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-JEB

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant the Department of the Interior's ("Department") Office of Federal Acknowledgement, ("OFA") Bureau of Indian Affairs ("BIA") (collectively "Defendant" or "the Department")[1] hereby respectfully submits the following Reply in Support of their Motion to Dismiss.

I. INTRODUCTION

Plaintiff, a group referring to itself as the Historical Eastern Pequot Tribe ("Plaintiff" or "HEP"), was denied federal acknowledgement as an Indian tribe. On September 14, 2023, Defendant moved to dismiss Plaintiff's Complaint, ECF No. 16, which sought to compel the Department to issue a final agency action on the Recommended Decision issued by the Department of the Interior's Office of Hearings and Appeals ("OHA"). OHA found that HEP was not eligible to re-petition for federal

[1] Plaintiff's Second Amended Complaint, ECF No. 15-1, 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.

acknowledgment and that HEP's 2016 request to have its status "reaffirmed" did not constitute a petition for acknowledgment within the regulatory definition of 25 C.F.R. Part 83 ("Part 83"). In its Memorandum of Points and Authorities in support of its Motion to Dismiss, Defendant showed that the Department already issued a final agency action on the Recommended Decision in June 2019 when Assistant Secretary – Indian Affairs ("AS-IA") Tara Sweeney issued the 2019 AS-IA Letter. In the Letter, AS-IA Sweeney informed all parties to the OHA proceedings, including HEP, that the Department considered the matter closed and that HEP was foreclosed from availing itself of the federal acknowledgment process in 25 C.F.R. Part 83. As such, the 2019 AS-IA Letter constitutes a final agency action under the Administrative Procedure Act ("APA") and the Court lacks the jurisdiction to grant Plaintiff any relief on its unreasonable delay claim because the Department already acted.

In its Memorandum in Opposition to Defendant's Motion to Dismiss, ECF No. 19, filed on October 4, 2023,[2] Plaintiff maintains that it "is prepared to contest such a letter was ever sent," but does not actually argue that the Letter does not constitute a final agency action. ("Pl.'s Mem."). Instead, Plaintiff erroneously argues that discovery is warranted in this APA case. Additionally, Plaintiff makes both factual and legal

[2] This Court's Rules states that a response in opposition to a motion is due within 14 days of the date of service. *See* LCvR 7(b). Plaintiff's Opposition to Defendant's Motion to Dismiss was due on September 28, 2023, but Plaintiff did not file until October 4, 2023. Given the untimely response, the Court has the authority to conclude that HEP conceded the motion. *See Cowtown Found., Inc. v. U.S. Dep't of Agric.*, 638 F. Supp. 3d 1, 7 (D.D.C. 2022) (stating that where plaintiffs, who were represented by counsel, did not timely submit their opposition to defendants' motion to dismiss, the District Court could treat the motion as conceded); *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1294 (D.C. Cir. 2004) (dismissing an amended complaint after plaintiff failed to timely respond to a motion to dismiss because of counsel's alleged lack of notice of motion to dismiss due to case filing system malfunction).

allegations without any support while failing to respond to Defendant's other arguments from the motion to dismiss. For instance, in addition to a continued failure to adequately state a claim for its alleged entitlement to federal acknowledgement, Plaintiff offers no response to Defendant's contention that the Court lacks jurisdiction to place HEP on the List of federally acknowledged tribes. Plaintiff therefore concedes that argument. Finally, Plaintiff does not address Defendant's argument that Plaintiff has failed to properly challenge any final agency action under the APA, which therefore is also conceded.

As a result, Defendant respectfully asks this Court to dismiss Plaintiff's operative complaint, ECF No. 15-1, for lack of jurisdiction and failure to state a claim.

II. ARGUMENT

A. Plaintiff concedes its second and third claims for relief because Plaintiff failed to respond to Defendant's arguments.

In Defendant's Memorandum of Points and Authorities in Support of its Motion to Dismiss, ECF No. 16 ("Def.'s Mem."), Defendant demonstrated that Plaintiff's third claim for relief seeking federal acknowledgement ("Claim 3") should be dismissed for lack of jurisdiction and failure to state a claim because Plaintiff failed to allege any facts to support its claim, and because this Court lacks the authority to compel BIA to acknowledge HEP as a federally recognized Indian tribe. Def.'s Mem., ECF No. 16 at 20-23. Defendant also demonstrated that Plaintiff's second claim for relief seeking review of some unidentified final agency action ("Claim 2") should be dismissed for failure to plead a valid cause of action under the APA. ECF No. 16 at 24-25.

Plaintiff's Opposition brief does not dispute or respond to Defendant's arguments concerning Claims 2 and 3. It is well established that "when a plaintiff files a response

to a motion to dismiss but fails to address certain arguments made by the defendant, the court may treat those arguments as conceded, even when the result is dismissal of the entire case." *See Bautista-Rosario v. Mnuchin*, 568 F. Supp. 3d 1, 9 (D.D.C. 2021) citing *Lockhart v. Coastal Int'l Sec., Inc.*, 905 F. Supp. 2d 105, 118 (D.D.C. 2012)*; see also Twelve John Does v. District of Columbia,* 117 F.3d 571, 577 (D.C. Cir. 1997) (stating that "[w]here the district court relies on the absence of a response as a basis for treating the motion as conceded, we honor its enforcement of the rule").

Here, Plaintiff provides no argument concerning the Court's lack of jurisdiction to compel BIA to federally acknowledge HEP. Nor does Plaintiff address Defendant's argument that Plaintiff fails to state a claim for that requested relief, or make any legal argument as to why the Court should (or even can) order BIA to federally acknowledge HEP. And although Plaintiff makes unsupported assertions on why discovery is warranted in relation to the 2019 AS-IA Letter, Plaintiff does not respond to Defendant's argument that Plaintiff has failed to identify a final agency action subject to APA review.

Read as generously as possible, the only statement that could be construed as responding to Defendant's arguments lies in Plaintiff's conclusion section. Plaintiff states that "[t]o the extent the defendant attacks remedies sought in the prayer for relief, those issues simply aren't ripe for a motion to dismiss." ECF No. 19 at 8. But Plaintiff does not explain why that would be the case. The Second Amended Complaint does not include any separate claims for relief—the requests for relief are Plaintiff's claims. Plaintiff has simply failed to provide any legal arguments, evidence, or other justification for why the Court has jurisdiction to award, or why Plaintiff has stated a plausible claim for the remedies sought in the prayer of relief. *See e.g.*, *Stephenson v. Cox*, 223 F.Supp.2d 119, 122 (D.D.C. 2002) (dismissing as conceded certain counts,

noting that "[t]he court's role is not to act as an advocate for the plaintiff and construct legal arguments on his behalf in order to counter those in the motion to dismiss").

Because Plaintiff has failed to address arguments relating to Claims 2 and 3, the Court should consider those arguments as conceded and grant Defendant's motion to dismiss.

B. Because the Department has already acted, Plaintiff's request for injunctive relief relating to the Recommended Decision should be dismissed.

In Defendant's Memorandum, we explained that although Plaintiff seeks to compel a final agency action, the Court lacks the jurisdiction to grant that relief because the Department already acted upon OHA's Recommended Decision when it issued the 2019 AS-IA Letter. ECF No. 16. at 18-20. As such, Plaintiff has already obtained the relief sought concerning an agency response and there is no further relief for the Court to grant concerning Plaintiff's first request for relief. *Id*. at 20. Plaintiff does not directly respond to this argument, nor does it challenge the Letter as an arbitrary and capricious final agency action under the APA. Instead, Plaintiff spends the entirety of its brief arguing that neither the 2019 AS-IA Letter nor the 2016 OFA Letter are proper subjects for judicial notice and that discovery is warranted "[b]ecause there are serious issues of material fact about notice of final agency action." ECF No. 19 at 1. Plaintiff states that it "is prepared to contest such a letter was ever sent." ECF No. 19 at 1. But Plaintiff's response does not save the Second Amended Complaint from dismissal.

For one, Plaintiff does not dispute that the Department's 2019 AS-IA Letter responded in a manner that satisfies the requirements for a final agency action under the APA. *See* ECF No. 16 at 18-19. As explained above, that means Plaintiff has conceded that the 2019 AS-IA Letter constitutes final agency action. Section 706(1) of the APA

authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1); *Ctr. for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 19–20 (D.D.C. 2017). Here, there is no agency action to compel under Section 706(1) because (as Plaintiff has conceded) the Department has already acted upon the Recommended Decision by issuing the 2019 AS-IA Letter as its last word on the matter in question.

Plaintiff instead implies that it never received the 2019 AS-IA Letter and contends that the Court should not take judicial notice of the Letter and instead, should let the case proceed to discovery. ECF No. 19. Neither point is correct.

Plaintiff's point about judicial notice is a red herring. "While a court generally does not consider matters beyond the pleadings for a motion to dismiss, it may consider 'the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, or documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss.'" *Xiaobing Liu v. Blinken*, 544 F. Supp. 3d 1, 8 (D.D.C. 2021) citing *Feng Wang v. Pompeo*, No. 18-cv-1732 (TSC), 2020 WL 1451598, at *3 (D.D.C. Mar. 25, 2020).

In this case, Defendant's produced the documents relevant and critical to responding to the Complaint— the 2019 AS-IA Letter that provides the very response Plaintiff seeks to compel. In the Complaint, Plaintiff maintains that it "filed this action to compel an answer" ECF No. 19 at 1. In response, Defendant's provided the answer or action which was already taken in relation to the suit. Thus, because the 2019 AS-IA Letter is a document upon which this case relies, the Court may consider the document, and judicial notice is not needed or relevant here. Assuming all other jurisprudential

requirements were met, Plaintiff would be free to challenge the 2019 AS-IA Letter under Section 706(2) of the APA. But neither the Second Amended Complaint nor Plaintiff's response to the motion to dismiss make that challenge.

Plaintiff also erroneously contends that discovery is warranted under these facts. ECF No. 19. To the extent Plaintiff desires discovery into whether Plaintiff received the 2019 AS-IA Letter in 2019, it would make little sense. Whether or not Plaintiff received the Letter in 2019 is irrelevant—Plaintiff has now received it. When an agency has acted, one can no longer be "aggrieved" by an agency failure to act. *See* 5 U.S.C. § 702. Unreasonable delay claims are moot when the "[agency] has now acted." *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1205 (D.C. Cir. 2013); *see also Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (stating that a case becomes moot when "'intervening events make it impossible to grant the prevailing party effective relief"). And Plaintiff does not dispute that the Letter constitutes final agency action under the APA, nullifying Plaintiff's request for the Court to compel that action. Thus, there is no claim on which discovery could occur.

To the extent Plaintiff desires discovery into the Department's decision-making with respect to the 2019 AS-IA Letter, that too would be inappropriate. As noted above, Plaintiff has not challenged the 2019 AS-IA Letter or identified a viable APA challenge to any other final agency action. But even if Plaintiff had adequately pled a challenge to a final agency action, it is well settled that when challenging an agency action, the court's review is strictly confined to the administrative record. *Kadi v. Geithner*, 42 F. Supp. 3d 1, 9 (D.D.C. 2012) (citing *Nat'l Treasury Emps. Union v. Seidman,* 786 F. Supp. 1041, 1046 (D.D.C. 1992)); *see also Camp v. Pitts,* 411 U.S. 138, 142 (1973) (stating that "the focal point for judicial review should be the administrative record already in existence,

not some new record made initially in the reviewing court"). Absent "evidence that the agency has given a false reason . . . discovery is inappropriate in cases under the APA." *Kadi* 42 F. Supp. 3d at 10.

Plaintiff further supports its request for discovery via several arguments about unrelated elements of the 25 C.F.R. Part 83 acknowledgement process that have no bearing whatsoever on Plaintiffs' requests for relief. First, Plaintiff appears to suggest that the Department's 2015 policy guidance terminating the practice of ad hoc administrative "reaffirmation" outside of the Part 83 process, 80 Fed. Reg. 37,538 (July 1, 2015), requires discovery or is otherwise relevant to the question of whether the 2019 AS-IA Letter was a final agency action. ECF No. 19 at 3, 5. But administrative reaffirmation has nothing to do with whether the Department has acted upon OHA's Recommended Decision. Second, Plaintiff refers to recent court rulings requiring the Department to promulgate a rule either allowing Part 83 re-petitioning or providing a more fulsome explanation for maintaining the current ban on re-petitioning. ECF No. 19 at 6. Again, the Department's ongoing rulemaking process has no bearing on whether the 2019 AS-IA Letter was a final agency action.

Plaintiff also seeks to avoid dismissal by asserting that "[a]t the time of the filing of the complaint, the agency did not list a final decision regarding this matter on its list of petitions on a public website." ECF No. 19 at 3. But this is not relevant and carries no weight because the 2019 AS-IA Letter was not part of a Part 83 petition and therefore was not appropriate for placement on OFA's website. As defined by regulations at 25 C.F.R. §§ 83.22 and 83.24, documents posted online during the Part 83 process are limited to various documents associated with a documented petition (as defined) and its formal proposed finding. AS-IA publishes final determinations (as defined) in the

Federal Register. *See* 25 C.F.R. § 83.45. As the Department informed HEP in 2016, and as OHA agreed in the Recommended Decision, *see* ECF No. 16, Exhibits 1 and 2, HEP's 2016 request was not a documented petition, and the 2019 AS-IA Letter was not a final determination on a documented petition under Part 83 (although it was a final agency action under the APA). Thus, there was no reason to have the 2019 AS-IA Letter posted on OFA's website because HEP was neither eligible for, nor proceeding under Part 83.

Plaintiff also implies that the Letter should have been published. ECF No. 19 at 5. But publication on a website is not the legal standard for a final agency action. As explained in Defendant's Memorandum, ECF No. 16 at 18-19, 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). 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).

As Defendant has explained, the Letter marked the consummation of the agency's decision-making process. In the 2019 AS-IA Letter, AS-IA informed HEP that it considered the matter closed and 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." Def.'s Mem. Ex. 4. The Letter also represents an action "from which legal consequences will flow." ECF No. 16 at 19. 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.[3] *Id.*; *see also* ECF No. 16 at 18-19. Because the Department has already acted on OHA's Recommended Decision, Plaintiff's request for the Court to compel the agency to act should be dismissed for lack of jurisdiction.

III. CONCLUSION

In an attempt to improperly gain federal acknowledgement through a court order and to compel the Department to act when it has already acted, Plaintiff still fails to state a claim upon which relief can be granted and fails to demonstrate that this Court has jurisdiction. Plaintiff also largely concedes the motion to dismiss because it fails to address Defendant's arguments and still has not identified a final agency action that can be challenged under the APA. Thus, for the foregoing reasons as well as those in Defendant's Memorandum in support of their motion to dismiss, Plaintiff's claims should be dismissed.

Respectfully submitted this 11th day of October, 2023.

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[3] Plaintiff repeatedly claims that, in the Recommended Decision, OHA found that there might be cause for factual or legal review. ECF No. 19 at 3, 6. As best Defendant can discern, Plaintiff appears to be referring to footnote 9 of the Recommended Decision, in which the administrative law judge noted that further review might be warranted if there were any factual or legal errors in the 2016 Letter (not the 2019 Letter) that the Department sent to HEP. ECF No. 16, Ex. 2 at 14 n.9. However, in the next sentence, the administrative law judge noted that Plaintiff had alleged no such errors and as such there was no basis for further review. *Id.*

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Certificate of Service

I hereby certify that on October 11, 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
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