan as early as October 2015 (Dkt. 14, Br. in Support of Aquila's Mot. to Intervene at 4), it nevertheless waited until the permitting process was nearly complete to raise its jurisdictional claim. Further, the Tribe is attempting to wrest jurisdiction from the State of Michigan under its 404 permitting program without even joining Michigan as a party to this action. Indeed, because any decision here would necessarily implicate Michigan's rights to the assumed permitting program, the State of Michigan is a necessary and indispensable party. Fed. R. Civ. P. 19(a)(1); Fed. R. Civ. P. 19(b). But Michigan has immunity from the Tribe's claims and cannot be joined without its consent. *Mich. PEAT v. EPA*, 175 F.3d 422, 428-29 (6th Cir. 1999); *Lac Du Flambeau Band of Superior Chippewa Indians*

⁵ And here, requiring the Federal Defendants to assert jurisdiction over an already-completed state 404 process would be particularly senseless since the agencies had the opportunity to exercise jurisdiction through their oversight function as part of the state process. EPA (after consultation with the Corps), issued objections to the state's proposed permit. If EPA believed that the state wetlands permit was inadequate, it could have maintained its objections and forced Aquila to obtain a federal 404 permit. EPA did not do that. Rather, EPA withdrew its objections because they were resolved by the state. That is why the state was able to issue a permit on June 4, 2018.

v. Norton, 327 F. Supp. 2d 995, 1000-01 (W.D. Wis. 2004). Dismissal is required on this basis as well. Fed. R. Civ. P. 19(b).

Nor will dismissal of this action foreclose the Tribe's ability to challenge the substance of Aquila's state 404 permit, as demonstrated by the fact that the Tribe and two other parties have filed contested case petitions challenging the permit. (*See Exhibits 1-3.*) All parties to this proceeding will be entitled to a robust evidentiary hearing (essentially a bench trial) before an administrative law judge to challenge any issues that relate to whether the permit should have been granted.⁶ M.C.L. § 324.30319(2). And although the Tribe has claimed that it cannot raise the issue of the State of Michigan's jurisdiction over Section 404(g) permits in the contested case proceeding, this is precisely what another challenger has done. (**Exhibit 1**, at 7-8.) At the conclusion of this hearing, the administrative law judge will issue a final decision and order, which is then appealable to an environmental permit panel. M.C.L. § 324.1317. This final permitting decision can, in turn, be challenged to a state circuit court, and that decision is appealable by leave to the Michigan Court of Appeals. M.C.L. § 324.1317(4); M.C.L. § 24.301; M.C.R. 7.203(B)(2).

III. The Tribe cannot obtain the relief it is seeking through its APA claim.

Finally, even if the Tribe were somehow able to overcome each one of the defects discussed above, the Tribe still would not be entitled to the relief it seeks under its APA claim. Specifically, this Court cannot order EPA or the Corps to take a particular action—such as exercising jurisdiction over Michigan's Section 404 permitting program—because the only avenue for obtaining such relief under the APA is by asserting a “failure to act” claim, which the Tribe has not done. *See* 5 U.S.C. § 706(1).⁷ In fact, there is no legal mechanism by which EPA or the Corps

⁶ In contrast, third parties challenging federal 404 permits are not afforded an evidentiary hearing. Federal permit appeals are APA record review challenges in federal district court.

⁷ As noted above, presumably, the Tribe has not done so because such a claim would require the Tribe to establish that “that an agency failed to take a *discrete* agency action that it is *required to take*.” *Norton*, 542 U.S. at 64.

can assume jurisdiction over individual permits that have been assumed by the State of Michigan under Section 404(g) (absent the State failing to resolve EPA objections under the assumed program). Thus, the Tribe cannot get an “order enjoining and instructing the EPA and the Corps to assume control and exercise jurisdiction over the Section 404 permitting for the Back Forty Mine,” as it seeks in its Complaint. (Dkt. 1, Compl. at 17.)

Nor can this Court revoke the permit that has already been issued by the State of Michigan or enjoin the state contested case process that has been initiated by the Tribe and two other petitioners. Rather, the only relief the Tribe can obtain is a remand to the agencies for reconsideration of the letters. And even if this Court were to determine that the letters were arbitrary and capricious, on remand, the agencies still could not assert jurisdiction over the permitting process unless they also determined that the river near the mine site is navigable under 404(g), and that the wetlands in the vicinity of the mine site are “adjacent” under Section 404(g). *See* 33 U.S.C. § 1344(g)(1); 40 C.F.R. § 230.2(b); 33 C.F.R. § 328.3(c). In short, the Tribe cannot obtain the relief it is seeking through its APA claim.

CONCLUSION

For the reasons given above, articulated in oral argument, and set forth in Aquila’s briefing in support of its motion to dismiss, Aquila respectfully requests that the Court dismiss all of the Tribe’s claims under Rule 12(b)(6).

Respectfully Submitted,

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Dated: August 22, 2018

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Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2018, I electronically filed the foregoing
SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS with the Clerk of the
Court by using the CM/ECF system. The participants in this case are registered CM/ECF users
and service will be accomplished via the CM/ECF system.

Ashley G. Chrysler
Ashley G. Chrysler

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