IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HISTORICAL EASTERN PEQUOT TRIBE, Plaintiff, v. OFFICE OF FEDERAL ACKNOWLEDGEMENT, BUREAU OF INDIAN AFFAIRS, Defendant.	)	Case No. 1:23-cv-00054

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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I. INTRODUCTION

Defendant Office of Federal Acknowledgement, Bureau of Indian Affairs ("OFA")[1] hereby submits this Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss Plaintiff's claims. In this case, a group calling itself the Historical Eastern Pequot Tribe ("Plaintiff" or "HEP") has filed suit seeking to compel the Department of the Interior ("Department") to issue a final decision on the Recommended Decision ("Recommended Decision") issued by the Department of the Interior's Office of Hearings and Appeals ("OHA") on January 12, 2017. The operative complaint seeks: (1) "injunctive relief requiring the agency to issue a final determination of the Recommended Decision of the Administrative Law Judge on January 12, 2017"; (2) an order directing the Bureau of Indian Affairs ("BIA")[2] to acknowledge HEP as an Indian tribe; and (3) judicial "review of any decision deemed final as relying upon an arbitrary and capricious reading of the record before the agency." Second Amended Complaint at 5, ECF No. 15-1 ("Am. Compl." or "Complaint").

Plaintiff's operative complaint should be dismissed for three reasons. First, Plaintiff's request for injunctive relief compelling action on the Recommended Decision fails because the Department has already taken final agency action by issuing a June 25, 2019 letter signed by then-Assistant Secretary - Indian Affairs ("AS-IA") Tara Sweeney ("2019 AS-IA Letter"). That letter informed the affected parties, including HEP, that the Department considered the matter closed

[1] Plaintiff's Second Amended Complaint names the Office of Federal Acknowledgment as a Defendant. We assume Plaintiff intended to name the Department of the Interior, the Secretary of the Interior, or the Assistant Secretary – Indian Affairs, the latter of whom exercises delegated authority to issue final agency actions concerning federal acknowledgment.

[2] We also assume that the Second Amended Complaint's reference to BIA was meant to encompass the Assistant Secretary – Indian Affairs, as it is that office (not BIA) that holds delegated authority for federal acknowledgment decisions.

and that HEP was foreclosed from availing itself of the federal acknowledgment process in 25 C.F.R. Part 83 ("Part 83"). The 2019 AS-IA Letter constituted a final agency action under the Administrative Procedure Act ("APA") and there is no further agency action Plaintiff can compel as a matter of law.

Second, even when viewing Plaintiff's factual allegations in the light most favorable to Plaintiff, the Complaint does not allege facts that could be fairly construed as stating a claim that this Court should, or could, order the Department to place HEP directly on the List of federally recognized Indian tribes. Even if the Complaint had adequately alleged such a claim, this Court lacks the authority to compel BIA to acknowledge HEP as a federally recognized Indian tribe because any decision regarding HEP's recognition status is committed to the Department's adjudicative process under 25 C.F.R. Part 83, and not subject to a direct order from a federal court.

Third, Plaintiff fails to otherwise plead a valid cause of action under the APA. The Complaint does not identify a final agency action subject to APA review. The Complaint also does not reference or otherwise challenge the validity of the 2019 AS-IA Letter, which is the only final agency action relevant here.

For these reasons, Plaintiff's complaint should be dismissed for lack of subject matter jurisdiction and failure to state a claim for which relief can be granted.

II. BACKGROUND

A. STATUTORY & REGULATORY BACKGROUND

1. The Federal Acknowledgment Process.

Federal acknowledgment (or recognition)[3] of Indian tribes establishes a government-to-government relationship between the tribe and the United States, and is a prerequisite to nearly all

[3] Under the Federally Recognized Indian Tribe List Act of 1994 ("List"), the Department is required to publish in the Federal Register "a list of all Indian tribes which the Secretary

the protection, services, and benefits of the federal government available to Indian tribes. 25 C.F.R. § 83.2. The responsibility for acknowledging Indian tribes is committed to the Executive branch. *See Chinook Indian Nation v. Zinke*, 326 F. Supp. 3d 1128, 1132 (W.D. Wash. 2018) ("Congress has delegated general responsibility over matters pertaining to Indian tribes, including issues of tribal recognition, to the Executive branch.") (citations omitted); *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1496 (D.C. Cir. 1997) (noting that if executive and other political departments recognize Indians as a tribe, courts must do the same).

Prior to 1978, Indian tribes were granted federal recognition through treaties approved by Congress or *ad hoc* decisions within the Executive branch. *See Mackinac Tribe v. Jewell*, 829 F.3d 754, 756 (D.C. Cir. 2016). In 1978, the Department established a comprehensive regulatory process for the review and approval of petitions for acknowledgment of Indian tribes. *See* 25 C.F.R. Part 83 ("Part 83"). Part 83 established uniform standards and procedures to answer the question "what is an Indian tribe?" *Miami Nation of Indians v. Babbitt*, 887 F. Supp. 1158, 1167 (N.D. Ind. 1995). Under the Part 83 regulations, entities seeking to be added to the List of federally recognized Indian tribes submit materials to OFA, which is composed of experts in anthropology, genealogy, and history. OFA evaluates petitions pursuant to the Part 83 standards for acknowledgment, and makes a recommendation as to accepting or rejecting the petition to AS – IA. Part 83 vests AS-IA with the sole authority to issue a final determination on a Part 83 petition. 25 C.F.R. § 83.42.

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recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5131. As a general matter, placement on the Department's List of tribes via the Part 83 regulations is referred to as "acknowledgment," whereas placement on the List via an act of Congress is referred to as "recognition." There is no legally significant distinction between those terms.

The Department revised the Part 83 regulations in 1994 and 2015. *See* 59 Fed. Reg. 9280 (Feb. 25, 1994); 80 Fed. Reg. 37,862 (July 1, 2015). The current Part 83 regulations[4] have seven mandatory criteria that a petitioner must meet to be acknowledged as a federally recognized Indian tribe.[5] These criteria are designed to demonstrate continuous existence as a social and political community from the historic Indian tribe. *See* 80 Fed. Reg. 37,862-63. Failure to meet any one of the criteria will result in a determination that the group is not entitled to a government-to-government relationship with the United States. 25 C.F.R. § 83.43(a).

The Part 83 process begins when the entity submits a documented petition (a defined term of art) to OFA. 25 C.F.R. § 83.20. If the petitioner fails to meet the criteria for federal acknowledgment, then OFA must issue (and publish, in the Federal Register, a notice of availability for) a negative proposed finding, 25 C.F.R. § 83.32(a)(1), addressing which of the acknowledgment criteria the petitioner failed to meet and why. 25 C.F.R. § 83.33(a). After publication of the notice of proposed finding, the regulations provide for a public comment period and a process for responding to those comments. 25 C.F.R. § 83.35-37. At the end of that response period, the petitioner may "challenge the proposed finding before an ALJ" by requesting a hearing from OHA. 25 C.F.R. § 83.38(a).

[4] Unless otherwise noted, all discussion of Part 83 refers to the post-2015 amended version of the regulations.

[5] These seven criteria, delineated in 25 C.F.R. § 83.11, require the petitioner to demonstrate that sources identify the petitioner as an American Indian entity on a substantially continuous basis since 1900; the petitioner is a distinct community from 1900 until the present; the petitioner maintains political influence or authority over its members as an autonomous entity from 1900 until the present; the petitioner has a governing document with membership criteria; the petitioner has a membership that descends from a historical Indian tribe; the petitioner is composed principally of persons who are not members of any federally recognized tribe; and, the petitioner is not subject to congressional legislation that terminated or forbids a Federal relationship. 25 C.F.R. § 83.11.

The OHA hearing process is governed by both Part 83 and the OHA's regulations at 43 C.F.R. Part 4 Subpart K ("Subpart K"). Once a petitioner challenges a proposed finding before an ALJ, OFA must provide OHA with "copies of the negative proposed finding, critical documents from the administrative record that are central to the portions of the negative proposed finding at issue, and any comments and evidence …sent in response to the [negative] proposed finding." 25 C.F.R. § 83.39(a). Subpart K describes the hearing process and specifies the sole form of relief that OHA may provide a petitioner: an ALJ may "issue a recommended decision," 43 C.F.R. § 4.1051(a), which itself must meet certain requirements. 43 C.F.R. § 4.1051(b).

The ALJ's recommended decision, along with the hearing record, are then forwarded to the AS-IA pursuant to 25 C.F.R. § 83.39(d) and 43 C.F.R. § 4.1051(c) in order for the AS-IA to issue a determination on the ALJ's recommendation. AS-IA must begin his or her review upon receipt of the ALJ's recommended decision, 25 C.F.R. § 83.40(a), and issue a final determination granting or denying federal acknowledgment within ninety days from the date on which AS-IA began its review. 25 C.F.R. § 83.42(a). AS-IA's final determination under Part 83 is a final agency action under the APA. 25 C.F.R. § 83.44.

Upon satisfaction of the federal acknowledgment process, the newly federally acknowledged Indian tribe is included on the next list of federally recognized Indian tribes entitled to receive benefits and services from the Department ("List"). 25 U.S.C. § 5131. The List is published annually in the Federal Register and is dispositive evidence of whether an Indian tribe is federally recognized. *Babbitt*, 117 F.3d at 1499 (noting that inclusion of a group of Indians on the List ordinarily suffices to establish that group's sovereign power and immunity from suit).

B. FACTUAL & PROCEDURAL BACKGROUND

In 1978, an entity referring to itself as the Eastern Pequot Indians of Connecticut filed a letter of intent seeking federal acknowledgment as an Indian tribe pursuant to Part 83. On June 24, 2002, AS-IA issued a Notice of Final Determination concluding that the "historical Eastern Pequot tribe, represented by two petitioners, the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut," satisfied the regulatory criteria for federal acknowledgment. *See* 67 Fed. Reg. 44,234-02 (July 1, 2002). The Notice of Final Determination stated that the Final Determination would "become effective 90 days from the date of publication, unless a request for reconsideration is filed pursuant to 25 C.F.R. 83.11." *Id*. at 44,240. The State of Connecticut and the towns of North Stonington, Ledyard, and Preston subsequently filed a request for reconsideration with the Interior Board of Indian Appeals ("IBIA"). *In Re Federal Acknowledgment of the Historical Eastern Pequot Tribe*, 2005 WL 2672008, at *1. On May 12, 2005, the IBIA issued an order vacating the Final Determination and remanded to AS-IA "for further work and reconsideration." *Id*. at 2, 22-23.

On October 14, 2005, the Department issued a Reconsidered Final Determination ("RFD") denying acknowledgment to the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut. 70 Fed. Reg. 60,099 (Oct. 14, 2005). The RFD denied acknowledgment to each group individually and denied acknowledgment to the combined group that the Department referred to as the "Historical Eastern Pequots." *See* 70 Fed. Reg. at 60,100 (stating that "EP and PEP separately or together did not meet criterion 83.7(b) from historical times until the present."). The RFD became final and effective on October 14, 2005. Subsequently, HEP sought relief in federal court. *See Historic E. Pequots v. Salazar*, 934 F. Supp. 2d 272 (D.D.C. 2013) ("*Salazar*"). On March 31, 2013, the District Court held in *Salazar* that HEP lacked standing

and that its claims regarding the RFD were barred by the applicable statute of limitations. *Id*. at 248.

In May 2016, HEP submitted a "Petition for Agency Review of Federal Acknowledgment" to OFA, requesting reaffirmation of HEP's status as a previously recognized Indian tribe under the Part 83 regulations as revised through a final rule in the 2015.[6] OFA did not review HEP's alleged "petition" (again, a term of art under Part 83) and instead responded to HEP's submission by letter dated June 2, 2016 ("2016 OFA Letter"), EXHIBIT 1. The 2016 OFA Letter informed HEP that, because it had been previously denied acknowledgment under Part 83 via the 2005 RFD, and because Part 83 precluded the Department from acknowledging any group previously denied acknowledgment, the Department could not consider HEP's new petition. *See* 25 C.F.R. § 83.4(d) ("The Department will not acknowledge . . . [a]n entity that previously petitioned and was denied Federal acknowledgment under these regulations or under previous regulations in Part 83 of this title (including reconstituted, splinter, spin-off, or component groups who were once part of previously denied petitioners)."); *see also* 2016 OFA Letter. The 2016 OFA Letter also cited to the District Court decision in *Salazar* to conclude that HEP had already "exhausted both its administrative and judicial remedies," and that "the alternative avenue to obtain Federal acknowledgment would be congressional legislation." *Id*.

[6] Neither the 1994 nor the 2015 regulations permitted a group to re-petition if it had been previously denied recognition through the Part 83 process. 25 C.F.R. § 83.4(d). In 2020, two federal district courts separately ruled that the 2015 final rule's justification for maintaining the ban did not satisfy the APA and remanded the ban to the Department for further consideration. *See Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt*, 613 F. Supp. 3d 371 (D.D.C. 2020); *Chinook Indian Nation v. Bernhardt*, No. 3:17-cv-05668-RBL, 2020 WL 128563 (W.D. Wash. Jan. 10, 2020). The Department has since published a notice of proposed rulemaking 87 Fed. Reg. 24,908 (Apr. 27, 2022), and has been ordered by the *Burt Lake* court to transmit a draft of either a final rule or a new proposed rule to the Office of Information and Regulatory Affairs by October 31, 2023. The *Chinook* and *Burt Lake* decisions post-date the 2019 AS-IA Letter discussed below.

HEP appealed the 2016 OFA Letter to OHA pursuant to 25 C.F.R. § 83.38, which affords a petitioner receiving a "negative proposed finding" from OFA—which the 2016 OFA Letter was not—the right to request a hearing before an OHA ALJ. Because HEP was not a Part 83 petitioner and had not received a negative proposed finding, and was therefore ineligible to have filed the OHA appeal, the Department (via OFA) opposed the appeal. The State of Connecticut and towns of Ledyard, North Stonington, and Preston (collectively, "Connecticut") intervened as defendants in the administrative appeal in support of OFA.

On January 12, 2017, the ALJ issued a "Recommended Decision," in which he ruled that OHA lacked jurisdiction to hold a hearing on HEP's petition because: (1) HEP never received a negative proposed finding from OFA, as required to invoke a hearing under 25 C.F.R. § 83.39; and (2) HEP was a "previously denied petitioner," which could not be federally acknowledged by OFA, and HEP therefore lacked authority to proceed under Part 83. *Historical E. Pequot Tribe v. Office of Federal Acknowledgment, Bureau of Indian Affairs*, No. FA AIT 2016-01, Office of Hearings and Appeals, Recommended Decision (Jan. 12, 2017) ("Recommended Decision") at 16, EXHIBIT 2. Nonetheless, the ALJ concluded that Part 83 and 43 C.F.R. Subpart K, the regulatory provisions outlining OHA's authority in Part 83 appeals, did not give him authority to dismiss the matter, but instead allowed him only to recommend that AS-IA dismiss the case. Thus, rather than dismissing HEP's petition outright, the ALJ styled his decisions as a "Recommended Decision" and forwarded the record to the AS-IA for a final decision and to take appropriate action. *Id*. at 15-16.

In May 2019, Connecticut sent a letter to then-AS-IA Tara Sweeney requesting a final action on the Recommended Decision. *See* Letter from William Tong, Attorney General for the State of Connecticut (May 20, 2019), EXHIBIT 3. In response, AS-IA issued the 2019 AS-IA

Letter to Connecticut, with a copy sent to HEP's counsel. *See* Letter from Tara Sweeney, Assistant Secretary – Indian Affairs to Mark F. Kohler, Assistant Attorney General State of Connecticut (June 25, 2019), EXHIBIT 4. The Letter explained that because HEP had exhausted both its administrative and judicial options on the matter, HEP "must pursue any future attempts for Federal acknowledgment through Act of Congress." *Id*. The 2019 AS-IA Letter went on to state:

> The Department of the Interior (Department) considers this matter to be closed. The Department does not anticipate further consideration of the 'Recommended Decision' or any other action with regard to HEP.

HEP filed the instant case on January 9, 2023. The operative complaint is the Second Amended Complaint, ECF No. 15-1.

III. STANDARD OF REVIEW

A. Lack of Subject Matter Jurisdiction

Under Federal Rule of Civil Procedure 12(b)(1), the Court must dismiss any claim for which it lacks subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h). Jurisdiction must be established before the Court may proceed to the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Courts are presumed to lack subject matter jurisdiction unless it is affirmatively indicated by the record. *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted). The burden of proving subject matter jurisdiction rests with plaintiff, the "party asserting [the federal court's] jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Rempfer v. Sharfstein*, 583 F.3d 860, 868–69 (D.C. Cir. 2009). Federal courts are courts of "limited jurisdiction," and are presumed to lack jurisdiction unless a plaintiff establishes its existence. *Kokkonen*, 511 U.S. at 377.

When considering a factual challenge to jurisdiction, as is the case (in part) here, "the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the

plaintiff and disputed by the defendant." *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C.Cir.2000*); see also Flynn v. Ohio Bldg. Restoration, Inc*., 260 F. Supp. 2d 156, 162 (D.D.C. 2003). Instead, a court deciding a Rule 12(b)(1) motion "must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Short v. Chertoff*, 526 F. Supp. 2d 37, 41 (D.D.C. 2007) (citing *Phoenix Consulting*, 216 F.3d 36, 40.). Additionally, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. *Id.; see also Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006). The plaintiff has the burden of proof that jurisdiction does in fact exist. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

B. Failure to State a Claim for relief.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). A court considering a Rule 12(b)(6) motion presumes the factual allegations of the complaint to be true. *See, e.g., United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 135 (D.D.C. 2000). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Twombly*, 550 U.S. 544, 562 (2007). The court need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004); *Browning*, 292 F.3d at 242. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

IV. ARGUMENT

Plaintiff's complaint should be dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted. First, Plaintiff's claim for injunctive relief, based on the Department's alleged inaction on the ALJ's Recommended Decision, should be dismissed because the Department has already acted on the Recommended Decision by issuing the 2019 AS-IA Letter. Second, Plaintiff's claim for relief seeking an order directing the Department to place HEP on the List of federally acknowledged tribes should be dismissed because, under well-settled law, any decision regarding HEP's acknowledgment status is committed to the Department's discretion and not subject to direct order by the Court. Plaintiff has additionally failed to adequately plead a claim concerning its alleged entitlement to federal acknowledgment via this case. Third, Plaintiff's claim for relief seeking judicial review of some undetermined future final agency action should be dismissed for failure to state a claim challenging final agency action under the APA.

A. Plaintiff's request for injunctive relief relating to the Recommended Decision should be dismissed for lack of jurisdiction.

HEP asserts that "[a]lmost six years has transpired without final agency determination" on the Recommended Decision, and that it is bringing suit "to compel a decision and review."[7] Am.

[7] We read Plaintiff's first claim for relief to mean a request for final agency action on the Recommended Decision and not a "final determination" within the meaning of 25 C.F.R. Part 83. To the extent Plaintiff, in its use of the phrase "final determination" (a term of art under 25 C.F.R. Part 83), is seeking to compel agency action in the form of a final determination by AS-IA pursuant to 25 C.F.R. § 83.42, dismissal would still be warranted because the Court does not have jurisdiction and such request fails to state a claim under 5 U.S.C. § 706(1). As the Supreme Court has instructed, "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). HEP's allegations regarding agency inaction fail to state a claim because they do not identify a nondiscretionary duty imposed by Part 83 or other authority of law. Further, Part 83 makes clear that a final determination is available only to a *petitioner* that has received a *proposed finding* from OFA. *See* 25 C.F.R. § 83.38. HEP fails both: it is not a petitioner eligible for federal acknowledgment under Part 83, and it did not receive a proposed finding from OFA.

Compl. at 4 and 5. Plaintiff seeks "[i]njunctive relief requiring the agency to issue a final determination of the Recommended Decision." *Id*. at 5. Plaintiff does not specify the legal basis for compelling agency action, but invokes jurisdiction under the APA, Am. Compl. at 1, and thus presumably asserts a failure to act claim under 5 U.S.C. § 706(1). But Plaintiff's request for relief is not cognizable because the Department has already taken final agency action on the Recommended Decision by issuing the 2019 AS-IA Letter and as a result, has not failed to act.

To state a claim for relief in federal court against the federal government, a plaintiff must demonstrate a waiver of sovereign immunity, subject matter jurisdiction, and a right of action. *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014). The APA waives sovereign immunity for, among other things, "action[s] in a court of the United States seeking relief other than money damages and stating a claim than an agency or officer or employee thereof . . . failed to act . . . ." 5 U.S.C. § 702. And the waiver is available to anyone "adversely affected or aggrieved by agency action," *id.*, which is defined to include a "failure to act." *Id.* § 551(13). The APA then grants the reviewing court the authority to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

Agency action is "final" under the APA if it satisfies two conditions: First, the action must mark the "consummation" of the agency's decision-making process, *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow[.]" *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citing *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

Here, the 2019 AS-IA Letter constitutes a final agency action. First, the 2019 AS-IA Letter

marks the consummation of the agency's decision-making process with respect the Recommended Decision. In the 2019 AS-IA Letter, sent to both HEP and Connecticut, AS-IA Tara Sweeney explained that HEP had exhausted both its administrative and judicial options, and that it "must pursue any future attempts for Federal acknowledgment through Act of Congress." *See* 2019 AS-IA Letter. The Letter further stated that the Department "considers this matter to be closed" and "does not anticipate further consideration of the 'Recommended Decision' or any other action with regard to HEP."' *Id*. Second, the 2019 AS-IA Letter represents an action "from which legal consequences will flow." The Letter confirmed that HEP is not authorized to proceed under Part 83, and that the unauthorized nature of HEP's alleged re-petition and subsequent appeal do not require further agency action. *Id*. The 2019 AS-IA letter thus represents the Department's "last word on the matter in question" and constitutes final agency action on the Recommended Decision. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). (internal citations omitted).

Because the Department has rendered final agency action on the Recommended Decision, Plaintiff's first claim for relief fails and should be dismissed. For one, the APA's waiver of sovereign immunity is not applicable. When an agency has acted, one can no longer be "aggrieved" by an agency failure to act. *See* 5 U.S.C. § 702. The Court therefore lacks jurisdiction to provide HEP the requested relief.[8] Indeed, as one court recently observed, "[t]he cases that interpret § 706(1) suggest that an agency's action in furtherance of complying with a statute, regardless of how feeble, removes a challenge to the agency's conduct from the realm of § 706(1)." *WildEarth Guardians v. Chao*, 454 F. Supp. 3d 944, 956 (D. Mont. 2020). "Thus, a claim under § 706(1) can

[8] For the same reason, Plaintiff lacks standing for its request to have the Court compel agency action on the Recommended Decision. Because the Department has already acted, Plaintiff is not suffering an injury-in-fact emanating from agency inaction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (reciting standing requirements).

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); *see also Kaufman v. Mukasey*, 524 F.3d 1334, 1338 (D.C. Cir. 2008)). And, as the Supreme Court explained in *Norton*, "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but it has no power to specify what the action must be*." Norton. at 65.* As a result, a court cannot compel agency action when the agency has already acted. *See Hells Canyon Preservation Council v. U.S. Forest Service*, 593 F.3d 923 (9th Cir. 2010); *see also Geronimo v. Obama*, 725 F. Supp. 2d 182, 186 (D.D.C. 2010).

Here, since the Department acted on the Recommended Decision by issuing the 2019 AS-IA Letter, Plaintiff has already obtained the relief sought concerning an agency response. Moreover, the Court lacks the "power to specify what the [agency] action must be," *Norton*, 542 U.S. at 65. As a result, there is no further relief for the Court to grant concerning Plaintiff's claim of unreasonable delay and the claim should be dismissed for lack of jurisdiction.

B. Plaintiff's claim for relief seeking federal acknowledgment should be dismissed for lack of jurisdiction and failure to state a claim.

In addition to seeking injunctive relief with respect to the Recommended Decision, Plaintiff also seeks "[a]n order directing the Bureau of Indian Affairs to acknowledge . . . the Historical Eastern Pequot as an American Indian tribe." Am Compl. at 5. Since federal acknowledgment results in placement on the BIA's next published List, HEP is essentially asking the Court to order HEP's inclusion on the List. *See* 25 C.F.R. § 83.46(a). This claim should be dismissed for both lack of jurisdiction and failure to state claim upon which relief could be granted.

1. The Court lacks jurisdiction to issue an order requiring BIA to federally acknowledge HEP as an Indian tribe.

The Court lacks jurisdiction over Plaintiff's claim for relief seeking federal acknowledgment because the Court lacks the authority to grant the relief sought. Plaintiff seeks an order directing the Department to federally acknowledge HEP as a tribe. But any decision regarding HEP's recognition status is committed to the Department's discretion and not subject to direct order by the Court.

As the Supreme Court has explained, even "when an agency is compelled by law" to take *some* agency action, if "the manner of its action is left" largely "to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *Norton,* 542 U.S. at 65. Thus, "[o]nly in extraordinary circumstances" do courts "issue detailed remedial" injunctions in APA cases. *N. Carolina Fisheries Ass'n, v. Gutierrez*, 550 F.3d 16, 20 (D.C. Cir. 2008). "[T]he court's authority to issue a detailed remedial order applies only to discrete action that is legally required . . . about which an official had no discretion whatever." *Id*.

Here, the Department cannot be compelled to place any entity directly on the List (let alone an entity that both OFA and the ALJ found was not eligible for acknowledgment under Part 83) because Part 83 "leaves [OFA] a great deal of discretion" in deciding whether to acknowledge an Indian tribe. *Norton,* 542 U.S. at 66. "Whether a group constitutes a 'tribe' is a matter that is ordinarily committed to the discretion of Congress and the Executive Branch, and courts will defer to their judgment". *Cherokee Nation of Okla.*, 117 F.3d at 1496. The D.C. Circuit has observed that Congress's delegation of authority to the Executive to regulate Indian affairs and the resulting regulatory scheme for seeking federal recognition "would be frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions

for recognition currently exist." *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987).

On matters of tribal status, the Supreme Court has held "it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs." *United States v. Holliday*, 70 U.S. 407, 419 (1865). As a result, the D.C. Circuit has instructed that in Part 83 cases, "deference is warranted to the views of the political branches," and that the Department should be allowed to decide recognition questions in the first instance. *Mdewakanton Band of Sioux v. Bernhardt*, 464 F. Supp. 3d 136, 321 (D.D.C. 2020) (citing *Cherokee Nation of Okla.*, 117 F.3d at 1496); *see also James*, 824 F.2d at1137-38.

Indeed, even in the context of a justiciable APA challenge to a final determination denying acknowledgment to a petitioning group (and, again, there has been no such determination with regard to HEP subsequent to their denial for acknowledgment many years ago), the Court would still lack authority to order, as a remedy, federal acknowledgment as an Indian tribe. This is because, under the APA, the only question would be whether the Department arbitrarily, capriciously, or unlawfully applied the Part 83 regulations in recognizing or failing to recognize the entity as an Indian tribe, and the only remedy available would be remand to the agency for further consideration. *Miami Nation of Indians of Indiana v. U.S. Dep't of the Interior*, 255 F.3d 342, 348 (7th Cir. 2001). A petitioner that has received a final determination from AS-IA pursuant to Part 83 cannot obtain—directly or indirectly—an order of federal acknowledgement from a federal court, only a ruling that the Department needs to consider anew a Part 83 decision that the reviewing court finds the Department to have made in violation of the APA. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (stating that in APA cases, "the proper course…, is to remand to the agency for additional investigation or explanation."). Thus, even if Plaintiff had

pled an otherwise viable APA claim here (which it has not), the Court still could not grant Plaintiff the relief it seeks: an order directing the BIA to acknowledge HEP as an Indian tribe.

2. Plaintiff has failed to state a claim concerning its alleged entitlement to federal acknowledgment.

Even if the Court had jurisdiction over such a claim, Plaintiff has failed to state a claim upon which relief can be granted because the operative Complaint does not provide any factual or legal basis for ordering the Department to federally acknowledge HEP. Plaintiff has not alleged a single fact that, if assumed to be true, would require the Department to acknowledge HEP and place the group on the List of federally recognized Indian tribes. In order to survive a motion to dismiss under Rule 12(b)(6), "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 570). The facts alleged "must be enough to raise a right to relief above the speculative level," or must be sufficient "to state a claim [for] relief that is plausible on its face." *Twombly*, 550 U.S. at 555, 570. A pleading must be "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678.

Here, nearly every paragraph in the operative Complaint is either unrelated background or facts and arguments going to the issue of the Department's alleged non-action on the Recommended Decision. Read as generously as possible, the only "facts" or "allegations" that could even remotely be construed as stating a claim to place HEP on the list are in Paragraphs 1, 3, and 16.[9]

[9] Paragraph 16 states: "The tribe filed a petition for federal recognition with the agency on May 4, 2016. The tribe asserted in its petition that it was a 'previously federally acknowledged petitioner.'" Am. Compl. at ⁋ 16. To the extent Plaintiff is claiming it is entitled to federal acknowledgment based on the 2005 RFD or the preceding 2002 Notice of Final Determination, that claim would be time barred. The statute of limitations with respect to any cause of action brought under the APA is six years after the right of action first accrues. 25

Even viewing these factual allegations in the light most favorable to HEP, nothing in any of these paragraphs, or any other paragraph in the Complaint, provides any factual or legal allegations as to why the Court must, can, or should order the Department to federally acknowledge HEP or place it on the List. Because there is nothing in the Complaint that would plausibly satisfy 12(b)(6), Plaintiff's request for an order compelling the Department to place HEP on the List should be dismissed.

C. Plaintiff has failed to otherwise plead a valid APA claim.

In addition to a request for injunctive relief compelling agency action and requiring BIA to federally acknowledge HEP, Plaintiff requests relief in the form of a "[r]eview of any decision deemed final as relying upon an arbitrary and capricious reading of the record before the agency." Am. Compl. at 5. The exact nature of the relief is unclear. But to the extent Plaintiff is requesting that the Court review a final agency action under the APA, 5 U.S.C. § 706(2), the Complaint fails to adequately plead such an APA claim.

The APA makes reviewable "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704; *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990); *Nat'l Wildlife Fed'n v. U.S. E.P.A.*, 945 F. Supp. 2d 39, 47 (D.D.C. 2013). Section "704 limits causes of action under the APA to final agency action." *Trudeau v. Federal Trade Com'n*, 456 F.3d 178, 188 (D.C. Cir. 2006). "[T]he absence of final agency action . . . cost[s] [the plaintiff] his APA cause of action." *Id.* at 188–89. This, in turn, means that, "[t]o state a claim under the APA, a plaintiff must challenge a 'final agency action[.]'" *Statewide Bonding, Inc. v. U.S. Dep't of Homeland Sec.*, 980 F.3d 109, 114 (D.C. Cir. 2020); *see also Osage Producers Ass'n v. Jewell*,

U.S.C. § 2401(a). Both the 2002 Notice of Final Determination and 2005 RFD were issued well before the applicable limitations for this suit, which HEP filed in 2023.

191 F. Supp. 3d 1243 (N.D. Okla. 2016) (rejecting plaintiffs' assertion that the APA does not require it to individually identify each and every decision it seeks to challenge).

In this case, Plaintiff has not identified any discrete "final agency action" to be reviewed. Although the 2019 Letter constitutes a final agency action, the Complaint, does not challenge or even reference the letter. As a result, Plaintiff's complaint does not rest on any identifiable final action, and thus suffers from a pleading defect that requires Plaintiff's request for review of final agency action to be dismissed.

V. CONCLUSION

Plaintiff's complaint should be dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted. Although Plaintiff seeks to compel a final agency action, the Court lacks the jurisdiction to grant that relief because the Department already acted upon the Recommended Decision when it issued the 2019 AS-IA Letter. Moreover, the Court lacks the jurisdiction to order BIA to federally acknowledge HEP as an Indian tribe because acknowledgment decisions are committed to agency discretion and the only remedy available under the APA—assuming a final agency action had been challenged—is a remand for further consideration. Finally, Plaintiff failed to identify a final agency action subject to APA review and has therefore failed to adequately plead an APA challenge.

For the foregoing reasons, Federal Defendants respectfully requests that Plaintiff's Second Amended Complaint be dismissed.

Respectfully submitted this 14th day of September, 2023.

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Certificate of Service

I hereby certify that on September 14, 2023, I filed the foregoing document electronically through the CM/ECF system, which caused Plaintiff to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Esosa Aimufua
Esosa Aimufua
Trial Attorney