IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002756-15T2

ON APPEAL FROM FINAL JUDGMENT OF MARCH 9, 2016,
IN DOCKET NO. MER-L-2343-15, SUPERIOR COURT, LAW
DIVISION, MERCER COUNTY

SAT BELOW:

THE HONORABLE WILLIAM ANKLOWITZ, J.S.C.

NANTICOKE LENNI-LENAPE TRIBAL NATION, Plaintiff, v. JOHN JAY HOFFMAN, ACTING ATTORNEY GENERAL OF NEW JERSEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, Defendant.

BRIEF AND APPENDIX OF PLAINTIFF

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I. PROCEDURAL HISTORY AND SUMMARY OF ARGUMENT

This is a civil rights action, with related common law claims. The Nanticoke Lenni-Lenape Tribal Nation alleges that the New Jersey's Acting Attorney General has wrongfully repudiated the state's recognition of it as an American Indian tribe, thereby violating the Tribe's state constitutional rights to due process and equal protection, and its common law right to rely on the state's word and to be free of arbitrary state treatment.

Plaintiff is a constitutionally organized, 3,000-member American Indian tribe based in Cumberland County. Defendant is the state's Acting Attorney General, in both his individual and official capacities.[1] Pa8.

State recognition of a tribe is a necessary predicate for certain federal benefits, such as grants, loans, scholarships, and the right to market crafts as "genuine" Native American merchandise. It is thus essential to the Tribe's viability. Pa14-15.

The Tribe filed its five-count complaint on October 18, 2015. Counts I through III, brought directly and under the New

[1] When the Tribe filed its complaint, the Acting Attorney General was John Jay Hoffman. Hoffman vacated the position and was replaced by Robert Lougy. The Governor recently nominated Lougy to the Superior Court and nominated Christopher Porrino as Acting Attorney General. See R. 4:34-4.

Jersey Civil Rights Act, allege deprivation of procedural due process, substantive due process, and equal protection under the state constitution. Count IV is a common-law estoppel claim, and Count V alleges improperly arbitrary treatment under state law. Pa23-27.

Defendant moved to dismiss the complaint for failure to state a claim and lack of subject matter jurisdiction. R. 4:6-2(a), (e). After oral argument on March 9, 2016, the trial court dismissed the case for failure to state a claim. Pa1. In a bench opinion, the court held that absent a statute expressly recognizing the Tribe, the Tribe lacked state recognition and therefore could not state a cause of action for its deprivation. T17-3 to 10.[2]

On March 11, 2016, the Tribe filed a timely notice of appeal. Pa2. For the following three reasons, it asks this Court to reverse the trial court's dismissal and reinstate the Tribe's complaint:

First, the legislature created the requirement of statutory tribal recognition in 2002. But Plaintiff was first recognized as a tribe in 1982. The trial court's decision improperly applies the statutory requirement retroactively, thereby

[2] References are as follows: "Pa___" refers to the Plaintiff's Appendix. "T___" refers to the transcript of the trial court's March 9, 2016, decision.

discrediting the state's established process of recognition prior to 2002.

Second, even if statutory recognition is required, N.J.S.A. 26:8-49 and N.J.S.A. 52:16A-53, enacted in 1992 and 1995 respectively, constitute ipso facto recognition of the Tribe.

Third, the Tribe's complaint alleges facts that, taken as true, establish both state recognition of the Tribe since 1982 and defendant's arbitrary, unconstitutional, and invidiously motivated attempt to repudiate that recognition.[3]

II. STATEMENT OF FACTS

On a motion to dismiss, a court must accept as true the plaintiff's well-pleaded facts. Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). Following are the facts of this matter under that standard, all of which are taken from the Tribe's complaint:

The Tribe has a long history in New Jersey and the surrounding region, dating back approximately 12,000 years. Pa8. Colonists' diseases and violence took heavy tolls on the Lenni-Lenape people, and the Brotherton Reservation in present-

[3] The Tribe has filed a parallel federal complaint, Nanticoke Lenni-Lenape Tribal Nation v. Lougy, Docket No. 15-cv-5645-RMB-JS, alleging federal constitutional violations. That case is pending before the Hon. Renee M. Bumb, U.S.D.J., in United States District Court on defendant's motion to dismiss.

day Burlington County, intended to be a permanent safe haven, was disbanded. Pa9.

New Jersey expelled most remaining Lenni-Lenape westward into Pennsylvania, and they were subsequently moved into Ohio, Indiana, Oklahoma, and eventually Canada. Pa9. Some tribal members evaded forced removal to remain in their homeland, and today the Tribe includes approximately 3,000 members, centered in Bridgeton and nearby Fairfield Township. Pa9.

From the late 19th century until the 1970s, New Jersey public officials practiced administrative racial reassignment, changing the race on American Indian birth certificates to either white or black to maintain "racial purity" and eliminate American Indian identity. Pa9.

New Jersey finally began to recognize its tribes in the early 1980s, granting state recognition to the Ramapough and Powhatan in 1980. Pa10. The state recognized the Nanticoke Lenni-Lenape by Senate Concurrent Resolution 73, dated December 17, 1982 and modeled on the prior resolutions, which stated plainly, "[t]he purpose of this concurrent resolution is to recognize [the tribe]" and to "assist them in obtaining similar recognition by the Federal Government," so that they may "receive Federal assistance as an Indian tribe." Pa10.

The state further confirmed the Tribe's recognition and expanded the privileges attached thereto by two statutes adopted in 1992 (N.J.S.A. 26:8-49) and 1995 (N.J.S.A. 52:16A-53 et seq.). Pa11.

The first statute corrected the longstanding state policy of reassigning birth certificates to eliminate the racial existence of Native Americans. Pa9, 11. The law ceded previously exclusive state powers to the tribal governments, stating:

> In the case of a correction to the birth record of a member of one of the three New Jersey tribes of American Indians, the Powhatan-Renape Nation, the Ramapough Mountain Indians, or the Nanticoke Lenni-Lenape Indians, the substantiating documentary proof may include, but shall not be limited to, an affidavit, satisfactory to the State registrar or any local registrar and signed by the chief of the tribe that according to tribal records the person whose certificate is to be amended is a member of the tribe of the chief whose signature appears on the affidavit.

N.J.S.A. 26:8-49 (emphasis added). Pa11.

The second statute created the Commission on American Indian Affairs, which "serves as the liaison among the governments of the tribes, New Jersey, and the United States." Pa11-12. It established two commission seats each for representatives of the specifically named "Nanticoke Lenni Lenape Indians," "the Ramapough Mountain Indians," and "the

Powhatan Renape Nation." N.J.S.A. 52:16A-53 (emphasis added). Pa11-12.

The statute reserved two other commission seats for "Intertribal People," defined as follows:

> American Indians who reside in New Jersey and are not members of the Nanticoke Lenni Lenape Indians, the Ramapough Mountain Indians, or the Powhatan Renape Nation, but are enrolled members of another tribe recognized by another state or the federal government.

Id. (emphasis added).

In subsequent decades, including to the present day, the state has repeatedly reaffirmed recognition of the three tribes in official declarations of the Commission on American Indian Affairs, in communications to federal agencies, and in dozens of acts in the regular course of state business. Pa9-14.

To take but one of numerous examples, in 1992 Governor Florio's office sent a letter to the federal Indian Arts & Crafts Board, in answer to an inquiry about the status of New Jersey tribes. Pa11. The letter said:

> The New Jersey State Legislature, comprised of the Senate and the Assembly, is the law-making body that is responsible for the legal recognition of Indian tribes. Formal recognition is accomplished by State Resolutions, which remain in effect until rescinded. To date, three tribes have been recognized.

Pa11 (emphasis added).

Accordingly, the Tribe has operated as a state-recognized tribe and received federal benefits connected to that status for more than three decades. Pa15.

State recognition is a predicate for receipt of these federal benefits. Pa14. The federal government does not require states to adopt a particular process for state recognition, or that a form of recognition adhere to a level of formality that the state might adopt in other circumstances. Pa15. For as long as the federal government has looked to states for expressions of recognition, the federal government has accepted statutes, reports like those issued by the Commission, executive orders, and concurrent resolutions as appropriate to open access to federal benefits. Even as some states have switched back and forth between their preferred forms over the decades, the federal government has continued to accept this full array of forms. Pa15-16.

Nevertheless, defendant – based on a racially invidious belief that all American Indians want to open casinos – now unilaterally seeks to change the Tribe's status, without any due process. Pa16, 23-24. Defendant's actions prior to this suit make clear that his concern stems from a fear of Indian casinos. Pa12.

For example, Defendant principally relies on a 2001 letter from the state's Division of Gaming Enforcement to the federal Indian Arts & Crafts Board declining to confirm that the state has recognized tribes. Pa19. But the DGE regulates casino gambling, and has no authority over or expertise in American Indian affairs.

Although the state later repudiated both the reasoning and conclusions of that 2001 letter, Defendant has now not only revived it based on a racial stereotype, but has turned its tentative language into a concrete conclusion that New Jersey has never had state-recognized tribes. Pa19-20.

Defendant's actions have caused the Tribe severe damage. Pa21-23. The Tribe has already lost grant funding for critical health and employment initiatives for women, children, and seniors; student scholarships; jobs; the ability to do business through its certified tribal company; the authorization to sell crafts as Indian-made under federal law; and its status, standing, and reputation in domestic and international American Indian organizations. Pa22. Those losses will continue so long as defendant maintains its position. Pa23.

The Tribe asks the Court to prevent Defendant from unilaterally terminating its status as a recognized tribe, and

require him to honor New Jersey's longstanding recognition of that status. Pa7-8, 27.

III. ARGUMENT

When an appellate court reviews the dismissal of a complaint under R. 4:6-2(e), it does so de novo, and applies the same standard as did the trial court. Teamsters Local 97 v. State, 434 N.J. Super. 393, 413 (App. Div. 2014).

That standard is a liberal one. "[M]otions to dismiss should be granted in only the rarest of instances." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 165 (2005)(quotation omitted).

The reviewing court owes no deference to a trial court's legal conclusions. Rezem Family Assoc. v. Bor. of Millstone, 423 N.J. Super. 103, 114 (App Div.), certif. denied and appeal dismissed, 208 N.J. 366 (2011). It must accept plaintiff's factual allegations as true, afford plaintiff all favorable inferences of fact, and deny the motion if the complaint "suggests" a cause of action. Printing Mart-Morristown v. Sharp Elec. Corp., supra, 116 N.J. at 746.

Judged by those standards, the trial court's dismissal was error and this Court should reverse it.

A. The Requirement of Statutory Recognition Did Not Retroactively Abrogate Prior Recognition of the Tribe.

The trial court held that as a matter of law, New Jersey must recognize a tribe by statute. It relied on N.J.S.A. 52:16A-56(g), which provides that tribal recognition "shall require specific statutory authorization."

But the legislature did not add the requirement of statutory authorization to Section 56 until 2002.[4] For the prior two decades, New Jersey could, and did, choose from among multiple methods of expressing state tribal recognition to the federal government.

As set forth in Point C below, the Tribe's complaint alleges facts that, if accepted as true, establish that the state officially recognized the Tribe as a tribe in 1982 and reaffirmed that recognition, by word and deed, for at least two decades thereafter.

The trial court's holding thus requires retroactive application of the 2002 amendment to Section 56. To put it another way, the trial court held that this amendment

[4] The amendment originated as A2957, principally sponsored by then-Assemblywoman Watson-Coleman. It passed both houses of the legislature unanimously on January 7, 2002, after conditional veto and amendment to incorporate changes suggested by Acting Governor DiFrancesco, and took effect the next day as P.L. 2001, c. 417.

retroactively abrogated the state's recognition of the Tribe by concurrent resolution in 1982.

That holding is error. The 2002 amendments to Section 56 do not apply retroactively.

In New Jersey, "statues generally should be given prospective application." James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 563 (2014), quoting In re D.C., 146 N.J. 31, 50 (1996). "[G]eneral rule[s] of statutory construction" favor this approach, "based on our long-held notions of fairness and due process." Cruz v. Cent. Jersey Landscaping, Inc., 195 N.J. 33, 45 (2008), quoting Gibbons v. Gibbons, 86 N.J. 515, 521 (1981).

Whether a statute may apply retroactively depends on (1) "whether [the] Legislature intended to give the statute retroactive application," and (2) "whether retroactive application … will result in either an unconstitutional interference with vested rights or a manifest injustice." In re D.C., 146 N.J. at 50. A court must first ask whether the legislature signaled its intent that the statute operate retroactively or enacted a "curative" amendment; if so, the court must then determine whether retroactivity will work a "manifest injustice" on a party. See James, supra, 216 N.J. at 563-65.

The 2002 amendment to Section 56 does not pass this "retroactivity test." Neither the language nor the legislative history of Section 56(g) indicates that the legislature intended it to operate retroactively.[5] Nor is the amendment "curative"; it is not designed to "remedy a perceived imperfection in or misapplication of" the original statute. Schiavo v. John F. Kennedy Hosp., 258 N.J. Super. 380, 386 (App. Div. 1992), aff'd, 131 N.J. 400 (1993).

Most importantly, as the Tribe's complaint makes clear, retroactive application of Section 56(g) would work a "manifest injustice" on the Tribe. For two decades before the amendment passed and for many years thereafter, New Jersey treated the Tribe as recognized. It passed a resolution saying so. It adopted statutes acknowledging that status. It repeatedly represented as much to the federal government. The Tribe relied

[5] The legislative history of this amendment reveals that the legislature's motivation was to discourage one individual from seeking state recognition. That individual, mere months before, had claimed to be the chief of his own tribe and sued the state threatening to make a large land claim and to build casinos. His suit failed, in part because the state maintained that he was not a member of one of its three recognized tribes. Also, the Nanticoke Lenni-Lenape successfully sued him to prevent him from claiming any association with it. Pa12. The amendment's sponsors did not aim to withdraw prior state recognition of the three tribes. Indeed, the amendment left untouched language that the legislature, when considering statutory recognition of new tribes, would solicit and consider the recommendations of the three already-recognized tribes.

on these representations to qualify for and receive federal benefits essential to its existence.

Under such circumstances, irrespective of legislative intent or the "curative" nature of the amendment, retroactive application of amendment to the Tribe would be grossly unfair. The trial court's decision to do so was therefore error. This Court should reverse it and reinstate the Tribe's complaint.

B. **Even if the Statutory Recognition Requirement Is Applied Retroactively, the Legislature Ipso Facto Recognized the Tribe By Statute**.

Even if the trial court were correct that the legislature must recognize the Tribe by statute, the legislature has taken that step – twice.

In 1992, the legislature adopted P.L. 1991, c. 359, which amended N.J.S.A. 26:8-49 to correct the state's racist practice of reassigning birth certificates to eliminate the existence of American Indians in New Jersey.

The law ceded powers formerly reserved to the state to "the three New Jersey tribes of American Indians, the Powhatan-Renape Nation, the Ramapough Mountain Indians, [and] the Nanticoke Lenni-Lenape Indians" (emphasis added). It does not grant such powers to *any* group of New Jersey residents who self-identify as American Indian.

The correcting paperwork must be "signed by the chief of the tribe that according to tribal records the person whose certificate is to be amended is a member of…" Pa11. Ethnic groups do not have chiefs; American Indian tribes have chiefs. See, e.g., United Houma Nation v. Babbitt, 1997 U.S. Dist. LEXIS 10095 at *23 (D.D.C. July 8, 1997) (explaining "fundamental distinction between the political classification of groups as Indian tribes and the racial classification of persons as Indians")[6].

The trial court asserted that the state's tribes are no more than ethnic groups. See T11-9 to 13. However, as the legislature was well aware, New Jersey is home to several ethic groups of American Indians: for example, other groups of Lenape, Cherokee, Taino, and Nanticoke. Those groups do not have chiefs, they are not referred to as tribes, and they are not named in this statute. The trial court's interpretation of the statute does not correspond with its plain meaning and must be rejected.

Then in 1995, the legislature created the Commission on Native American Affairs. N.J.S.A. 52:16A-53, et seq.[7] Section

[6] A copy of this opinion is included in the appendix at Pa98. R. 1:36-3.

[7] P.L. 1995, c. 295. This is the statute that was amended in 2002 to add a new requirement that future tribes be recognized by statute.

53 of that statute allocates two seats each to the Nanticoke Lenni-Lenape, the Ramapough Mountain and the Powhatan Renape tribes, and two seats to "Intertribal People."

The statute defines "Intertribal People" as "American Indians who reside in New Jersey and are not members of the Nanticoke Lenni-Lenape Indians, the Ramapough Mountain Indians, or the Powhatan Renape Nation, but are enrolled members of another tribe recognized by another state or the federal government." N.J.S.A. 52:16A-53 (emphasis added).

Both statutes specifically name the Tribe as having access to the privilege granted by the laws, use the terms "tribe" and "chief," and distinguish the Tribe from other groups not recognized by the state. They therefore constitute ipso facto statutory recognition of the Tribe.[8]

Accordingly, even if the 2002 statutory authorization requirement applies retroactively, the Tribe satisfies it. For this reason as well, the trial court's dismissal of the complaint was error and the Court should reverse it.

[8] At the April 12, 2016, oral argument in the federal case on the state's motion to dismiss, Judge Bumb indicated that she believed these statutes ipso facto recognized the Nation as a tribe.

C. The Complaint Alleges State Recognition of the Tribe Since 1982, and Defendant's Unconstitutional Attempt to Repudiate It.

The complaint states causes of action sufficient to survive defendant's motion to dismiss.

The complaint alleges that the state recognized the Tribe in 1982 and reaffirmed that recognition for several decades thereafter. The Tribe's allegations establish that (1) since 1982 the state has recognized the Tribe by word and deed; (2) federal agencies accept the forms of recognition which New Jersey adopted; (3) the Tribe has reasonably relied on that recognition; (4) the state now seeks arbitrarily to repudiate that recognition; and (5) a stereotyped, invidiously race-based motive underlies that attempted repudiation. On defendant's motion, the Court must accept the Tribe's factual allegations as true. Banco Popular, supra, 184 N.J. at 166.

1. By resolution, statutes, and conduct, the state recognized Plaintiff as a tribe.

The Tribe's complaint alleges that the state first recognized the Tribe as such in 1982, when the legislature passed Concurrent Resolution 73. That resolution recognized plaintiff as a tribe "to qualify [the Tribe] for appropriate federal funding for Indians." It mirrored similar prior

enactments, which recognized the Ramapough Mountain Indians and Powhatan Renape Nation as tribes.

The trial court, relying on In re N.Y. Susquehanna & Western R.R. Co., 25 N.J. 343, 348 (1957), accepted defendant's argument that a concurrent resolution does not have "the force of law" and therefore cannot constitute "statutory recognition." T5-11 to 6-15; T15:9 to 14. But that proposition begs the relevant question: whether the state's action, even if not equivalent to a statute, sufficiently recognizes a tribe to qualify it for federal benefits.

By its terms, CR73 was intended to do just that, consistent with federal and state Indian law and policy for as long as the practices of recognition have existed. And as the Tribe's complaint avers, the federal government accepts a wide variety of state methods of recognition, including by concurrent resolution. In any event, whether the federal government accepts concurrent resolutions as sufficient to convey state recognition is a factual question and should not be determined on a motion to dismiss.

Moreover, the Tribe does not merely allege "recognition by concurrent resolution." It alleges a lengthy course of state conduct – pre- and post-2002 – that acknowledges and reaffirms recognition, including passage of the two statutes discussed

above in Section B, communications from the state to the federal government, and state actions predicated on plaintiff's status as a recognized tribe. Pa9-14.

Finally, the complaint alleges that the Tribe reasonably relied on these methods and indicia of state recognition, and that it is losing access to essential benefits while the state attempts to repudiate its prior position.

In short, the complaint alleges facts that establish state recognition of plaintiff as an American Indian tribe, and the Tribe's reasonable ongoing reliance on that recognition. This Court should so hold.

2. Post-2002 legislative efforts to clarify the Tribe's status in the face of continued discrimination do not establish prior non-recognition.

The trial court pointed to several failed attempts, post-2002, to have the legislature pass another statute reaffirming recognition of the Tribe. T13-8 to 15-3. From this lack of legislative success, the trial court inferred that the legislature had never previously recognized the Plaintiff as a tribe.

But this inference rests on the flawed assumption, discussed above, that the 2002 amendment requiring recognition by statute applies retroactively. Moreover, the trial court ignored detailed allegations in the Tribe's complaint that these

bills were introduced not to recognize the Tribe in the first instance, but to clarify the Tribe's previously obtained status in the face of irrational fears that the Tribe, as a "recognized tribe," would attempt to compete with Atlantic City's casinos. See Pa18-19, 25.

Accordingly, on a motion to dismiss, these legislative failures cannot bear the determinative weight the trial court assigned them. The Court should reject the trial court's reasoning on this point.[9]

3. The complaint alleges that Defendant has an arbitrary and invidious motivation in attempting to strip the Tribe of its state recognition.

Finally, the Tribe's complaint alleges, in substantial detail, that (1) defendant attempts to repudiate its status in an arbitrary manner and with no process whatsoever; (2) defendant's action deprives the Tribe of its fundamental right to exist as a distinct ethnic group; and (3) defendant is motivated by an irrational, invidious, and stereotypical view

[9] The Tribe is prepared to present evidence that the trial court's conclusions regarding the legislative intent behind failed statutes were wrong and that the motivation for the proposals was to protect existing tribes and discourage new applicants. See Pa12.

that the Tribe wants recognition so it can open a casino.[10]

In short, the complaint sufficiently alleges facts that establish the arbitrary and discriminatory nature of the Defendant's attempt to repudiate the Tribe's recognition.

On a motion to dismiss, "[t]he issue [is] not whether the [plaintiff's] allegations were true or whether they could be proved, but only whether they were made." Banco Popular, supra, 184 N.J. at 184. The Tribe's complaint satisfies that liberal standard, and this Court should acknowledge that it does.

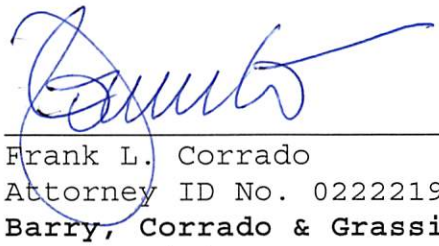
IV. CONCLUSION

The trial court's decision impermissibly applies a 2002 statute retroactively to abrogate prior state recognition of the Tribe. It also ignores the state legislature's ipso facto statutory recognition of the tribe in 1992 and 1995. It further disregards three decades of state affirmations of the Tribe's status to federal agencies, which continue, upon information and belief, to the present. The Tribe's complaint sufficiently alleges colorable claims of both state recognition and improper repudiation.

[10] The Tribe also alleges that it has formally disclaimed any interest in gaming, and that defendant is or should be aware that state recognition plays no role whatsoever in acquiring federal gaming rights. Pa 18-19.

Accordingly, for the foregoing reasons, the Court should reverse the trial court's dismissal and reinstate the Tribe's complaint.

Respectfully submitted:



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Dated: June 22, 2016

APPENDIX

PREPARED BY THE COURT

Nanticoke Lenni Lenape Plaintiff v. John Jay Hoffman, Acting Attorney General Defendant	SUPERIOR COURT OF NEW JERSEY COUNTY OF MERCER LAW DIVISION, CIVIL PART Docket MER-L-2343-15 CIVIL ACTION ORDER

This matter being opened to the Court and for good cause shown;

IT IS ON March 9, 2016, ORDERED THAT:

1. The motion to dismiss is granted;
2. the reasons are as set forth ☐herein ☒on the record this same date;
3. a copy of this order shall be served on all parties within 10 days.

William Anklowitz, J.S.C.

New Jersey Judiciary
Superior Court - Appellate Division
NOTICE OF APPEAL

Type or clearly print all information. Attach additional sheets if necessary.

TITLE IN FULL (AS CAPTIONED BELOW):
NANTICOKE LENNI LENAPE TRIBAL NATION, Plaintiff
v.
JOHN JAY HOFFMAN, ACTING ATTORNEY GENERAL OF NEW JERSEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, Defendant.

ATTORNEY / LAW FIRM / PRO SE LITIGANT

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ON APPEAL FROM

TRIAL COURT JUDGE	TRIAL COURT OR STATE AGENCY	TRIAL COURT OR AGENCY NUMBER
Hon. William Anklowitz, J.S.C.	Trial Court	MER-L-2343-15

Notice is hereby given that plaintiff appeals to the Appellate Division from a ☐ Judgment or ■ Order entered on March 9, 2016, in the ■ Civil ☐ Criminal or ☐ Family Part of the Superior Court or from a ☐ State Agency decision entered on _____.

If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed.

Have all issues, as to all parties in this action, before the trial court or agency been disposed of? (In consolidated actions, all issues as to all parties in all actions must have been disposed of.) ■ Yes ☐ No

If not, has the order been properly certified as final pursuant to R. 4:42-2? ☐ Yes ☐ No

For criminal, quasi-criminal and juvenile actions only:

Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed:

This appeal is from a ☐ conviction ☐ post judgment motion ☐ post-conviction relief.

If post-conviction relief, is it the ☐ 1st ☐ 2nd ☐ other _____ (specify)

Is defendant incarcerated? ☐ Yes ☐ No

Was bail granted or the sentence or disposition stayed? ☐ Yes ☐ No

If in custody, name the place of confinement:

Defendant was represented below by:

☐ Public Defender ☐ self ☐ private counsel _____ (specify)

Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge	The Honorable William Anklowitz, J.S.C.	3/11/16
Trial Court Division Manager	Judith Irizarry	3/11/16
Tax Court Administrator		
State Agency		
Attorney General or Attorney for other Governmental body pursuant to R. 2:5-1(a), (e) or (h)		

Other parties in this action:

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
John Jay Hoffman, Acting Atty Gen. of NJ, in his individual and official capacities	STUART FEINBLATT, AAG, 25 Market Street, P.O. Box 112, Trenton, NJ 08625, (609) 984-9504	3/11/16

Attached transcript request form has been served where applicable on the following:

	Name	Date of Service	Amount of Deposit
Trial Court Transcript Office	Robert Mull	3/11/16	$150.00
Court Reporter (if applicable)	J&J Court Transcribers, Inc.	3/11/16	
Supervisor of Court Reporters	Ellen Gumpel	3/11/16	
Clerk of the Tax Court			
State Agency			

Exempt from submitting the transcript request form due to the following:

- ☐ No verbatim record.
- ☐ Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy).
  List the date(s) of the trial or hearing:

- ☐ Motion for abbreviation of transcript filed with the court or agency below. Attach copy.
- ☐ Motion for free transcript filed with the court below. Attach copy.

I certify that the foregoing statements are true to the best of my knowledge, information and belief. I also certify that, unless exempt, the filing fee required by N.J.S.A. 22A:2 has been paid.

3/11/16
DATE

SIGNATURE OF ATTORNEY OR PRO SE LITIGANT

FILED, Clerk of the Appellate Division, March 11, 2016, **A-002756-15**

New Jersey Judiciary
Superior Court - APPELLATE DIVISION

COURT TRANSCRIPT REQUEST

R.O. #

Instructions for Court Reporter or Transcription Agency:

I am sending in a Court Transcript Request for the proceeding in this matter on March 9, 2016. I am requesting a transcript of the Oral Opinion on Motion to Dismiss - and am seeking only that portion of the transcript containing the Court's decision. Per Mr. Mull at Superior Court, Mercer County a deposit of $150 is required.

TITLE IN FULL (AS CAPTIONED BELOW)	TRIAL COURT DOCKET NUMBER
NANTICOKE LENNI LENAPE TRIBAL NATION, PLAINTIFF V. JOHN JAY HOFFMAN, ACTING ATTORNEY GENERAL OF NEW JERSEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DEFENDANT.	**MER-L-2343-15 (*)**
	COUNTY / COURT **MERCER**

REQUESTING PARTY

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To NAME / ADDRESS (TRANSCRIPT OFFICE or COURT CLERK (if sound recorded))
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I authorize the preparation of an original and one copy of the following hearing dates, to be completed in the delivery schedule listed here: **Standard**

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REQUESTOR 'S NAME / ADDRESS
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CASE INFORMATION

CASE NAME (Plaintiff)	(Defendants)	
Nanticoke Lenni-Lenape	vs. Hoffman et al	☒ Appeal ☐ Non-Appeal

LOWER COURT DOCKET TYPE	LOWER COURT NUMBER		TRANSCRIPT REQUEST DATE
☐ Indictment ☐ Accusation ☐ Complaint	MER-L-2343-15		
DOCKET NUMBER	**COUNTY** Mercer County - Civil Part, Trenton NJ	**COURT** Anklowitz	**TRANSCRIPT REQUEST RECEIPT DATE** 3/14/2016

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NANTICOKE LENNI-LENAPE TRIBAL NATION,

Plaintiff,

v.

JOHN JAY HOFFMAN, ACTING ATTORNEY GENERAL OF NEW JERSEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Defendant.

Superior Court of New Jersey
Law Division, Mercer County
Docket No. L-2343-15

Civil Action

Complaint

The Nanticoke Lenni-Lenape Tribal Nation ("Nation"), by way of complaint against the Defendant, avers as follows:

1. This is a civil rights action. The Nation alleges that the Attorney General of the State of New Jersey, in his individual and official capacities, has wrongfully repudiated the state's official recognition of the Nation as an American Indian tribe, and has thereby violated: 1) the Nation's right to procedural and substantive due process under the New Jersey Constitution; 2) the Nation's right to equal protection under the New Jersey Constitution; and 3) the Nation's right

under state law to rely on the State's word and to be free from arbitrary and unlawful state action.

2. The Nation is a constitutionally organized, self-governing, inherently sovereign American Indian tribe. Its principal place of business is at 18 East Commerce Street, Bridgeton, New Jersey. The majority of the Nation's approximately 3,000 members reside in New Jersey.
3. Defendant John Jay Hoffman is Acting Attorney General of the state of New Jersey. He is sued in his individual and official capacities. His principal place of business is at the Richard Hughes Justice Center in Trenton, New Jersey.
4. The lineage of the Lenni-Lenape people (also called "Delawares") in what became New Jersey and the surrounding region dates back more 12,000 years and through 500 generations. The Lenni-Lenape were often referred to as "the Grandfather tribe" because of their diplomatic skills, and their reliable honesty in dealing with others, and because they provide the ancient root of many other American Indian nations.
5. Colonists' diseases and violence took heavy tolls on the Lenni-Lenape. In 1758, the Colonies established an American Indian reservation in New Jersey, the Brotherton Reservation in present-day Burlington County, to be a permanent safe haven.
6. But the emerging American government saw in the Lenni-Lenape a potential ally in its fight against the British, so the first treaty the government signed after the Declaration of Independence was with the Lenape-Lenape Nation. It promised the Tribe statehood and seats in Congress if they would join the revolutionary cause. The Lenni-Lenape kept their end of the bargain, but the American government did not.

7. In 1802 the reservation was disbanded and New Jersey began expelling the remaining Lenni-Lenape. They were relocated westward into Pennsylvania, Ohio, Indiana, Oklahoma, and eventually Canada after colonial governments broke additional treaties.

8. Some Lenni-Lenape families managed to evade forced removal to maintain a presence in their ancient homeland. The Plaintiff in this case—the Nanticoke Lenni-Lenape Tribal Nation—includes among its approximately 3,000 members persons whose ancestors include Lenni-Lenape who remained in New Jersey and the Nanticoke, a documented tribe residing on the Chesapeake Bay side of the Delmarva Peninsula. Many of Nation's families have lived for hundreds of years in what is now Fairfield Township, New Jersey, where the Nation maintains tribal grounds, called "Cohanzick," housing a community center, ceremonial grounds, and store.

9. American Indians were not considered "persons within the meaning of the law" until 1879. Not until 1924 did Congress recognize American Indians as United States citizens.

10. Beginning in the late 19th century and continuing at least through the 1970s, New Jersey pursued a practice of administrative racial reassignment. Public officials changed the race indicated on birth certificates of American Indians to either white or black in an attempt to eliminate American Indian racial identity. This practice by the state injured New Jersey's American Indian tribes in profound ways, including socially, economically, and politically.

11. In the early 1980s, New Jersey began to reverse the historical course of its maltreatment of American Indians by implementing a process of state recognition. New Jersey has described its process of state-recognition to the federal government as follows:

> The New Jersey State Legislature, comprised of the Senate and Assembly, is the law-making body that is responsible for the legal recognition of Indian tribes. Formal recognition is accomplished by State Resolutions, which remain in effect until rescinded.

12. In 1979, the New Jersey legislature initiated its recognition process for two tribes, the Ramapough Mountain Indians and the Powhatan-Renape Nation. The legislature requested and received tribal genealogical records, evidence of self-governance, and testimony of tribal representatives.

13. In 1980 the legislature passed concurrent resolutions recognizing those two tribes, and explaining clearly the state's intent:

> "The purpose of this concurrent resolution is to *recognize* The Ramapough Mountain People of Western Bergen and Passaic County as the Ramapough Indian Tribe to assist them in obtaining *similar recognition* by the Federal Government and receive Federal assistance as an Indian tribe, so they may become self-determined." (emphasis added)

14. The next year the legislature initiated the same process for the Nanticoke Lenni-Lenape Tribal Nation, requesting and receiving tribal genealogical records, evidence of self-governance, and testimony of tribal representatives. On December 16, 1982, by concurrent resolution modeled after the prior resolutions, the New Jersey legislature officially recognized the Nation as an American Indian tribe.

15. As described below, states have used and continue to use legislative resolutions to confer state recognition upon American Indian tribes, and it was reasonable for New Jersey to do so.

16. For decades thereafter New Jersey routinely reaffirmed recognition of the Nanticoke Lenni-Lenape Nation—as well as the other two tribes—through a series of actions consistent with and necessarily predicated upon that recognition. Those actions include, but are not limited to, the following:

a. In 1991, New Jersey enacted N.J. Stat. Ann. §§ 26:8-49, to attempt to correct the aforementioned racial reassignment of birth certificates by the state. The law ceded previously exclusive state powers to the tribal governments, stating, in part:

> [C]orrection to the birth record of a member of *one of the three New Jersey tribes* of American Indians, the Powhatan-Renape Nation, the Ramapough Mountain Indians, or the Nanticoke Lenni-Lenape Indians, the substantiating documentary proof may include, but shall not be limited to, an affidavit, satisfactory to the State registrar or any local registrar and signed by the chief of the tribe that according to tribal records the person whose certificate is to be amended is a member of the tribe of the chief whose signature appears on the affidavit. (emphasis added)

b. In September 1992, the Office of Governor James Florio sent a letter to the federal Indian Arts & Crafts Board, which board ensures that only products produced by American Indian tribes recognized by the state or federal government are labeled "Indian-made." This oversight protects tribes, the public, and museums from fraud. The letter reiterates the state's process of recognition:

> Governor Florio has asked me to respond to your recent letter about the state of state-recognized Indian tribes in New Jersey. The New Jersey State Legislature, comprised of the Senate and Assembly, is the law-making body that is responsible for the legal recognition of Indian tribes. Formal recognition is accomplished by State Resolutions, which remain in effect until rescinded. To date, three tribes have been recognized.

c. In 1995, during the administration of Governor Christine Todd Whitman, New Jersey formed by statute the Commission on American Indian Affairs. The Commission, which still operates, "...serves as the liaison among the governments of the tribes, New Jersey, and the United States." The statute reserves two seats each for representatives of the specifically named Nanticoke Lenni-Lenape Tribal Nation, Ramapough Mountain Indians, and Powhatan Renape Nation. N.J. Stat. Ann. §§ 52:16A-53. Other

seats are reserved generally for persons who reside in New Jersey but are members of recognized tribes from other states.

d. In February 2000, the Office of New Jersey's Secretary of State stated:

> [t]he Department [of State] has confirmed, upon inquiry, that the State of New Jersey has recognized three groups of Indians. They are referred to in the law as the Nanticoke Lenni-Lenape Indians, the Ramapough Mountain Indians, and the Powhatan Renape Nation.

e. In 2000, Governor Whitman's office confirmed to the U.S. Department of Commerce, Census Bureau, that the Nation is one of New Jersey's three state-recognized American Indian tribes. New Jersey's designation of a State Designated American Indian Statistical Area ("SDAISA") is defined as "...statistical entities for state recognized American Indian tribes that do not have a state recognized land base (reservation)." The U.S. Census Bureau confirmed the designation in a letter to the state Commission on American Indian Affairs, stating: "Our records show that the state of New Jersey has granted recognition to...tribal governments [including the Nation]."

f. A November 2000 report to the Governor and Legislature of New Jersey by the statutorily created Commission on American Indian Affairs states:

> There are only three tribes in the state of New Jersey that are *legally recognized by the State*," (before identifying the Nation, the Ramapough, and the Powhatan Renape).

g. In 2001, a private citizen claiming to represent his own newly constituted tribe sued the state seeking the acquire lands in the geographic area of the former reservation. The Nation simultaneously successfully sued the citizen to prevent him from implying any association with it. The citizen's lawsuit against the state failed, in part, because the state asserted that the citizen was not affiliated with one of its three existing tribes.

h. Between 2000 and 2001, multiple governmental environmental assessments for improvements at McGuire Air Force Base confirmed that the Nation is state-recognized.

i. From 2002 to 2005, the Nation and its *pro bono* counsel sued a New Jersey municipality that sought to undermine the integrity of New Jersey's statewide historic preservation process. The Nation won, protecting the state's process and preserving the Black Creek Site, one of only four American Indian sites among the 1,600 sites listed on the New Jersey Register of Historic Places. In formal ceremonies at the State Capitol, the Governor presented the Nation, its legal counsel, and community leaders with the Governor's Award for Historic Preservation. Officials celebrated the Nation as a tribe that had validated its state-recognized status by demonstrating its commitment to the welfare of all residents of New Jersey.

j. In March 2003, then-U.S. Senator and later Governor Jon S. Corzine wrote to the U.S. Department of the Interior, Bureau of Indian Affairs, stating:

> The Nanticoke Lenni-Lenape have been functioning as a designated tribe in New Jersey since a concurrent resolution passed the New Jersey Legislature to designate them as such in 1982. As a result, the Nanticoke Lenni-Lenape has received grants and services from federal programs for [state-recognized] Indians.

k. In 2006, Governor Corzine created a Committee of Native American Affairs to research and report on the social and economic conditions of New Jersey's state-recognized American Indian tribes and other American Indian communities. The report identified continuing issues of unfair treatment in areas of civil rights, education, environmental protection, employment, fair housing, health care, and infrastructure.

l. Released in December 2007, the Committee report observed that while the state's prior recognition of the Tribes was legally sufficient, it was proving politically insufficient, because over time members of the state bureaucracy had begun to undermine the tribes' status out of confusion or prejudice. It recommended that further steps be taken to reaffirm the recognition of 25 years prior, with options including refreshed concurrent resolutions, an executive order, or legislation. The report found:

> Concurrent New Jersey legislative resolutions passed in 1980 and 1982 *recognized* three New Jersey Native American tribes—the Nanticoke Lenni-Lenape, the Powhatan Renape, and the Ramapough Lenape.... [The Committee] determined that the 1980 and 1982 concurrent legislative resolutions *did recognize* the three New Jersey American Indian tribes... [emphasis added].
>
> New state action might be taken to further "*affirm* state recognition for [the] three tribes *previously recognized...*," even if such legislation was not required (emphasis added).

m. In 2010, the state once again affirmed to the U.S. Census Bureau that the Nation was state-recognized.

17. State recognition of a tribe has little to no impact on a state budget, except that it may provide tribes access to certain federal benefits that save the state from spending its own dollars. Benefits to state-only recognized tribes like those in New Jersey are much more limited than those available to federally recognized tribes, but nonetheless these benefits are critical to a state-recognized tribe's ability to pursue economic and educational vitality, including:

a. Authorization to sell artwork and crafts as "Indian-made" under the Indian Arts and Crafts Act, 25 U.S.C. §§ 305 *et seq*.

b. Grants and student scholarships.

c. Favored contractor status under the U.S. Small Business Administration 8(a) Business Development Program, which helps small, disadvantaged businesses compete in the

marketplace, and supports small businesses owned by American Indians and other socially disadvantaged groups.

18. Since 1982, the Nation has reasonably relied on the state's official recognition to claim eligibility for, and entitlement to, certain federal benefits, and to obtain them. During the past 33 years, the Nation and its members have expended time, money, and energy in reliance on the state's recognition; the Nation has also, to a significant degree, associated its tribal identity with that recognition.

19. The federal government, for the purposes of providing access to certain of its programs, does not require that states adopt a standard process for state recognition or that the state's process adhere to a level of formality that might be required by the state in other policy-making circumstances. Accordingly, states have adopted multiple processes. For example:

    a. South Carolina originally used statutes to recognize tribes. In 2003, the legislature granted the State Commission on Minority Affairs authority to recognize any additional tribes.

    b. Virginia has utilized executive orders, concurrent legislative resolutions, and state statutes for tribal recognition. Two tribes were recognized by executive order, eight tribes were recognized by concurrent legislative resolutions in 1983, 1985, and 1989, and one tribe was recognized by state statute.

    c. Georgia originally recognized four tribes by statute; any additional tribes will be recognized by concurrent legislative resolution.

    d. Connecticut originally recognized tribes through executive order. The state now recognizes any additional tribes by statute.

e. Delaware recognized the Lenape Indian Nation of Delaware with a single letter from the Secretary of State to the U.S. Census Bureau. The letter states that upon inquiry by the federal government, Delaware conducted a review of historical and anthropological references to the tribe and previous actions by the state legislature and state agencies and concluded that that the tribe had obviously been state-recognized in practice, even absent a concurrent resolution, state statute, executive order, or other means.

20. States can and have changed their processes for recognizing tribes, but states have not applied those changes retroactively to previously recognized tribes. Indeed, in 2001 New Jersey amended the law governing its Commission on American Indian Affairs so that recognition of New Jersey tribes beyond the original three already recognized "shall require specific statutory authorization...." N.J. Stat. Ann. §§ 52:16A-56(g). The change was not retroactive, nor has Defendant relied to date on that statute in attempting to articulate its current position to Plaintiff or to federal agencies.

21. Notwithstanding New Jersey's prior actions over three decades recognizing and then repeatedly reaffirming the Nation's official tribal status, the state now wrongfully attempts to deny and repudiate such recognition—and that of the other two tribes—without affording the Nation due process.

22. The State has recently advanced several groundless and contradictory rationales for denying that the Nation is a state-recognized tribe.

a. Defendant has argued that it only "acknowledged" or "designated" the three tribes, and did not *recognize* them. Upon information and belief, no law, rule, or practice distinguishes between these terms in the context of state recognition of American Indian tribes. Defendant has used the terms "acknowledged," "designated," and

"recognized" interchangeably in statements and communications regarding the Nation. Similarly, many federal agencies use "Federally Acknowledged" and "Federally Recognized" interchangeably.

b. Defendant has argued that "it does not now and has not previously had any process that provides any tribes with state recognition." To the contrary, prior to the adoption of the relevant concurrent resolutions, the legislature required and received evidence of the Nation's genealogy and self-governance and formal testimony. New Jersey has described its exact process to the federal government. Before the 2001 amendments to the Commission on American Indian Affairs statute, the Commission would provide recommendations on tribes seeking state recognition at the request of the Governor. The 2001 amendments changed the process, dictating for the first time that New Jersey's process for conferring state recognition would require passage of a statute. N.J. Stat. Ann. 52:16A-56(g).

c. Defendant has argued that "only the federal government has the authority to recognize tribes," and thus no action by any state to recognize its tribes is valid. This position contradicts decades of accepted practice and policy in the United States, as well as the 2001 amendments to the Commission on American Indian Affairs statute, through which the state affirms its own powers to confer state recognition.

d. Defendant has argued that it was improper for Defendant to use concurrent resolutions to recognize the tribes because such resolutions "do not have the force of law." However, for most of the benefits it provides to state-recognized tribes, the federal government requires no particular mode or formality of expression of state recognition. When it does set forth a mode, as in the case of eligibility for protections under the

Indian Arts and Crafts Act, it requires only that *the state legislature* express its intent to recognize, not that a governor sign such recognition into law. Indeed, numerous states have and continue to use concurrent resolutions in the same way that New Jersey did and without issue.

23. While taking the position that it does not recognize the three New Jersey tribes, Defendant has yet to articulate what exactly the tribes are, except to imply that they are something lesser and undefined.

24. Defendant's purported justifications for its position are pretextual. On information and belief the state is actually motivated by a racial-stereotype-driven and irrational fear that any American Indian tribe, if recognized as such, will seek to conduct gaming in competition with New Jersey's politically powerful non-Indian gaming interests. As noted in the National Conference of State Legislatures' April 2009 report *Government to Government: Models of Cooperation Between States and Tribes*, "Some state officials fear that recognition of a tribe will lead to the establishment of casinos within their state boundaries."

25. State recognition of tribes plays no part in securing rights to conduct gaming under federal law. The separate process of federal recognition, which itself is no guarantee of gaming rights, can take tribes decades to navigate, in part because it requires tribes to produce the very same birth records that states such as New Jersey altered in prior decades.

26. Further, the Nation, like many American Indian tribes, is deeply and publicly opposed to gaming. Its opposition is written into its governing documents, flows from the Nation's members' religious beliefs, and has been repeatedly conveyed to the State. The three state-recognized tribes in New Jersey are parties to a pact prohibiting economic benefit from gaming and have offered to have proscriptions written into law if such assurances meant the state would

cease undermining their status. In 2001 the Nation successfully sued a private citizen to prevent him from associating with the Nation, suspecting he had aspirations to pursue gaming rights. In the three decades since New Jersey recognized the Nation, the Tribe has never attempted to leverage its state-recognized status for gaming.

27. Upon information and belief, the earliest attempt by state officials to undermine the tribes' state-recognized status was a letter written by the Division of Gaming Enforcement – a division of the Attorney General's office – in 2001 during the pendency of the lawsuit by the private citizen against the state for a land claim. The federal Indian Arts and Crafts Board sent its standard inquiry to the state Commission on American Indian Affairs asking for any additions to the state's list of recognized tribes. Before the Commission replied, or on information and belief was even made aware of the Board's inquiry, the Division of Gaming Enforcement intervened, asserting that New Jersey has no state-recognized tribes. On information and belief, the Commission responded to the same standard federal inquiry in previous *and subsequent* years by *confirming* the Nation's state-recognized status.

28. Periodically thereafter, a division of the Attorney General's office sent similar letters to the federal Indian Arts and Crafts board without prior notice to the tribes or the Commission, which letters aimed to undermine the state's prior recognition with the specious arguments identified above.

29. Agencies of the federal government continued to treat the Nation and other tribes as state-recognized because of the clear history of state-recognition in New Jersey, and because the state itself continued to act and make statements in direct contravention of those letters, or, as in the 2007 Corzine report, specifically reviewed and rejected them.

30. The Nation's status was undermined fundamentally, however, after the federal General Accounting Office issued a report in 2012 on the status of American Indians in the U.S. The Nation eventually discovered from the federal government that a state employee assigned to staff the state Commission on American Indian Affairs had, without the knowledge or consent of the Commissioners who are charged with executing its mission, informed the GAO that New Jersey has no state-recognized tribes.

31. The Nation sought answers from Defendant. The Attorney General's then-Chief of Staff took up the matter and liaised between the Nation, the Attorney General's Office, the Office of the Governor. After investigating the issue in depth, the Chief of Staff proposed that the Attorney General consider issuing a formal written retraction of previous state correspondence denying the state-recognition of the tribes. The Chief of Staff circulated multiple drafts of the retraction during several rounds of input from state officials and the Nation.

32. The Fort Lee lane closure scandal broke just as this process was concluding, and the Attorney General suspended communications with the Nation for many months. Dialogue briefly resumed, this time coordinated by the Governor's Deputy Chief of Staff, not long before Governor Christie began exploring a candidacy for the presidential nomination. The draft retraction language was recirculated, including, upon information and belief, to Defendant. The Nation was again asked for and provided briefs detailing why Defendant's and/or established gaming interests' race-based assumption that the Nation will leverage its state-recognition to pursue gaming is unwarranted. Ultimately, the Nation was informed that Defendant planned to do nothing to resolve the matter unless required by a court to do so.

33. The Nation has suffered and is continuing to suffer significant financial and non-financial losses as a consequence of Defendant's position regarding state recognition, including but not limited to:

    a. The loss of the ability to sell artwork and crafts, including beadwork, walking sticks, drums, headdresses, regalia, and pottery as "Indian-made" under the Indian Arts and Crafts Act, 25 U.S.C. §§ 305 *et seq.* The Nation conservatively estimates that as a result of the inability to market and sell artisan goods as Indian-made under the Act, the Nation's 40 artisans, including senior citizens and college students who rely on the income, are losing an aggregate of $260,000 each year, as well as a primary vehicle through which the Nation sustains and educates the public about its culture.

    b. The loss of approximately $600,000 from grants from the U.S. Department of Health and Human Services ("HHS") Administration for Native Americans (42 U.S.C. § 2991c(3)).

    c. The loss of the Nation's 8(a) entity's ability to do business as a certified tribal company. The Small Business Association program restricts the special status for tribe-owned businesses to federally or state recognized tribes. Even individual American Indians cannot have their privately owned companies certified, unless the individual is enrolled in or acknowledged by a federal or state tribe. This will likely result in the loss of approximately 30 tribal jobs and additional non-tribal jobs, as well as revenue for tribal programming and services that result from 8(a) contracts. The Nation estimates that through its 8(a) entity NLT Enterprises, it has secured an average of approximately $650,000 per year in tribal employment and services revenue, and approximately $7.8 million since the company was formed ten years ago.

d. The loss of educational opportunities and funding. Young tribal members have lost their college scholarship awards reserved for members of state-recognized tribes. On information and belief, additional students have ceased applying for scholarship support after the Defendant placed the Nation's status in question.

e. The loss of funding—approximately $45,000 a year—from HHS's Office of Community Services Community Service Block Grant Program, given only to federally and state-recognized American Indian tribes and tribal organizations.

f. Continuing harm from the ineligibility for recurring grants previously secured by the Nation, and for other benefits available only to recognized tribes.

g. The threat of loss of the Nation's membership or standing in professional organizations, including the National Congress of American Indians, the oldest and largest political organization of American Indian nations in the United States; the Alliance of Colonial Era Tribes, an intertribal league of sovereign American Indian nations dating from the colonial era of the United States; and the United League of Indigenous Nations, an international treaty organization of indigenous sovereign nations working to promote indigenous rights and governmental development.

h. The loss of other financial resources. For instance, Wells Fargo Bank initially approved the Nation's 8(a) entity's application for a line of credit, then withdrew its approval specifically citing the Nation's state recognition, and possible impacts on 8(a) eligibility and government contracts. This withdrawal is causing extreme hardship on the 8(a) company.

34. On information and belief, Defendant's actions also have caused and continue to cause serious harm to the approximately 4,500 members of the Ramapough Mountain Indians and the 300 members of the Powhatan Renape Nation.

35. On information and belief, should its attempted repudiation of the Nation's state-recognized status be permitted to stand, New Jersey will be the first and only state in modern times retroactively to withdraw state recognition of Native American tribes.

36. As a result of Defendant's attempt to repudiate its recognition of the Nation, the Nation and its members have suffered, and continue today to suffer, the loss of benefits to which they are entitled, the loss of revenues that accrue from those benefits, and a concomitant loss of tribal identity and prestige.

37. Defendant's actions were taken under color of state law.

38. Defendant's attempts to repudiate or deny official recognition of the Nation were undertaken pursuant to, and in furtherance of, an official policy, practice, or custom of the state of New Jersey, and represent the state's current official position on the issue.

39. Defendant's actions were intentional and willful, and undertaken for an improper purpose

40. Defendant's actions have caused the Nation immediate and irreparable harm.

COUNT I
(Procedural Due Process under the New Jersey Constitution)

41. The Nation incorporates the averments of the prior paragraphs as if fully set forth.

42. The Nation brings this count directly under the New Jersey Constitution and pursuant to N.J. Stat. Ann. § 10:6-2(e).

43. The Nation has a property interest, protected under state law, in protecting and preserving its tribal identity and in its recognition by New Jersey as an official American Indian tribe, eligible for various benefits under federal law.

44. Defendant's actions, as described above, in denying or repudiating the state's official recognition of the Nation were undertaken without proper notice to the Nation or an opportunity for the Nation to be heard, or without any of the process required by law before the state can interfere with the Nation's protected interest.

45. Defendant's actions, as set forth above, have deprived the Nation of its right to procedural due process under the due process component of Article I, Paragraph 1 of the New Jersey Constitution.

46. As a proximate result of Defendant's actions, the Nation has been irreparably injured in that it has been stripped of its proper status as a state-recognized American Indian tribe and wrongfully deprived of the benefits of that status.

COUNT II
(Substantive Due Process under the New Jersey Constitution)

47. The Nation incorporates the averments of the prior paragraphs as if fully set forth.

48. The Nation brings this count directly under the New Jersey Constitution and pursuant to N.J. Stat. Ann. § 10:6-2(e).

49. Defendant's actions, as described above, constitute arbitrary and unreasonable governmental action that deprives the Nation of its tribal status without any adequate justification or need, and that tramples unnecessarily and wrongfully on the Nation's interests, in violation of the Nation's rights under the substantive due process component of Article I, Paragraph 1 of the New Jersey Constitution.

50. As a proximate result of Defendant's actions, the Nation has been irreparably injured in that it has been stripped of its proper status as a state-recognized American Indian tribe and wrongfully deprived of the benefits of that status.

COUNT III
(Equal Protection under the New Jersey Constitution)

51. The Nation incorporates the averments of the prior paragraphs as if fully set forth.

52. The Nation brings this count directly under the New Jersey Constitution and pursuant to Stat. Ann. § 10:6-2(e).

53. Defendant's repudiation of the Nation's recognition was arbitrary and invidiously motivated, based on the Nation's status as an American Indian tribe, and was entirely unnecessary given the state interests involved. The repudiation was based on the Nation's status as an American Indian tribe, in that the Defendant wrongfully and erroneously assumed that the Nation's desire for continued state recognition is motivated by the intention to conduct casino gaming, despite plentiful evidence that the Nation, like many American Indian tribes, is deeply and publicly opposed to gaming and that state recognition of tribes plays no part in securing rights to conduct gaming.

54. Defendant's actions, as described above, are improperly discriminatory and based on the race of the Nation's members.

55. Defendant's actions violated the Nation's rights under the equal protection component of Article I, paragraph 1 of the New Jersey Constitution.

56. As a proximate result of Defendant's actions, the Nation has been irreparably injured in that it has been stripped of its proper status as a state-recognized American Indian tribe and wrongfully deprived of the benefits of that status

COUNT IV
(Estoppel under State Common Law)

57. The Nation incorporates the averments of the prior paragraphs as if fully set forth.

58. Singly and in combination, state action between 1982 and at least 2010, as described above, constituted a representation by the state that it officially recognized the Nation as an American Indian tribe.

59. The state's actions were such that any reasonable person would have interpreted them as a representation that the state officially recognized the Nation as an American Indian tribe and would have accepted that representation as true.

60. The Nation reasonably and in good faith accepted that representation and relied on it to avail itself of the benefits of state recognition.

61. The Nation and its members expended money, time, and effort in reliance on the state's representation, and to a significant degree predicated its tribal identity on what it reasonably believed was the state's binding recognition of it as an American Indian tribe.

62. Defendant's subsequent denial and repudiation of that recognition was wrongful and inequitable and redounded to the Nation's detriment.

63. Defendant is equitably precluded or estopped from denying or repudiating its prior recognition of the Nation.

64. As a proximate result of Defendant's actions, the Nation has been irreparably injured in that it has been the victim of the Defendant's wrongful repudiation of the Nation's status as a state-recognized American Indian tribe and has been wrongfully deprived of the benefits of that status.

COUNT V
(Arbitrary and Capricious Action under State Common Law)

65. The Nation incorporates the averments of the prior paragraphs as if fully set forth.

66. Defendant's denial and repudiation of the Nation's status as an officially recognized American Indian tribe was arbitrary, capricious, unreasonable, and contrary to law.

67. As a proximate result of Defendant's actions, the Nation has been irreparably injured in that it has been stripped of its proper status as a state-recognized American Indian tribe and wrongfully deprived of the benefits of that status.

WHEREFORE, the Nanticoke Lenni-Lenape Tribal Nation demands judgment in its favor, and against Defendant, as follows:

a. Enjoining Defendant from denying, repudiating, or otherwise impairing the Nation's status as an American Indian tribe officially recognized by the State of New Jersey.

b. That Defendant's actions violated the Nation's substantive and procedural due process right under Article I, paragraph 1 of the New Jersey Constitution.

c. That Defendant's actions violated the Nation's right to equal protection of the laws under Article I, paragraph 1 of the New Jersey Constitution.

d. That Defendant's actions were arbitrary, capricious, unreasonable, and otherwise contrary to law.

e. That Defendant is estopped from denying or repudiating the Nation's status as an American Indian tribe officially recognized by the State of New Jersey.

f. For compensatory damages in consequence of:

    1) loss of the ability to sell "Indian-made" goods under the U.S. Indian Arts and Crafts Act;

    2) loss of grants from agencies and departments of the federal government;

    3) loss of tribal jobs;

    4) loss of revenue related to 8(a) contracts;

    5) loss of educational awards; and

    6) other monetary damages resulting from Defendant's violations of Plaintiff's rights;

g. For punitive damages;

h. costs and fees pursuant to N.J.S.A. 10:6-2(f).

i. For all other appropriate relief.

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Attorney ID No. 022221983
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Wildwood NJ 082603
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Tel: 202.567.7594

Attorneys for Plaintiff
October 9, 2015

CERTIFICATION

It is hereby certified that there are no other known actions or arbitrations relating to this action, except for the case of Nanticoke Lenni-Lenape Tribal Nation, v. John Jay Hoffman Acting Attorney General of New Jersey in his individual and official capacities, USDC, Docket No. 1:15-cv-05645-RMB-JS, and there are no known parties who should be joined with respect to the matter in controversy.

BARRY, CORRADO & GRASSI, P.C.

Dated: 10/9/15

By: _____
FRANK L. CORRADO, ESQUIRE

DESIGNATION OF TRIAL COUNSEL

TAKE NOTICE that Frank L. Corrado, Esquire is hereby designated as trial counsel in the above captioned litigation for the firm of Barry, Corrado & Grassi, PC, pursuant to R. 4:25-1.

BARRY, CORRADO & GRASSI, P.C.

Dated: 10/9/15

By: _____
FRANK L. CORRADO, ESQUIRE

CONFIDENTIAL PERSONAL IDENTIFIERS

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule* 1:38-7(b).

BARRY, CORRADO & GRASSI, P.C.

By: _____
FRANK L. CORRADO, ESQUIRE

Dated: 6/9/15

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112
Counsel for Defendant John J. Hoffman,
Acting Attorney General

By: Stuart M. Feinblatt (NJ #018781979)
Assistant Attorney General
609-984-9504
Stuart.Feinblatt@lps.state.nj.us

NANTICOKE LENNI-LENAPE TRIBAL NATION, Plaintiff, v. JOHN J. HOFFMAN, ACTING ATTORNEY GENERAL OF NEW JERSEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, Defendant.	SUPERIOR COURT OF NEW JERSEY MERCER COUNTY - LAW DIVISION DOCKET NO. MER-L-2343-15 Civil Action NOTICE OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO R. 4:6-2(a) and (e)

TO: Clerk of the Court
Mercer County
175 South Broad Street
Trenton, NJ 08650-0068

Frank L. Corrado, Esq.
Barry, Corrado & Grassi, PC
2700 Pacific Avenue
Wildwood, New Jersey 08260

PLEASE TAKE NOTICE THAT ON Friday, January 22, 2016, the undersigned, John J. Hoffman, Acting Attorney General of New Jersey, by Stuart M. Feinblatt, Assistant Attorney General, on

behalf of defendant John J. Hoffman, Acting Attorney General of New Jersey, shall move for an order dismissing Plaintiff's Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

PLEASE TAKE FURTHER NOTICE that Defendant will rely upon the brief and Certification of Stuart M. Feinblatt attached hereto.

PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 1:6-2, it is requested that the Court consider this motion on the papers submitted unless opposition is entered, in which case oral argument is requested.

A discovery end date has not been set. A proposed form of Order is attached hereto.

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: Stuart M. Feinblatt
Stuart M. Feinblatt
Assistant Attorney General

DATED: December 24, 2015

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112
Counsel for Defendant John J. Hoffman,
Acting Attorney General

By: Stuart M. Feinblatt (NJ #018781979)
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609-984-9504
Stuart.Feinblatt@lps.state.nj.us

NANTICOKE LENNI-LENAPE TRIBAL NATION, Plaintiff, v. JOHN J. HOFFMAN, ACTING ATTORNEY GENERAL OF NEW JERSEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, Defendant.	SUPERIOR COURT OF NEW JERSEY MERCER COUNTY - LAW DIVISION DOCKET NO. MER-L-2343-15 Civil Action CERTIFICATION OF STUART M. FEINBLATT

I, STUART M. FEINBLATT, of full age, certify to the Court as follows:

1. I am an attorney at law of the State of New Jersey, and I am the Assistant Attorney General responsible for the defense of this matter on behalf of Defendant, John J. Hoffman, Acting Attorney General of New Jersey ("State defendant").

2. In this capacity, I am fully familiar with the facts stated herein.

3. I submit this Certification in support of the State defendant's Motion to Dismiss the Complaint.

4. On or about July 20, 2015, the plaintiff in this case, Nanticoke Lenni-Lenape Tribal Nation, filed a suit in federal court. Nanticoke Lenni-Lenape Tribal Nation vs. John J. Hoffman, United States District Court, District of New Jersey, Civil Action No. 1:15-cv-05645. The federal complaint initially included both federal and state law claims, but was later amended to drop the state law claims. The factual assertion in the federal complaint are essentially the same as asserted in this case. A motion to dismiss the federal complaint in its entirety is pending.

5. On December 17, 1982, the New Jersey Legislature passed Senate Concurrent Resolution No. 73. A true copy of Senate Concurrent Resolution No. 73 is attached hereto as Exhibit A.

6. On December 14, 2001, the Director of the Division of Gaming Enforcement wrote to the Acting Director of the federal Indian Arts & Crafts Board. A true copy of that letter is attached hereto as Exhibit B.

7. The following unpublished opinions are cited in Defendant's moving brief and are attached hereto as Exhibits C-E, respectively:

Exhibit C - Lt Propco, LLC v. Westland Garden State Plaza L.P., 2010 N.J. Super. Unpub. LEXIS 3116 (App. Div. Dec. 28, 2010);

Exhibit D - NJ Sand Hill Band of Lenape & Cherokee Indians v. Corzine, No. 09-683, 2010 U.S. Dist. LEXIS 66605 (D.N.J. June 30, 2010); and

Exhibit E - Shinnecock Indian Nation v. Kempthorne, No. 06-5013, 2008 U.S. Dist. LEXIS 75826 (E.D.N.Y. Sept. 30, 2008)

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

S M. Feinblatt

Stuart M. Feinblatt
Assistant Attorney General

Dated: December 24, 2015

EXHIBIT A

Filed with Sec. of State 12-17-82

SENATE CONCURRENT RESOLUTION No. 73

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1982 SESSION

By Senators ZANE and LIPMAN

A CONCURRENT RESOLUTION designating the Confederation of Nanticoke-Lenni Lenape Tribes as such and memorializing the Congress of the United States to acknowledge the Confederation of Nanticoke-Lenni Lenape Tribes in order to qualify the Confederation for appropriate federal funding for Indians.

WHEREAS, The Confederation of Nanticoke-Lenni Lenape Tribes desires to be designated by the State of New Jersey as such because it is comprised of several surviving tribes of the Confederation of Nanticoke-Lenni Lenape cultures; and

WHEREAS, These people have an unbroken history of hundreds of years of settlement in the southern New Jersey area; and

WHEREAS, The Nanticoke-Lenni Lenape Native Americans are resident in New Jersey and there are approximately 1,600 Nanticoke-Lenni Lenape Native Americans in the southern New Jersey area; and

WHEREAS, The Confederation of Nanticoke-Lenni Lenape Tribes has been an important and intrinsic factor in culturally enriching the life style of Native Americans in southern New Jersey and other indigenous peoples elsewhere; and

WHEREAS, Said Confederation has been historically preserved intact and is widely accepted as culturally unique; and

WHEREAS, The Confederation of Nanticoke-Lenni Lenape Tribes specifically reserves any and all rights and attributes pursuant to the federal—Tribal treaty powers and provisions thereof; and

WHEREAS, The Federal Government has provided funds for various programs for Indians; and

WHEREAS, The Confederation of Nanticoke-Lenni Lenape Tribes is seeking acknowledgment by the Federal Government as such in order to receive federal funds for the Nanticoke-Lenni Lenape Indian Center which is located in Bridgeton, New Jersey, and which is dedicated to preserving Native American culture through education committed to the preservation of the Native American Peoples' heritage; now, therefore,

BE IT RESOLVED *by the Senate of the State of New Jersey (the General Assembly concurring):*

1. That the Confederation of Nanticoke-Lenni Lenape Tribes of southern New Jersey, as an alliance of independent surviving tribes of the area, is hereby designated by the State of New Jersey as such.

2. That the Congress of the United States, is hereby memorialized to acknowledge the Confederation of Nanticoke-Lenni Lenape Tribes as such.

3. That copies of this concurrent resolution signed by the President of the Senate and attested to by the Secretary thereof, and signed by the Speaker of the General Assembly and attested by the Clerk thereof, be forwarded to the Speaker of the House of Representatives and the Majority and Minority leaders thereof, and to the President of the United States Senate and the Majority and Minority leaders thereof, and to every member of Congress elected thereto from the State of New Jersey.

STATEMENT

The purpose of this concurrent resolution is expressed in its title.

EXHIBIT B

State of New Jersey
JAN 10 02
Department of Law and Public Safety
Division of Gaming Enforcement
P.O. Box 047
Trenton, NJ 08625-0047

Donald T. DiFrancesco
Acting Governor

John J. Farmer, Jr.
Attorney General

John Peter Suarez
Director

December 14, 2001

Meridith Z. Stanton
Acting Director
Indian Arts & Crafts Board
Department of Interior
1849 C Street, N.W.
Washington, D.C. 20240

RE: Indian Arts and Crafts Act of 1990

Dear Ms. Stanton:

I have reviewed your letters dated July 13, 2000 and September 9, 1999 with respect to the Indian Arts and Crafts Act of 1990 ("Act"). You have requested to be advised whether New Jersey has any State recognized tribes as defined by the Act as well as the process for State recognition of Indian tribes, if any.

New Jersey has no specific statutory or administrative procedure for granting State recognition to Indian groups. Accordingly, the State has not enacted any statute for the specific purpose of officially recognizing any Indian group as a tribe. Likewise, no agency has been charged with officially recognizing Indian tribes.

Two decades ago various State Legislatures passed concurrent resolutions "designating" three Indian groups within New Jersey as tribes: the Ramapough Mountain People in 1980 (ACR 3031); the Powhatan Renape in 1980 (SCR 104); and the Nanticoke -Lenni Lenape Tribes in 1982 (SCR 73).

These concurrent resolutions did not have the force of law. Normally concurrent resolutions have no binding legal effect outside the Legislature. Except in the case of concurrent resolutions proposing amendments to the State Constitution, ratifying amendments to the United States Constitution, or invalidating an administrative agency

regulation, a concurrent resolution is "without legislative quality of any coercive or operative effect." *In Re N.Y., Susquehanna & Western R.R. Co.*, 25 *N.J.* 342,348 (1957). Such resolutions merely express the sentiments of the legislative branch.

Specifically, ACR 3031 *designated* the Ramapough Mountain People as the Ramapough Indians. It memorialized *Congress* to *recognize* the Ramapough Mountain People as the Ramapough Indian Tribe so that they could qualify for Federal funding to establish a cottage industry for purposes of self-help and to establish and develop programs designed to meet the special educational needs of Indian children. Similar concurrent resolutions regarding the Powhatan Renape and the Nanticoke-Lenni Lenape Indian groups were adopted. These resolutions did not recognize or acknowledge these groups as tribes, but only assigned a designation and memorialized Congress to acknowledge them. *See*, SCR 104 (October 16, 1980); *SCR* 73 (December 15, 1982). *SCR* 104 resolved that "the Powhatan Renape People of the Delaware Valley, as the surviving tribes of the Renape linguistic group of the Powhatan alliance, are hereby designated by the State of New Jersey as the Powhatan Renape Nation." Emphasis added. It also memorialized Congress to acknowledge the Powhatan Renape People as the Powhatan Renape Tribe. SCR 73 resolved that "the Confederation of Nanticoke-Lenni Lenape Tribes of Southern New Jersey, as an alliance of independent surviving tribes of the area, is hereby designated by the State of New Jersey as such." This resolution also memorialized Congress "to *acknowledge* the Confederation of Nanticoke-Lenni Lenape Tribes as such." Emphasis added.

These resolutions do not state explicitly that official recognition has been extended. These resolutions do not "officially recognize" the three groups as "tribes." They "designate" them, a term which means to mark or point out, to name or entitle. *Webster's Universal College Dictionary*. They do not demonstrate a legislative design to formally acknowledge a tribe's existence as a domestic independent nation with tribal sovereignty or to deal with the group in a special relationship on a government to government basis.

You have indicated that the Indian Arts and Crafts Act extends protection to State recognized Indian tribes. The federal definition of these tribes is "[a]ny Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority." 25 *C.F.R.* §309.2(e)(2). Whether the legislative concurrent resolutions qualify the three New Jersey Indian groups as Indian tribes for purposes of the federal Indian Arts and Crafts Act would be a determination to be made by the appropriate federal agency and not by any official or office of this State.

Sincerely yours,

John Peter Suarez
Director

EXHIBIT C

LT PROPCO, LLC, Plaintiff-Appellant, v. WESTLAND GARDEN STATE PLAZA LIMITED PARTNERSHIP AND BOROUGH OF PARAMUS PLANNING BOARD, Defendants-Respondents.

DOCKET NO. A-2529-09T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2010 N.J. Super. Unpub. LEXIS 3116

November 4, 2010, Argued
December 28, 2010, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Related proceeding at *LT Propco, L.L.C. v. Westland Garden State Plaza Ltd. P'ship, 2012 N.J. Super. Unpub. LEXIS 1050 (App.Div., May 14, 2012)*

PRIOR HISTORY: [*1]
On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-217-09.

COUNSEL: John R. Edwards, Jr., argued the cause for appellant (Price, Meese, Shulman & D'Arminio, P.C., attorneys; Gail L. Price and Kathryn J. Razin, on the brief).

Matthew H. Adler argued the cause for respondent Westland Garden State Plaza Limited Partnership (Pepper Hamilton, LLP, and Stephen P. Sinisi, LLC, attorneys; Mr. Adler, Michael T. Pidgeon, and Suvarna Sampale, of counsel and on the brief).

JUDGES: Before Judges Cuff, Sapp-Peterson and Fasciale.

OPINION

PER CURIAM

This case involves a lease dispute between plaintiff subtenant LT Propco, LLC (Propco) and a commercial landlord, defendant Westland Garden State Plaza Limited Partnership (Westland). Propco appeals from Judge Peter Doyne's January 5, 2010 order that dismissed its first amended complaint pursuant to *Rule 4:6-2(e)*, and denied its motion to file a second amended complaint. Judge Doyne determined that Propco had no standing to sue Westland due to lack of privity. We agree and affirm.

Westland leased property in the Garden State Plaza Mall to The May Department Store Company (May Stores). [1] The lease term was for twenty years with an option [*2] to extend. Section 19.2 of the lease required May Stores to operate a:

> specialty [] retail department store . . . under the trade name of 'Lord & Taylor' or under such other name as is then being used in conjunction with a majority of the stores operating in the 'Metropolitan New York Area' . . . now operated by the division known as Lord & Taylor.

Lord & Taylor was not a freestanding company when the Lease was executed; it was a division of May Stores.

1 The May Department Store Company subsequently changed its name to Federated Retail Holdings, Inc. (Federated), and then to Macy's Retail Holdings, Inc, (Macy's).

Other than Westland and May Stores, no other party is a beneficiary of the Lease. Section 41.22 of the Lease provided that:

> This Lease is made for the exclusive benefit of the parties hereto and to their

> successors and assigns (except to the extent limited by the specific terms of this Lease), and nothing herein contained shall be deemed to confer upon any other Person than the parties hereto, and such successors and assigns, any rights or remedies by reason of this Lease.

The Lease provided that May Stores had expansion rights of up to 65,000 square feet of retail space (Section 42.2), [*3] and entitled May Stores to withhold consent to any parking plan that decreased the number of parking spots guaranteed by Westland (Section 21).

Section 26.4 of the Lease entitled May Stores to sublet the premises and stated in part that:

> [t]enant shall have the right . . . to assign or sublease this lease to an entity which, in conjunction with such assignment or sublease, acquires a majority of the then existing stores in the metropolitan New York area now operated by the division known as Lord & Taylor.

On October 2, 2006, Federated (formerly May Stores) sublet the premises to Propco for a five-year term, or until October 1, 2011. In 2006, Propco acquired the Lord & Taylor division from Macy's and continued to operate the Lord & Taylor retail store. The Sublease recognized that there is no privity of contract between Westland and Propco. Paragraph seven of the Sublease stated in part that:

> Subtenant [Propco] acknowledges that Sublandlord [Federated] is not obligated to provide services hereunder; however, since Prime Landlord [Westland] and Subtenant do not have privity of contract under this Sublease . . . Sublandlord shall . . . enforce . . . Sublandlord's rights to cause Landlord [*4] to provide such services, repairs or replacements as Landlord is obligated to provide under the Prime Lease.

The Sublease provided that Propco, for the payment of a separate fee and execution of additional documents, had the right to take the Lease by assignment. Paragraph eighteen of the Sublease stated in part that:

> Subtenant shall have the right to elect to take, or have its designee take, the Prime Lease by assignment by notice delivered to Sublandlord not earlier than the date the 'Tenant's Operating Covenant' as described in section 19.2 of the Prime Lease expires. Such assignment shall be made pursuant to the form of Lease Assignment and Assumption Agreement . . . and the form of Real Estate Contracts Assignment and Assumption Agreement . . . and shall take effect upon the date that all of the following have occurred: . . . (b) Subtenant has paid to Sublandlord the assignment fee . . . .

Propco did not elect to take the Lease by assignment.

On July 14, 2006, Westland and Macy's (formerly Federated) signed a first amendment to the Lease that provided Westland with the right to construct a new one-level mall addition of, among other things, additional retail space.

On August 29, 2008, [*5] Westland filed a land development application (Application) with the Paramus Planning Board (the Board). Westland requested certain relief from the Board to construct a new parking structure and additional retail space. Westland appeared before the Board on six days between February and July 2009. Westland did not notify either Macy's or Propco of the Application, and did not request additional retail space for Lord & Taylor. Through counsel, Propco made an appearance at the hearings before the Board. On July 16, 2009, the Board voted to approve the Application.

On July 13, 2009, Propco filed a verified complaint and order to show cause with temporary restraints. Propco sought to enforce provisions of the Lease between Westland and Macy's. Propco sought to (1) enjoin Westland from proceeding on the Application; (2) compel Westland to withdraw the Application; and (3) compel Wetland to specifically enforce "the terms of the leasehold documents," [2] including the enforcement of its expansion rights of 65,000 square feet on a third level.

> 2 Alternatively, Propco sought to enjoin the Board from continuing its review of the Application.

On September 15, 2009, Judge Doyne denied the injunctive [*6] relief requested by Propco. On September 22, 2009, Propco filed the first amended complaint. [3] The verified complaint and first amended complaint cited and quoted extensively to the Lease and Sublease. Westland filed its *Rule 4:6-2(e)* motion and Propco filed a cross-motion to file a second amended complaint.

3 The first amended complaint contained six counts: specific performance (count one); breach of contract (count two); breach of implied covenant of good faith and fair dealing (count three); consumer fraud (count four); misrepresentation (count five); and protection of future interests (count six).

Judge Doyne conducted oral argument on December 9, and issued a comprehensive eighteen-page written opinion on December 15, 2009. Relying on the Lease and Sublease specifically referred to in the first amended complaint, Judge Doyne dismissed the contract claims for lack of privity. He found that Propco was not a signatory, assignee, or third-party beneficiary of the Lease. The Sublease allowed for an assignment but Propco never executed the necessary documents or paid the required fee. Judge Doyne explained that Lord & Taylor was only referenced in the Lease because it was a division of [*7] May Stores. Lord & Taylor was not a party to the Lease. In concluding that Propco was not a third-party beneficiary of the Lease, Judge Doyne explained that:

> There is nothing in the plain language of the [L]ease to indicate [that May Stores and Westland] intended to create independent rights for whoever may one day own Lord & Taylor [Propco]. In fact, the [L]ease specifically prohibits the creation of such rights in the absence of the execution of the documents provided in the assignment provisions of the [L]ease.

Propco's counsel explained to Judge Doyne that the consumer fraud counts were dropped in the proposed second amended complaint, and Judge Doyne dismissed the "protection of future interests" count as non-existent. In denying Propco's motion to file a second amended complaint, Judge Doyne stated that:

> [Propco's] counsel conceded [that] the only differences between the amended complaint and the second amended complaint are the abandonment of the claims alleging misrepresentation and violations of the CFA and the expansion of the argument for [Propco's] status as a third party beneficiary. As such, the need for an in depth review of both filed complaints is obviated.

This appeal [*8] followed.

On appeal, Propco argues that Judge Doyne misapplied the standards of *Rule 4:6-2(e)* and erred by finding that Propco was not a third-party beneficiary. We disagree.

"In reviewing a complaint dismissed under *Rule 4:6-2(e)* our inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." *Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746, 563 A.2d 31 (1989).* "[A] reviewing court 'searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" *Ibid.* (quoting *Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252, 128 A.2d 281 (App. Div. 1957)).*

Rule 4:6-2 provides in pertinent part that:

> If, on a motion to dismiss based on [a failure to state a claim upon which relief can be granted], matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by *R. 4:46*, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion.

Thus, the motion for dismissal [*9] "should be based on the pleadings, with the court accepting as true the facts alleged in the complaint." *Nat'l Realty Counselors, Inc., v. Ellen Tracy, Inc., 313 N.J. Super. 519, 522, 713 A.2d 524 (App. Div. 1998).* A court may consider documents referenced in the complaint without converting a motion to dismiss into one for summary judgment. *E. Dickerson & Son, Inc. v. Ernst & Young, LLP, 361 N.J. Super. 362, 365 n.1, 825 A.2d 585 (App. Div. 2003), aff'd, 179 N.J. 500, 846 A.2d 1237 (2004); In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997); N.J. Sports Prod. Inc. v. Bobby Bostick Promotions, LLC, 405 N.J. Super. 173, 178, 963 A.2d 890 (Ch. Div. 2007).*

Our Supreme Court has stated "[i]n evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" *Banco Popular N. Am v. Gandi, 184 N.J. 161, 183, 876 A.2d 253 (2005)* (quoting *Lum v. Bank of Am., 361 F.3d 217, 221 n.3 (3d Cir.), cert. denied., 543 U.S. 918, 125 S. Ct. 271, 160 L. Ed. 2d 203 (2004)).* "The purpose of this rule is to avoid the situation where a plaintiff with a legally deficient claim that is based on a particular document can avoid dismissal [*10] of that claim by failing to attach the relied upon document." *Lum, supra, 361 F.3d at 221 n.3.* Reliance on a docu-

ment referenced in a complaint gives a plaintiff notice that it will be considered. *Ibid.*

Here, Judge Doyne applied properly the standards of *Rule 4:6-2(e)*. We have carefully reviewed the record and the arguments presented by counsel and affirm for the reasons expressed by Judge Doyne in his thorough written opinion.

Affirmed.

EXHIBIT D

LexisNexis®

NEW JERSEY SAND HILL BAND OF LENAPE & CHEROKEE INDIANS; RONALD-STACEY, Plaintiffs, v. JON CORZINE, et al., Defendants.

Civil Action No. 09-683 (KSH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2010 U.S. Dist. LEXIS 66605

June 30, 2010, Decided
June 30, 2010, Filed

NOTICE: NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Complaint dismissed at, Motion denied by *N.J. Sand Hill Band of Lenape & Cherokee Indians v. New Jersey, 2011 U.S. Dist. LEXIS 36874 (D.N.J., Mar. 31, 2011)*

PRIOR HISTORY: *N.J. Sand Hill Band of Lenape & Cherokee Indians v. Corzine, 2009 U.S. Dist. LEXIS 23104 (D.N.J., Mar. 24, 2009)*

COUNSEL: [*1] For NEW JERSEY SAND HILL BAND OF LENAPE AND CHEROKEE INDIANS, MONTAGUE POST OFFICE, Suae potestate esse, RONALD STACEY, Suae potestis esse, Petitioners: ARLENE GAIL RICHARDS, LEAD ATTORNEY, NEW JERSEY SAND HILL BAND OF LENAPE & CHEROKEE INDIANS, MONTAGUE, NJ.

For DE FACTO STATE OF NEW JERSEY, JON CORZINE acting de facto governor of the State of New Jersey, individually, and in official capacity, NINA WELLS, acting de facto secretary of state of the State of New Jersey, individually, and official capacity, THE NEW JERSEY COMMISSION ON INDIAN AFFAIRS, Corporate and political subdivisions of the State of New Jersey to include but not limited to, All Freeholders, Respondents, Cross Defendants: ELLEN M. HALE, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, R.J. HUGHES JUSTICE COMPLEX, TRENTON, NJ.

For BERGEN COUNTY, Respondent, Cross Defendant: JAMES X. SATTELY, LEAD ATTORNEY, BERGEN COUNTY COUNSEL, HACKENSACK, NJ.

For BURLINGTON COUNTY, COUNTY OF BURLINGTON, Respondent: JOHN CHARLES GILLESPIE, LEAD ATTORNEY, PARKER MCCAY, PA, MARLTON, NJ.

For COUNTY OF MONMOUTH, Respondent, Cross Defendant: RAYMOND V. KING, LEAD ATTORNEY, KING, KITRICK, JACKSON & TRONCONE, ESQS., BRICK, NJ.

For ATLANTIC COUNTY, [*2] COUNTY OF ATLANTIC, Respondent, Cross Defendant, Cross Claimant: DONNA M. TAYLOR, LEAD ATTORNEY, ATLANTIC COUNTY LAW DEPARTMENT, ATLANTIC CITY, NJ.

For CAMDEN COUNTY, Respondent, Cross Defendant, Cross Claimant: DONNA M. WHITESIDE, OFFICE OF CAMDEN COUNTY COUNSEL, CAMDEN, NJ.

For OCEAN COUNTY, COUNTY OF OCEAN, Respondent, Cross Defendant: MARY JANE LIDAKA, LEAD ATTORNEY, BERRY, SAHRADNIK, KOTAZ & BENSON, PC, TOMS RIVER, NJ.

For COUNTY OF MERCER, Respondent, Cross Defendant: SARAH G. CROWLEY, LEAD ATTORNEY, OFFICE OF THE MERCER COUNTY COUNSEL, TRENTON, NJ.

For MIDDLESEX COUNTY, COUNTY OF MIDDLESEX, Respondent, Cross Defendant: PATRICK J.

BRADSHAW, LEAD ATTORNEY, KELSO & BRADSHAW, ESQS., NEW BRUNSWICK, NJ.

For SOMERSET COUNTY, COUNTY OF SOMERSET, Respondent, Cross Defendant: SCOTT D. RODGERS, LEAD ATTORNEY, MILLER, ROBERTSON AND RODGERS, P.C., SOMERVILLE, NJ.

For COUNTY OF HUNTERDON, Respondent, Cross Defendant: FREDERICK C. SEMRAU, LEAD ATTORNEY, DORSEY & SEMRAU, BOONTON, NJ.

For WARREN COUNTY, COUNTY OF MORRIS, Respondents, Cross Defendants: JOSEPH J. BELL, LEAD ATTORNEY, BELL & GAGE, ESQS., ROCKAWAY, NJ.

For COUNTY OF SUSSEX, Respondent, Cross Defendant: ROBERT B CAMPBELL, LEAD ATTORNEY, [*3] MCCONNELL, LENARD & CAMPBELL, LLP, STANHOPE, NJ.

For PASSAIC COUNTY, COUNTY OF PASSAIC, Respondents, Cross Defendants: ELTIA MONTANO-GALARZA, LEAD ATTORNEY, FLORIO PERRUCCI STEINHARDT & FADER, ROCHELLE PARK, NJ.

For COUNTY OF ESSEX, Respondent, Cross Defendant: ALAN R. RUDDY, LEAD ATTORNEY, OFFICE OF THE ESSEX COUNTY COUNSEL, NEWARK, NJ.

For UNION COUNTY, COUNTY OF UNION, Respondents, Cross Defendant: MOSHOOD MUFTAU, LEAD ATTORNEY, UNION COUNTY COUNSEL, ADMINISTRATION BUILDING, ELIZABETH, NJ.

For GLOUCESTER COUNTY, COUNTY OF GLOUCESTER, CAPE MAY COUNTY, Respondents, Cross Defendants: RICHARD L. GOLDSTEIN, LEAD ATTORNEY, MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN, PA, CHERRY HILL, NJ.

For CUMBERLAND COUNTY, COUNTY OF CUMBERLAND, Cross Defendant: STEVEN L. ROTHMAN, LEAD ATTORNEY, LIPMAN ANTONELLI BATT GILSON MALESTEIN ROTHMAN & CAPASSO, VINELAND, NJ.

For COUNTY OF SALEM, Respondent: ELIZABETH A. DALBERTH, LEAD ATTORNEY, THE LAW OFFICES OF MICHAEL J. DUNN, CHERRY HILL, NJ.

For CUMBERLAND COUNTY, COUNTY OF CUMBERLAND, Respondents, Cross Defendants, Cross Claimants: STEVEN L. ROTHMAN, LEAD ATTORNEY, LIPMAN ANTONELLI BATT GILSON MALESTEIN ROTHMAN & CAPASSO, VINELAND, NJ.

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For COUNTY OF MIDDLESEX, Cross Defendant: PATRICK J. BRADSHAW, LEAD ATTORNEY, KELSO & BRADSHAW, ESQS., NEW BRUNSWICK, NJ.

For JON CORZINE, acting de facto governor of the State of New Jersey, individually, and in official capacity, Cross Defendant: ELLEN M. HALE, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, R.J. HUGHES JUSTICE COMPLEX, TRENTON, NJ.

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For SALEM COUNTY, COUNTY OF SALEM, Cross Defendant: E. ELAINE VOYLES, LEAD ATTORNEY, PENNSVILLE, NJ.

For BURLINGTON COUNTY, COUNTY OF BURLINGTON, Cross Claimant: JOHN CHARLES GILLESPIE, LEAD ATTORNEY, PARKER MCCAY, PA, MARLTON, NJ.

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For DE FACTO STATE OF NEW JERSEY, Cross Defendant: ELLEN M. HALE, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, R.J. HUGHES JUSTICE COMPLEX, TRENTON, NJ.

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For SALEM COUNTY, Respondent, Cross Defendant: ELIZABETH A. DALBERTH, LEAD ATTORNEY, THE LAW OFFICES OF MICHAEL J. DUNN, CHERRY HILL, NJ.

JUDGES: KATHARINE S. HAYDEN, SENIOR UNITED STATES DISTRICT JUDGE.

OPINION BY: KATHARINE S. HAYDEN

OPINION

KATHARINE S. HAYDEN, SENIOR DISTRICT JUDGE.

I. INTRODUCTION

The New Jersey Sand Hill Band of Lenape & Cherokee Indians ("Sand Hill Band") and its putative public minister, Ronald S. Holloway, Sr. [1] (collectively, "plaintiffs") instituted this civil action seeking damages as well as injunctive, declaratory, and punitive relief from the defendants, the State of New Jersey, each county therein, and their official representatives (collectively, "defendants"). Stripped to its essence, the plaintiffs' complaint alleges that the defendants and their predecessors have converted and misappropriated their land and other property rights for more than 200 years, in violation of federal constitutional and statutory law. They also claim that the defendants have wrongfully precluded [*6] representation on the New Jersey Commission on American Indian Affairs, which is also named as a defendant. Now pending before the Court are the defendants' collective motions to dismiss the Second Amended Complaint ("SAC") pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. The State Defendants [2] have filed a motion to dismiss [D.E. 97], in which the County Defendants [3] have joined. (Several of the County Defendants have also submitted letter-briefs asserting county-specific arguments.) Additionally, the County Defendants have filed their own joint motion to dismiss. [D.E. 123].

1 Though the case caption refers to Ronald-Stacey, the body of the second amended complaint refers to Ronald S. Holloway, Sr. The Court understands these two identities to be the same person, and for consistency refers only to Holloway.

2 As used herein, the "State Defendants" are the State of New Jersey; former New Jersey Governor Jon S. Corzine, in his individual and official capacities; former New Jersey Secretary of State Nina Wells, in her individual and official capacities; former Attorney General Anne Milgram, in her individual and official capacities; New Jersey Senate President, Richard Codey; and the [*7] New Jersey Commission on Indian Affairs. To the extent the individual State Defendants are sued in their official capacities, those defendants are now: Christopher J. Christie, Governor; Paula T. Dow, Attorney General; and Kim Guadagno, Secretary of State. *See Fed. R. Civ. P. 25(d)*. The individual State Defendants sued in their personal capacities (Corzine, Wells, and Milgram, and Codey) remain subject to suit to that extent.

3 As used herein, the "County Defendants" include each of New Jersey's twenty-one counties: Atlantic; Bergen; Burlington; Camden; Cape May; Cumberland; Essex; Gloucester; Hudson; Hunterdon; Mercer; Middlesex; Monmouth; Morris; Ocean; Passaic; Salem; Somerset; Sussex; Union; and Warren.

II. BACKGROUND

A. Factual Background [4]

4 The facts are taken from the allegations contained in the SAC and, for purposes of this motion only, are assumed as true. The Court emphasizes, however, that many of the factual allegations contained in the SAC are in tension with a recent lawsuit in which a different tribal group laid claim to the land at issue here, and another suit pressed by a group with the same name in New Jersey state court. *See generally Unalachtigo Band of the Nanticoke Lenni Lenape Nation v. Corzine, 606 F.3d 126, 2010 U.S. App. LEXIS 10570 (3d Cir. 2010)*; [*8] *Unalachtigo Band of the Nanticoke Lenni Lenape Nation v. New Jersey, 375 N.J. Super. 330, 867 A.2d 1222 (N.J. Super. Ct. App. Div. 2005)*. Moreover, the plaintiffs' legal claims here appear to be substantially similar, if not identical, to those asserted in these cases. Nonetheless, the Court recites the historical facts as asserted by the plaintiffs. The Court further notes that the authenticity of the plaintiffs' tribal membership is a factual issue subject to fierce debate. *See, e.g.*, Joe Ryan, *Indian feud, 21 counties, a big lawsuit*, NJ.com (March 22, 2009) (last visited June 24, 2010) (on file with the Court) (chronicling the filing of this lawsuit, the competing claims between two groups calling themselves Sand Hill Indians, and stating that competing group "accuse[s] [Holloway] of hijacking their heritage to try to extract money from the government"); D.E. 167 (May 6, 2010 letter to the Court alleging that "Holloway is not a Sand Hill Indian," and "is not known to anyone in our Sand Hill family").

The Sand Hill Band is a Native American tribal family descending from the Delaware, Raritan, and Unami Indians. SAC P 1, 19. From time immemorial, it has owned and occupied approximately 2,000,000 acres [*9] of land constituting the present-day State of New Jersey, within which formerly lay the Brotherton Indian Reservation, and which presently constitutes Shamong Township, Burlington County, New Jersey. *Id.* PP 1, 19, 62. Holloway is a member of the Sand Hill Band and a descendant from its original landowners. *Id.* P 19. The Sand Hill Band is not an Indian tribe formally recognized by the federal government.

The plaintiffs allege that in the 1700s, the Sand Hill Band entered into a series of treaties with the British government that conferred upon the tribe the right to possess its land, unless purchased by the United States. SAC PP 1, 62. Related to these dealings, the plaintiffs allege that in 1758, they entered into a treaty (the Treaty of Easton) in which they ceded to the British government some one million acres of land (which passed to the United States at the conclusion of the American Revolution), but that they retained "all rights of hunting, fishing, and like uses of the land." *Id.* P 64. In 1790, Congress passed the Trade and Intercourse Act ("Nonintercourse Act" or "NIA"), 1 CONG. CH. 33, 1 STAT. 137 (July 22, 1790), codified at *25 U.S.C. § 177.* In short, the Nonintercourse Act [*10] "bars the sale of tribal land without federal government acquiescence." *Oneida Indian Nation of N.Y. v. Madison County, No. 05-6408, 605 F.3d 149, 152, 2010 U.S. App. LEXIS 8643, at *7 (2d Cir. 2010).* [5]

5 The NIA states:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for title or purchase of any lands by them held or claimed, is liable to a penalty of $ 1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.
>
> *25 U.S.C. § 177.*

Despite [*11] the Sand Hill Band's negotiated land rights and the protection of the Nonintercourse Act, the plaintiffs allege that in 1802, the defendants sold the acreage constituting the Brotherton Reservation without the federal government's consent, thus violating the NIA. *See, e.g.*, SAC PP 1-3, 65, 91, 100, 103, 105, 109. [6] According to the plaintiffs, the sale "illegally deprive[d the Sand Hill Band] of use of the acreage ceded to the British Crown (and thereby to the United States) over which [it] retained hunting, fishing and other use rights, and further . . . deprived [it] of the ownership of its own land." SAC P 65. The plaintiffs variously claim original title to the 3,044 acres of land that formerly made up the Brotherton Reservation and the 2,000,000 acres constituting the entire State of New Jersey. For purposes of this opinion, it is unnecessary to discern the metes and bounds of the lands over which the plaintiffs claim rightful ownership. For simplicity, however, the Court refers herein only to the Brotherton Reservation.

6 There is some question whether the sale occurred in 1801 or 1802. *Compare* SAC P 1-3 (alleging 1802) *with Unalachtigo Band, 867 A.2d at 1225* (stating that sale [*12] occurred in 1801). The Court refers to 1802, as it appears in the SAC.

The plaintiffs also allege that the County Defendants have violated the Native American Graves Protection and Repatriation Act of 1990 ("NAGPRA"), PUB. L. 101-601, § 2, 104 STAT. 3048 (Nov. 16, 1990), codified at *25 U.S.C. §§ 3001-3013*, because they "are in possession of burial land and artifacts belonging to [the plaintiffs]." SAC PP 158-63.

Finally, the plaintiffs aver that the State Defendants have acted in concert with the New Jersey Commission of American Indian Affairs to deny the Sand Hill Band representation on the Commission, thereby ensuring that the group does not achieve recognition by the federal Bureau of Indian Affairs ("BIA") as a Native American tribe. SAC PP 10-11, 111-14. The plaintiffs claim, moreover, that the State Defendants have appointed to the Commission representatives from various Indian entities that are not indigenous to the State of New Jersey

and have less historical documentation than the Sand Hill Band, which to date has garnered no representation on the Commission. *Id.* PP 11, 112-14.

B. Procedural Background

On February 17, 2009, the plaintiffs filed an initial complaint (styled a "petition") [*13] seeking damages and emergent injunctive relief. [D.E. 1.] On February 23, 2009, they filed an amended petition/complaint [D.E. 2], and thereafter filed an application for a temporary restraining order seeking an order enjoining enforcement of certain New Jersey laws and regulations related to their claims. [D.E. 5.] The Court denied the application in an opinion and order issued on March 24, 2009. [D.E. 14.] The plaintiffs filed a partial amendment to the amended complaint on April 20, 2009 [D.E. 66], and filed a complete SAC on May 22, 2009 [D.E. 88], which is the subject of the pending motions to dismiss. The State Defendants moved to dismiss on June 18, 2009 [D.E. 97], a motion which each County Defendant joined. On July 6, 2009, Magistrate Judge Patty Shwartz ordered that each County Defendant may, in addition to joining the State Defendants' arguments, file its own dispositive motion. [D.E. 117.] On July 23, 2009, defendant Salem County filed a motion to dismiss [D.E. 123] on behalf of all County Defendants. *See* D.E. 123-1 at 2.

C. Causes of Action

The SAC asserts fifteen causes of action against the defendants. Before explaining the factual and legal bases for them, the Court notes [*14] that the plaintiffs have withdrawn the following causes of action: Count 2 (to the extent the SAC asserts claims under *18 U.S.C. § 241*), Count 6 (to the extent it asserts claims under *18 U.S.C. § 1170*), and Counts 10 and 12 (in their entirety). *See* Pl. Opp. to State Br. at 15, 16, 27. Accordingly, those counts are dismissed without further discussion. Furthermore, the plaintiffs have taken the explicit position in their brief that the only claim against the County Defendants relates to Count 6, asserted pursuant to the NAGPRA. *See* Pl. Opp. to County Br. at 2, 12. [7]

> 7 After submitting his counseled brief, Holloway personally requested the Court to set aside his statement that he only asserts claims against the County Defendants under the NAGPRA, twice suggesting his brief was "in error." [D.E. 137, 143]. Magistrate Judge Patty Shwartz has already addressed and rejected these requests in an order granting the plaintiffs permission to substitute attorneys. Specifically, Judge Shwartz concluded that the "the plaintiffs are bound by the positions taken in the briefs submitted in opposition to the motion to dismiss despite [the] change in counsel," and that "the change in counsel is not a [*15] basis to change legal positions taken in the this case and the positions are binding on the client." [D.E. 152.] The Court agrees. Accordingly, it addresses the motions to dismiss mindful that the plaintiffs have expressly limited their claims against the County Defendants to those under the NAGPRA.

In Count 1 of the SAC, the plaintiffs assert that the State Defendants, in their official capacity, conspired to commit, and in fact did commit, acts of fraud, genocide and crimes against humanity by conveying the Brotherton Reservation without authority and without due process of law, in violation of the *Fourteenth Amendment to the United States Constitution.* SAC PP 118-129.

In Count 2, the plaintiffs allege that the State Defendants, in their official and individual capacities, violated *42 U.S.C. §§ 1983, 1985(3),* and *1988.* Specifically, they assert that because the New Jersey Constitution was not ratified until August 13, 1844, all sales or relinquishment of their land, rights, privileges and immunities before that date are now moot, null, and void. SAC P 131. Accordingly, the plaintiffs claim that the State Defendants violated their *Fourteenth Amendment* rights and their rights under the [*16] New Jersey Constitution by "colluding to circumvent the *due process clause* by passing an illegal state law that allowed the state counties to sell off land belonging to the [plaintiffs] without the review of, and approval of the United States Government." *Id.* P 137.

In Count 3, the plaintiffs allege that the State Defendants' actions with regard to the New Jersey Commission on Native American Affairs [8] have violated Title VI of the Civil Rights Act of 1964 ("Title VI"), PUB. L. 88-352, § 601, 78 STAT. 252 (July 2, 1964), codified at *42 U.S.C. § 2000d, et seq.* Specifically, the plaintiffs assert that the State Defendants have unlawfully reserved appointment powers to the Commission for themselves, thereby "creating an arbitrary and capricious selection procedure that is selectively discriminatory." SAC P 144. The plaintiffs allege that the State Defendants use federal funds "for minority programs[,] but have failed to ensure a non-discriminatory process by which all Indian Nations can be given an opportunity to compete equally for a position on said commission, and be represented by that body directly." *Id.* P 143.

> 8 The SAC names the New Jersey Commission on Indian Affairs as a defendant. [*17] The Commission's official title, however, is the New Jersey Commission on American Indian Affairs. *N.J. Stat. Ann. § 52:16A-53.* The New Jersey State Department's website variously refers to the

Commission as the New Jersey Commission on Native American Affairs, as well as by its correct title. *See http://www.state.nj.us/state/divisions/community/indian/mission/* (last visited June 29, 2010). There is no dispute, however, over the entity on which the plaintiffs seek representation. The Court refers herein to the "Commission" or by referencing its full official name.

In Count 4, the plaintiffs allege that the State Defendants violated their rights under the *Due Process Clause of the Fourteenth Amendment*. SAC PP 147-51. Specifically, they assert that the defendants violated these provisions by "facilitating the sale of Indian lands to private interests without affording [them] the opportunity of Presidential or Congressional review." *Id.* P 150

Counts 5, 7, and 8 each assert claims under the Nonintercourse Act based on the State Defendants' allegedly unauthorized 1802 land sale. PP 152-57, 164-84. The counts are separated to account for the loss of land (Count 5), the loss of water rights [*18] and revenues (Count 7) and the loss of their ostensibly unqualified hunting and fishing rights (Count 8). Counts 7 and 8 also assert violations of the 1758 Treaty of Easton.

In Count 6, the plaintiffs allege that the defendants, State and County, have violated the NAGPRA by "retaining, disturbing, possessing, and refusing to return valuable ancestral remains and cultural artifacts." SAC PP 159-160.

In Count 9, the plaintiffs allege that the individual State Defendants violated Title VI by "selectively discriminate[ing]" against them in an "arbitrary and capricious selection process, their failure to adhere to their oath of office, and breach of their fiduciary responsibilities to the public at large." SAC P 187. They seek an injunction ordering the removal of each representative of the New Jersey Commission of Indian Affairs, and establishing a "codified system that is level for all minorities and applied without discriminatory practices." *Id.* P 190.

In Count 11, the plaintiffs assert a direct constitutional claim arising from Article I, § 8, cl. 2 and *Article II, § 2, cl. 2 of the federal Constitution*. They assert that as a result of the defendants' actions vis-a-vis the illegal 1802 [*19] land transaction, they have been "denied their constitutionally guaranteed right to deal with Congress in relationship to commerce." SAC P 198.

In Count 13, the plaintiffs allege that the State Defendants have violated the 1758 Treaty of Easton, which "guarantees [to them] hunting and fishing rights." SAC P 209. The plaintiffs seek injunctive relief from the requirement that they purchase permits for their hunting and fishing activities. *Id.* P 210. In Count 14, the plaintiffs seek a declaratory judgment pronouncing that the 1802 land transaction is in violation of the Nonintercourse Act, and that all resulting "land seizures . . . not sanctioned by the United States government are invalid and unenforceable." SAC P 219. Finally, in Count 15, the plaintiffs seek restitution for all profits gained by defendants as a result of the wrongful seizure and use of their property. SAC PP 224-25.

Aside from the declaratory and injunctive relief that the Court has already specified, the plaintiffs seek compensatory damages "in the amount of 999,999,999 1 oz. American Eagle Gold Coins, exclusive of punitive damages." They further seek, *inter alia*, "the return of all reservation, tribal, and private [*20] lands in whatever counties they may be found"; "[t]he return of all water rights[,] above and below ground"; "[a]ll hunting, fishing, and travel rights as previously enjoyed"; "[a]ll proceeds from the sale of tribal lands, waters, timber, mineral . . . from 1802 through [the] present"; "[a]ll burial, tribal, cultural[,] and other artifacts that are in existence" in the defendants' possession; "[o]fficial recognition as a Native American Indian tribe from both the State of New Jersey and the Federal Government"; and "[r]e-establishment of a New Jersey Indian Commission with representation by the plaintiffs." SAC Prayer for Relief PP (f)-(l), (p).

III. JURISDICTION & STANDARD OF REVIEW

The Court exercises subject-matter jurisdiction under *28 U.S.C. § 1331*, as the plaintiffs' claims arise under the Constitution and laws of the United States. It also exercises jurisdiction over Count 6 pursuant to *25 U.S.C. § 3013*. Given the uncertainty of the plaintiffs' tribal status, *see infra*, the Court does not exercise jurisdiction under *28 U.S.C. § 1362* (granting district courts "original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body *duly recognized by* [*21] *the Secretary of the Interior*, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.") (emphasis added). *See Price v. Hawaii, 764 F.2d 623, 626 (9th Cir. 1985)* ("Because neither the [tribal plaintiffs] nor their governing body have been 'duly recognized' by the Secretary, they do not qualify for *§ 1362* jurisdiction . . . .").

Rule 12(b)(6) provides a defense to pleaded causes of action where a complaint "fail[s] to state a claim upon which relief can be granted[.]" *Fed. R. Civ. P. 12(b)(6)*. "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.'" *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed.*

2d 929 (2007)); *accord Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S. Ct. at 1949* (quoting *Twombly, 550 U.S. at 556*); *see also Mayer v. Belichick, 605 F.3d 223, 229, 2010 U.S. App. LEXIS 10212, at *16 (3d Cir. 2010)* [*22] ("In order to withstand a motion to dismiss, a complaint's factual allegations must be enough to raise a right to relief above the speculative level.") (citations and internal quotation marks omitted). The Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff[s], and determine whether, under any reasonable reading of the complaint, [they] may be entitled to relief," *Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008)*, but it is free to "disregard any legal conclusions." *Fowler, 578 F.3d at 210-11*. A complaint will not withstand a *Rule 12(b)(6)* challenge if it contains nothing more than "unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *Iqbal, 129 S. Ct. at 1949*; *see also Twombly, 550 U.S. at 555* ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (citations and alterations omitted).

IV. DISCUSSION

Given the overlapping claims (some of which are conceptually redundant), the defendants have asserted several independent and alternative arguments in [*23] support of their respective motions. The Court addresses them in turn.

A. Preliminary Considerations

1. Direct Constitutional Claims

In Counts 1 and 4, the plaintiffs assert direct constitutional claims for violations of, and they seek redress under, the *Fourteenth Amendment*. But "a plaintiff may not sue a state defendant directly under the Constitution where [*42 U.S.C. §] 1983* provides a remedy." *Martinez v. City of Los Angeles, 141 F.3d 1373, 1382-83 (9th Cir. 1998)*. *See also Azul-Pacifico, Inc. v. Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992)* ("Plaintiff has no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize *42 U.S.C. § 1983*."); *Thomas v. Shipka, 818 F.2d 496, 499 (6th Cir. 1987)* ("[I]n cases where a plaintiff states a constitutional claim under *42 U.S.C. § 1983*, that statute is the exclusive remedy for the alleged constitutional violation[]."), *vacated on other grounds, 488 U.S. 1036, 109 S. Ct. 859, 102 L. Ed. 2d 984 (1989)*; *Hunt v. Robeson County Dep't of Social Servs., 816 F.2d 150, 152 n.2 (4th Cir. 1987)* ("Because defendants here are all local officials, any cause of action against them for [*24] unconstitutional conduct under color of state law could only proceed under *§ 1983*."); *Morris v. Metropolitan Area Transit Auth., 702 F.2d 1037, 1042, 226 U.S. App. D.C. 300 (D.C. Cir. 1983)*.

Instead, where "Congress has provided what it considers adequate remedial mechanisms for constitutional violations," *Schweiker v. Chilicky, 487 U.S. 412, 423, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)*, direct constitutional claims against officials acting under color of state law are not cognizable. And the plaintiffs here have an adequate statutory remedy for their claims against the State Defendants for their alleged due process violations, namely, *42 U.S.C. § 1983*. Indeed, the plaintiffs have brought such claims against the State Defendants. Counts 1 and 4 will therefore be dismissed. [9]

> 9 The Court recognizes that the Third Circuit has not yet opined on this issue. At the very least, however, since " *§ 1983* affords a remedy for infringement of one's constitutional rights, identical claims raised under the *Fourteenth Amendment* are redundant, rendering the outcome of the *§ 1983* claims dispositive of the independent constitutional claims." *Capogrosso v. Supreme Court of N.J., 588 F.3d 180, 185 (3d Cir. 2009)*. As the Court holds below that the plaintiffs' *§ 1983* [*25] claims bottomed on the *Fourteenth Amendment* fail in any event, so too do the direct constitutional claims. In either case, these counts will not be discussed further.

2. Claims Asserted Under *§§ 1983, 1985* and *1988*

To the extent that the plaintiffs assert claims in Count 2 under *42 U.S.C. §§ 1983, 1985*, and *1988* against the State itself, the New Jersey Commission on American Indian Affairs, and the individual defendants sued in their official capacities, those claims fail. The State Defendants are correct that these defendants are not "persons" as *§ 1983* uses that term. [10] *See Will v. Mich. Dep't of State Police, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)* (holding that states and state officials acting in their official capacity are not "persons" under *§ 1983*); *United States ex rel. Foreman v. State of N.J., 449 F.2d 1298 (3d Cir. 1971)*.

> 10 *Section 1983* states in relevant part:
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution [*26] and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

As is relevant here, *§ 1985(3)* prohibits conspiracies between two or more persons to deprive a person or class of persons of equal protection of the laws. [11] *See Estate of Oliva v. N.J., Dep't of Law & Pub. Safety, Div. of State Police, 604 F.3d 788, 802, 2010 U.S. App. LEXIS 9142, at *34-35 (3d Cir. May 4, 2010)*. The Court agrees with the State Defendants that "persons" in *§ 1983* and "persons" in *§ 1985* have the same meaning. *See Rode v. Dellarciprete, 617 F. Supp. 721, 723 n.2 (M.D. Pa. 1985), vacated in part on other grounds, 845 F.2d 1195 (3d Cir. 1988)*. Thus, because "two or more *persons*" must conspire to be liable under *§ 1985*, and because states and state officials sued in their official capacities are not "persons" and cannot be liable under *§ 1983*, they cannot be liable under *§ 1985* either. *See Santiago v. N.Y. State Dep't of Corr. Servs., 725 F. Supp. 780, 783 (S.D.N.Y. 1983)*.

11 *Section 1985(3)* states in relevant part:

> In any case of conspiracy set forth in this section, if one or more persons engaged therein do . . . any act in furtherance [*27] of the object of such conspiracy, whereby another is injured in his person or property, . . . the party so injured . . . may have an action for the recovery of damages occasioned by such injury or deprivation against any one or more of the conspirators.

Finally, *§ 1988* authorizes in civil rights cases resort to the remedies and procedures of the common law, where federal law is inadequate, and also permits a court to award attorney's fees to a prevailing party in certain cases. [12] *See Post v. Payton, 323 F. Supp. 799, 803 (E.D.N.Y. 1971)*. It "does not create an independent cause of action." *Id.* Because "*[§] 1988* is inapplicable where substantive law denies a plaintiff any right to relief," *Baker v. F & F Investment, 420 F.2d 1191, 1196 (7th Cir. 1970)* -- as it does here, *see infra* - the plaintiffs' invocation of it provides them no assistance.

12 *Section 1988* reads in relevant part:

> (a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws [*28] of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.
>
> (b) Attorney's fees. In any action or proceeding to enforce a provision of [*42 USCS §§ 1981-1983, 1985*, or *1986*], [title *20 USCS §§ 1681 et seq.*], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . [*29] . .

The Court will therefore dismiss Count 2 insofar as it is asserted against the State Defendants -- the entities and the individuals sued in their official capacities. To the extent that Count 2 remains viable, the Court addresses it below.

B. Nonintercourse Act Claims

1. *Eleventh Amendment* Immunity

The plaintiffs base Counts 5, 7, 8, 11, 14, and 15 of the SAC on the 1802 land transaction that the plaintiffs claim violated the Nonintercourse Act. [13] (Count 2 is also based to some extent on the challenged sale of the Brotherton Reservation. The Court's discussion in this section applies equally to that count as well.) The State Defendants argue that these claims are barred by the *Eleventh Amendment to the United States Constitution.*

13 Counts 7 and 8 also assert violations of the 1758 Treaty of Easton. That portion of Counts 7 and 8 will be addressed below.

The *Eleventh Amendment* provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *U.S. Const., Amend. XI.* The *Eleventh Amendment* renders [*30] unconsenting States, state agencies, and state officers sued in their official capacities immune from suits brought in federal courts by private parties, including Indian tribes and their members. *See Idaho v. Coeur d' Alene Tribe, 521 U.S. 261, 268-269, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997)* ("Under well established principles, the Coeur d'Alene Tribe, and, *a fortiori*, its members, are subject to the *Eleventh Amendment.*"); *Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991)*; *Edelman v. Jordan, 415 U.S. 651, 662-63, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)*; *Haybarger v. Lawrence County Adult Prob. & Parole, 551 F.3d 193, 197 (3d Cir. 2008)*; *Lombardo v. Pa. Dep't of Pub. Welfare, 540 F.3d 190, 194-95 (3d Cir. 2008).*

The shield of the *Eleventh Amendment* extends to "subunits of the State." *Haybarger, 551 F.3d at 198* (citing *Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)*); *accord Benn v. First Judicial District of Pennsylvania, 426 F.3d 233 (3d Cir. 2005).* Thus, the New Jersey Commission on American Indian Affairs is clearly protected by sovereign immunity as well. *See Capogrosso v. Supreme Court of N.J., 588 F.3d 180, 185 (3d Cir. 2009)* ("The *Eleventh Amendment to the United States Constitution* protects an [*31] unconsenting state or *state agency* from a suit brought in federal court, regardless of the relief sought.") (emphasis added); *C.H. ex rel. Z.H. v. Oliva, 226 F.3d 198, 201 (3d Cir. 2000)* (en banc); *cf. Fitchik v. N.J. Transit Rail Operations, 873 F.2d 655, 658 (3d Cir. 1989)* (en banc). But the state sovereign-immunity shield "does not extend to counties and similar municipal corporations." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)* (citing *Moor v. County of Alameda, 411 U.S. 693, 717-721, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973)*; *Lincoln County v. Luning, 133 U.S. 529, 530, 10 S. Ct. 363, 33 L. Ed. 766 (1890)).* [14] Accordingly, the discussion below does not apply to the County Defendants. (In any event, however, the plaintiffs have expressly stated that they do not assert these claims against the County Defendants. *See supra* note 7.) Nor does the *Eleventh Amendment* immunize state officers sued in their individual capacities. *See Hafer v. Melo, 502 U.S. 21, 30-31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991).* [*32] However, the Counts listed above, save Count 2, are asserted against the individual defendants in their official capacities only. (Again, the Court addresses below Count 2 to the extent asserted against individual officers in their personal capacities.)

14 *See also Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979)* (stating that the Court "has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power'"); *Chisolm v. McManimon, 275 F.3d 315, 322 (3d Cir. 2001)* ("While *Eleventh Amendment* immunity may be available for states, its protections do not extend to counties."); *Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 734 F.2d 730, 732 (11th Cir. 1984)* ("*Eleventh Amendment* immunity does not extend to independent political entities, such as counties."); *Hall v. Medical College of Ohio, 742 F.2d 299, 301 (6th Cir. 1984)* ("Municipalities, counties and other political subdivisions (e.g., public school districts) do not partake of the state's *Eleventh Amendment* immunity.").

Because Counts 5, 7, 8, 11, 14, [*33] and 15 are asserted against the State of New Jersey, the Commission, and the individual defendants in their official capacities, they are barred by the *Eleventh Amendment* if one of three exceptions does not apply: (1) congressional abrogation; (2) state waiver; or (3) suits against individual state officers for prospective injunctive relief to end

an ongoing violation of federal law. *MCI Telecommunication Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491, 503 (3d Cir. 2001)* (hereinafter "*MCI*").

a. Congressional Abrogation

"Congress may, in some limited circumstances, abrogate sovereign immunity and authorize suits against states. If a statute has been passed pursuant to congressional power under *§ 5 of the Fourteenth Amendment* to enforce the provisions of that amendment, Congress can abrogate a state's sovereign immunity." *MCI, 271 F.3d at 503* (citations omitted). But Congress may not "abrogate state sovereign immunity when a statute is passed pursuant to its Article I powers, such as the *Commerce Clause*[.]" *Id.; see also Board of Tr. of Univ. of Alabama v. Garrett, 531 U.S. 356, 121 S. Ct. 955, 962, 148 L. Ed. 2d 866 (2001)* ("Congress may not, of course, base its abrogation of the States' [*34] *Eleventh Amendment* immunity upon the powers enumerated in Article I."); *Seminole Tribe v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996)*. Congress passed the Nonintercourse Act using its Article I powers, i.e., the Indian *Commerce Clause*. It therefore "did not, and could not, abrogate *Eleventh Amendment* immunity . . . ." *MCI, 271 F.3d at 503*. Accordingly, "[a]brogation is not implicated here." *Id.; see also Ysleta del sur Pueblo v. Raney, 199 F.3d 281, 288 (5th Cir. 2000)* (finding it "nonsensical" to believe that Congress abrogated *Eleventh Amendment* immunity under the *Fourteenth Amendment*, as the NIA was passed *before* the *Fourteenth Amendment*); *cf. Schlossberg v. Maryland, 119 F.3d 1140, 1145-47 (4th Cir. 1997)* ("We will not presume that Congress intended to enact a law under a general *Fourteenth Amendment* power to remedy an unspecified violation of rights when a specific, substantive Article I power clearly enabled the law."). [15]

> 15 Even assuming, *arguendo*, that Congress could validly abrogate sovereign immunity using the powers granted to it at the time it passed the Nonintercourse Act, the Court agrees with the Court of Appeals for the Fifth Circuit that "the statute, on its face, does not provide [*35] an unmistakably clear intent to abrogate state sovereign immunity." *Ysleta, 199 F.3d at 288*. Because "[a] valid abrogation of *Eleventh Amendment* immunity requires Congress to 'unequivocally express[] its intent to abrogate the immunity,'" *Wheeling & Lake Erie Ry. v. Pub. Util. Comm'n of Pa., 141 F.3d 88, 92 (3d Cir. 1998)* (quoting *Seminole Tribe, 517 U.S. at 55*), and because such a statement is absent from the Nonintercourse Act, the State Defendants' sovereign immunity remains intact for this additional reason.

b. Waiver

"[A] state may waive sovereign immunity by consenting to suit." *MCI, 271 F.3d at 503* (citations omitted). "The waiver by the state must be voluntary and our test for determining voluntariness is a stringent one." *Id.* Specifically, "[t]he state either must voluntarily invoke our jurisdiction by bringing suit (not the case here) or must make a clear declaration that it intends to submit itself to our jurisdiction." *Id. at 504* (citations and internal quotation marks omitted).

The plaintiffs argue that the illegality of the State Defendants' actions constitutes a voluntary waiver of their *Eleventh Amendment* immunity. That would put the cart before the horse. The entire point [*36] of sovereign *immunity* is to *immunize* states from suit and liability, even if the challenged actions are unlawful. "The *Eleventh Amendment* bar does not vary with the merits of the claims pressed against the State." *County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 252, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985)*. The State Defendants have not waived their *Eleventh Amendment* immunity.

c. *Ex Parte Young*

"The third exception to the *Eleventh Amendment* is the doctrine of *Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*, under which individual state officers can be sued in their individual capacities for prospective injunctive and declaratory relief to end continuing or ongoing violations of federal law." *MCI, 271 F.3d at 506*. "However, *Young* does not apply if, although the action is nominally against individual officers, the state is the real, substantial party in interest and the suit in fact is against the state." *Id.* (citing *Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 103, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)*). Moreover, the Supreme Court in *Coeur d' Alene, supra*, extended this real-party-in-interest doctrine in unique situations that would inflict significant harm on the fundamental sovereignty of the state itself. As the Third Circuit has explained [*37] it:

> *Coeur d'Alene* did carve out one narrow exception to *Young*: An action cannot be maintained under *Young* in those unique and special circumstances in which the suit against the state officer affects a unique or essential attribute of state sovereignty, such that the action must be understood as one against the state. One example of such special, essential, or fundamental sovereignty is a *state's title, control, possession, and ownership of water and land, which is equivalent to its control over funds of the state treasury. See Coeur d' Alene, 521 U.S. at 287*; *id. at 296-97* (O'Connor, J., concur-

> ring in part and concurring in the judgment). This exception is best understood as an application of the general rule that *Young* does not permit actions that, although nominally against state officials, in reality are against the state itself. *See Pennhurst, 465 U.S. at 102.*

MCI, 271 F.3d at 508 (emphasis added).

The Court agrees with the State Defendants that the relief the plaintiffs seek requires application of the *Coeur d' Alene* "exception to the exception." Entering an injunction requiring the State Defendants to return their sovereign land would implicate precisely the type of "core or fundamental [*38] matter of state sovereignty comparable to the ability of a state to maintain ownership of and title to its . . . lands." *MCI, 271 F.3d at 515.* The injunctive relief the plaintiffs seek squarely triggers "the state interest . . . derive[d] from its general sovereign powers." *Id.* With respect to the counts now under discussion, therefore, *Ex Parte Young* does not apply. [16]

> 16 In their opposition brief, the plaintiffs challenge the defendants' actions vis-a-vis representation on the New Jersey Commission on American Indian Affairs. Pl. Opp. to State Br. at 9-12. Moreover, they inject additional factual allegations that do not appear in the SAC, and the Court has not considered them. In any event, these allegations do not concern the 1802 land transaction that underpins the claims now under consideration. The Court here considers the application for prospective injunctive relief only as it relates to the challenged land transaction. To the extent the plaintiffs ask the Court to enjoin the State Defendants from unlawfully depriving them of representation on the Commission, the Court addresses that point below.

* * *

None of the exceptions to the State Defendants' *Eleventh Amendment* immunity [*39] applies. The claims against the State Defendants asserted in Counts 5, 7, 8, 11, 14, and 15 (except to the extent asserted against individual defendants in their individual capacities) are accordingly barred by the *Eleventh Amendment* and will be dismissed.

2. Deference to the Primary Jurisdiction of the Bureau of Indian Affairs

The State Defendants alternatively argue that the Nonintercourse Act claims should be dismissed because existing factual issues require extensive involvement of an administrative agency better equipped to answer such questions. Specifically, a plaintiff asserting an NIA claim must prove, among other things, that it is a *bona fide* Indian tribe. Accordingly, because the Sand Hill Band in this action is not a federally recognized Indian tribe, and because such recognition would require complex determinations by the federal Bureau of Indian Affairs ("BIA"), the State Defendants argue that this Court should defer to the primary jurisdiction of the BIA before adjudicating the Nonintercourse Act claims. The Court agrees. Though it has accepted the State Defendants' *Eleventh Amendment* arguments above, weighty considerations of institutional competence counsel this Court [*40] to defer to the BIA's historical, genealogical, and anthropological expertise before any adjudication on the merits would otherwise be appropriate. *See United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 551 (10th Cir. 2001)* ("Determining whether a group of Indians exists as a tribe is a matter requiring . . . specialized agency expertise . . . ."); *W. Shoshone Bus. Council v. Babbitt, 1 F.3d 1052, 1057 (10th Cir. 1993)* ("The judiciary has historically deferred to executive and legislative determinations of tribal recognition." (citing *United States v. Rickert, 188 U.S. 432, 445, 23 S. Ct. 478, 47 L. Ed. 532 (1903)*; *United States v. Holliday, 70 U.S. 407, 419, 18 L. Ed. 182 (1865))*). The NIA claims will be dismissed for this independent reason.

Again, the plaintiffs allege that their property rights were protected by -- and later violated under -- the Nonintercourse Act, *25 U.S.C. § 177*, which provides that no person or entity may purchase or sell Indian lands without the federal government's approval. *See supra* note 5. To establish a *prima facie* NIA violation, a plaintiff must establish four elements: (1) that it is an Indian tribe; (2) that the land in question is tribal land; (3) that the United States has never [*41] consented to or approved the alienation of this tribal land; and (4) that the trust relationship between the United States and the tribe has not been terminated or abandoned. [17] *Delaware Nation v. Pennsylvania, 446 F.3d 410, 418 (3d Cir. 2006).* [18]

> 17 It bears noting that Holloway cannot recover personally for any alleged NIA violation. "The Nonintercourse Act protects only Indian tribes or nations, and not individual Indians." *Unalachtigo Band, 867 A.2d at 1226* (citing *James v. Watt, 716 F.2d 71, 72 (1st Cir. 1983))*. The NIA claims are therefore dismissed to that extent.
>
> 18 *See also Seneca Nation of Indians v. New York, 382 F.3d 245, 258 (2d Cir. 2004)*; *Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 56 (2d Cir. 1994)*; *Catawba Indian Tribe v. South Carolina, 718 F.2d 1291, 1295 (4th Cir. 1983), aff'd, 740 F.2d 305 (4th Cir. 1984)* (en banc), *rev'd on other grounds, 476 U.S. 498, 106*

S. Ct. 2039, 90 L. Ed. 2d 490 (1986); *Epps v. Andrus, 611 F.2d 915, 917 (1st Cir. 1979)* (per curiam); *cf. Montoya v. United States, 180 U.S. 261, 266, 21 S. Ct. 358, 45 L. Ed. 521, 36 Ct. Cl. 577 (1901)*.

Focus on the first. "To prove tribal status under the Nonintercourse Act, an Indian group must show that it is a body of Indians of the same or a similar race, united in [*42] a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 59 (2d Cir. 1994)* (citations omitted). Recall, however, that in this case the plaintiffs' tribal authenticity is hotly disputed, as another tribal group claims that its members (and not the plaintiffs) comprise the real Sand Hill Band. *See supra* note 4. Given this factual dispute and the fact that the plaintiffs have either (1) not yet begun the federal recognition process (which would involve proving their tribal authenticity); or (2) have only recently begun taking those steps, the BIA is the proper forum to resolve these issues before any legitimate analysis in this Court could be undertaken.

In 1832, Congress established within the Executive Branch the office of Commissioner of Indian Affairs, and delegated authority to that officer to oversee "all matters arising out of Indian relations." 4 STAT. 564, § 1 (July 9, 1832), codified at *25 U.S.C. §§ 1, 2*. Two years later, Congress granted the President authority to "prescribe such rules and regulations as he may think fit, for carrying into effect the various [*43] provisions of [any act] relating to Indian affairs[.]" 4 STAT. 738, § 17 (June 30, 1834), codified as amended at *25 U.S.C. § 9*. In the same act, Congress also established the Department of Indian Affairs, predecessor to the BIA. *See Golden Hill Paugussett Tribe, 39 F.3d at 57*; 4 STAT. 735-38 (June 30, 1984).

Almost 150 years later, the Department of the Interior exercised its regulatory authority by promulgating a detailed administrative program known as the "federal acknowledgement process," under which the BIA "recognize[s] American Indian tribes on a case-by-case basis." *Golden Hill Paugussett Tribe, 39 F.3d at 57*; *see also Miami Nation of Indians v. U.S. Dep't of the Interior, 255 F.3d 342, 345 (7th Cir. 2001)*. Federal recognition bestows upon Indian tribes certain rights and privileges. Chief among them are quasi-sovereignty and the ability to acquire land (to be held in trust by the federal government). *See 25 C.F.R. § 151.3-4*. When a tribal group seeks formal recognition (by filing a letter of intent with the BIA, and then later a full-fledged petition for recognition), the BIA conducts a complex historical, anthropological, and genealogical study to determine whether the group [*44] is in fact a *bona fide* "Indian tribe" warranting governmental recognition. *See Golden Hill Paugussett Tribe, 39 F.3d at 57*; *25 C.F.R. § 83.1, et seq.*

A tribal group seeking federal recognition must satisfy seven mandatory criteria: (a) the group has been identified as an American Indian entity on a substantially continuous basis since 1900; (b) a "predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present"; (c) the petitioning group "has maintained political influence or authority over its members as an autonomous entity from historical times until the present"; (d) a copy of the group's present governing document must be submitted, including its membership criteria; (e) the petitioning group's "membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity"; (f) the group's membership is composed principally of persons who are not members of any already-acknowledged North American Indian tribe; and (g) neither the petitioning group nor its members are the subject of congressional [*45] legislation that has expressly precluded their relationship with the federal government. *25 C.F.R. § 83.7*; *see also Miami Nation of Indians, 255 F.3d at 345-46*. By its nature, this multifaceted inquiry is fact-intensive and complex.

The plaintiffs fail to proffer in the SAC non-conclusory facts explaining how they themselves are the authentic lineal descendants entitled to assert NIA claims pertaining to the sale of the Brotherton Reservation. Bald assertions that an entity is a "tribe" -- especially where, as here, competing groups assert mutually exclusive claims of tribal membership -- are not sufficient. *See Shawnee Indians, 253 F.3d at 548* (rejecting plaintiff's claim on motion to dismiss that BIA acted outside its authority when it denied tribal recognition; stating that the plaintiff's "argument assumes the very factual issue at the heart of this litigation," and that plaintiff "can only prevail on its contention if we accept its bare assertion that it is the present-day embodiment of the Shawnee Tribe"); *cf. Twombly, 550 U.S. at 555*. In short, the SAC is devoid of any specific allegations that would permit the Court to draw a plausible inference that the plaintiffs are who they [*46] say they are. Nor does the complaint allege that the plaintiffs have ever petitioned the BIA for federal acknowledgement. (The plaintiffs do claim in their brief -- but without providing any factual or contextual support -- that they initiated the BIA process at some point in 2007. Pl. Opp. to State Br. at 26.) Given the factual dispute over the plaintiffs' ancestral lineage, the BIA is better equipped than is this Court to adjudicate these intricate matters. For the reasons that follow, dismissal of the NIA claims is appropriate under the doctrine of primary jurisdiction.

The doctrine of primary jurisdiction "'applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.'" *MCI, 71 F.3d at 1103* (quoting *Greate Bay Hotel & Casino v. Tose, 34 F.3d 1227, 1230 n.5 (3d Cir. 1994)).* In other words, the doctrine "applies where the administrative agency cannot provide a means of complete redress to the complaining party and yet the dispute involves issues that are clearly better resolved in the first instance [*47] by the administrative agency charged with regulating the subject matter of the dispute." *Id. at 1105* (citation omitted). [19] "There is no fixed formula for determining whether the doctrine of primary jurisdiction applies and matters should be evaluated on a case-by-case basis." *Global Naps, Inc. v. Bell Atlantic-New Jersey, Inc., 287 F. Supp. 2d 532, 549 (D.N.J. 2003)* (Greenaway, J.). [20]

19 *See also CSX Transp. Co. v. Novolog Bucks County, 502 F.3d 247, 253 (3d Cir. 2007)* ("Primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.") (citations and internal quotation marks omitted), *cert. denied, 552 U.S. 1183, 128 S. Ct. 1240, 170 L. Ed. 2d 65 (2008); Cheyney State College Faculty v. Hufstedler, 703 F.2d 732, 736 (3d Cir. 1983)* (stating that the doctrine applies when decisionmaking "is divided between courts and administrative agencies [and] calls for judicial abstention in cases where protection of the integrity of a regulatory scheme dictates primary resort to the agency which administers the scheme"); *Golden Hill Paugussett Tribe, 39 F.3d at 58-59* ("Primary jurisdiction applies where a claim is originally cognizable [*48] in the courts, but enforcement of the claim requires, or is materially aided by, the resolution of threshold issues, usually of a factual nature, which are placed within the special competence of the administrative body.").

20 The Court has taken into account the four factors listed by the Court in *Global Naps, see 287 F. Supp. 2d at 549*, and its analysis reflects those queries. To the extent that the plaintiffs believe these factors comprise a four-element "test," *see* Pl. Opp. to State Br. at 26, they are not correct, as the court in *Global Naps* explicitly emphasized the flexible nature of the inquiry.

The Court recognizes "that tribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Nonintercourse Act." *Golden Hill Paugussett Tribe, 39 F.3d at 57; see also Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975)* ("There is nothing in the [NIA] to suggest that 'tribe' is to be read to exclude a *bona fide* tribe not otherwise federally recognized."). And it is true, as the plaintiffs advise, that the BIA lacks the ultimate jurisdiction to resolve NIA claims. *See Golden Hill Paugussett Tribe, 39 F.3d at 57.* [*49] Yet the issues of Indian status for NIA purposes and Indian status under the federal recognition program "overlap to a considerable extent." *Id.* Especially so in this case. The antecedent issue of the plaintiffs' tribal status is tightly intertwined with their claim that the defendants have deprived *them* (and not other alleged Sand Hill Indians) of personal property rights. In other words, while a federal court must adjudicate the NIA claim, here this Court cannot do so due to the live dispute over the legitimacy of the plaintiffs' ancestry. *See Passamaquoddy Tribe, 528 F.2d at 377* ("This is not to say that *if there were doubt about the tribal status of the Tribe*, the judgments of officials in the federal executive branch might not be of great significance.") (emphasis added). Because an altogether different group claims that it is the rightful Sand Hill Band, whether the plaintiffs are an "Indian tribe" for NIA purposes is an issue parallel with, if not identical to, the federal government's failure (thus far) to recognize the plaintiffs as an 'Indian tribe" under the administrative scheme.

The Second Circuit's invocation of the primary jurisdiction doctrine in *Golden Hill Paugussett* [*50] *Tribe* is on point and instructive. In that case, a tribal group asserted a land claim pursuant to the Nonintercourse Act, claiming that an 1802 Connecticut land sale violated the NIA. *39 F.3d at 54.* The defendants argued that the tribe could not assert NIA claims because it had not been recognized by the Department of the Interior (although a petition with the BIA had been filed), and the district court agreed, dismissing the complaint for lack of subject-matter jurisdiction. *Id. at 55-56.* Though the Second Circuit rejected the district court's dismissal on standing and subject-matter jurisdiction grounds, it found the doctrine of primary jurisdiction on stronger footing. The court recognized the discrete difference between the tribal status necessary to press a claim under the Nonintercourse Act and the tribal status necessary for BIA recognition. Nonetheless, the Second Circuit held that the issues were close enough to warrant judicial deference to the primary expertise of the BIA. This Court quotes at length Judge Cardamone's incisive analysis:

> The primary jurisdiction doctrine serves two interests: consistency and uniformity in the regulation of an area which Congress has entrusted [*51] to a federal agency; and the resolution of technical questions of facts through the agency's

specialized expertise, prior to judicial consideration of the legal claims.

Federal courts have held that to prove tribal status under the Nonintercourse Act, an Indian group must show that it is "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *See, e.g., United States v. Candelaria, 271 U.S. 432, 442, 46 S. Ct. 561, 70 L. Ed. 1023 (1926)* (quoting *Montoya v. United States, 180 U.S. 261, 266, 21 S. Ct. 358, 45 L. Ed. 521, 36 Ct. Cl. 577 (1901))*[.] The formulation of this standard and its use by the federal courts occurred after Congress delegated to the executive branch the power to prescribe regulations for carrying into effect statutes relating to Indian affairs . . . and without regard to whether or not the particular group of Indians at issue had been recognized by the Department of the Interior. . .

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The *Montoya/Candelaria* definition [for NIA purposes] and the BIA criteria *both have anthropological, political, geographical and cultural bases and require, at a minimum, a community with a political structure. The two standards overlap, though* [*52] *their application might not always yield identical results.* A federal agency and a district court are not like two trains, wholly unrelated to one another, racing down parallel tracks towards the same end. *Where a statute confers jurisdiction over a general subject matter to an agency and that matter is a significant component of a dispute properly before the court, it is desirable that the agency and the court go down the same track -- although at different times -- to attain the statute's ends by their coordinated action.*

Whether there should be judicial forbearance hinges therefore on the authority Congress delegated to the agency in the legislative scheme. The BIA has the authority to prescribe regulations for carrying into effect any act relating to Indian affairs. Before the promulgation of the acknowledgment regulations there did not exist a uniform, systematic procedure to determine tribal status within the Department of the Interior. Therefore, deferral of the issue of tribal status was not required nor would it aid a court in its determination. The Department of the Interior's creation of a structured administrative process to acknowledge "nonrecognized" Indian tribes using [*53] uniform criteria, and its experience and expertise in applying these standards, has now made deference to the primary jurisdiction of the agency appropriate. In fact, the creation in 1978 of the acknowledgment process currently set forth in 25 C.F.R. Part 83 -- a comprehensive set of regulations, the BIA's experience and expertise in implementing these regulations, and the flexibility of the procedures weigh heavily in favor of a court's giving deference to the BIA. . . .

The general notion of deference was the philosophical basis for Justice Frankfurter's opinion in *Far East Conference v. United States, 342 U.S. 570, 72 S. Ct. 492, 96 L. Ed. 576 (1952).* There, in writing for the Court, he explained that *issues of fact not within the ordinary ken of judges and which required administrative expertise should be resolved preliminarily by the agency, which Congress has vested with authority over the subject matter, even though the ascertained facts later serve "as a premise for legal consequences to be judicially defined." Id. at 574. A court should delay forging ahead when there is a likelihood that agency action may render a complex fact pattern simple or a lengthy judicial proceeding short.* Thus, the judicial hand [*54] should be stayed pending reference of plaintiffs claims to the agency for its views. A federal court, of course, retains final authority to rule on a federal statute, but should avail itself of the agency's aid in gathering facts and marshalling them into a meaningful pattern. As a consequence, under the present circumstances, the BIA is better qualified by virtue of its knowledge and experience to determine at the outset whether Golden Hill meets the criteria for tribal status. This is a question at the heart of the task assigned by Congress to the BIA and should be answered in the first instance by that agency. The BIA's resolution of these factual issues regarding tribal status will be of considerable assistance to the dis-

> trict court in ultimately deciding Golden Hill's Nonintercourse Act claims.

Id. at 59-60 (emphasis added, some internal citations omitted). [21]

> 21 *Cf. also Shawnee Indians, 253 F.3d at 550-51* (affirming dismissal of suit seeking federal recognition, and requiring exhaustion of administrative efforts in the BIA before federal adjudication becomes appropriate); *James v. U.S. Dep't of Health & Human Services, 824 F.2d 1132, 1138, 263 U.S. App. D.C. 152 (D.C. Cir. 1987)* (same).

And so it is here. [*55] This Court is ill-equipped to assess the anthropological, political, geographical, genealogical, and cultural minutiae necessary to determine whether the plaintiff Sand Hill Band qualifies as a tribe under the NIA, whether it deserves federal acknowledgment, and whether the plaintiffs are in fact the rightful successors of the Brotherton Indians. This is especially true where, as here, the veracity of plaintiffs' claim of tribal ancestry has been called into question by the State Defendants and third parties. *See Unalachtigo Band of the Nanticoke Lenni Lenape Nation v. New Jersey, 375 N.J. Super. 330, 867 A.2d 1222, 1231 (N.J. Super. Ct. App. Div. 2005)* (dismissing for lack of subject-matter jurisdiction NIA claim challenging the same land transaction challenged here, and strongly suggesting that the plaintiffs "first obtain a determination from the BIA that the Unalachtigo Band constitutes an Indian tribe directly descendant from the tribe of Indians who lived on the Brotherton Reservation"). And, as noted, still other groups have laid claim to the land now at issue. *See generally id.; Unalachtigo Band of the Nanticoke Lenni Lenape Nation v. Corzine, No. 05-5710, 2008 U.S. Dist. LEXIS 108393 (D.N.J. May 20, 2008)*; [*56] *supra* note 4. The competing land claims and the competing claims to rightful membership in the Sand Hill Band relegate this Court's institutional expertise far behind that of the executive agency established precisely to make these types of determinations.

And therefore, even had the Court rejected the State Defendants' claim to immunity secured by the *Eleventh Amendment* (which it has not), it would dismiss the SAC's claims under the Nonintercourse Act based upon these disputed ancestral issues, whose resolution would first be required before a proper analysis of the NIA claims could be undertaken. Because two coordinate branches of government have promulgated a well-developed scheme for answering these difficult questions, it behooves this Court not to volunteer answers in the first instance. [22]

> 22 Normally a court's invocation of the doctrine of primary jurisdiction compels referral of the matter to the executive agency. *See CSX, 502 F.3d at 253*; *Golden Hill Paugussett Tribe, 39 F.3d at 59-60*. And had the Court rejected the sovereign immunity arguments discussed above, it would indeed have referred the matter to the BIA for a threshold resolution of these issues. *See Global Naps, 287 F. Supp. 2d at 549-50* [*57] (after holding that it had no subject-matter jurisdiction over two particular claims, stating that even if it did it would defer under the primary jurisdiction doctrine and refer the matter to the appropriate agency). Given the Court's *Eleventh Amendment* holding, however, it makes no referral to the BIA in this case. The Court's primary jurisdiction discussion here serves only as an additional, independent reason why the NIA claims are not properly before this Court.

C. Title VI

In Counts 3 and 9, the plaintiffs allege that the individual State Defendants, in their personal capacities, have violated their civil rights secured by Title VI of the Civil Rights Act of 1964. The plaintiffs claim in Count 3 that the State Defendants "have failed to ensure a non-discriminatory process by which all Indian Nations can be given an opportunity to compete for a position on [the New Jersey Commission on American Indian Affairs], and be represented by that body directly." SAC P 143. They claim in Count 9 that the State Defendants have "selectively discriminated against [them] by their arbitrary and capricious selection process" to the Commission. SAC P 187. The plaintiffs seek, in addition to damages, [*58] injunctive relief requiring removal of all representatives currently sitting on the Commission and immediate appointment in their favor. *Id.* P 190. [23]

> 23 The SAC cites *Ex Parte Young* in seeking injunctive relief. SAC PP 186, 189. As the State Defendants correctly point out, however, resort to *Young* is unnecessary here, for Congress has abrogated *Eleventh Amendment* immunity in Title VI cases. *See Three Rivers Ctr. for Indep. Living, Inc. v. Hous. Auth. of the City of Pittsburgh, 382 F.3d 412, 426 n. 14 (3d Cir. 2004)* (quoting *Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 72, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992)*); *42 U.S.C. § 2000d-7*.

Relevant here, Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

under any program or activity receiving Federal financial assistance." *42 U.S.C. § 2000d.* The statute "provides for federal funding to be terminated if an entity receiving assistance fails to comply with its requirements." *A.W. v. Jersey City Pub. Sch., 486 F.3d 791, 804 (3d Cir. 2007)* (en banc); *42 U.S.C. § 2000d-1.* Additionally, though it contains no express [*59] private right of action, the Supreme Court has found in the statute an implied private right of action. *See id.* (citing *Barnes v. Gorman, 536 U.S. 181, 185, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002)).* To establish a *prima facie* Title VI violation, the plaintiff must plead sufficiently (1) that there is racial or national origin discrimination and (2) that the entity engaging in discrimination is receiving federal financial assistance. *Baker v. Bd. of Regents of State of Kan., 991 F.2d 628, 631 (10th Cir. 1993)*

The State Defendants argue that the plaintiffs improperly sued them in their individual capacities, because Title VI claims may only be brought against organizations. While the Third Circuit has not squarely addressed the issue in a precedential decision, [24] the Sixth and Eleventh Circuits have held that individual defendants are not proper defendants under Title VI, because they are not "program[s] or activit[ies]" receiving federal financial assistance. *See Shotz v. City of Plantation, 344 F.3d 1161, 1169 (11th Cir. 2003); Buchanan v. City of Bolivar, 99 F.3d 1352, 1356 (6th Cir. 1996), superseded by statute on other grounds, see Hernandez v. Attisha, No. 09-2257, 2010 U.S. Dist. LEXIS 20235, at *8 (S.D. Cal. Mar. 5, 2010).* [*60] [25] The Court agrees that individuals are not the proper defendants in a Title VI case. To the extent Counts 3 and 9 seek relief against individual state officials for violations of Title VI, therefore, the claims will be dismissed because those defendants do not fall within the statute's scope. [26]

24 *But see Shannon v. Lardizzone, 334 F. App'x 506, 508 (3d Cir. (2009)* (per curiam) (not precedential) ("Courts have held that, because Title VI forbids discrimination only by recipients of federal funding, individuals cannot be held liable under Title VI. We agree with this reasoning.") (internal citations omitted); *cf. Emerson v. Thiel College, 296 F.3d 184, 190 (3d Cir. 2002)* (noting that there is no individual liability under *Title IX of the Education Amendments Act of 1972,* which is substantially similar to Title VI).

25 *Accord Taylor v. Altoona Area Sch. Dist., 513 F. Supp. 2d 540, 558 (W.D. Pa. 2007); Folkes v. N.Y. Coll. of Osteopathic Med. of N.Y. Inst. of Tech., 214 F. Supp. 2d 273, 292 (E.D.N.Y. 2002); Steel v. Alma Pub. Sch. Dist., 162 F. Supp. 2d 1083, 1085 (W.D. Ark. 2001); Powers v. CSX Transp., Inc., 105 F. Supp. 2d 1295, 1311-12 (S.D. Ala. 2000); Wright v. Butts, 953 F. Supp. 1343, 1350 (M.D. Ala. 1996);* [*61] *Jackson v. Katy Indep. Sch. Dist., 951 F. Supp. 1293, 1298 (S.D. Tex. 1996).*

26 The State Defendants also argue that the Title VI claims fail because the New Jersey Commission on American Indian Affairs does not receive or distribute federal funding, a necessary prerequisite for a Title VI claim. The SAC specifically alleges that the Commission receives federal funding, *see, e.g.,* SAC P 145, and the plaintiffs have submitted documentation from the State demonstrating that the Commission obtains *revenues* in the amount of $ 150,000. *See* D.E. # 128-8. But the documentation plainly does not establish that the Commission receives funds from the federal government. Other publicly available information suggests quite the opposite. *See* Table, Office of Management & Budget, New Jersey Department of the Treasury, *Federal Funds Appropriations,* FY 2008-2009, at D-12-13 (listing no federal funds appropriations to the Commission of American Indian Affairs), *available at http://www.state.nj.us/treasury/omb/publications/09budget/index.shtml* (last visited June 29, 2010). Furthermore, the State Defendants have offered to certify that the Commission receives no federal funding. Def Rep. Br. at 20. Given [*62] the Court's resolution herein, and the present procedural posture, such a certification is unnecessary. The Court will not address the funding issue in greater detail at this time. The Court mentions it, however, for completeness.

To the extent Counts 3 and 9 can be liberally construed as claims against the proper defendants -- the State of New Jersey or the Commission itself (and to the extent the SAC properly seeks injunctive relief against the individual state officers) -- they fail as well. The plaintiffs have not "plead[ed] factual content that allows the court to draw the reasonable inference that the [State Defendants are] liable for the misconduct alleged." *Iqbal, 129 S. Ct. at 1949.* Instead, Counts 3 and 9 (*see* SAC PP 141-46, 185-90), along with the SAC's background allegations (*see* SAC PP 10-11, 15, 112-17), do little more than assert in conclusory and threadbare fashion that the defendants have, for instance, "colluded with the [Commission] and the Indian entities represented therein, to keep the plaintiff[s] from being given representation on that body[.]" *Id.* P 10.

The plaintiffs suggest that the Commission selection process is discriminatory and arbitrary because the defendants [*63] "have reserved appointment power to themselves," SAC P 144, and because the defendants have failed to "insure [sic] institution of a codified

standard by which all Indian Nations can be selected for representation." *Id.* But it is the very statute creating the Commission that accords such appointment powers to the Governor. *See N.J. Stat. Ann. § 52:16A-53.* Specifically, the statute prescribes that the Commission be comprised of nine members: the Secretary of State (*ex officio*) and eight tribal members. *Id.* Six of the members must be appointed from the following three tribes (two members per tribe): the Nanticoke Lenni Lenape Indians, the Ramapough Mountain Indians, and the Powhatan Renape Nation. *Id.* These members are to be recommended by their respective tribes, and are "appointed by the Governor . . . with the advice and consent of the Senate." *Id.* The other two members must be members of the "Intertribal People," that is, "American Indians who reside in New Jersey and are not members of the Nanticoke Lenni Lenape Indians, the Ramapough Mountain Indians, or the Powhatan Renape Nation, but are enrolled members of another tribe recognized by another state or the federal government." [*64] *Id.*

The complaint fails to allege why or how the State Defendants have violated the federal statutory rights of the plaintiffs by appointing, pursuant to the Commission selection scheme -- persons other than the plaintiffs. If the plaintiffs believe that the Intertribal allotment and the favored appointments of the three tribes specified by *§ 52:16A-53* is ill-advised or bad policy, their remedy is with the Legislature. But such a belief does not in itself establish discriminatory conduct actionable under Title VI. [27]

> 27 The plaintiffs intimate in their brief that the statute itself "is discriminatory on its face." Pl. Opp. to State Br. at 28. To the extent that the plaintiffs challenge the validity of the statute itself, the Court does not consider the claim, as it appears nowhere in the SAC. The SAC seeks relief for the defendants' conduct, not the invalidity of the statute.

Vague allegations that the individual defendants "arbitrarily select members to the . . . Commission . . . with no regard for fairness," SAC P 116, that the selection process is "arbitrary and capricious," *id.*, and that the defendants have "selectively discriminated against the [p]laintiff[s], *id.* P 111, "will not [*65] do." *Twombly, 550 U.S. at 555.* This Court is not obliged to accept as fact a complaint's conclusory legal assertions where specific factual allegations do not rise above the speculative level. *Fowler, 578 F.3d at 210-11.* The complaint here does not explain what it is that the State Defendants have done to "selectively discriminate" against the plaintiffs (except that they have not, to date, appointed to the Commission a person from the plaintiff's group), nor does the SAC provide any detail why or how the selection process under the statute is irrational. Rather, the allegations of discriminatory conduct fundamentally are "unadorned, the-defendant[s]-unlawfully-harmed-me accusation[s]." *Iqbal, 129 S. Ct. at 1949.* Accordingly, they fail on their face to state actionable Title VI claims.

Finally (and related to the point above), the complaint fails to set forth the manner in which the plaintiffs have been subjected to discrimination "*on the ground* of race, color, or national origin." *42 U.S.C. § 2000d-1* (emphasis added). Instead, the plaintiffs complain only that their members have not yet been chosen for representation on the Commission. That fact alone, however, is not discrimination [*66] *based on* a protected characteristic. The plaintiffs take umbrage not at the *reasons* the defendants have thus far failed to secure them representation on the Commission. Their challenge, instead, is to the end result in itself. Indeed, the plaintiffs' opposition brief says so expressly: "[T]he State individuals/officials . . . failed to designate plaintiffs as a tribe despite plaintiffs[']' repeated requests for consideration." Pl. Opp. to State Br. at 28. This does not meet the *Twombly/Iqbal* burden of alleging specific facts warranting a plausible inference of discriminatory treatment.

Counts 3 and 9 will be dismissed. [28]

> 28 The plaintiffs suggest in their brief that the alleged Title VI violation is also actionable under *§ 1983. See* Pl. Opp. Br. at 15. The Court disagrees. *See A.W. v. Jersey City Pub. Sch., 486 F.3d 791, 804-05 (3d Cir. 2007)* (en banc) (holding that claims under *§ 504* of the Rehabilitation Act, which "adopts the schemes, rights and remedies" of Title VI, are not also cognizable under *§ 1983*); *M.M.R.-Z. v. Commw. of Puerto Rico, 528 F.3d 9, 13 n.3 (1st Cir. 2008)* ("*Section 1983* cannot be used as a vehicle for . . . statutory claims that provide their own frameworks for [*67] damages."); *Alexander v. Chicago Park Dist., 773 F.2d 850, 856 (7th Cir. 1985)* (holding that that the remedial scheme in Title VI is comprehensive, and that Congress consequently did not intend to allow violations of Title VI to be remedied through *§ 1983*); *Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 756 (2d Cir. 1998)* (holding that Title IX, which is almost identical to Title VI, is similarly comprehensive and does not support claims under *§ 1983*).

D. *Section 1983* and *1985* Claims

The Court has already dismissed Count 2 insofar as it asserts claims under *42 U.S.C. §§ 1983* and *1985* against the State of New Jersey, the New Jersey Commission on American Indian Affairs, and the individual State Defendants sued in their official capacities. It now

dismisses the remainder of Count 2, i.e., to the extent asserted against the individual State Defendants in their personal capacities.

At the outset, Count 2 fails to allege any specific facts that would permit a plausible inference that any individual State Defendant conspired with one or more of the other individual State Defendants to deprive the plaintiffs of any constitutional protection. *See Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997)* [*68] ("[T]he reach of *section 1985(3)* is limited to private conspiracies predicated on 'racial, or perhaps otherwise class based, invidiously discriminatory animus.'" (quoting *Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)*)); *Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 34 (3d Cir. 1996)* ("An actionable *section 1985(3)* claim must allege that (i) the alleged conspirators possessed some racial, or perhaps otherwise class-based, invidiously discriminatory animus, and (ii) their alleged conspiracy was aimed at interfering with rights . . . protected against private, as well as official, encroachment.") (internal citations and quotation marks omitted). A complaint asserting a *§ 1985(3)* claim will not withstand a *Rule 12(b)(6)* motion by claiming only that multiple defendants have conspired against the plaintiff. *See Romero-Barcelo, 75 F.3d at 34* ("The conspiracy allegation must identify an overt act."); *accord Slotnick v. Staviskey, 560 F.2d 31, 33 (1st Cir. 1977)* ("Complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with references to material facts."). And Count 2 does nothing more than that. *See, e.g.*, SAC [*69] P 137. To the extent that the SAC presses a cause of action under *42 U.S.C § 1985(3)*, therefore, it will be dismissed.

For reasons identical to its dismissal of the plaintiffs' Title VI claim, *supra*, the Court further holds that Count 2 fails to allege a violation of Due Process. Insofar as the plaintiffs allege that the State Defendants have violated their *Fourteenth Amendment* rights by refusing to appoint one of their own to the Commission, the plaintiffs have failed to allege what process they were due in the selection of Commission members, and how the defendants withheld the same.

Finally, to the extent the plaintiffs assert a Due Process challenge to the 1802 sale of the Brotherton Reservation, that claim appears to be little more than a recapitulation of the plaintiffs' Nonintercourse Act claim. *See* SAC P 134 ("American Indians enjoy protected property right[s,] especially in regard to reservation lands. *At a minimum this includes the right to have the sale or transfer of title to such reservation land reviewed by the Federal Government for sufficiency.*") (emphasis added); *id.* P 139 ("The [defendants] had (and have) fair warning that the confiscation, sale, or disposal of protected [*70] Indian lands lies in the sole jurisdiction of the United States government for congressional due process review . . . .") Alleged violations of a congressional act, however, may not be recast as constitutional transgressions so easily. The Court has already rejected the NIA claims.

In any event, the individual State Defendants are not liable under *§ 1983* for a simpler, yet more fundamental reason -- the challenged land sale occurred in 1802, two centuries before the defendants' governmental affiliation. As the Third Circuit has explained:

> A defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of *respondeat superior*. Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity.

Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1986); *accord Evancho v. Fisher, 423 F.3d 347, 353 (3d Cir. 2005)* (affirming dismissal of *§ 1983* claim for failing to allege with any detail the defendant's personal involvement in the challenged actions). [*71] Because the defendants could not possibly have had anything to do with an early 19th-century land transaction, they cannot be held personally liable under *§ 1983* for it.

The SAC fails to establish an actionable *§ 1983* claim. Count 2 will therefore be dismissed. [29]

> 29 Count 11 asserts a direct constitutional claim under Articles I and II of the Constitution. SAC PP 196-201. This claim assails the defendants' role in the procurement of and transacting in the profits on the land formerly constituting the Brotherton Reservation. Because this claim is derivative of, and therefore necessarily depends on, the legitimacy of the claims challenging the 1802 land sale, it fails too. Count 11 is dismissed.

E. Claim Under the Native American Graves Protection and Repatriation Act

The plaintiffs claim in Count 6 that the State and County Defendants have violated the NAGPRA. Enacted in 1990, "[t]he NAGPRA establishes rights of tribes and lineal descendants to obtain repatriation of human remains and cultural items from federal agencies and museums, and protects human remains and cultural items

found in federal public lands and tribal lands." *Romero v. Becken, 256 F.3d 349, 354 (5th Cir. 2001)*; *25 U.S.C. § 3002-3005.*

Count [*72] 6 avers that the plaintiffs' "unique position as the successor heir of the Delaware, Raritan, and Unami Indians entitles them to all the [r]ights, privileges, benefits[,] and protections of the [NAGPRA]," SAC P 159, and that the defendants "have not complied with this act and its provisions" by "retaining, disturbing, possessing, and refusing to return valuable ancestral remains and cultural artifacts." *Id.* PP 160-61. Similarly, the SAC's background allegations state only that the County Defendants "are in possession of burial land and artifacts belonging to [them,] in violation of . . . the [NAGPRA]," SAC P 7, and that the County Defendants have "sold, purchased, and acquired lands, burial artifacts[,] and other protected items that belong to [them,] in violation of the [NAGPRA]." SAC P 18. This is insufficient. The SAC provides no specific facts drawing a plausible picture as to what artifacts or remains the defendants have unlawfully disturbed, confiscated, or retained, where such artifacts or remains were discovered, or the manner in which the defendants have violated the acts. Once again, the conclusory allegation that "the defendants have not complied with the Act" does not pass [*73] muster.

Additionally, the NAGPRA grants district courts the "authority to issue such orders as may be necessary to enforce [its] provisions," *id. § 3013*, but the statute's reach is limited to "federal or tribal land." *Id. § 3002(a)*; *see also Romero, 256 F.3d at 354.* "Federal land" is defined as "any land other than tribal lands which are controlled or owned by the United States[.]" *25 U.S.C. § 3001(5).* "Tribal land," in turn, "means . . . (A) all lands within the exterior boundaries of any Indian reservation; (B) all dependent Indian communities; and (C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act[.]" *25 U.S.C. § 3001(15).* Accordingly, a claim under the NAGPRA fails when the land from which specified remains or artifacts are uncovered is not federal or tribal land. In *Romero*, the Court of Appeals for the Fifth Circuit affirmed a *Rule 12(b)(6)* dismissal of a NAGPRA claim for this very reason:

> Despite th[e] broad enforcement power [that NAGPRA grants], the district court correctly held that [the plaintiffs] claims suffer from a fundamental flaw -- that the human remains were found on *municipal rather than federal or tribal land.* [*74] By its plain terms, the reach of the NAGPRA is limited to 'federal or tribal lands.' *25 U.S.C. § 3002(a).* It is undisputed that the remains in this case were found on the land of the City of Universal City. The fact that the U.S. Army Corps of Engineers, a federal agency, was involved in a supervisory role with the Texas Antiquities Commission does not convert the land into 'federal land' within the meaning of the statute.

Romero, 256 F.3d at 354 (emphasis added); *see also W. Mohegan Tribe and Nation of N.Y. v. New York, 100 F. Supp. 2d 122, 125 (N.D.N.Y. 2000)* ("NAGPRA governs the disposition of Native American cultural items that are 'excavated or discovered on federal or tribal lands.' *25 U.S.C. § 3002(a).* As this Court [has] concluded . . ., the Island [on which the items were alleged to have been discovered] does not fall within the scope of NAGPRA's jurisdiction since it is neither federal nor tribal land within the statute's meaning."), *vacated in part on other grounds, 246 F.3d 230 (2d Cir. 2001).*

Here, the plaintiffs have failed to allege that remains or artifacts were discovered and removed from federal or tribal lands, as defined. As the NAGPRA claim is asserted against every [*75] defendant, State and County, it is impossible to divine from the conclusory allegations why or how the land from whence the alleged artifacts came meets those statutorily defined terms. The land that underlay the 1802 land transaction is not federally owned or controlled, does not fall within the exterior boundaries of an Indian reservation, and -- so far as the factual allegations in the complaint go -- is not a dependant Indian community. [30] Instead, the plaintiffs allege only that the County Defendants "are in possession of burial land and artifacts belonging to the plaintiff" in violation of NAGPRA and that certain County Defendants "have sold, purchased, and acquired lands, burial artifacts and other protected items that belong to the plaintiff in violation" of the statute. Accordingly, because plaintiffs have not pleaded facts properly invoking NAGPRA's protection, Count 6 is dismissed.

> 30 *See 18 U.S.C. § 1151(b)*; *United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981).*

F. 1758 Treaty of Easton

The claims based on the 1758 Treaty of Easton -- asserted in Counts 7, 8, and 13 -- remain. These claims assert that the defendants have breached the 1758 compact granting the Sand [*76] Hill Band plenary authority over the fishing, hunting, and water rights appurtenant to the land formerly constituting the Brotherton Reservation. Whether one accepts as fact the SAC's historical account of the Treaty of Easton or another ver-

sion, *see Unalachtigo Band of the Nanticoke Lenni Lenape Nation v. New Jersey, 375 N.J. Super. 330, 867 A.2d 1222, 1224-25 (N.J. Super. Ct. App. Div. 2005)* (recounting evolution of the 1758 Treaty of Easton and the 1801 sale of the Brotherton lands), the state-law breach-of-contract claims asserted in Counts 7, 8, and 13 fails for two independent reasons.

First, the Court agrees that the equitable doctrine of laches eviscerates the plaintiffs' right to assert claims under the compact. This case is, as the State Defendants contend, controlled by *City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005)*. There, the Oneida Indian Nation sought to reestablish Indian sovereignty over lands that once had been subject to Indian control, then subsequently relinquished, and then many years later reacquired by the tribe. The Supreme Court rejected the tribe's re-established sovereignty argument, holding that the doctrine of laches barred it:

> The wrongs of which [the tribe] [*77] complains in this action occurred during the early years of the Republic. For the past two centuries, New York and its county and municipal units have continuously governed the territory. The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's. And not until the 1990's did [the tribe] acquire the properties in question and assert its unification theory to ground its demand for exemption of the parcels from local taxation. This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [them] from gaining the disruptive remedy it now seeks.

Id. at 216-17; *accord Cayuga Indian Nation v. Pataki, 413 F.3d 266, 277-78 (2d Cir. 2005)*.

Here, the plaintiffs seek possessory redress for an alleged contractual violation that ripened, at the latest, 208 years ago. The grant of such relief would be disruptive to say the least. As was the case in *Sherrill* and *Cayuga*, much has happened in the interim. As a result of the plaintiffs' "long delay in seeking equitable relief against New [Jersey] or its local [*78] units" and the "developments in [the area] spanning several generations," *Sherrill, 544 U.S. at 221*, the Court holds that the doctrine of laches bars their claims.

Second, the Appellate Division of the New Jersey Superior Court rejected precisely this contract claim in *Unalachtigo Band of the Nanticoke Lenni Lenape Nation v. New Jersey, 375 N.J. Super. 330, 867 A.2d 1222 (N.J. Super. Ct. App. Div. 2005)*. In that case, the plaintiffs asserted the same NIA claims that the plaintiffs in this case assert (based on the same facts), but the Appellate Division held that the NIA grants exclusive jurisdiction to federal courts. *867 A.2d at 1227-30*. It went on, however, to address the contractual claim asserted under the Treaty of Easton. And it rejected the claim. *See id. at 1229-30*. The court held that the voluntary sale of the Brotherton Reservation in 1801 (or 1802, according to the plaintiffs) extinguished any contractual rights arising from the 1758 compact:

> In 1801, both parties to the contract agreed, for valuable consideration, to rescind the following two portions of the contract: (1) providing "it shall not be in the power of the said Indians, or their Successors," to sell any part of their interest in [*79] the land, and (2) providing that the Commissioners would hold the reservation in trust for the Indians and their successors, forever.
>
> Because the 1758 Act was a contract, under State law the parties may modify, abrogate, or rescind it. Both parties must clearly assent to the change, and consideration is generally required. There is no question here that the Lenni Lenape not only assented to the sale of their land, but requested it, and the record reflects that they received full value, without any deception or overreaching.
>
> When, at the request of the Indians, the land was sold to other parties in fee-simple absolute, the abnormal qualities of Indian tenure were extinguished. The Act of 1801 . . . in effect rescinded the conflicting provisions of the 1758 Act, and modified the land rights associated with the reservation to permit the reservation to be subdivided and sold to non-Indians.
>
> The provisions at issue do not exist any longer; at least under State contract law without considering the impact of the federal Nonintercourse Act. *Only by application of the federal restraint on the 1801 reservation sale, does plaintiffs' specific performance State claim achieve potential viability.* [*80] *In the absence*

> *of any federal restraint, plaintiffs would not be entitled to specific performance of the 1758 Act.*

Id. at 1231 (emphasis added; internal citations and quotation marks omitted).

The Court has found above that the plaintiffs' NIA claims are not actionable. Accordingly, no "federal restraint" exists to undermine the Appellate Division's contractual analysis of the Treaty of Easton. Whether or not the Appellate Division's holding is binding on this Court, *see* State Def Br. at 40, the Court agrees with it. Accordingly, the claims based on the Treaty of Easton fail.

G. Summary

The following is a summary of the Court's disposition. Counts 1 and 4 -- asserting claims arising directly out of the Constitution -- have been dismissed because *§ 1983* is the exclusive vehicle for achieving redress against a state officer for constitutional deprivations. (Alternatively, those counts are subsumed by Count 2, and fail on their merits.) Count 2 -- asserting claims under *§§ 1983* and *1985* -- has been dismissed for two essential reasons: (1) to the extent it is asserted against the State of New Jersey, the New Jersey Commission on American Indian Affairs, and the individual State Defendants [*81] in their official capacities, those defendants are not "persons" under the statute and cannot be held liable; and (2) to the extent it is asserted against the individual State Defendants in their personal capacities, Count 2 fails to set forth sufficient factual allegations permitting a plausible inference that the defendants have violated the plaintiffs' federal constitutional or statutory rights. Counts 3 and 9 -- asserting claims under Title VI -- fail for similar reasons, and also because individual persons cannot be held liable under the statute.

Counts 5, 7, 8, 11, 14, and 15 assert claims and seek relief under the Nonintercourse Act, challenging the 1802 sale of the land formerly constituting the Brotherton Reservation. Those counts assert claims against the State of New Jersey and one of its agencies, and are accordingly barred by the *Eleventh Amendment*. Alternatively, even if they were not barred, the Court would defer to the primary jurisdiction of the Bureau of Indian Affairs to make complex determinations regarding the plaintiffs' ancestral lineage.

Count 6, asserted against all defendants, fails because the SAC does not set forth sufficient factual matter to permit a plausible [*82] inference that the defendants have violated the NAGPRA. The remaining portion of Count 6 has been withdrawn by the plaintiffs.

Counts 10 and 12 have been withdrawn by the plaintiffs. Finally, Counts 7, 8, and 13 -- asserting contract claims under the Treaty of Easton -- are dismissed under the equitable doctrine of laches and on their merits.

H. Housekeeping

Two issues remain. First, the SAC makes reference to alleged violations of the New Jersey Constitution, although it does not allege them as independent counts. *See, e.g.*, SAC P 118. This Court has dismissed all claims underlying its original federal-question jurisdiction, and has addressed one state-law claim, as it is intertwined with the federal claims. To the extent that the SAC can be read to assert independent state-law claims arising under the New Jersey Constitution, however, the Court will decline to exercise supplemental jurisdiction over them. *See 28 U.S.C. § 1367(c)*; *Carlsbad Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 1862, 1866, 173 L. Ed. 2d 843 (2009)* ("With respect to supplemental jurisdiction . . ., a federal court has subject-matter jurisdiction over specified state-law claims, which it may (or may not) choose to exercise. A district [*83] court's decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary.") (internal citation omitted).

Second, on June 16, 2010, the plaintiffs filed a motion [D.E. 168] to amend the complaint, seeking to file a Third Amended Complaint. Pursuant to her earlier case management order [D.E. 165], Magistrate Judge Shwartz terminated the motion to amend without prejudice pending the disposition of the motions to dismiss [D.E. 173]. Pursuant to that order, and in accord with *Fed. R. Civ. P. 15(a)(2)*, the plaintiffs will be permitted to re-file their motion to amend. The parties are directed to confer with Judge Shwartz no later than July 9, 2010 for specific instructions regarding motion practice.

V. CONCLUSION

For the foregoing reasons, the Court grants the motions to dismiss the Second Amended Complaint.

/s/ Katharine S. Hayden

KATHARINE S. HAYDEN

UNITED STATES DISTRICT JUDGE

DATE: JUNE 30, 2010

ORDER

KATHARINE S. HAYDEN, SENIOR DISTRICT JUDGE.

For the reasons stated in the opinion filed herewith, and good cause appearing,

It is on this 30th day of June, 2010, hereby

ORDERED the motions to dismiss [D.E. 97, 123] the Second [*84] Amended Complaint [D.E. 88] pursuant to *Fed. R. Civ. P. 12(b)(6)* are **GRANTED**; and it is further

ORDERED that the Second Amended Complaint [D.E. 88] is **DISMISSED**; and it is further

ORDERED that plaintiffs shall be granted leave to file a motion to amend the complaint pursuant to *Fed. R. Civ. P. 15(a)(2)*; and it is further

ORDERED that the parties are directed to confer with Judge Shwartz no later than July 9, 2010 for specific instructions regarding motion practice.

/s/ Katharine S. Hayden

KATHARINE S. HAYDEN

UNITED STATES DISTRICT JUDGE

EXHIBIT E

THE SHINNECOCK INDIAN NATION, Plaintiff, VERSUS DIRK KEMPTHORNE, SECRETARY OF THE DEPARTMENT OF THE INTERIOR, JAMES E. CASON, ASSOCIATE DEPUTY SECRETARY OF THE DEPARTMENT OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants.

No 06-CV-5013 (JFB) (ARL)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2008 U.S. Dist. LEXIS 75826

September 30, 2008, Decided
September 30, 2008, Filed

SUBSEQUENT HISTORY: Summary judgment granted by, Claim dismissed by *Shinnecock Indian Nation v. Kempthorne, 2009 U.S. Dist. LEXIS 81957 (E.D.N.Y., Sept. 9, 2009)*

PRIOR HISTORY: *New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 2005 U.S. Dist. LEXIS 28168 (E.D.N.Y., 2005)*

COUNSEL: [*1] For Plaintiff: Evan A. Davis, Esq., Christopher H. Lunding, Esq., and S. Christopher Provenzano, Esq. of Cleary, Gottlieb, Steen & Hamilton, New York, New York; John M. Peebles, Esq., Steven J. Bloxham, Esq., and Darcie L. Houck, Esq., Fredericks, Peebles & Morgan LLP, Sacramento, California.

For Defendants: Kevin P. Mulry, Esq., United States Attorney's Office, Brooklyn, New York.

JUDGES: JOSEPH F. BIANCO, United States District Judge.

OPINION BY: JOSEPH F. BIANCO

OPINION

MEMORANDUM AND ORDER

JOSEPH F. BIANCO, District Judge:

Plaintiff the Shinnecock Indian Nation (the "Nation" or "plaintiff"), brings this action against defendants Dirk Kempthorne, Secretary of the Department of the Interior, James E. Cason, Associate Deputy Secretary of the Department of the Interior, and the United States Department of the Interior (collectively, "Interior" or "defendants"), pursuant to the Administrative Procedure Act, *5 U.S.C. § 551* (the "APA"), arising from Interior's alleged continuing refusal to acknowledge the federal Indian tribal status of the Nation, as well as Interior's alleged refusal to fulfill its trust obligations regarding the Nation's land claim pursuant to the Indian Non-Intercourse Act of 1834, *25 U.S.C. § 177* [*2] (the "NIA").

In particular, the Nation's First Amended Complaint asserts the following four APA claims against Interior: (1) that Interior violated and continues to violate the APA and the *Due Process Clause of the Fifth Amendment* by refusing to acknowledge that the Nation is an Indian tribe entitled to the substantive rights, protections, and assistance flowing from that status under federal law, and that such refusal constitutes a deprivation of valuable property and other rights of the Nation and its members; (2) that Interior violated and continues to violate the APA and the NIA by continuing to deny the Nation's request to Interior, in 2005, that Interior join in a land claim filed by the Nation and, specifically, through Interior's refusal to investigate and take such action as may be warranted under the circumstances with respect to this land claim pursuant to the NIA; (3) that Interior violated and continues to violate the APA and the Federally Recognized Indian Tribes Act of 1994, *25 U.S.C. § 479a et seq.* (the "List Act"), by failing to include the Nation on Interior's two most recently published lists of federally-recognized Indian tribes; and (4) that Interior violated

and [*3] continues to violate the APA and the Federal Acknowledgment Regulations, *25 C.F.R. 83* (the "Part 83 regulations") by unreasonably delaying Interior's decision on the Nation's petition for federal acknowledgment for many years.

The first and third claims are premised on the Nation's contention that it has already been acknowledged as an Indian tribe, in the past, by all three branches of government. First, the Nation contends that Interior and the Commission of Indian Affairs recognized the Nation in 1915 and confirmed its recognition in reports from 1916 to 1958. Second, the Nation asserts that Congress recognized the Shinnecock Indians, the Shinnecock Indian Reservation, and the Shinnecock Nation in 1948 and 1950 in legislation allocating federal, state, and tribal jurisdiction over Indians and Indian Reservations in New York State. Finally, the Nation argues that the 2005 decision by the Honorable Thomas C. Platt in *New York v. Shinnecock Indian Nation, see 400 F. Supp. 2d 486 (E.D.N.Y. 2005)*, which found "that the Shinnecock Indians are in fact an Indian Tribe" as a matter of federal common law under *Montoya v. United States, 180 U.S. 261, 21 S. Ct. 358, 45 L. Ed. 521, 36 Ct. Cl. 577 (1991)* and *United States v. Candelaria, 271 U.S. 432, 46 S. Ct. 561, 70 L. Ed. 1023 (1926)*, *400 F. Supp. 2d at 489*, [*4] has the legal effect of federal recognition equivalent to recognition by Interior or Congress.

Defendants now move to dismiss the First Amended Complaint pursuant to *Rules 12(b)(1)* and *12(b)(6) of the Federal Rules of Civil Procedure*. For the reasons set forth below, with the exception of the Nation's "unreasonable delay" claim under the APA, the claims must be dismissed as a matter of law because there is no legal basis for this Court to review the "recognition" issue under the APA until there has been a final agency action with respect to the petition. The issue of federal recognition of an Indian tribe is a quintessential political question that, in the first instance, must be left to the political branches of government and not the courts. In *Article I, Section 8 of the United States Constitution*, our Founding Fathers explicitly granted Congress the authority to regulate commerce with Indian tribes and Congress has delegated general responsibility over matters pertaining to Indian tribes to the Department of the Interior. Although the Nation asserts that Congress recognized it as a Tribe and established a government-to-government relationship in legislation over fifty years ago, [*5] that legislation did no such thing. Similarly, although the Nation points to evidence that it was recognized at some point in the past by the Department of the Interior as an Indian Tribe, it is undisputed that Interior does not currently recognize a government-to-government relationship with the Nation and that its petition is still pending with Interior. Therefore, it is not the role of the court to usurp the constitutionally-protected province of the politically-elected branches of government by attempting to address the merits of the recognition issue before the Secretary of the Interior has acted.

Moreover, the 2005 court decision concluding that the Nation was an "Indian Tribe" under the common law standard does not, and cannot, alter this constitutional equation. In other words, although the Court clearly had the authority to determine the common law tribe issue for purposes of deciding the limited issue before it, relating to the proposed construction of a casino on Shinnecock land, there is no legal authority for the proposition that such a judicial decision in a particular case allows a tribe to completely bypass the recognition procedure established by the political branches [*6] and create a government-to-government relationship through judicial fiat. In fact, in *Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51 (2d Cir. 1994)*, the Second Circuit specifically noted the following: "The *Montoya/Candelaria* definition and the [Bureau of Indian Affairs (the "BIA")] criteria both have anthropological, political, geographical and cultural bases and require, at a minimum, a community with a political structure. The two standards overlap, *though their application might not always yield identical results.*" *39 F.3d at 59* (emphasis added). Therefore, the Court cannot interfere at this juncture by reviewing the merits of the recognition issue pending with the Interior, but rather must await the outcome of that review. Accordingly, the first and third claims under the APA must be dismissed because there has not been a final agency action by Interior. The second claim, relating to Interior's failure to investigate and take action in connection with the Nation's 2005 land claim litigation, is similarly defective and must be dismissed because there was no final agency action.

Of course, even though the Court cannot review the merits of the recognition issue before [*7] Interior reaches its decision, the Court does have authority under the APA to review whether Interior has unreasonably delayed its decision on that issue. In particular, as noted above, the Nation has set forth detailed allegations in support of their contention that the petition has been pending for years with no action by Interior and that such delay is "unreasonable" under the APA. These allegations of complete inaction by Interior on the Nation's petition for many years, without a clear explanation, certainly constitutes a plausible claim for "unreasonable delay" that requires further inquiry by the Court and survives a motion to dismiss. If the Nation is ultimately successful on this "unreasonable delay" claim, the proper remedy is not for the Court to make the recognition decision ahead of Interior, but rather to direct that Interior make its decision within a certain, specified time frame. Thus, dismissal of the Nation's fourth claim for "unrea-

sonable delay" under the APA is unwarranted and the parties will proceed with discovery on this issue, absent a binding commitment by Interior to a specific, reasonable timeframe for its final determination.

I. BACKGROUND

A. The APA and [*8] the Finality Principle

As stated *supra*, the Nation brought this lawsuit pursuant to the APA. Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *5 U.S.C. § 702*. Specifically, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject" to such judicial review. *5 U.S.C. § 704*. Thus, as the Second Circuit has observed, a "plaintiff may obtain judicial review of an action taken by an agency only if (1) it constitutes agency action, a term of art defined by the APA, and (2) the action was final." *Benzman v. Whitman, 523 F.3d 119, 132 (2d Cir. 2008)* (citations and quotation marks omitted). In particular, the Second Circuit has explained that,

> [u]nder the APA, an action is "final" insofar as it is not a "preliminary, procedural, or intermediate agency action or ruling"; a ruling may be final whether or not it may be subject to appeal or reconsideration "unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative." [*5 U.S.C. § 704*.] [*9] The "core question" for determining finality is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."

Lunney v. United States, 319 F.3d 550, 554 (2d Cir. 2003) (quoting *Dalton v. Specter, 511 U.S. 462, 470, 114 S. Ct. 1719, 128 L. Ed. 2d 497 (1994)*). Further, "the finality requirement of Section 10(c) of the APA, *5 U.S.C. § 704*, . . . is to be interpreted in a pragmatic way, with an eye toward protecting agencies from the disruption of piecemeal appeals and toward insuring that judicial review involves concrete disputes over meaningful interests, rather than abstract disputes over hypothetical governmental actions." *Nat'l Wildlife Federation v. Goldschmidt, 677 F.2d 259, 263 (2d Cir. 1982)* (citations omitted); *see also Acquest Wehrle LLC v. United States, No. 06-CV-654C, 567 F. Supp. 2d 402, 2008 U.S. Dist. LEXIS 47936, at *19 (W.D.N.Y. June 20, 2008)* ("The APA's explicit requirement that the agency action be 'final' before the claim for review can be brought in federal court is jurisdictional, and serves several functions: For example: It allows the agency an opportunity to apply its expertise and correct its mistakes, it avoids disrupting the agency's [*10] processes, and it relieves the courts from having to engage in piecemeal review which is at the least inefficient and upon completion of the agency process might prove to have been unnecessary.") (citation and quotation marks omitted).

B. The Constitutional, Statutory, and Regulatory Framework for Federal Tribal Recognition

(1) The Authority of Congress and Its Delegation to Interior

Article I, Section 8 of the United States Constitution grants Congress the authority to regulate commerce with Indian tribes. *See U.S. Const. Art. I, § 8*. Congress has delegated implementation of its statutes dealing with Indian affairs to Interior. *See 43 U.S.C. § 1457*. In particular, in 1832, "Congress established the position of Commissioner of Indian Affairs (currently within the Department of the Interior) and delegated to the Commissioner the authority to manage all Indian affairs." *Golden Hill, 39 F.3d at 57*. "The Department of the Interior did not actively begin to engage in recognition determinations until after the passage of the Indian Reorganization Act of 1934. After passage of the Indian Reorganization Act recognition proceedings were necessary because the benefits created by it were made available [*11] only to descendants of 'recognized' Indian tribes." *Golden Hill, 39 F.3d at 57* (citation omitted) (quoting *25 U.S.C. § 479*). Interior is bound to publish in the Federal Register "a list of all Indian tribes entitled to receive services from the Bureau [of Indian Affairs (the "BIA")] by virtue of their status as Indian tribes." *25 C.F.R. § 83.5(a)*; *25 U.S.C. § 479a*.

(2) Petitioning for Federal Recognition

In 1978, Interior promulgated the Part 83 regulations, which establishes the process for the review and approval of petitions for acknowledgment of Indian tribes. *See 25 C.F.R. §§ 83.1-83.13*; *see also 43 Fed. Reg. 39361 (1978)*; *59 Fed. Reg. 9280 (1994)*. According to these regulations, the BIA's approval of a tribe's petition under Part 83 "is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such [*12] tribes. Acknowledgment shall subject the Indian tribe to the same authority of Congress

and the United States to which other federally acknowledged tribes are subjected." *25 C.F.R. 83.2.*

(3) The Procedure for Petitions

Under the Part 83 regulations, Indian groups apply for acknowledgment by filing a "documented petition" that must provide "thorough explanations and supporting documentation" demonstrating that the petitioner meets the seven mandatory criteria set forth in the regulations. *See 25 C.F.R. §§ 83.6(c), 83.7.* The burden of proof is on the petitioning group to submit evidence that establishes each of the following seven criteria: (a) the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900; (b) a predominate portion of the petitioning group comprises a distinct community from historical times until the present; (c) the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history; (d) a copy of the group's present governing document or, in its absence, a statement describing in full its membership criteria and current governing procedure; (e) the group's [*13] membership consists of individuals who descend from a historical Indian tribe or from historical tribes which combined and functioned as a single autonomous entity; (f) the membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe; and (g) Congress has not expressly terminated or forbidden a Federal relationship with the group. *See id. § 83.7(a)-(g).*

Upon receipt of a documented petition under the regulations, the Assistant Secretary -- Indian Affairs ("AS-IA") reviews the petition and its supporting documentation and provides technical assistance regarding additional research needed to support the petitioner's claims. *See id. § 83.10(b).* Interested parties, such as the relevant state governors and attorneys general, are provided notice of the petition and the opportunity to become active participants in the process, along with other third parties, such as local governments, other federally recognized Indian tribes, and other non-recognized Indian groups that might be affected by an acknowledgment determination. *See id. §§ 83.1, 83.9.*

Once AS-IA determines that the documentation in the petition is adequate to permit [*14] a full review, the petition is considered "ready" for a full evaluation by the AS-IA and is placed on the "Ready, Waiting for Active Consideration" list (the "ready list"). *See id. § 83.10(d).* The acknowledgment regulations specify that "[t]he order of consideration of documented petitions shall be determined by the date of the Bureau's notification to the petitioner that it considers that the documented petition is ready to be placed on active consideration." *See id.*

The actual evaluation of the petition and its evidence under the regulatory criteria by the agency professional staff occurs during "active consideration." During active consideration, the AS-IA continues the review and publishes proposed findings in the Federal Register. *See id. §§ 83.10(g), (h).* The proposed findings are preliminary decisions as to whether the petitioning group meets the regulatory criteria based on the documentation before the agency at the time.

After issuance of notice in the Federal Register of the proposed findings, there is a public comment period of 180 days, with extensions granted for good cause. *See id. § 83.10(i).* During this time period, the AS-IA provides informal and formal technical assistance, [*15] and petitioners and third parties may submit additional arguments and evidence in support of, or in opposition to, the proposed findings. See id. *§ 83.10(i), (j).* Following the close of the public comment period, the petitioner has a reply period, during which it responds to comments submitted during the public comment period. *See id. § 83.10(k).*

Following consultation, *id. § 83.10(l),* the final phase of active consideration begins. The OFA professional staff evaluates the evidence in the record, prepares a summary of the evidence under the regulatory criteria and recommends to the AS-IA whether the petitioner meets the criteria. The AS-IA then issues a final determination on the status of the petitioner. *See id. § 83.10(l)(2).* This determination is not deemed to be a final and effective agency action, however, unless a period of 90 days passes without the filing of a request for reconsideration with the Interior Board of Indian Appeals ("IBIA"). *See id. § 83.11(a)(2).* If there is a request for reconsideration before the IBIA, the IBIA may affirm or vacate the final determination, or refer issues to the Secretary of the Interior (the "Secretary") for further response or evaluation. *See* [*16] *id. §§ 83.11(e), (f).*

C. The Nation's Federal Acknowledgment Petition

As stated *supra,* plaintiff has filed a petition with Interior for federal tribal recognition pursuant to the Part 83 regulations. Set forth below are facts regarding the history of this petition that are relevant to the instant motion. [1]

1 These facts are taken from the First Amended Complaint ("Compl." or the "complaint") and are not findings of fact by the Court. The Court assumes these facts to be true for the purpose of deciding this motion and construes them in the light most favorable to plaintiff, the non-moving party.

(1) Facts Contained in the Complaint

According to the complaint, the Nation filed a petition for federal tribal recognition in 1978. (Compl. P 3.) Plaintiff alleges that, at the time it was filed, the petition was "fourth in order of priority of consideration" based on applicable regulations. (Compl. P 86.) Subsequently, "for more than fifteen years the Department failed to take any action" on the petition, including any notification to the Nation of any obvious deficiencies or significant omissions in the petition, (Compl. PP 88, 91), even though the regulations in place at that time required the [*17] Interior to make such notification if applicable. (Compl. P 88.)

In particular, the complaint states that, in 1994, Interior amended the regulations under which the Nation first filed its petition. (Compl. P 92.) As a consequence, and "[a]lthough it had never withdrawn the petition and had never been notified by the Department of any obvious deficiencies or significant omissions in that petition," the Nation filed another petition in September 1998. (Compl. P 95.)

According to plaintiff, "[o]n or about December 22, 1998, the Department issued a Technical Assistance Letter to the Nation, requesting additional information. The Nation responded to the Technical Assistance Letter in February 2003." (Compl. P 96.)

Plaintiff further alleges that, "[o]n or about September 9, 2003, the Department notified the Nation that it deemed the Shinnecock Nation's acknowledgment petition 'ready' and awaiting active consideration." (Compl. P 97.) However, "[o]n or about July 26, 2006, the Department issued a second Technical Assistance Letter to the Nation. The Nation responded to the second Technical Assistance Letter on or about November 22, 2006." (Compl. P 98.)

According to the Nation, "[t]o date, nearly [*18] thirty years from the Nation's initial filing of its 1978 acknowledgment petition, and nearly nine years after the filing of its supplemental 1998 acknowledgment petition, the Department has not yet undertaken active consideration of the Nation's Petition." (Compl. P 99.) Further, plaintiff alleges that the "Department has advised the Nation that it believes it may take as long as until the year 2014 before the Department may make a final determination on the Nation's Petition, without binding itself even to this schedule." (Compl. P 99.)

(2) Facts That Developed After This Motion Was Briefed

By letter dated May 23, 2008, after this motion was fully briefed, defendants notified the Court of a new policy promulgated by Interior that would permit tribes that meet certain criteria to bypass the regulatory priority order described *supra*. Interior enclosed a letter it had sent to plaintiff, also dated May 23, 2008, informing plaintiff that the Nation "is the only petitioner presently on the 'Ready' list that might qualify under the new waiver policy. . . . If the genealogical documentation so indicates, the Shinnecock petition will be eligible under this policy to be the top petition on the [*19] 'Ready' list." (Letter from Carl J. Artman, dated May 23, 2008, at 2.) Interior further stated that, "[a]ssuming the genealogical documentation indicates that the Shinnecock petitioner is eligible for a waiver under this new policy, the Department would anticipate placing the Shinnecock petition on active consideration in the late fall of 2008." (Letter from Carl J. Artman, dated May 23, 2008, at 2.)

Subsequently, in accordance with a request the Court made during a conference on June 19, 2008, the parties conferred regarding a potential time limit for the remainder of the acknowledgment process and submitted a letter regarding the status of these negotiations on August 6, 2008. According to this letter, although defendants agreed in theory to set a time limit for plaintiff's petition, the parties could not agree as to the level of "supervision and enforcement by the Court of Defendants' compliance with the proposed timeframes." (Status Letter, dated August 6, 2008, at 2.)

II. PROCEDURAL HISTORY

The Nation filed its initial complaint in this action on September 14, 2006. Defendants moved to dismiss this initial complaint on February 16, 2007, plaintiff responded on March 16, 2007, and [*20] defendants submitted their reply on March 30, 2007. The Court held oral argument on June 19, 2007 (the "June argument"). Following the June argument, and prior to any Court decision on the pending motion, plaintiff requested an opportunity to amend the initial complaint, which the Court granted. On October 5, 2007, plaintiff filed its First Amended Complaint, which is the subject of the instant motion. On December 14, 2007, defendants moved to dismiss the complaint. Plaintiff responded on February 15, 2008, and defendants submitted their reply on March 7, 2008. On April 18, 2008, the Court held oral argument (the "April argument"). [2] By letters dated May 12, 2008 and May 23, 2008, the Nation and defendants, respectively, provided supplemental documents to the Court. Further, on August 6, 2008, at the Court's request, the parties submitted the status report described *supra*.

2 By letter to the Court dated May 8, 2008, the Nation requested leave to file a second amended complaint. The Court granted such leave and plaintiff filed a second amended complaint on August 15, 2008. The parties are presently briefing defendants' motion to dismiss the second amended complaint, which raises two [*21] new

> claims that are wholly discrete from those at issue on the instant motion. The Court will not, therefore, address herein the new claims contained in the second amended complaint.

III. STANDARD OF REVIEW

"A case is properly dismissed for lack of subject matter jurisdiction under *Rule 12(b)(1)* when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)*. In reviewing a motion to dismiss under *Rule 12(b)(1)*, the court "must accept as true all material factual allegations in the complaint, but we are not to draw inferences from the complaint favorable to plaintiffs." *J.S. ex rel. N.S. v. Attica Cent. Schs., 386 F.3d 107, 110 (2d Cir. 2004)* (citation omitted). Moreover, the court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but we may not rely on conclusory or hearsay statements contained in the affidavits." *Id.* (citations omitted). "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Aurecchione v. Schoolman Transp. Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005)*.

In reviewing a motion to dismiss [*22] under *Rule 12(b)(6)*, a court must accept the factual allegations set forth in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See Cleveland v. Caplaw Enters., 448 F.3d 518, 521 (2d Cir. 2006)*; *Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 100 (2d Cir. 2005)*. The plaintiff must satisfy "a flexible 'plausibility' standard, which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)* (emphasis in original). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1969, 167 L. Ed. 2d 929 (2007)*. The Court does not, therefore, require "heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face." *Id. at 1974*. Further, in reviewing a motion to dismiss under *Rule 12(b)(6)*, "the district court is normally required to look only to the allegations on the face of the complaint." *Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007)*. The [*23] Court may only consider a document not appended to the complaint if the document is "incorporated in [the complaint] by reference" or is a document "upon which [the complaint] *solely* relies and . . . is *integral to the complaint.*" *Id.* (quoting *Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991)* (emphases in original). Courts also "'routinely take judicial notice of documents filed in other courts . . . not for the truth of the matters asserted in other litigation, but rather to establish the fact of such litigation and related filings.'" *Crews v. County of Nassau, No. 06-CV-2610 (JFB), 2007 U.S. Dist. LEXIS 6572, at *5 n.2 (E.D.N.Y. Jan. 30, 2007)* (quoting *Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991)*.

"A court presented with a motion to dismiss under both *Fed. R. Civ. P. 12(b)(1)* and *12(b)(6)* must decide the 'jurisdictional question first because a disposition of a *Rule 12(b)(6)* motion is a decision on the merits, and therefore, an exercise of jurisdiction.'" *Coveal v. Consumer Home Mortgage, Inc., No. 04-CV-4755 (ILG), 2005 U.S. Dist. LEXIS 25346, at *7 (E.D.N.Y. Oct. 21, 2005)* (quoting *Magee v. Nassau County Med. Ctr., 27 F. Supp. 2d 154, 158 (E.D.N.Y. 1998)*); [*24] *see also Rhulen Agency, Inc. v. Ala. Ins. Guar. Ass'n, 896 F.2d 674, 678 (2d Cir. 1990)* (noting that a motion to dismiss for failure to state a claim may be decided only after finding subject matter jurisdiction).

IV. THE COURT PRESENTLY LACKS JURISDICTION OVER CLAIMS ONE AND THREE BECAUSE THESE CLAIMS POSE NON-JUSTICIABLE POLITICAL QUESTIONS AND INTERIOR HAS NOT TAKEN "FINAL" ACTION ON THE NATION'S PETITION UNDER THE APA

As stated *supra,* claims one and three of the complaint allege that Interior violated and continues to violate the Nation's rights by refusing to acknowledge that the Nation is an Indian tribe under federal law and to include the Nation on the list. Consequently, plaintiff seeks "to compel inclusion of the Nation" on the list by means of this lawsuit. (Compl. P 2.)

Defendants, however, seek to dismiss claims one and three on the grounds that the political question doctrine and the finality requirements of the APA preclude judicial review of these claims at this time, prior to Interior's issuance of a final determination of plaintiff's federal tribal status. In response, plaintiff argues that the political question doctrine does not bar the Nation's claims because, "in [*25] fact, [the Nation] already has been federally recognized as an Indian tribe" by all three branches of government and, therefore, "is entitled as a matter of law promptly to be placed" on the list. (Compl. P 4.) Similarly, the Nation argues that any one component of the alleged, previous tripartite recognition is sufficient to create a legal obligation on the part of Interior to place plaintiff on the list and, therefore, Interior's failure to do so qualifies as final agency action under the APA. (Pl.'s Mem. at 23-24.) For the reasons set forth below, the Court disagrees with plaintiff on both grounds and concludes that the political question doctrine operates to preclude judicial review of claims one and three

at this juncture because the factual and legal premise set forth in the complaint for compelling federal recognition fails as a matter of law under the circumstances of this case. Thus, at this premature stage in the Nation's administrative proceedings with Interior, *i.e.*, prior to Interior's issuance of a decision on the Nation's petition that is "final" for purposes of APA review, the Constitution does not empower this Court to provide the relief plaintiff seeks and the Court [*26] will not, as plaintiff urges, provide such relief by judicial fiat.

A. Legal Standard

As the Court sets forth below, and as the Second Circuit has explicitly recognized, the issue of federal recognition of an Indian tribe -- *i.e.*, inclusion of an Indian tribe on the list for purposes of establishing, among other things, a government-to-government relationship with the United States -- is a political question that, in the first instance, must be left to the political branches of government and not the courts.

As the Second Circuit has explained,

> the political question doctrine is a function of the constitutional framework of separation of powers. Although prudential considerations may inform a court's justiciability analysis, the political question doctrine is essentially a constitutional limitation on the courts. Just as Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, or to entertain friendly suits, it may not require courts to resolve political questions, because suits of this character are inconsistent with the judicial function under Art. III. Thus, where adjudication would force the court to resolve political questions, the proper course [*27] for the courts is to dismiss.

767 Third Avenue Assocs. v. Consulate General of Socialist Federal Republic of Yugoslavia, 218 F.3d 152, 164 (2d Cir. 2000) (citations and quotation marks omitted). As the Second Circuit has also recognized, a "nonjusticiable" political question would ordinarily involve one or more of the following factors:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of being decided without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995), cert. denied 518 U.S. 1005, 116 S. Ct. 2524, 135 L. Ed. 2d 1048 (1996) (quoting *Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*).

Applying these principles against the constitutional, statutory, [*28] and regulatory background the Court described *supra*, the Second Circuit has held that federal recognition of Indian tribes, *i.e.*, recognition for the purpose of obtaining the benefits described in the Rule 83 regulations, such as a government-to-government relationship with the United States, poses such a political question for Congress -- or, by delegation, the BIA -- to decide in the first instance, and for federal courts to review pursuant to the APA only after a final agency determination. *See Golden Hill, 39 F.3d at 60* ("The BIA has the authority to prescribe regulations for carrying into effect any act relating to Indian affairs. . . . The Department of the Interior's creation of a structured administrative process to acknowledge 'nonrecognized' Indian tribes using uniform criteria, and its experience and expertise in applying these standards, has now made deference to the primary jurisdiction of the agency appropriate."); *see also Arakaki v. Lingle, 477 F.3d 1048, 1067 (9th Cir. 2007)* ("[I]f the question before us were whether a remedy would lie against Congress to compel tribal recognition, the answer would be readily apparent. . . . A suit that sought to direct Congress to [*29] federally recognize an Indian tribe would be nonjusticiable as a political question.") (quoting *Kahawaiolaa v. Norton, 386 F.3d 1271, 1275-76 (9th Cir. 2004)*); *Samish Indian Nation v. United States, 419 F.3d 1355, 1372-73 (Fed. Cir. 2005)* ("To be sure, by adopting the acknowledgment criteria the government voluntarily bound its process within the confines of its regulations, subject to APA review by the courts. But that limitation alters neither the commitment of the federal recognition determination to the political branches, nor the regard for separation of powers that precludes judicial evaluation of those criteria in the first instance. The political determination may be circumscribed by regulation, but it is still a political act. The regulations create a limited role for judicial intervention, namely, APA review to ensure that the government followed its regulations and accorded

due process. Thus, under the acknowledgment regulations, the executive -- not the courts -- must make the recognition determination.") (citations and quotation marks omitted); *Miami Nation of Indians of Indiana, Inc. v. United States Dept. of the Interior, 255 F.3d 342, 347-48 (7th Cir. 2001), cert. denied* [*30] *534 U.S. 1129, 122 S. Ct. 1067, 151 L. Ed. 2d 970, 2002 U.S. LEXIS 672 (2001)* ("It comes as no surprise . . . that the action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review. . . . But this conclusion assumes that the executive branch has not sought to canalize the discretion of its subordinate officials by means of regulations that require them to base recognition of Indian tribes on the kinds of determination, legal or factual, that courts routinely make. By promulgating [the Part 83 regulations] the executive brings the tribal recognition process within the scope of the [APA].") (citation and quotation marks omitted); *United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 550 (10th Cir. 2001)* ("We have indicated that exhaustion is required when, as here, a plaintiff attempts to bypass the regulatory framework for establishing that an Indian group exists as an Indian tribe. . . . '" [T]he judiciary has historically deferred to executive and legislative determinations of tribal recognition,'" and . . . continuing such deference is justified by Congress' broad power over Indian affairs.") (quoting *Western Shoshone Bus. Council v. Babbitt, 1 F.3d 1052, 1057 (10th Cir. 1993)*); [*31] *James v. United States Department of Health and Human Services, 263 U.S. App. D.C. 152, 824 F.2d 1132, 1135 (D.C. Cir. 1987)* ("Regulations establishing procedures for federal recognition of Indian tribes certainly come within the area of Indian affairs and relations. Further, requiring exhaustion allows the Department of the Interior the opportunity to apply its developed expertise in the area of tribal recognition. The Department of the Interior's Branch of Acknowledgment and Research was established for determining whether groups seeking tribal recognition actually constitute Indian tribes and presumably to determine which tribes have previously obtained federal recognition, *see 25 C.F.R. § 83.6(b)*. The Branch staffs two historians, two anthropologists, and two genealogical researchers and has evaluated some twenty petitions for federal acknowledgment. It is apparent that the agency should be given the opportunity to apply its expertise prior to judicial involvement."); *Puzz v. United States Dept. of Interior, No. C 80-2908, 1984 U.S. Dist. LEXIS 23096, at *8-9 (N.D. Cal. 1984)* ("[Q]uestions of the status of particular tribes are political questions that the courts ought not undertake to resolve.") (citing [*32] *Baker, 369 U.S. at 215-17*); see generally *United States v. Holliday, 70 U.S. 407, 419, 18 L. Ed. 182 (1866)* ("In reference to all matters of this kind, 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. If by them those Indians are recognized as a tribe, this court [m]ust do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress.").

(2) Application

Here, as stated *supra,* plaintiff argues that the political question doctrine does not preclude the Court from "compelling" Interior to place the Nation on the list because all three branches of government have already recognized the Nation as a tribe. However, for the reasons set forth below, the Court wholly disagrees and finds that the political question doctrine forecloses judicial review of the Nation's federal tribal status at this juncture.

(1) Alleged Congressional Recognition

Plaintiff first claims that Congress has already classified the Nation as a federally-recognized Indian tribe. Specifically, plaintiff alleges [*33] that,

> in 1948 and 1950, respectively, Congress passed legislation granting New York civil and criminal jurisdiction over Indians on *all* Indian reservations in that State, after having been expressly informed by a Department official in congressional hearings that the Indians and the two Indian reservations on Long Island, New York (which necessarily included the Shinnecock Indians and the Shinnecock Indian Reservation []), were among the Indians and Indian reservations in New York.

(Compl. P 7.)

In particular, the 1948 statute, entitled "Jurisdiction of New York State over offenses committed on reservations within State," states:

> The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: Provided, That nothing contained in this Act [this section] shall be construed to deprive any Indian tribe, band, or community, or members thereof,

> [of] hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish [*34] and game licenses for the exercise of such rights.

25 U.S.C. § 232.

Further, the 1950 statute, entitled "Jurisdiction of New York State courts in civil actions," states:

> The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State. . . .

25 U.S.C. § 233. According to plaintiff, "[n]othing in the language of the two bills indicates any intention that the proposed legislation would not apply to the Shinnecock Indian Reservation and the Shinnecock Indians." (Compl. P 70.) Moreover, plaintiff argues that the legislative history of these statutes demonstrates that they applied to the Nation. (Pl.'s Mem. at 11.) [3] Thus, plaintiff contends, Congress has already recognized the Nation for purposes of, among other things, establishing a government-to-government relationship with the United States and the Court should, therefore, compel Interior to place the Nation on the list. For the reasons set [*35] forth below, however, the Court rejects this argument pursuant to well-settled principles of statutory construction.

> 3 Interior rebuts plaintiff's attempt to resort to legislative history by noting that the fact that Congress did not confer federal recognition on the Nation in 1948 or 1950 is strongly supported by a finding of a Congressional commission in the mid-1970s that the Nation was not a recognized Tribe. Specifically, defendants point out that Congress created the American Indian Policy Review Commission in 1975 in order to "conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians," including "an examination of the statutes and procedures for granting Federal recognition and extending services to Indian communities and individuals." 88 Stat. 1911, Section 2(3). In 1977, the American Indian Policy Review Commission issued its "Final Report," which included a "Chart of Available Information on Nonfederally Recognized Indian Tribes." (See Defs.' Reply, Exh. [*36] A.) The "Shinnecock Tribe: Southampton" appears on this list. (*Id.*)

According to the Supreme Court, "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)* (citations and quotation marks omitted); *see also Estate of Barbara Pew v. Cardarelli, 527 F.3d 25, 30 (2d Cir. 2008)* ("We first look to the statute's plain meaning; if the language is unambiguous, we will not look farther.") (citations and quotation marks omitted). Consequently, as the Second Circuit has held regarding the limited role of legislative history in statutory interpretation, "[w]hen a statute's language is clear, our only role is to enforce that language according to its terms. We do not resort to legislative history to cloud a statutory [*37] text that is clear even if there are contrary indications in the statute's legislative history." *Arciniaga v. General Motors Corp., 460 F.3d 231, 236 (2d Cir. 2006), cert. denied 549 U.S. 1097, 127 S. Ct. 838, 166 L. Ed. 2d 667, 2006 U.S. LEXIS 9491 (2006)* (citations and quotation marks omitted); *see also Green v. City of New York, 465 F.3d 65, 78 (2d Cir. 2006)* ("Statutory analysis begins with the text and its plain meaning, if it has one. Only if an attempt to discern the plain meaning fails because the statute is ambiguous, do we resort to canons of construction. If both the plain language and the canons of construction fail to resolve the ambiguity, we turn to the legislative history.") (citations and quotation marks omitted); *Lee v. Bankers Trust Co., 166 F.3d 540, 544 (2d Cir. 1999)* ("It is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms. Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous.") (citations omitted).

Here, the Court has carefully reviewed the statutes that, according to plaintiff, constituted federal recognition of the Nation and finds that they [*38] plainly and unambiguously do nothing of the sort. These statutes relate, respectively, to New York State's jurisdiction over crimes committed on Indian reservations and civil ac-

tions involving Indian litigants. The statutes do not pertain to tribal recognition -- either explicitly or implicitly -- nor do they even mention the Nation by name. According to the Supreme Court and the Second Circuit, therefore, the Court should not -- and, thus, will not -- consult legislative history in order to strain these statutes beyond their plain and unambiguous meaning. [4] As this Court and other courts have warned, divorcing statutory interpretation from the plain language of the text and instead utilizing legislative history to somehow discern Congressional intent is a precarious exercise by the non-elected branch of government that could lead to results, including the creation of statutory rights, that were never intended by Congress, but rather simply represented misguided efforts by a court to glean such intent, regardless of the plain text, from the murky waters of legislative history. *See, e.g., U.S. ex rel. Fullington v. Parkway Hosp., Inc., 351 B.R. 280, 286 n.4 (E.D.N.Y. 2006)* ("The Supreme [*39] Court has emphasized the dangers in courts interpreting statutes by relying on remarks from floor debates or similar comments by lawmakers to discern legislative intent.") (citations omitted).

> 4 The Court is aware that plaintiff points to the decision in *Bess v. Spitzer, 459 F. Supp. 2d 191, 203-05 (E.D.N.Y. 2006)*, which noted that *25 U.S.C. § 232* is the basis for New York State's criminal jurisdiction over Shinnecock Indians, as purported evidence of "the continued vitality of the federal jurisdiction over and federal acknowledgment of the Shinnecock Indian Nation. . . ." (Pl.'s Mem. at 12.) Plaintiff's argument is unavailing. The so-called "vitality" of federal criminal jurisdiction over the Nation is not at issue here. The key question is whether the federal government has recognized the Nation for purposes of obtaining particular government benefits ? such as a government-to-government relationship with the United States ? not whether the federal government "acknowledge[s]" the existence of the Nation's members for purposes of enforcing state criminal laws. *Bess*, therefore, is wholly inapposite.

In sum, although plaintiff argues that these statutes in 1948 and 1950 reflect federal [*40] recognition of the Nation by Congress, the plain and unambiguous language of these statutes does no such thing and, thus, any claim of federally-recognized tribal status based on such statutes fails as a matter of law. [5]

> 5 Thus, the Court need not consider plaintiff's argument that the Nation's status was never "terminated" by Congress and, therefore, the Court is empowered to compel Interior to put the Nation on the list. (Pl.'s Mem. at 12-13.) As described above, the plain and unambiguous language of the statutes that purportedly conferred federal tribal recognition demonstrate that Congress never accorded the Nation federal tribal status in the first instance. The question of the Nation's "termination" by Congress -- and, relatedly, any jurisdiction this Court might have regarding such termination, (*see* Pl.s Mem. at 20-23) -- is, therefore, logically irrelevant.

(2) Alleged Recognition by Interior

Second, as stated *supra*, the Nation also claims, as with Congress, that Interior has previously classified plaintiff as a federally recognized Indian tribe. The complaint contains a summary of the historical evidence that the Nation argues supports their position. For example, plaintiff points [*41] to a letter dated December 26, 1914 from John R.T. Reeves of the Indian Office (which, according to plaintiff, was a predecessor of the BIA), to the Commissioner of Indian Affairs (the "1914 Reeves Report"). (Compl. P 45.) The 1914 Reeves Report refers to the Nation as a "tribe []." (Compl. P 47; Pl.'s Exh. C.) As plaintiff points out, "[t]he 1914 Reeves Report also reviews the status of each of the Indian reservations under federal jurisdiction that he determined to exist in New York, and included within that category the 'Shinnecock Reservation.'" (Compl. P 48; *see also* Pl.'s Exh. C.) Moreover, plaintiff notes that "the 1914 Reeves report asserted the inalienability of lands possessed by the New York Indians, including lands of the Shinnecock Indians. . . ." (Compl. P 49; *see also* Pl.'s Exh. C.) According to plaintiff, the 1914 Reeves Report thus demonstrates that,

> by no later than 1914, when the 1914 Reeves Report was prepared by the representative of the Indian Office of the Department of the Interior and submitted to Congress, the Department acknowledged the Shinnecock Indian Nation to be among the Indian tribes then existing in the State of New York that were subject to federal [*42] jurisdiction and supervision, with their tribal lands subject to the general restraint against alienation accorded to Indian lands by federal law.

(Compl. P 5 1.) In addition, plaintiff points to various annual reports and other documents issued by Interior, generated as early as 1915, that refer to the Nation as an Indian tribe or that may otherwise imply that the Nation is an Indian tribe. (*See, e.g.*, Compl. PP 52-56, 63, 66-68, 71.) For the reasons set forth below, however, plaintiff's failure to obtain a final determination on the petition

from the BIA precludes the Court from considering such historical evidence of alleged prior Interior recognition, particularly for the purpose of "compelling" Interior to put the Nation on the list.

As a threshold matter, the Court notes that the Second Circuit has not directly addressed whether historical evidence of alleged prior recognition by Interior -- absent formal recognition by the BIA pursuant to the Part 83 regulations and consequent inclusion on the list -- is sufficient to "compel" Interior to undertake such formal recognition. However, other courts have considered this precise issue and have held that historical evidence of such prior [*43] recognition is merely a factor to be considered by the BIA, which must issue a final determination according to the Part 83 regulations prior to judicial review.

For instance, in *James v. United States Department of Health and Human Services,* the District of Columbia Circuit considered a claim brought by members of the Gay Head Indian Tribe who "sought an order directing the Interior to place the Gay Heads on the list of recognized tribes," *824 F.2d at 1135*, based in part upon historical evidence that the Executive Branch had already demonstrated such recognition, *id. at 1136-37*. Interior moved to dismiss the action because the Tribe had not formally petitioned the BIA for federal recognition and, therefore, had not obtained a final determination of the issue in order to make it ripe for judicial review. *Id. at 1135*. The district court agreed with Interior and the Tribe appealed. *Id.* In support of this appeal, the Tribe argued, as does the Nation in the instant case, that

> it would be redundant for them to exhaust administrative channels in an attempt to obtain federal recognition because the Gay Heads have already been recognized by the Executive Branch. They note that if the Executive [*44] Branch determines that a tribe of Indians is recognized, that decision must be respected by the Judicial Branch. Relying on this line of authority, they conclude that the Gay Head's recognition is locked in and the court below had a duty to order the Department of the Interior to place the Gay Head Tribe on the list of federally recognized tribes and therefore erred in concluding that exhaustion of administrative remedies was required.

Id. at 1137 (citations omitted). The District of Columbia Circuit, however, rejected this argument, holding that

> the determination whether [the historical evidence the tribe supplied] adequately support[] the conclusion that the Gay Heads were federally recognized in the middle of the nineteenth century, or whether other factors support federal recognition, should be made in the first instance by the Department of the Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. The purpose of the regulatory scheme set up by the Secretary of the Interior is to determine which Indian groups exist as tribes. That purpose would be frustrated if the Judicial Branch made initial determinations [*45] of whether groups have been recognized previously or whether conditions for recognition currently exist.

Id. at 551 (citation omitted).

More recently, the Tenth Circuit had the opportunity to consider an argument similar to that made by the Tribe in *James* -- and by the Nation in the case at bar -- and relied on *James* to arrive at the same conclusion as the District of Columbia Circuit. Specifically, in *United Tribe of Shawnee Indians v. United States,* the Tenth Circuit reviewed the district court's dismissal of a tribe's request to bypass the Part 83 regulations and have the court compel inclusion on the list of federally-recognized tribes where the tribe relied, in part, on "historical events to assert that it was already federally recognized and that it therefore need not exhaust administrative channels." *253 F.3d at 550-51*. In affirming the district court's dismissal for lack of jurisdiction, the Tenth Circuit explained:

> Determining whether a group of Indians exists as a tribe is a matter requiring the specialized agency expertise the Court considered significant in [*McCarthy v. Madigan, 503 U.S. 140, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992)]*. Moreover, the judicial relief [the Shawnee Tribe] requests would frustrate [*46] Congress' intent that recognized status be determined through the administrative process. Finally, exhaustion "may produce a useful record for subsequent judicial consideration, especially in a complex or technically factual context." These factors argue compellingly for requiring exhaustion.

Id. at 1137 (citations omitted).

Similarly, in *Burt Lake Band of Ottawa and Chippewa Indians,* the District of Columbia relied on *James* and *United Tribe of Shawnee Indians* in rejecting the efforts of the Burt Lake Band of Ottawa and Chippewa Indians to compel the court to confer federal tribal recognition prior to a final BIA determination, on the grounds that historical evidence demonstrated previous recognition by the Executive Branch in the form of treaties:

> As *James* and *Shawnee* demonstrate, historical recognition by the Executive Branch does not allow a defendant to bypass BIA, even if the recognition occurred in a treaty. The fact that BIA's regulations include separate fast tracking provisions for groups claiming prior federal recognition makes all the more evident that federal recognition does not allow an entity to completely bypass the BIA's recognition process. Accordingly, neither the Treaty [*47] of Washington nor the Treaty of Detroit excuses plaintiff from exhausting its administrative remedies.

217 F. Supp. 2d at 79 (citations omitted).

The Court finds these cases to be persuasive authority and, therefore, similarly holds that, although historical evidence of alleged prior federal recognition may be relevant to the BIA during the administrative process, the Court cannot consider such evidence absent a final determination by the BIA of the Nation's status. [6] Such premature consideration of historical evidence would frustrate the intent of Congress that a tribe's status be determined, in the first instance, by the Executive Branch of government pursuant to the political question doctrine, and would violate the finality requirements of the APA.

> 6 Thus, plaintiff's observation that the parties "have seriously conflicting views about the meaning and effect" of these historical documents, (Pl.'s Mem. at 10 n.4), has no bearing on the Court's analysis herein. As the courts in *James and United States Tribe of Shawnee Indians* persuasively observed, a federal court is not the proper forum to resolve such a conflict prior to the BIA's issuance of a final determination.

(3) Alleged Federal [*48] Recognition by the Judiciary

Third, plaintiff argues that the judicial branch also accorded the Nation federal recognition. Specifically, as stated *supra,* plaintiff claims that such recognition was accomplished in 2005 in the context of an unrelated matter before Judge Platt -- subsequently reassigned to the undersigned -- concerning the potential construction of a casino on Shinnecock land (the "casino litigation"). As the Court sets forth below, however, the Second Circuit's holding in *Golden Hill* forecloses this argument. A court decision cannot accomplish federal recognition of an Indian tribe where the BIA has not yet issued a final determination.

According to plaintiff, Judge Platt "'recognized' the Shinnecock Nation as an Indian tribe within the meaning of" the List Act in his ruling on defendants' summary judgment motion in the casino litigation. (Compl. P 115.) In this ruling, Judge Platt first observed that the casino litigation presented the question of whether the Nation fell "within the umbrella of the *Montoya v. United States, 180 U.S. 261, 21 S. Ct. 358, 45 L. Ed. 521, 36 Ct. Cl. 577 (1901)* and *Golden Hill, 39 F.3d 51* line of cases and are not obligated under present circumstances to seek or obtain approval by the [*49] United States before proceeding to develop their properties." *New York v. Shinnecock Indian Nation, 400 F. Supp. 2d at 491.* The Court then held that "[t]he cases described above, beginning with *Montoya* and continuing to the present, establish a federal common law standard for determining tribal existence that the Shinnecock Indian Nation plainly satisfies." *Id. at 492.*

However, as set forth below, the Second Circuit in *Golden Hill* squarely distinguished the "federal common law" recognition reflected in Judge Platt's decision from federal recognition pursuant to the Part 83 regulations, described in detail *supra.* In particular, the Second Circuit held that such common law recognition is limited to the inquiry into whether an Indian group is a "tribe" for purposes of interpreting federal statutes, such as the NIA, and is wholly separate from the federal recognition plaintiff seeks to obtain by means of the instant lawsuit.

In *Golden Hill,* the Second Circuit considered claims brought by the Golden Hill Paugussett Tribe of Indians pursuant to the NIA, which, in essence, prohibits "the sale by Indians of any land unless the sale was by public treaty made under the authority of the United [*50] States." *39 F.3d at 56.* The district court had dismissed the claims because the Golden Hill tribe had not been federally-recognized by the BIA under the Part 83 regulations. *Id. at 55.* The Second Circuit remanded the case, explaining that the "Tribe's claim is not cognizable in the first instance solely by the BIA. In fact, the BIA lacks the authority to determine plaintiff's land claim. Regardless of whether the BIA were to acknowledge Golden Hill as a tribe for purposes of federal benefits, Golden Hill must

still turn to the district court for an ultimate judicial determination of its claim under the Nonintercourse Act." *Id. at 58.* In particular, the Second Circuit premised its holding on the different standards established for tribal recognition under the NIA and the Part 83 regulations:

> Federal courts have held that to prove tribal status under the [NIA], an Indian group must show that it is "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *See, e.g., United States v. Candelaria, 271 U.S. 432, 442, 46 S. Ct. 561, 70 L. Ed. 1023 (1926)* (quoting *Montoya v. United States, 180 U.S. 261, 266, 21 S. Ct. 358, 45 L. Ed. 521, 36 Ct. Cl. 577 (1901).* [*51] . . . The formulation of this standard and its use by the federal courts occurred after Congress delegated to the executive branch the power to prescribe regulations for carrying into effect statutes relating to Indian affairs, *see 25 U.S.C. § 9*, and without regard to whether or not the particular group of Indians at issue had been recognized by the Department of the Interior. . . .
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> The *Montoya/Candelaria* definition and the BIA criteria both have anthropological, political, geographical and cultural bases and require, at a minimum, a community with a political structure. The two standards overlap, though their application might not always yield identical results. A federal agency and a district court are not like two trains, wholly unrelated to one another, racing down parallel tracks towards the same end. Where a statute confers jurisdiction over a general subject matter to an agency and that matter is a significant component of a dispute properly before the court, it is desirable that the agency and the court go down the same track -- although at different times -- to attain the statute's ends by their coordinated action.

39 F.3d at 59. In sum, the Second Circuit explicitly recognized [*52] the distinction between federal recognition and recognition under the common law. [7]

7 As a matter of law, therefore, the Court rejects plaintiff's argument that, "[o]nce an Indian tribe has been determined to exist and to fall within the purview of federal legislation or federal common law protecting Indian tribes generally, effectively the tribe has been federally recognized, even though the initial determination was only for a discrete, limited purpose." (Pl.'s Opp. at 15.) As the Court explains *infra,* the Second Circuit's holding in *Golden Hill* directly forecloses this argument by drawing a clear distinction between federal recognition and recognition under the common law, and by explaining that the differing analyses for each form of recognition may also produce different results.

Here, to the extent plaintiff wishes to construe the 2005 decision to confer federal recognition upon the Nation -- *i. e.,* recognition for purposes of, among other things, forming a government-to-government relationship with the United States -- the Court would have had no legal authority to do so in that litigation. Indeed, the case presented the limited question of *Montoya recognition* -- i. e., common [*53] law recognition -- and, therefore, the Court analyzed the Nation's status according to this common law standard. [8] Thus, consistent with the clear distinction between common law recognition and federal recognition outlined in *Golden Hill* -- and in keeping with the strictures of the political question doctrine, described *supra* -- the issue of federal tribal status could not be determined by the Court in the course of the casino litigation, including the 2005 court decision to which plaintiff points. In other words, although the Court could and did determine common law tribal status in order to decide the issues presented in the casino litigation, that determination has no binding effect on the BIA for purposes of determining federal tribal recognition that would establish a government-to-government relationship. [9]

8 Indeed, plaintiff appears to recognize that the 2005 court decision related to the common law standard for recognition, acknowledging that the Court in that decision "surveyed the record and distilled from the overwhelming evidence the Shinnecock Indian Nation's existence and rightful status a determination as a matter of federal common law that the Shinnecock Indians are [*54] in fact an Indian tribe." (Pl.'s Mem. at 13 (citation and quotation marks omitted).)

9 Because the Court thus finds that the 2005 court decision could not confer federal tribal recognition establishing a government-to-government relationship -- but could only decide common law recognition as it related to that lawsuit -- any argument by plaintiff that de-

fendants are collaterally estopped from contesting the issue of federal tribal recognition in the instant action is similarly without merit.

The Court is aware that plaintiff refers to "Congressional findings" contained in the List Act in an attempt to demonstrate that Congress has, in fact, empowered federal courts to determine the issue of federal tribal recognition prior to a final BIA determination. In particular, plaintiff points to the following "Congressional finding" in the List Act:

> (3) Indian tribes presently may be recognized by Act of Congress, by the administrative procedures set forth in Part 83 of the Code of Federal Regulations . . .; or by a decision of a United States Court.

25 U.S.C. § 479a (Congressional findings). For the reasons set forth below, that argument is without merit.

As a threshold matter, the Court recognizes [*55] that, "[n]ormally, congressional findings are entitled to much deference. *Thompson v. Colorado, 278 F.3d 1020, 1033 (10th Cir. 2001), cert. denied 535 U.S. 1077, 122 S. Ct. 1960, 152 L. Ed. 2d 1021, 2002 U.S. LEXIS 3597 (2002)* (citing *Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 n.12, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985)*). However, as courts routinely note, a Congressional finding does "not create a substantive right." *J.P. v. County Sch. Bd. of Hanover County, VA, 447 F. Supp. 2d 553, 573 (E.D. Va. 2006); see, e.g., Pennhurst v. Halderman, 451 U.S. 1, 19, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981)* (explaining that a Congressional finding "is too thin a reed to support the rights and obligations read into it by the court below"). Here, plaintiff urges the Court to determine that Congress intended to create a significant substantive right -- namely, the right to obtain federal tribal status through the federal courts in the absence of a final agency determination under the APA -- but failed to include language referring to that right in the primary text of the statute itself. [10] The Court will not read such a significant, affirmative right into a statute, the actual language of which makes no reference to cloaking the judiciary with the co-equal role of the political branches [*56] in the federal recognition process. [11]

> 10 Specifically, the List Act states that Interior must "publish in the Federal Register a list of all Indian tribes *which the Secretary recognizes to be eligible* for the special programs and services provided by the United States to Indians because of their status as Indians." *25 USC § 479a-1* (emphasis added). Thus, the text of the List Act solely refers to recognition by Interior -- not the judiciary.
>
> 11 Of course, the courts do have authority to review these determinations under the APA *after* the BIA's final determination.

Moreover, although plaintiff again urges the Court to also resort to legislative history, including statements by Senators, to find the existence of such a power by the Courts, the Court again declines to do so and, instead, will rely on the text of the statutory language, which confers no power on the judiciary to bypass the elaborate federal recognition process through the Executive Branch that had existed for years, pursuant to federal regulations. In short, the "Congressional findings" in the List Act do not confer upon federal courts the authority to review a tribe's federal status for federal recognition purposes prior [*57] to the BIA's final determination.

Indeed, the very purpose of the Part 83 regulations (which Congress clearly did not disturb with the passage of the List Act) was, among other things, to remedy the piecemeal system of recognition that had existed previously, which included *ad hoc* recognition of tribes after courts found tribal status to exist for purposes of a particular case. *See Kahawaiolaa, 386 F.3d at 1273* ("[P]rior to the late 1970's, the federal government recognized American Indian tribes on a case-by-case basis. In 1975, Congress established the American Indian Policy Review Commission to survey the current status of Native Americans. The Commission highlighted a number of inconsistencies in the Department of Interior tribal recognition process and special problems that existed with non-recognized tribes. As a result, in 1978, the Department of Interior exercised its delegated authority and promulgated [the Part 83 regulations] establishing a uniform procedure for acknowledging American Indian tribes.") (citations and quotation marks omitted). This historical context for the Congressional findings is consistent with "The Official Guidelines to the Federal Acknowledgment Regulations, [*58] *25 CFR 83*," which plaintiff provided to the Court by letter dated May 12, 2008. These Guidelines explain that, "before 1978, requests from Indian groups for Federal acknowledgment as tribes were determined on an *ad hoc* basis. Some tribes were acknowledged by Congressional action. Others were done by various forms of administrative decision within the Executive Branch of the Federal Government, or through cases brought in the courts." The Court is aware that these Guidelines also state that the "federal courts have the power to acknowledge tribes through litigation." These generalized references in the Guidelines, which are similar to the Congressional findings in the List Act, appear to simply be a reflection of the historical practice of the political branches -- prior to

establishing any regulations, criteria, or procedures for recognition -- to adopt on an *ad hoc* basis judicial determinations of tribal status resulting from a particular litigation. This historical practice of the political branches relying on such court decisions, however, does not lead to the conclusion that courts possess this inherent power; to the contrary, no constitutional or statutory provision provides such [*59] authority. Thus, when the Department of the Interior (with power delegated by Congress) chose to abandon this practice of relying on *ad hoc* judicial determinations of recognition and, instead, created a clear process for federal recognition through the Executive Branch, courts had no power to disregard such process. *See Western Shoshone Business Council, 1 F.3d at 1056* ("[W]e conclude that the limited circumstances under which ad hoc judicial determinations of recognition were appropriate have been eclipsed by federal regulation."). As the Court recognized in *Western Shoshone Business Council,* courts that failed to defer questions of federal tribal recognition to Interior did so prior to or immediately following passage of the this regulatory process:

> Other relatively recent cases in which courts did not defer to the Department's acknowledgment procedures either predate the regulations entirely, *see Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975)*, or were decided only shortly after the regulations were promulgated, *see Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 581 (1st Cir. 1979)* ("the Department does not yet have prescribed procedures [*60] and has not been called on to develop special expertise in distinguishing tribes from other groups of Indians").

1 F.3d at 1057. Relatedly, courts have observed that, after passage of the regulations, it is abundantly clear that the judiciary should not intervene before exhaustion of the administrative procedures has taken place. *See James, 824 F.2d at 1138* ("We believe that the time for a different conclusion has come; the Department has been implementing its regulations for eight years. . . . Moreover, the factual record developed at the administrative level would most assuredly aid in judicial review should the parties be unsuccessful in resolving the matter; in the event that the dispute is resolved at the administrative level, judicial economy will be served. All of these facts weigh in favor of requiring exhaustion in this case."). In fact, where courts have addressed the issue of tribal status -- as in *Golden Hill,* discussed *supra* -- the inquiry was largely limited to application of specific statutes, and was not meant to encompass recognition for purposes of obtaining federal benefits, such as a government-to-government relationship. *See, e.g., Montoya, 180 U.S. at 270* (analyzing [*61] whether group of Indians was "tribe" for purposes of Indian Depredation Act); *Candelaria, 271 U.S. at 441* (analyzing whether group of Indians was "tribe" for purposes of NIA). Indeed, this distinction between federal tribal recognition and judicial determinations for a particular case is perhaps most apparent in cases where, after courts found insufficient basis for tribal recognition in a particular case, the BIA nevertheless conferred federal tribal status on the same tribe. For instance, in *Mashpee Tribe v. Town of Mashpee,* a jury found that plaintiff was not a "tribe" for NIA purposes, *see 447 F. Supp. 940 (D. Mass. 1978), aff'd 592 F.2d 575 (1st Cir. 1979)*, but Interior accorded plaintiff federal tribal status in 2007. *72 F.R. 8007 (Feb. 22, 2007)*. The same sequence of events transpired in 1996 with respect to the Samish Indian Tribe. *See United States v. Washington, 641 F.2d 1368, 1374 (9th Cir. 1981)* (affirming district court's finding that group of Indians was not a tribe for purposes of treaty rights); *61 F.R. 15825 (Apr. 9, 1996)* (conferring federal recognition on same group of Indians).

In sum, the Court rejects the Nation's argument that, on the basis of alleged prior recognition [*62] by all three branches of government, plaintiff may bypass the political question doctrine. [12] At this juncture, the APA bars judicial review of claims one and three in the complaint because Interior has not made a final determination of the Nation's federal tribal status. The Court will not, by pure judicial fiat, provide relief made unavailable to plaintiff at this juncture under the United States Constitution. [13] *See Burt Lake Band of Ottawa and Chippewa Indians, 217 F. Supp. 2d at 79* (granting motion to dismiss claim brought by tribe seeking "to completely bypass the BIA's recognition process," where tribe argued on basis of historical evidence that Executive Branch had already conferred such recognition, because tribe had to exhaust BIA's administrative process before obtaining judicial review).

> 12 Relatedly, therefore, the Court rejects plaintiff's assertion, described *supra,* that Interior's ongoing failure to put the Nation on the list in itself constitutes final agency action subject to the Court's review at this juncture. The Court is aware, as the Second Circuit recently confirmed, that the APA "requires a reviewing court to 'compel agency action unlawfully withheld.'" *Sharkey v. Quarantillo, No. 06-1397-cv, 541 F.3d 75, 2008 U.S. App. LEXIS 18793, at *16 (2d Cir. Sept. 3, 2008)* [*63] (quoting *5 U.S.C. § 706(1)*). However, as plaintiff explicitly recog-

nized in its opposition papers, such review would be available here only if Interior has "refus[ed] to take action Interior is legally required to take." (Pl.'s Mem. at 23.) Hence, plaintiff's argument is, again, necessarily premised on its assertion that the Nation has already been federally recognized by all three branches of government and, therefore, that Interior is legally bound to place the Nation on the list. As stated above, however, the Court has rejected this assertion. Thus, plaintiff has failed to demonstrate the existence of a final agency action reviewable at this juncture under the APA with respect to claims one and three.

13 By the same token, of course, the APA enables the Nation to obtain judicial review of its petition -- if necessary -- after obtaining a final determination by Interior. As the Second Circuit has held, "[w]e begin with the strong presumption that Congress intends judicial review of administrative action." *Sharkey, 541 F.3d 75, 2008 U.S. App. LEXIS 18793, at *17* (citation and quotation marks omitted). In keeping [*64] with the holding of the Second Circuit in *Golden Hill* and the overwhelming number of other courts to consider the question, however, the Court simply concludes herein that it cannot undertake such review at this juncture pursuant to the strictures of the political question doctrine and the finality principle embodied in the APA.

V. THE COURT LACKS JURISDICTION OVER CLAIM TWO BECAUSE INTERIOR HAS NOT TAKEN A FINAL AGENCY ACTION REVIEWABLE UNDER THE APA IN CONJUNCTION WITH THE NATION'S 2005 LITIGATION REQUEST

As described *supra*, in claim two of the complaint, the Nation challenges Interior's failure to investigate and join in a land claim filed by plaintiff in 2005, in accordance with Interior's alleged trust responsibilities to the Nation under the NIA. As the Court sets forth below, this claim is dismissed for lack of jurisdiction pursuant to the APA because Interior did not take final agency action with respect to this request.

The NIA states that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into [*65] pursuant to the Constitution." *25 U.S.C. § 177*. In other words, as the Court explained above, the NIA essentially prohibits "the sale by Indians of any land unless the sale was by public treaty made under the authority of the United States." *Golden Hill, 39 F.3d at 56*. Further, the NIA "created a trust relationship between the federal government and American Indian tribes with respect to tribal lands covered by the Act." *Golden Hill, 39 F.3d at 56*; *see also Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975)* ("That the Nonintercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act seems to us beyond question "). In addition, the Court recognizes that this trust relationship entails a "corresponding federal duty to investigate and take such action as may be warranted in the circumstances." *Joint Tribal Council of the Passamaquoddy Tribe, 528 F.2d at 379*.

According to the complaint, the Nation filed suit on June 15, 2005 in the Eastern District of New York, alleging that plaintiff ceded land to the Town of Southampton in 1859 without the consent of the United States [*66] and, therefore, in violation of the NIA. (Compl. PP72, 78.) [14] Subsequently, by letter dated December 20, 2005 "to the Secretary of the Interior and the Attorney General of the United States, the Nation formally in writing requested that the United States intervene as a plaintiff in the 2005 Land Claim Lawsuit and bring suit on behalf of the Nation seeking relief for the loss of the Nation's lands in 1859 in violation of the [NIA]" (the "2005 litigation request"). (Compl. P 79.)

14 This litigation related to the 2005 land claim is distinct not only from the instant action, but also from the casino litigation discussed *supra*.

Interior responded by letter dated February 13, 2006 (the "February 2006" letter). (Compl. P 80.) This letter, which plaintiff attached to the complaint, states as follows:

> At my meeting with you and your representatives on January 19, 2006, you discussed the Shinnecock petitioner's tribal status and I agreed to review certain documents and analyses that you offered to submit concerning this matter. . . .
>
> With respect to your request for the United States to intervene as a plaintiff to assist the Shinnecock petitioner in its New York land claim, you assert that the [*67] United States is required to do so by virtue of its trust obligation owed to the Shinnecock and the [NIA]. The Department disagrees. Presently, there is no established trust obligation between the United States and the Shinnecock petitioner because the Department does not consider the Shinnecock petitioner to be an Indian tribe. Until the Department evaluates the evidence through the ac-

> knowledgment process, the Department does not know if your group meets the regulatory criteria to be acknowledged as an Indian tribe.
>
> While the Department must consider any request by an Indian tribe to recommend land claim litigation, the [NIA] does not require the United States to intervene in land claims litigation or to initiate such litigation. Instead, the Department considers requests to litigate in concert with the Department of Justice. A host of factors are reviewed and considered by both agencies in making such a decision. At this time, the Department has yet to receive any historical records concerning the merits of the land claim you allege. United the Departments develop our own records on the matter, it is premature to consider intervention in your litigation.

(Pl.'s Exh. O.)

As a threshold [*68] matter, defendants argue that the principle stated in *Shoshone-Bannock Tribes v. Reno, 312 U.S. App. D.C. 406, 56 F.3d 1476 (D.C. Cir. 1995)* -- namely, that "agency refusals to institute investigative or enforcement proceedings are presumed immune from judicial review. . . .", *56 F.3d at 1481* -- operates to completely preclude judicial review over claim two in this case. However, the Court need not decide that issue because, even assuming *arguendo* that judicial review over such refusals is generally permitted, the Court has determined that it lacks jurisdiction over claim two pursuant to the APA because Interior never took final agency action on the 2005 litigation request.

Specifically, as the Court explained *supra,* only a "final" agency action is judicially reviewable under the APA. Here, after carefully reviewing the complaint and the documents appended thereto, including the February 2006 letter, the Court concludes that Interior took no judicially-reviewable final action with respect to the 2005 litigation request. In particular, although the February 2006 letter explicitly states Interior's intention to consider the merits of the Nation's litigation request and review any material the Nation submitted [*69] in support thereof, nowhere in the complaint does plaintiff allege that the Nation either (1) supplied the factual documentation specifically requested by Interior, or (2) notified Interior that the Nation was refusing to submit such additional documentation. [15] Under these circumstances, it is beyond cavil that Interior had not completed its "decision-making process" in satisfaction of the APA and, thus, never took final action with respect to the 2005 litigation request that the Court may review under the APA. Pursuant to the APA, therefore, claim two in the complaint is dismissed for lack of jurisdiction. [16]

15 Moreover, to the extent plaintiff argues that Interior was legally required to investigate the 2005 litigation request and failed to do so, thus "withholding" agency action under the APA, the Court rejects that assertion. In *Passamaquoddy Tribe* -- a case upon which plaintiff relies heavily in opposition to dismissal of count two of the complaint -- the court emphasized that the trust relationship entails a "corresponding federal duty to investigate and take such action as may be warranted *in the circumstances," 528 F.2d at 379* (emphasis added), and, moreover, that "it would [*70] be inappropriate to attempt to spell out what duties are imposed by the trust relationship. . . . It is now appropriate that the departments of the federal government charged with responsibility in these matters should be allowed initially at least to give specific content to the declared fiduciary role," *id.* Thus, the court in *Passamaquoddy Tribe* declined to hold that the government was obligated to litigate on behalf of the Passamaquoddy, holding merely that the government "may not decline to litigate on the sole ground that there is no trust relationship," *id.*, in rejecting a litigation request. Here, the Court similarly declines, as a matter of law and under the circumstances of this case, to impose a legal duty upon Interior to continue investigating a litigation request when the Nation refused to participate in the investigation despite a written request for specific records from Interior.

16 To the extent that plaintiff also bases claim two on defendants' alleged failure to assent to a separate litigation request the Nation made in 1978, such a claim would be dismissed on timeliness grounds pursuant to *28 U.S.C. § 2401*, which provides a six-year statute of limitations for suits [*71] against the United States. *28 U.S.C. § 2401(a).*

VI. THE UNREASONABLE DELAY CLAIM SURVIVES DEFENDANTS' MOTION

As stated *supra,* in claim four of the complaint, the Nation alleges that Interior violated and continues to violate the APA and the Part 83 regulations by unreasonably delaying Interior's decision on the Nation's Federal Acknowledgment Petition for many years. Defendants move to dismiss this claim on the grounds that Interior is complying with the regulations. Essentially, defendants argue that the petition is not yet in "active consideration" and, thus, Interior has no duty to evaluate it at

this time. (Defs.' Mem. at 28.) However, after carefully reviewing the complaint, the Court declines to hold at this juncture -- *i.e.*, before plaintiff has had the opportunity to conduct any discovery -- that Interior's failure to issue a final determination on the Nation's petition for at least ten years [17] is reasonable as a matter of law under the circumstances of this case. As the Court sets forth below, therefore, the Nation has alleged sufficient facts to defeat defendants' motion to dismiss claim four. [18]

17 As described *supra*, the Nation alleges that it initially petitioned for recognition [*72] in 1978, but submitted a new petition in 1998 pursuant to revised regulations by Interior. According to Interior, because these revised regulations "changed the provisions concerning the sequence of processing documented petitions," (Defs.' Reply at 8), the only relevant petition for purposes of the instant motion is the second petition filed in 1998. In fact, defendants also argue that the Nation did not petition for recognition in 1978, but merely made a litigation request. (Defs.' Reply at 8.) In any event, even assuming *arguendo* that the sole relevant period of alleged delay began in 1998, the Court has determined, as set forth *infra*, that plaintiff has adequately alleged a claim of unreasonable delay to survive a motion to dismiss.

18 The Court rejects as a threshold matter, however, plaintiff's argument that any unreasonable delay the Nation has allegedly 3160 experienced excuses plaintiff from completing the administrative process for purposes of obtaining judicial review of the merits of the Nation's petition for recognition, (*see* Pl.'s Mem. at 32-33); the obstacles posed at this juncture by the APA's finality principle and the political question doctrine are wholly separate [*73] from the question of unreasonable delay. *See Burt Lake Band of Ottawa and Chippewa Indians, 217 F. Supp. 2d at 79* (rejecting plaintiff's argument "that a party can forego administrative remedies simply because it believes the process is taking unreasonably long").

A. Legal Standard

As the Second Circuit has recognized, "*Section 6(b)* of the [APA] requires that an agency conclude proceedings 'within a reasonable time.'" *Reddy v. Commodities Futures Trading Comm'n, 191 F.3d 109, 120 (2d Cir. 1999)* (quoting *5 U.S.C. § 555(b)*); *see also Khdir v. Gonzales, No. 07-cv-00908, 2007 U.S. Dist. LEXIS 82374, 2007 WL 3308001, at *6 (D. Colo. Nov. 6, 2007)* ("Where . . . there is no set deadline for an agency to complete a legally-required action, the APA provides a requirement that it do so within a reasonable time."). Consequently, as the Supreme Court has confirmed, the APA provides that federal courts may "compel agency action unlawfully withheld or unreasonably delayed." *Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 62, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004)* (quoting *5 U.S.C. § 706(1)*). "Moreover, where delay of administrative remedy is at issue, the lack of a final order by the agency, which might otherwise engender a question about ripeness, [*74] does not preclude this court's jurisdiction." *Muwekma Tribe v. Babbitt, 133 F. Supp. 2d 30, 34 (D.D.C. 2000)* (citing *TRAC, 750 F.2d at 75*).

"Resolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court." *Mashpee Wampanoag Tribal Council, Inc. v. Norton, 357 U.S. App. D.C. 422, 336 F.3d 1094, 1100 (D.C. Cir. 2003)*. In particular, in determining whether an agency's delay is reasonable, courts consider the following factors, known as the "*TRAC* factors":

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; [*75] and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

Tummino v. Von Eschenbach, 427 F. Supp. 2d 212, 231 (E.D.N.Y. 2006) (citing *In re Barr Laboratories, 289 U.S. App. D.C. 187, 930 F.2d 72, 74-75 (D.C. Cir. 1991)* and quoting *Telecommunications Research & Action Ctr. v. FCC, 242 U.S. App. D.C. 222, 750 F.2d 70, 80 (D.C. Cir. 1984)* (hereinafter, "*TRAC*")); *see also Loo v. Ridge, No. 04-CV-5553, 2007 U.S. Dist. LEXIS 17822, at *14 and n.4 (E.D.N.Y. Mar. 14, 2007)* (applying *TRAC* factors); *Nat'l Resources Defense Council, Inc. v. Fox, 93 F. Supp. 2d 531, 543-48 (S.D.N.Y. 2000)* (same). The "issue cannot be decided in the abstract, by reference to some

number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part . . . upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency." *Mashpee Wampanoag Tribal Council, Inc., 336 F.3d at 1102* (remanding case to district court, where plaintiff tribe alleged unreasonable delay in the BIA's review of recognition petition, because district court did not fully consider *TRAC* factors); *see,* [*76] *e.g., Muwekma, 133 F. Supp. 2d at 32-33* (agreeing with plaintiff that Interior had unreasonably delayed tribe's petition for federal recognition after applying *TRAC* factors where petition had been pending for approximately five years).

B. Application

Here, as described *supra,* the Nation alleges that its petition has been pending without reasonable cause since at least 1998, *i.e.,* for approximately ten years, despite plaintiff's compliance with Interior's Technical Assistance Requests for additional information related to the petition. In addition, the complaint alleges that Interior has estimated that it may not issue a final determination until 2014, and will not even bind itself to that time limit. According to the complaint, the Nation's prolonged absence on the list has caused plaintiff not only substantial economic harm, but has also deprived plaintiff from participating in various government services to which federally-recognized tribes are entitled, including health, education, housing, substance abuse, child, and family services. (*See* Compl. PP 142-44.) After reviewing the allegations in the complaint -- and particularly in light of the highly fact-based, nuanced review required [*77] for unreasonable delay claims according to the *TRAC* factors -- the Court declines to conclude as a matter of law at the motion to dismiss stage that Interior has been reasonable in letting at least ten years elapse without issuing a final decision on the Nation's petition. [19] The Nation has adequately pled an unreasonable delay claim and, therefore, defendants' motion to dismiss that claim is denied. [20]

19 As discussed in greater detail *supra,* subsequent to briefing this motion, Interior promulgated a new waiver policy that, according to defendants, could render review of the unreasonable delay claim unnecessary because the policy could put the Nation at the top of the "Ready" list and place them under active consideration in the late fall of 2008. However, to date, despite the Court's urging, the parties have been unable to resolve the question of the Court's oversight regarding the acknowledgment process, including the extent to which any timetable agreed upon by the parties would be binding on Interior. In light of the Court's denial of Interior's motion to dismiss the unreasonable delay claim, the Court will conduct a telephone conference on October 7, 2008 at 4:30 p.m. in order [*78] to discuss these matters.

20 The Court notes that, to the extent the Nation successfully demonstrates unreasonable delay, the Court would not usurp the recognition decision from Interior, but may require Interior to adhere to a reasonable deadline for issuing a final determination on the Nation's petition. *See, e.g., Muwekma v. Norton, 206 F. Supp. 2d 1, 3 (D.D.C. 2002)* (refusing to vacate prior order setting deadline for BIA to issue final determination on tribe's petition for federal recognition).

VII. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss the complaint is granted in its entirety pursuant to *Rules 12(b)(1)* and *12(b)(6) of the Federal Rules of Civil Procedure* with the exception of claim four. The parties shall have a telephone conference with the Court on October 7, 2008, at 4:30 p.m., in order to discuss how the "unreasonable delay" claim should proceed.

SO ORDERED.

JOSEPH F. BIANCO

United States District Judge

Dated: September 30, 2008

Central Islip, NY

Amalgamated Indus., Inc. v. Historic E. *Pequot* Tribe

Superior Court of Connecticut, Judicial District of New London, Complex Litigation Docket at New London

May 2, 2005, Decided ; May 2, 2005, Filed

X03CV034000287

Reporter
2005 Conn. Super. LEXIS 1214

Amalgamated Industries, Inc. v. Historic Eastern ***Pequot*** Tribe aka The Eastern ***Pequot*** Tribal Nation et al.

Notice: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Disposition: Motion to dismiss of the defendants, the PEPs and the individual PEP councillors, denied.

Core Terms

tribe, tribal, sovereign immunity, councillors, motion to dismiss, Historics, counts, waived, tribal council, memorandum, allegations, immunity, unequivocally, interim, contracts, argues, internal quotation marks, defendants', activities, Statutes, courts, sovereignty, membership, faction, parties, casino

Case Summary

Procedural Posture
Plaintiff corporation filed an 18-count complaint against defendants, the Paucatuck Eastern Pequots, a/k/a Paucatuck Eastern Pequot Tribal Nation (the tribe), and its council members (councillors), alleging breach of contract and related claims. Defendants moved to dismiss the complaint as against them on the ground that the court lacked subject matter jurisdiction to consider the corporation's claims.

Overview
The corporation claimed it "partnered" with the tribe in its project to become a federally recognized Indian tribe. Defendants moved to dismiss on the ground that the court lacked subject matter jurisdiction to consider the corporation's claims. The court addressed the motion to dismiss as to counts one through five, seven through twelve, fourteen, and sixteen through eighteen only, finding that in its contracts with the corporation, the tribe clearly and unequivocally waived its sovereign immunity. The tribe agreed to two relevant provisions, titled "Waiver of Sovereign Immunity" and "Submission to State and Federal Court Jurisdiction," respectively. Regardless of whether the tribe was the tribe at the time it entered into contracts with the corporation, it was not entitled to the protections of sovereign immunity, and the motion to dismiss was denied as to the counts directed at it. The individual councillors were also not entitled to sovereign immunity. As tribal councillors of a tribe that had unequivocally waived "any and all sovereign immunity which it currently or at any future time might otherwise be entitled to assert," the councillors had no immunity to assert.

Outcome
Defendants' motion to dismiss was denied.

LexisNexis® Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1 Separate and distinct causes of action, as distinguished from separate and distinct claims for relief, shall be pleaded in separate counts.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > General Overview

HN2 The standard of review of a motion to dismiss is well established. In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint including those facts necessarily implied from the allegations, construing them in a manner most favorable to the

pleader. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Native Americans > Authority & Jurisdiction

HN3 Jurisdiction of the subject-matter is the power of the court to hear and determine cases of the general class to which the proceedings in question belong. A reviewing court should indulge every presumption in favor of the trial court's subject matter jurisdiction. The doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Evidence > Burdens of Proof > General Overview

HN4 It is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. The plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Governments > Native Americans > Authority & Jurisdiction

HN5 Native American tribal membership is determined by the tribes. Conn. Gen. Stat. § 47-66j(b).

Governments > Native Americans > Authority & Jurisdiction

Governments > Native Americans > Tribal Sovereign Immunity

HN6 As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity and the tribe itself has consented to suit in a specific forum. Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe. However, such waiver may not be implied, but must be expressed unequivocally.

Governments > Courts > Authority to Adjudicate

Governments > Native Americans > Authority & Jurisdiction

Governments > Native Americans > Tribal Sovereign Immunity

HN7 Tribal sovereign immunity does not extend to individual members of a tribe and the tribe itself must assert immunity. A state court does have the authority to adjudicate actions against tribal members when it properly obtains personal jurisdiction. The doctrine of tribal immunity however extends to individual tribal officials acting in their representative capacity and within the scope of their authority. The doctrine does not extend to tribal officials when acting outside their authority in violation of state law.

Judges: PECK, J.

Opinion by: Peck

Opinion

MEMORANDUM OF DECISION MOTION TO DISMISS OF DEFENDANTS PAUCATUCK EASTERN PEQUOTS, AKA PAUCATUCK EASTERN PEQUOT TRIBAL NATION; JAMES A. CUNHA, JR.; FRANCES M. YOUNG; AGNES E. CUNHA; GINA M. HOGAN; EUGENE R. YOUNG, JR.; BEVERLY KILPATRICK; JAMES L. WILLIAMS, SR; AND CHRISTINE C. MEISNER

This action arises out of an alleged breach of contract by the defendants, the Paucatuck Eastern Pequots, a/k/a Paucatuck Eastern Pequot Tribal Nation (PEPs); James A. Cunha, Jr.; Frances M. Young; Agnes E. Cunha; Gina M. Hogan; Eugene R. Young, Jr.; Beverly Kilpatrick; James L. Williams, Sr.; and Christine C. Meisner (PEP councillors). [1] **[*3]** The plaintiff, Amalgamated Industries, Inc., filed an eighteen-count complaint on July 10, 2003, alleging, *inter alia*, breach of contract (counts one through five), conversion (count

[1] Although the Historic Eastern Pequot Tribe, a/k/a Eastern Pequot Tribal Nation (Historics), the Eastern Pequot Indians of Connecticut, Inc., a/k/a Eastern Pequot Tribe (Easterns), Eastern Capital Development, LLC f/k/a Eastern Capital Funding, LLC (ECD), Mark R. Sebastian, Marcia Jones-Flowers a/k/a Marcia Flowers, Lynn D. Powers, Ronald M. Jackson, Joseph A.

six), breach of implied covenant of good faith and fair dealing (count seven), tortious interference **[*2]** with contract (count eight), tortious interference with business relations (count nine), commercial disparagement (count ten), civil conspiracy (count eleven), and violations of the Connecticut Unfair Trade Practices Act (CUTPA), *General Statutes § 42-110a et seq.* (count twelve). The plaintiff also sets forth five alternative claims against the defendants. As alternative grounds for recovery against the Historic Eastern Pequot Tribe, a/k/a Eastern Pequot Tribal Nation (Historics), "including and consisting of the [PEPs] and Easterns," the plaintiff claims successor liability (count fourteen), breach of implied contract (count sixteen), quantum meruit/unjust enrichment (count seventeen), and promissory estoppel (count eighteen). As its remedies, the plaintiff seeks a mandatory injunction (count thirteen, reformation of contract (count fifteen), specific performance, a prohibitive injunction, money damages, punitive damages, attorneys fees and costs, reimbursement of sums paid for and on behalf of the defendants; and imposition of a constructive trust (count seventeen). [2]

[*4] The defendant PEPs and PEP councillors have moved to dismiss the complaint as against them on the ground that the court lacks subject matter jurisdiction to consider the plaintiff's claims because these claims (1) have not ripened into an actual controversy, (2) are dependent upon a political determination committed to another branch of government and (3) are barred by principles of tribal sovereignty and tribal sovereign immunity.

In the complaint, the plaintiff alleges the following relevant facts: The plaintiff "partnered" with the defendant PEPs, an Indian tribe recognized by the state of Connecticut, in the PEPs' project to become a federally recognized Indian tribe. (Complaint, PP1, 2 and 16.) In exchange for the PEPs' promises to pay the plaintiff according to the terms of their written agreements, the plaintiff, *inter alia*, "spent over ten years assisting, guiding and strategizing day-to-day with the [PEPs'] Tribal Council regarding, among other things, the [PEPs'] efforts to become officially recognized by the United States government" (Complaint, P2), provided the PEPs with "valuable business and financial advice and council," introduced the PEPs to, garnered support **[*5]** from, and assisted in negotiations with "world class developers and financial partners." (Complaint, PP2 and 3.) The plaintiff and others "funded more than fourteen million dollars to pay for the numerous academic, legal and other experts necessary to prepare a competent federal recognition petition, as well as all [PEP] tribal salaries, offices and operations." (Complaint, P4.)

In exchange for the plaintiff's assistance, the PEPs "agreed to compensate [the plaintiff] by paying it amounts equal to a small percentage of any future gaming proceeds, and of any financing originated for the [PEPs]." (Complaint, P8.) The PEPs "also granted a right of first refusal to meet or best any acceptable financing otherwise arranged for the [PEPs]." (Complaint, P8.)

"To reflect [the plaintiff's] acceptance and performance of increasing responsibilities with the [PEPs], and to reflect the [PEPs'] desire that [the plaintiff] continue its work, the [PEP] tribal council by unanimous resolution dated January 12, 1999, authorized a Restated Agreement and a separate Restated Capital Fee Agreement [(Amalgamated agreements)] with [the plaintiff]." (Complaint, P56.) This resolution "authorized

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Perry, Jr., Katherine H. Sebastian, William O. Sebastian, Jr., Mary E. Sebastian, and Lewis E. Randall, Sr. (Eastern councillors) were also named as defendants, they are not parties to this motion to dismiss. Accordingly, unless otherwise specified, all references herein to the defendants are to the PEPs and/or the PEP councillors.

[2] Since the defendants moved to dismiss "the complaint against them," without specifying which counts they view as being directed against them, the court assumes that the motion seeks dismissal of the counts directed at the PEPs and various PEP councillors, that, counts one through three (against Historics, "including and consisting of the [PEPS] and Easterns"), counts four and five (against PEP councillors), count seven (against Historics, "including and consisting of the [PEPS] and Easterns"), counts eight through eleven (against, *inter alia*, Eugene R. Young, Jr.) and counts twelve, fourteen and sixteen through eighteen (against Historics, "including and consisting of the [PEPS] and Easterns"). Counts thirteen and fifteen are not proper counts because they do not contain separate and distinct claims. See Practice Book § 10-26 (***HN1*** separate and distinct causes of action, as distinguished from separate and distinct claims for relief, shall be pleaded in separate counts). Accordingly, this memorandum addresses the PEP councillors' motion to dismiss as to counts one through five, seven through twelve, fourteen, and sixteen through eighteen only. Counts thirteen and fifteen will not be addressed in connection with this motion to dismiss because they are more properly addressed by a motion to strike. Count six is directed solely at the defendant ECD and will not be addressed here.

[*6] Grand Chief Sachem Williams to execute the Amalgamated agreements on the [PEPs'] behalf, which he did . . ." (Complaint, P57.) Each PEP councillor signed this resolution and "individually signed their agreement to the Amalgamated agreements before a notary, acknowledging that [the plaintiff] had performed all its obligations to earn, and had earned, all the compensation detailed in the Amalgamated agreements." (Complaint, P58.) "The Restated Agreement also provides that the [PEPs] will pay additional compensation for [the plaintiff's] efforts for the period from the date the [PEPs'] petition was placed on active status until the [PEPs become] federally recognized." (Complaint, P60.)

The plaintiff also includes in its complaint a lengthy recitation of facts that was allegedly part of the Restated Agreement, which include the following statements: "WHEREAS, because the tribe lacked funds, [the plaintiff] financed many tribal governmental and other activities, as well as substantial portions of the tribal government's federal recognition project; and . . . WHEREAS, [the plaintiff] . . . at its own expense flew in gaming industry experts as well as persons and entities **[*7]** with established backgrounds in either the gaming industry or structuring large and/or sophisticated investment packages . . . and . . . WHEREAS, due to the tribe's historic lack of an economic base, it could offer [the plaintiff] no consideration other than the possibility of payment if the tribal government, through [the plaintiff's] intervention, succeeded in its lengthy, expensive, time-consuming and highly speculative project to pursue federal recognition and economic development . . ." (Complaint, P62.)

The plaintiff further alleges the following with regard to compensation: The PEPs agreed to pay the plaintiff five percent of the net revenues of the PEPs' gaming activities, as well as an additional five percent of any and all other PEP tribal economic activities in which the plaintiff participates, "paid quarterly over a period of fifteen (15) years, commencing thirty (30) days subsequent to the first quarter of operation of a casino gaming facility." (Complaint, P63.) The PEPs also agreed to pay the plaintiff, "as presently earned and payable, 'additional compensation' for continuing to advise and assist until the date the [PEPs'] petition was placed on active status, **[*8]** " 0.625 percent "of gross revenues of any and all gaming and related gaming facility activities . . . paid quarterly as an operating expense, for a period of [eighty-four] months, commencing thirty (30) days subsequent to the first quarter of operation of a casino gaming facility." (Complaint, P64; see also Complaint, P65.) The plaintiff further alleges that the Restated Agreement provides that "if the [PEPs] . . . for any reason other than [the plaintiff's] gross misconduct, [prevent the plaintiff] from completing its performance to earn additional compensation for the period from the date the [PEPs'] petition was placed on active status until the [PEPs are] federally recognized, this entire additional compensation amount also is immediately earned and payable as a debt of the [PEPs] in its entirety." (Complaint, P66.) Further, the plaintiff alleges that the PEPs agreed in the Restated Capital Fee Agreement to pay the plaintiff two percent "of all sums procured, originated or financed by or through any source for the [PEPs], for a period from the date the [PEPs] first associated with [the plaintiff] and ending [ninety-six] months subsequent to the date the [PEPs **[*9]** receive] final federal recognition." (Complaint, P67.)

In the Amalgamated agreements, the PEPs "purposefully, intentionally, expressly and unequivocally waived, as to the subject matter of its agreements with [the plaintiff], any and all sovereign immunity it had or may have at any time in the future." (Complaint, P69.) Further, the PEPs expressly and unequivocally consented to submit to the jurisdiction of the United States District Court for the District of Connecticut and the courts of the state of Connecticut. (Complaint, P70; see Complaint, exhibit B, PP7.a. and 7.b.; Complaint, exhibit C, PP3.a. and 3.b.)

The Easterns, "at various relevant tines claimed to be part of the [PEPs] that shared the state reservation located in New London County, Connecticut, and at other times held themselves out as a separate Indian tribe. The Easterns sought federal recognition separately from the [PEPs]." (Complaint, P18.) The Historics consist of the PEPs and. the Easterns. (Complaint, P20.)

On July 1, 2002, the Assistant Secretary of the Interior for Indian Affairs "determined that the [PEPs] and the Easterns equally and together comprise the Historic Tribe that qualifies for federal **[*10]** recognition." (Complaint, P22; see Complaint, P87.) The court notes that, in rendering its decision, the BIA determined that both groups "had derived in recent times from the historical Eastern Pequot Tribe which had existed continuously since first sustained contact with Europeans . . . This determination does not merge two tribes, but determines that only a single tribe exists

which is represented by two petitioners." Final Determination to Acknowledge the Historical Eastern Pequot Tribe, 67 Fed.Reg. 44, 234, 44, 235 (Bureau of Indian Affairs July 1, 2002). The BIA's determination was to become final after ninety days from the date of publication, unless a request for reconsideration was filed. 67 Fed.Reg. 44, 240; 25 C.F.R. § 83.11. The BIA's determination is "currently pending appeal." (Complaint, P87; see Complaint, Count Seventeen, P189.)

Shortly after the BIA issued its determination, the defendant Historics "approved an interim Historic tribal constitution in January 2003 authorizing a joint interim tribal council composed of [five PEPs] and [nine Easterns], with a quorum of ten, thereby allowing either side to prevent [*11] a quorum if necessary to protect their rights and interests." (Complaint, P92.) The defendant PEPs "chose its five joint tribal council members from among the nine members of the [PEP] tribal council, which continues to control internal [PEP] matters." (Complaint, P93.) The defendants "[Eastern Capital Development, LLC (ECD)], Mark R. Sebastian and others advised the joint interim tribal council that it could pick and choose among backers, notwithstanding written agreements with them, and void the agreements with [the plaintiff] and Trump [i.e., Donald Trump, Trump Hotels and Casino Resorts Development Company, LLC, and Seven Arrows Investment and Development Corp.] without cause or justification." (Complaint, P95.) The defendant "ECD also demanded that the joint interim tribal council not meet with [the plaintiff]." (Complaint, P96.) Defendants "ECD, Mark Sebastian and others advised the [Historics'] joint interim tribal council to breach its agreements with [the plaintiff] and Trump." (Complaint, P98.)

In March 2003, defendant Eugene R. Young, Jr., a PEP councillor and councillor on the joint interim tribal council, called the plaintiff and stated "that he wanted [*12] a 'bonus,' and demanded that either Trump or [the plaintiff] immediately pay him ten thousand dollars . . ." (Complaint, PP101-02.) Young also "demanded from both [the plaintiff] and the [PEPs'] attorney that he receive a substantial increase in his annual salary as a tribal council member." (Complaint, P104.) "Young further stated that 'things have changed on the council, and I have the power now,' and threatened that [the plaintiff] and Trump would be 'out' and ECD would be 'in' if [the plaintiff] and Trump failed to meet his demands for money." (Complaint, P106.) The plaintiff was later told that "Young went to Mark Sebastian and other Eastern members of the joint interim tribal council to request protection from any administrative action by the [PEP] tribal council, and was promised their protection." (Complaint, P115.)

"In March 2003, with Eugene Young providing a quorum, the Eastern members of the joint interim tribal council voted to breach the Amalgamated and Trump agreements in favor of ECD." (Complaint, P118.) In May 2003, defendant "Marcia Flowers, an Eastern member and the joint interim tribal council chair, delivered separate letters to [the plaintiff] and [*13] Trump on behalf of the joint interim tribal council, terminating the [Historics'] relationship with each . . ." (Complaint, P119.) At that time, the plaintiff had "completed all its obligations under the Amalgamated agreements." (Complaint, P120.)

The plaintiff commenced this suit by service of process on the various defendants on July 9, 2003. (Marshal's returns.) On July 15, 2004, the defendants PEPs and PEP councillors filed a motion to dismiss "the complaint against them," accompanied by a memorandum in support as required by Practice Book § 10-31. In response to the defendants' motion to dismiss, the plaintiff filed a memorandum in opposition on August 19, 2004. [3]

[*14] Counts one through five, seven through twelve, fourteen and sixteen through eighteen are directed against the defendant PEPs and PEP councillors. For the reasons stated in the court's memorandum of

[3] With regard to this motion to dismiss, the parties filed numerous documents in addition to those mentioned above, including the plaintiff's "*STATEMENT OF UNDISPUTED FACTS*" and "*OBJECTIONS TO EXHIBITS AND PORTIONS OF INDIAN DEFENDANTS' MOTIONS TO DISMISS AND SUPPORTING MEMORANDUMS*" filed on August 19, 2004, the *AFFIDAVIT OF MARCIA J. FLOWERS In Re MOTION TO DISMISS - MAY 19, 2004*" filed on September 8, 2004 the plaintiff's "*HEARING MEMORANDUM AS TO INDIAN DEFENDANTS' CITED CASES*" filed on September 10, 2004, the plaintiff's "*POST-HEARING MEMORANDUM TO CLARIFY MISTATEMENTS IN HEARING ON MOTIONS TO DISMISS*" filed October 6, 2004, the plaintiff's "*POST-HEARING MEMORANDUM REGARDING 'FACTION' ARGUMENTS IN THE INDIAN DEFENDANTS' MOTIONS TO DISMISS*" filed October 18, 2004, and the defendant Historics' "*REPLY TO AMALGAMATED INDUSTRIES' POST-HEARING MEMORANDA*" filed December 13, 2004. These have all been considered by the court in rendering its decision with regard to this motion to dismiss.

decision on the motion to dismiss of the defendants Historics, Easterns, and Eastern councillors, the court rejects the defendants' claims in their motion to dismiss that the issues raised in the counts against them are nonjusticiable, that is, that they concern a political question or are not ripe for adjudication. [4] In addition, for the reasons stated in the remainder of this memorandum, the defendants PEPs and PEP councillors' motion to dismiss the complaint on the ground of sovereign immunity is also denied.

[*15] *I*

STANDARD OF REVIEW

As noted in the memorandum of decision concerning the motion to dismiss of the defendants Historics, Easterns and Eastern councillors, ***HN2*** "the standard of review of a motion to dismiss is . . . well established. In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader . . . A motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Dyous v. Psychiatric Security Review Board, 264 Conn. 766, 773, 826 A.2d 138 (2003)*. "When a [trial] court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light." (Internal quotation marks omitted.) *Martin v. Brady, 261 Conn. 372, 376, 802 A.2d 814 (2002)*.

HN3 "Jurisdiction of the subject-matter is the power [of the court] to hear and determine cases of the general class to which the proceedings in question **[*16]** belong." (Internal quotation marks omitted.) *New England Pipe Corp. v. Northeast Corridor Foundation, 271 Conn. 329, 334, 857 A.2d 348*. "[A] reviewing court should indulge every presumption in favor of the trial court's subject matter jurisdiction." (Internal quotation marks omitted.) *Amore v. Frankel, 228 Conn. 358, 374, 636 A.2d 786 (1994)*. "The doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." *Gordon v. H.N.S. Management Co., 272 Conn. 81, 92, 861 A.2d 1160 (2004)*.

HN4 "It is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." (Internal quotation marks omitted.) *St. George v. Gordon, 264 Conn. 538, 544-45, 825 A.2d 90 (2003)*. "The plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." *Fink v. Golenbock, 238 Conn. 183, 199 n.13, 680 A.2d 1243 (1996)*.

II

TRIBAL SOVEREIGN IMMUNITY

The defendants argue that the plaintiff's claims **[*17]** against them are barred by the doctrine of sovereign immunity. They contend that the PEP councillors retain their sovereign immunity for acts within the scope of their authority as tribal councillors because the PEPs did not explicitly waive the immunity of the PEP councillors, although they allegedly waived the sovereign immunity of the tribe. They maintain that all of the allegations against the PEP councillors concern acts within the scope of their authority as tribal councillors. They contend that claims against tribal officials, whether arising in the context of contract or tort, for acts within the scope of their authority are barred by sovereign immunity. Moreover, they argue that the PEPs' waiver of sovereign immunity was invalid and does not bind the tribe. They contend that although Trump and the plaintiff encouraged them to think of themselves as a tribe, they were a minority faction lacking the authority to execute such a waiver.

The plaintiff makes several arguments against the defendants' assertion of tribal sovereign immunity. First, it argues that this matter does not infringe tribal sovereignty or implicate sovereign immunity. It contends that "because the tribe exercised **[*18]** its sovereignty [in submitting to the jurisdiction of the state courts in its contracts with the plaintiff], the court is actually obligated to uphold the tribe's sovereignty by exercising its jurisdiction to enforce the tribe's sovereign choices." (Plaintiff's memorandum filed 8/19/04, p. 22.) It also argues that the tribe waived any and all sovereign immunity.

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[4] In so ruling, the court notes that the claims in counts four and five, which were not addressed in the memorandum of decision on the motion to dismiss of the defendants Historics, Easterns, and Eastern councillors, are also ripe for adjudication for the reasons stated in that decision concerning the other counts; that is, they are not entirely contingent on federal recognition and the operation of a casino gaming facility and they contain allegations of "severe and continuing economic harm." (Complaint, PP136 and 138.)

The plaintiff next argues that the doctrine of collateral estoppel, or issue preclusion, prohibits the defendants from arguing that the PEPs were not the state-recognized tribe at the time the plaintiff entered into contracts with them. It contends that the court previously decided this issue in *Sebastian v. Indian Affairs Council*, Superior Court, judicial district of New London, Docket No. 028949 (November 30, 1979, Hendel, J.), which, it argues, upheld a 1977 ruling of the Connecticut Indian Affairs Council (CIAC) determining that descendants of Tamar Brushel Sebastian, the Easterns, were not members of the state-recognized tribe.

In Sebastian v. Indian Affairs Council, supra, Docket No. 028949, the court dismissed an appeal of a CIAC decision, which found that Tamar Brushell Sebastian was at least "one-half **[*19]** blood Eastern Pequot Indian and that all direct linear decedents of Tamar Brushell Sebastian found to have at least one-eighth percentage of her blood are recognized as members of the Eastern Pequot tribe of Indians." Contrary to the plaintiff's assertion, the CIAC had not determined that descendants of Tamar Brushell Sebastian were not members of the tribe, but merely had placed a limitation on the number of descendants who would have qualified for membership. Moreover, the General Statutes were amended in 1989 to eliminate the role of the CIAC in determining tribal membership. See Public Acts 1989, No. 89-368. ***HN5*** Tribal membership is now determined by the tribes. See General Statutes § 47-66j(b). [5] Collateral estoppel, therefore, does not preclude the defendants from litigating the issue of whether the PEPs were the state recognized tribe at the time the parties entered into the contracts because the CIAC decision at issue in Sebastian v. Indian Affairs Council, supra, Docket No. 028949, was superceded by statute.

[*20] The plaintiff further contends that the PEPs, with which it entered into contracts, was the only group calling itself the "Paucatuck Eastern Pequots," the name of the state-recognized Indian tribe in the General Statutes, and that the public should not have to "parse beyond state statutes." It argues that at the time it entered into contracts with the PEPs, the PEPs alone, therefore, had the authority to enter into contracts and to waive the tribe's sovereign immunity, "thereby subjecting itself and its agreements to state court jurisdiction and state law." The plaintiff also argues that even if the PEPs' were a tribal faction, tribal factions and unincorporated associations may enter into contracts and waive whatever sovereign immunity they might be ale to assert. Moreover, it argues, if the PEPs were not a tribe and had no sovereign rights when they entered into the Restated Agreement and Restated Capital Fee Agreement, then they admit that they are subject to the court's jurisdiction.

HN6 "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity . . . and the tribe itself has consented to suit in **[*21]** a specific forum . . . Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe . . . However, such waiver may not be implied, but must be expressed unequivocally." (Citations omitted; internal quotation marks omitted.) Kizis v. Morse Diesel International, Inc., supra, 260 Conn. 53-54.

In its contracts with the plaintiff, the defendant PEPs have clearly and unequivocally waived their sovereign immunity. In the Restated Agreement and the Restated Capital Fee Agreement, the PEPs agreed to two relevant provisions in each, entitled "*Waiver of Sovereign Immunity*" [6] **[*23]** and "Submission to State and Federal

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[5] General Statutes § 47-66j(b) provides, "[a] membership dispute shall be resolved in accordance with tribal usage and practice. Upon request of a party to a dispute, the dispute may be settled by a council. Each party to the dispute shall appoint a member of the council and the parties shall jointly appoint one or two additional members provided the number of members of the council shall be an odd number. If the parties cannot agree on any joint appointment, the Governor shall appoint such member who shall be a person knowledgeable in Indian affairs. The decision of the council shall be final on substantive issues but an appeal may be taken to the Superior Court to determine if membership rules filed in the office of the Secretary of the State pursuant to this section have been followed. If the court finds that the dispute was not resolved in accordance with the provisions of the written description, it shall remand the matter with instructions to reinstitute proceedings, in accordance with such provisions."

[6] Paragraph 7.a. of the Restated Agreement and P3.a. of the Restated Capital Fee Agreement provide, "the Tribe hereby *WAIVES*, completely and to the fullest extent under the law, any and all sovereign immunity which it currently or at any future time might otherwise be entitled to assert as to any and all matters relating to this Agreement, including, but not limited to, the interpretation and/or enforcement of this Agreement."

Court Jurisdiction," [7] respectively. (Complaint, exhibit B, PP7.a. and 7 b.; Complaint, exhibit C, PP3.a. and 3.b.) Moreover, the plaintiff alleges that the PEPs "purposefully, intentionally, expressly and unequivocally waived, as to the subject matter of its agreements with Amalgamated, any and all sovereign immunity it had or may have at any time in the future." (Complaint, P69.) The plaintiff further alleges that the PEPs "purposefully, intentionally, expressly and **[*22]** *unequivocally consented to submit to the jurisdiction of the . . . courts of the state of Connecticut." (Complaint, P70.) The defendants have submitted no evidence to contradict these allegations. To the extent the PEPs are entitled to assert sovereign immunity, the court, therefore, finds that it has been waived. Nevertheless, if the PEPs were a mere faction of the tribe, and lacked the requisite authority to waive the tribe's sovereign immunity, then they are not entitled to assert sovereign immunity; the tribe itself must assert sovereign immunity.* See Kizis v Morse Diesel International, Inc., supra, 260 Conn. 51 n.7; State v. Sebastian, 243 Conn. 115, 161, 701 A.2d 13 (1997). Accordingly, regardless of whether the PEPs were the tribe at the time it entered into the contracts with the plaintiff, they are not entitled to the protections of sovereign immunity and the motion to dismiss is hereby denied as to the counts directed at them.

[*24] The plaintiff also argues that the individual tribal councillors cannot assert sovereign immunity because the immunity of individual tribal members cannot extend beyond that of the tribe, and the tribe has waived any and all sovereign immunity. Further, it argues that tribal representatives are never immune for actions that are outside the scope of their authority. It contends that the complaint contains allegations of "significant illegal conduct outside the authority of individual defendants, such that they cannot possess representative immunity therefore under any circumstance." Regardless of whether the plaintiff alleged sufficient facts demonstrating that the PEP councillors acted beyond the scope of their authority, it is not necessary for the court to address this issue because they are not entitled to the protections of sovereign immunity for any acts.

"Several cases have established that ***HN7*** tribal sovereign immunity does not extend to individual members of a tribe and that the tribe itself must assert immunity. A state court does have the authority to adjudicate actions against tribal members when it properly obtains personal jurisdiction. See, e.g., Puyallup Tribe, Inc. v. Washington Game Dept., 433 U.S. 165, 173, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977); **[*25]** United States v. James, 980 F.2d 1314, 1319 (9th Cir. 1992), cert. denied, 510 U.S. 838, 114 S. Ct. 119, 126 L. Ed. 2d 84 (1993); State v. Sebastian, [supra, 243 Conn. 115, 701 A.2d 13]. The doctrine of tribal immunity [however] extends to individual tribal officials acting in their representative capacity and within the scope of their authority . . . Romanella v. Hayward, 933 F. Supp. 163, 167 (D.Conn. 1996). The doctrine does not extend to tribal officials when acting outside their authority in violation of state law. See Puyallup Tribe, Inc. v. Washington Game Dept., supra, 171-72." (Internal quotation marks omitted.) Kizis v. Morse Diesel International, Inc., supra, 260 Conn. 51 n. 7. The court finds no case in which members of a tribe have successfully asserted sovereign immunity after the tribe had executed an unlimited waiver of that immunity. [8]

[*26] Accordingly, the individual PEP councillors are not entitled to sovereign immunity. As tribal councillors of a tribe that has unequivocally waived "any and all sovereign immunity which it currently or at any future time might otherwise be entitled to assert"; (Complaint,

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[7] Paragraph 7.b. of the Restated Agreement andP3.b. of the Restated Capital Fee Agreement provide in relevant part, "for the purposes set forth in this paragraph, including, but not limited to, in any action to interpret or enforce its obligations under this Agreement, including any payment obligation to Amalgamated . . . the Tribe hereby agrees and expressly consents to be a party defendant, and submits to the jurisdiction of . . . any and all courts of the state of Connecticut, and agrees to take any and all steps necessary to confer jurisdiction upon any such court, including, but not limited to, after it is federally recognized. The Tribe specifically requests that those courts accept such jurisdiction . . . The Tribe further agrees and represents that such exercise of jurisdiction does not and will not infringe or interfere with the Tribe's sovereignty, its right to govern its internal affairs or property, or its ability to regulate organized commercial activities on Tribal lands, or the authority of future Tribal courts to adjudicate disputes arising from activities on Tribal lands. There is no current or anticipated action in any Tribal court or tribunal regarding the subject matter herein."

[8] The court notes that in the case of *Trump Hotels and Casino Resorts Development Co., LLC v. Rosow,* Superior Court, Judicial District of New Britain, Complex Litigation Docket Docket No. X03 CV 03 4000160 (April 29, 2005, Peck, J.), this court granted the motion to dismiss filed on behalf of the PEPs' councillors on the ground that the tribe's waiver of sovereign immunity in its contract with the plaintiff therein explicitly excluded the PEP councillors, thereby preserving the PEP councillors' sovereign immunity with respect to acts within the scope of their authority as tribal councillors. The court reaches a different conclusion

exhibit B, PP7.a.; Complaint, exhibit C, PP3.a.); the PEP councillors have no immunity to assert. In *Chayoon v. Sherlock*, Superior Court, judicial district of New London, Docket No. CV 03 0128101 (April 23, 2004, Martin, J.), a case relied upon by the defendants, "the plaintiff [did] not allege that the tribe has waived immunity from suit or that Congress has abrogated it. Instead, he asserted that the defendants are non-Indians and claimed that the defendants acted beyond the scope of their authority by violating company policy." Similarly, in *Bassett v. Mashantucket Pequot Museum & Research Center, Inc., 221 F. Supp. 2d 271, 280 (D.Conn. 2002)*, the court does not state that the tribe had waived its immunity. These cases are distinguishable because in this case, the plaintiff has alleged and shown that the PEPs clearly and unequivocally waived their sovereign immunity. Moreover, if the PEPs **[*27]** were not a tribe at the time the waivers were executed, then the PEP councillors would have no immunity to assert as councillors of a group that is not a tribe. Accordingly, the defendants' motion to dismiss is denied on the ground of tribal sovereign immunity.

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CONCLUSION

For the foregoing reasons, the motion to dismiss of the defendants, the PEPs and the individual PEP councillors, is hereby denied.

BY THE COURT

PECK, J.

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in the instant case because in the Amalgamated agreements, the PEPs' waiver of sovereign immunity is unequivocal and comprehensive, and, as distinguished from the Trump contract, did not exclude the PEP tribal councillors from its waiver.

Neutral
As of: June 21, 2016 3:19 PM EDT

United Houma Nation v. *Babbitt*

United States District Court for the District of Columbia

July 8, 1997, Decided ; July 8, 1997, FILED

Civil Action No. 96-2095 (JHG)

Reporter
1997 U.S. Dist. LEXIS 10095; 1997 WL 403425

UNITED ***HOUMA*** NATION, Plaintiff, v. BRUCE ***BABBITT***, SECRETARY OF THE INTERIOR, et al., Defendants.

Disposition: [*1] Defendants' Motion to Dismiss granted in part and denied in part. Judgment entered in favor of the defendant as to Counts One, Two, Four and part of Count Three, and the remaining portions of Count Three remanded to the agency for proceedings.

Core Terms

tribe, acknowledgment, regulations, Amendments, rulemaking, reconsideration, descendance, motion to dismiss, petitioning, issues, initiate, Revision, historic, requests, summary judgment, Procedures, agency's, decisions, federally, positions, changes, letters, Reply, adjudication hearing, reaffirmed, criterion, documents, administrative record, ad hoc, communities

Case Summary

Procedural Posture
Defendant Secretary of the Interior filed a motion to dismiss plaintiff Indian nation's complaint seeking judicial review of the denial of the Indian nation's petition for a rulemaking to change regulations concerning the acknowledgment of Indian tribes, and to stay its petition for acknowledgment pending the conclusion of the action.

Overview
The Bureau of Indian Affairs proposed denying the Indian nation's petition seeking federal recognition as an Indian tribe because the nation failed to show that its members were the descendants of an historical tribe as required by 25 C.F.R § 83.7. The Indian nation petitioned for a rulemaking, contending that 1994 amendments to the Indian Reorganization Act of 1934, 25 U.S.C.S. § 476(f) and (g), precluded reliance on the nation's lack of historical descendance. The Secretary denied that petition, as well as a subsequent petition. The court granted the Secretary's motion to dismiss the Indian nation's action seeking judicial review in part. The court held that the amendments did not preclude making regulatory distinctions between historic and non-historic tribes, and because the Secretary's interpretation of the statute as requiring historical descendance was reasonable, it was entitled to deference. Accordingly, the decision to not initiate a rulemaking based on the amendments was not arbitrary and capricious. Because the Secretary failed to explain its reason for rejecting certain requested procedural changes to the regulations, the court remanded.

Outcome
The court granted the Secretary's motion to dismiss the Indian nation's action seeking judicial review of the denial of a petition for a rulemaking in part. It denied the motion in part concerning the Indian nation's request for certain procedural changes to the regulations and remanded for further proceedings.

LexisNexis® Headnotes

Governments > Courts > Rule Application & Interpretation

HN1 Whether to hold oral argument on a motion is a decision committed to the court's discretion. U.S. Dist. Ct., D.C., R. 108(f).

Governments > Native Americans > Authority & Jurisdiction

Governments > Native Americans > Indian Reorganization Act

HN2 The regulations at 25 C.F.R. Part 83 establish the procedure through which a group may seek acknowledgment as a federally recognized Indian tribe. Among other things, federal recognition as a tribe opens the door to federal protection, services and benefits. 25 C.F.R. § 83.2. To attain federal recognition, a group

must petition the Department of the Interior for acknowledgment and demonstrate that the tribe satisfies the seven criteria of 25 C.F.R. § 83.7(a)-(g). Failure to meet any one of the criteria will result in a determination that the petitioning group is not entitled to federal recognition and a government-to-government relationship with the United States. 25 C.F.R. § 83.6(c).

Governments > Native Americans > Authority & Jurisdiction

Governments > Native Americans > Indian Reorganization Act

HN3 The petitioning group must demonstrate that its membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity. 25 C.F.R. § 83.7(e). Historical means dating from first sustained contact with non-Indians. 25 C.F.R. § 83.1.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > Appeals > Standards of Review > Reversible Errors

Criminal Law & Procedure > Appeals > Reversible Error > General Overview

HN4 Once the court decides to accept matters outside the pleading, it must convert the motion to dismiss into one for summary judgment, and several courts have held that it is reversible error to consider outside matter without converting the motion to dismiss into a motion for summary judgment.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Need for Trial

HN5 Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The inquiry performed is the threshold inquiry of determining whether there is a need for trial, whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. The role of the court on a motion for summary judgment is not to weigh the evidence, but to determine whether genuine issues of material fact exist for trial. To survive summary judgment, the nonmoving party must offer more than mere allegations, by going beyond the pleadings and by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. If the material facts proffered by the nonmoving party are subject to diverse interpretations, summary judgment is not available. Any doubts must be resolved in favor of the nonmoving party and the nonmoving party is entitled to all justifiable inferences.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

HN6 The court's scope of review of an agency's refusal to initiate rulemaking procedures under the Administrative Procedure Act, 5 U.S.C.S. §§ 701-706, is "very narrow." The court's role is limited to ensuring that the agency has adequately explained the facts and policy concerns it relied on, and that the facts have some basis in the record. An agency decision to not initiate rulemaking will be overturned only in the rarest and most compelling circumstances, which have primarily involved plain errors of law, suggesting that the agency has been blind to the source of its delegated power.

Governments > Native Americans > Authority & Jurisdiction

Governments > Native Americans > Indian Reorganization Act

HN7 Historical descendance of a group of Indians is required as one component leading to political recognition as an independent sovereign and a government-to-government relationship with the United States.

Governments > Federal Government > US Congress

Governments > Native Americans > Authority & Jurisdiction

HN8 Congress can recognize Indian tribes directly under its own authority and it may do so however it so chooses.

Governments > Native Americans > Authority & Jurisdiction

Governments > Native Americans > Indian Reorganization Act

Public Health & Welfare Law > Social Services > Native Americans

HN9 Section 16 of the Indian Restoration Act of 1934, 25 U.S.C.S. § 461 et seq., provides: Any Indian tribe or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such Constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior (Secretary) shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the Constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original Constitution and bylaws.

Governments > Native Americans > Indian Reorganization Act

Governments > Native Americans > Tribal Sovereign Immunity

HN10 25 U.S.C.S. § 476(f) provides: Privileges and immunities of Indian tribes; prohibition on new regulations. Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934, 25 U.S.C.S. § 461 et seq., as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

Governments > Native Americans > Indian Reorganization Act

Governments > Native Americans > Tribal Sovereign Immunity

HN11 25 U.S.C.S. § 476(g) provides Privileges and immunities of Indian tribes, existing regulations. Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

Governments > Federal Government > US Congress

Governments > Native Americans > Authority & Jurisdiction

Governments > Native Americans > Indian Reorganization Act

HN12 While Congress may enact legislation to grant specific Indian tribes recognition based on whatever policy criteria it deems appropriate, the Department of the Interior acts based on the statutory authority provided by Congress.

Counsel: For UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, BRUCE BABBITT, Secretary of the Interior, BUREAU OF INDIAN AFFAIRS, ADA E. DEER, Assistant Secretary - Indian Affairs, BRANCH OF ACKNOWLEDGMENT AND RESEARCH, HOLLY RECKFORD, Chief, Branch of Acknowledgment and Research, federal defendants: Michael Kerry Martin, U.S. DEPARTMENT OF JUSTICE, Environment & Natural Resources Division, Washington, DC.

Judges: JOYCE HENS GREEN, United States District Judge

Opinion by: JOYCE HENS GREEN

Opinion

MEMORANDUM OPINION AND ORDER

Upon consideration of the defendants' Motion to Dismiss, the plaintiff's opposition, the defendants' reply, and the entire record in this matter, the motion will be converted to a motion for summary judgment, and it will

be granted in part and denied in part. [1] Judgment will be entered in favor of the defendant as to Counts One, Two, Four and part of Count Three. The remaining portions of Count Three, as detailed below, [*2] will be remanded to the agency for proceedings consistent with this opinion.

I. Background

The following facts are not in dispute. In 1979, Plaintiff, United Houma Nation ("UHN"), filed a Letter of Intent to Petition for Federal Acknowledgment. UHN formally sought federal recognition under 25 C.F.R. Part 83 by filing a "Documented Petition" on July 18, 1985. [2] Between 1986 and 1991, the Department of Interior's ("Department") Bureau of Indian Affairs ("BIA") and UHN engaged in technical discussions to address deficiencies in UHN's petition, which [*3] was placed on "Active Consideration" status on May 20, 1991.

On December 22, 1994, the Department published its "Proposed Findings" in the Federal Register. See 59 Fed.Reg. 66118 (Dec. 22, 1994). In those Proposed Findings, the Assistant [*4] Secretary of Indian Affairs "proposed to decline to acknowledge that the United Houma Nation . . . exists as an Indian tribe within the meaning of Federal Law. This notice is based on a determination that the tribe does not meet three of the seven mandatory criteria set forth in 25 CFR 83.7. Therefore, the United Houma Nation does not meet the requirements necessary for a government-to-government relationship with the United States." Id. [3] The principal reason? UHN failed to present evidence that its members were the descendants of the historical Houma Indian tribe. [4]

[*5] Publication of the Proposed Findings triggered the start of a 180-day comment period during which any person, including UHN, could assert a challenge. See

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[1] In its opposition to the Motion to Dismiss, the plaintiff requested oral argument. See UHN's Opp. at 25. ***HN1*** Whether to hold oral argument on a motion is a decision committed to the Court's discretion. See Local Rule 108(f). In this case, oral argument is not necessary to resolve the Motion to Dismiss, particularly since oral argument was held on the motion for a preliminary injunction involving the same principal issue raised by the Motion to Dismiss.

[2] ***HN2*** The regulations at 25 C.F.R. Part 83 establish the procedure through which a group may seek acknowledgment as a federally recognized Indian tribe. Among other things, federal recognition as a tribe opens the door to federal protection, services and benefits. 25 C.F.R. § 83.2; see James v. U.S. Dep't of Health and Human Serv., 263 U.S. App. D.C. 152, 824 F.2d 1132, 1136 (D.C. Cir. 1987). To attain federal recognition, a group must petition the Department for acknowledgment and demonstrate that the tribe satisfies the seven criteria of 25 C.F.R. § 83.7(a)-(g). Failure to meet any one of the criteria will result in a determination that the petitioning group is not entitled to federal recognition and a government-to-government relationship with the United States. See 25 C.F.R. § 83.6(c).

[3] The principal criterion at issue here is the requirement that ***HN3*** the petitioning group demonstrate that its "membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity." Id. § 83.7(e). Historical means "dating from first sustained contact with non-Indians." Id. § 83.1.

[4] In parts most relevant, the Proposed Findings stated:

> . . . There are no documented genealogical, social, or political connections between this tribe of Indians and the petitioner [UHN]. There is also no evidence that the petitioner, as a group, descends from any other historical tribe, or from historical tribes which combined and functioned as a single autonomous entity.
>
> There is no evidence that the petitioner's ancestors constituted a social community, Indian or non-Indian, before 1830. Because of this, the petitioner has also failed to meet criterion 83.7(b), maintenance of social community, and criterion 83.7(c), exercise of political influence, prior to 1830. Lacking the evidence for an ancestral community prior to 1830, there is, of course, no evidence for the exercise of political influence prior to 1830. The federal acknowledgment criteria 83.7(b) and (c) require the petitioner to provide evidence that they fulfill criteria 83.7(b) and (c) from the time of first sustained contact with Europeans to the present.
>
> * * *
>
> There is the possibility, though not well-documented at this time, that some or all of the component communities on the lower bayous may meet criteria 83.7(b) and (c) from 1880 to the present, as separate communities. But the petitioner has not established any connection to a historical tribe prior to 1830. Nor did the petitioner submit its

25 C.F.R. §§ 83.10(i), (k). The Department's regulations also provided UHN with a minimum of sixty days to respond to any third-party submissions, which could further extend the date of the agency's final determination. Id. § 83.10(k). On May 12, 1995, UHN requested the first of what would be a series of extensions. Ultimately, the comment period was extended until November 13, 1996, to provide for an aggregate 690-day period. [5]

[*6] On May 31, 1995, citing the Act of May 31, 1994 ("Technical Corrections Act of 1994 or "94 Amendments"), Pub. L. No. 103-263, 108 Stat. 707, amending 25 U.S.C. §§ 476(f), (g), UHN petitioned the Department for a rulemaking. See Plaintiff's Opp. at Ex. A. [6] UHN contended that the Proposed Findings relied upon criteria that were invalidated by the 94 Amendments, and it sought an appropriate revision to the federal acknowledgment provision of 25 C.F.R. § 83.7(e) and related criteria. Id.

On November 27, 1995, the Department denied UHN's petition. See Letter of Ada Deer, Ass't Secretary for Indian Affairs, attached to Plaintiff's Opp. at Ex. B. Accompanying Assistant Secretary Deer's letter denying UHN's petition [*7] were a number of documents, including a letter of November 1, 1995, in which the Solicitor's Office analyzed and rejected UHN's interpretation of the 94 Amendments. In her letter of November 27, 1995, Assistant Secretary Deer stated:

> Based on the analysis completed by the Department over the past few months as elaborated in the October 18, 1995, letters the recent analysis prepared by the Solicitor's Office, a review of your petition, and a review of the legislative history of the 1994 IRA amendments, the Department will not engage in informal rulemaking under the Administrative Procedures Act in response to your petition. This decision is final for the Department.

Id.

On December 4, 1995, UHN and four other non-recognized tribes "filed a petition seeking revision of the acknowledgment regulations in a number of respects including the historic tribe requirement." Compl. P29; Plaintiff's Opp. at 23. [7] The December 1995 petition was, in substantial respect, identical to the May 1995 petition ("Houma" petition), and it stated: "We therefore request reconsideration of the Houma petition as incorporated in this petition." Dec. 1995 Petition at 8, Ex. L to Plaintiff's [*8] Opp. The difference between the May and December petitions was that the December petition included issues that, while raised previously, were not raised specifically in the May petition. Those issues involved requested revisions to the acknowledgment regulations to include the acknowledgment decisionmaker in the process leading to a recognition decision, id at 4; implementation of a formal adjudicatory hearing; id. at 5, use of 1934 as the baseline from which a petitioning group should be required to show tribal existence; id. at 8, re-evaluation of certain pre-1994 final decisions; id. at 11, and implementation of a requirement to notify acknowledgment petitioners of all submissions and contacts regarding their petitions, id.

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petition as a confederation, but rather as a single entity. For these combined reasons, there is no need to further evaluate the continued existence of separate communities from 1880 to the present, at this time.

59 Fed.Reg. at 66118-19.

[5] On Nov. 13, 1996, UHN filed its response. See Plaintiff's Opp. at 3. Upon the conclusion of the comment period and the 60-day period within which UHN may respond to any third-party submissions, the regulations require the Assistant Secretary to consult with UHN and interested parties to establish an "equitable time frame for consideration of written arguments and evidence submitted during the response period." 25 C.F.R § 83.10(1). After considering the written arguments and evidence supporting and rebutting the Proposed Findings, the Assistant Secretary will determine UHN's status Id. § 83.10(1)(2). If the Assistant Secretary determines that recognition of UHN is not appropriate, her determination would be a final agency decision, and it would become effective 90 days from publication. Id. § 83.10(o). UHN can then seek judicial review of an adverse decision or it may first request review by the Interior Board of Indian Appeals ("IBIA") and the Secretary of the Interior. See id. § 83.11.

[6] The 11-page petition was entitled "Petition for Revision of the Acknowledgment Regulations, 25 C.F.R. Part 83 or, in the Alternative, for Written Confirmation that 25 C.F.R. § 83.7(e) is No Longer a Requirement for Acknowledgment and that Related Sections Have Been Modified."

[7] This 12-page petition was entitled "Petition for Revision of the Acknowledgment Regulations, 25 C.F.R Part 83."

While UHN contends that the defendants have not considered the 1995 Petition, see Compl. P30, the administrative record makes clear that the defendants **[*9]** construed the December 1995 petition as a request for reconsideration and denied it on March 12, 1996. See Motion to Dismiss at 19-20 & App. C; Reply at 19-20 & Ex. D (Ada Deer letter of March 12, 1996). This position was reaffirmed by letter of November 18, 1996, from Assistant Secretary Deer to counsel for UHN "on behalf of the United Houma, Mashpee, Wampanoag, Shinnecock, Pamunkey, and Miami." Letter of Ada Deer, Ass't Secretary of the Interior for Indian Affairs at 1 (Nov. 18, 1996), attached to Motion to Dismiss at App. C. Because this letter describes the tortured regulatory symbiosis between the parties on the matters at issue in Count III, substantial portions of the Assistant Secretary's letter are extracted and provided below:

> Dear [counsel for UHN]:
>
> In December, 1995, on behalf of the United Houma, Mashpee, Wampanoag, Shinnecock, Pamunkey, and Miami, you submitted a twelve page "Petition for Revision of the Acknowledgment Regulations, *25 CFR Part 83*." (December submission). This submission included and incorporated as a substantial part of it, as well as an exhibit, a previous May 31, 1995, 11 page petition for rule-making with attachments, (May petition) **[*10]** filed by you on behalf of the United Houma. The purpose of this letter is to reaffirm the Department's position concerning the December submission.
>
> The Assistant Secretary Indian Affairs declined to initiate rule-making as requested in the May petition on November 27, 1995. The December submission arrived at the Department six days after the November 27, 1995, final decision not to initiate rule-making, and raised other arguments which had been dismissed previously by this Department, either orally or in writing.
>
> It has recently come to my attention that you are alleging, on behalf of one of the groups which submitted the December submission, that the submission is still pending in the Department. The purpose of this letter is to clarify and reiterate the position of this Department that the second submission is essentially a request for reconsideration, the original issues in it having been addressed previously by the Department.
>
> * * *
>
> Excerpts from your May and December submissions are identical. Both specifically state that "the time requirements of criteria (e), (b), and (c) are related" and request changes to the criteria (December submission at 3; March (sic) **[*11]** petition at 3). The December submission, at page 8, however, requests reconsideration of the final decision regarding the impact of the 1994 amendments. As such, it was not a petition for rulemaking. The impact of the 1994 amendments is now in litigation, United Houma Nation v. Babbitt, Civil No. 1:96CV02095 JHG (D.D.C.), and will not be addressed further in this letter.
>
> * * *
>
> In addition to the identical paragraphs in the two submissions, the December submission includes arguments concerning acknowledgment criteria (b) and (c) previously made by Mr. Dauphinais and Ms. Locklear on behalf of the Miami. These arguments were opposed by the Department in the litigation, rejected by the district court in Miami Nation of Indians v. Babbitt, and rejected again by letter of November 1, 1995, from the Associate Solicitor to Mr. Dauphinais and Mr. Tilden, which letter was incorporated in the November 27, 1995, final decision. Thus, the Department considered the December submission a request for reconsideration of the then recent Department's (sic) letters and briefs concerning acknowledgment criteria (b) and (c).
>
> On September 25, 1995, after the court in Miami ruled, **[*12]** counsel filed with the Department a request for reconsideration of the June 1992, decision denying the Miami federal acknowledgment. The Associate Solicitor responded on October 27, 1995. By letter dated November 20, 1995, the Miami "clarified" the earlier letter, requested reconsideration of the October letter, including issues or adjudicatory hearings, reconsideration of the 1992 decision, and impact of the 1994 amendments. By letter dated March 8, 1996, the attorneys for the Miami wrote again on these issues and referenced the December submission.
>
> By letter of March 12, 1996, in response to the last Miami requests for reconsideration, the Assistant Secretary reaffirmed the positions of the Department. This March reaffirmation incorporated the November 27, 1995, denial to initiate

rule-making as well as the letter from October, 1995. These October and November letters, including those cited therein, address your December submission. Consequently, your December submission was simply requesting reconsideration. To the extent the December submission was other than a request for reconsideration, the March 12, 1996, decision letter which incorporated the earlier Departmental **[*13]** positions, addressed the issues yet again.

In addition to the reconsideration of the 1994 amendments issue, you requested in the December submission that an adjudicatory hearing process be added in the regulations. As stated above, this issue also had been raised previously by Mr. Dauphinais on behalf of the Miami in their letter of September 25, 1995. This issue was rejected by the Associate Solicitor, Division of Indian Affairs in a letter of October 27, 1995, which I incorporated in my letter of March 12, 1996, to you. This March letter incorporated also the briefs filed in the Miami litigation. These documents explain the Department's position in regard to the lack of need to include adjudicatory hearings in *Miami Nation v. Babbitt, 887 F. Supp. 1158 at 1173*. These briefs also included the Department's position on acknowledgment criteria (b) and (c), issues raised in the December submission, even though they had been addressed previously by the Department in correspondence from the two months preceding the December submission.

Finally (sic), one very short section of the December submission, page 8, states that "it makes sense to look at 1934 to the present as the **[*14]** time frame over which a petitioning group must show tribal existence." The December submission then references earlier correspondence with the Department concerning focusing on "named leaders" for purposes of criterion (c), which had been the subject of a dialog[ue] between the Department and unacknowledged groups concerning revising the regulations, referenced on page 10 of the December submission as a "task force."

The Department, in response to numerous discussions with the ad hoc group which included both of you, offered the 1934 date with modifications in a "draft letter to Congress," as a position which the Department could support if enacted by Congress. This draft letter also included the Department's position that legislation was necessary to effectuate this change. This draft letter did not recommend other changes suggested by the ad hoc group, such as the "named leaders" comments. This draft was sent to other unacknowledged groups and to recognized tribes for comment. (Deputy Assistant Secretary - Indian Affairs to Parties Interested in the Federal Acknowledgment Process, Memorandum of August 30, 1995). The Department received a number of comments on these **[*15]** positions, including one from [the Native American Rights Foundation] signed by Mr. Dauphinais, none of which supported the Department's draft. Based on these comments, this draft letter to Congress was never sent.

Your December submission which reiterated the request for a 1934 date for review, and focus on "named leaders" for criterion (c), was, at best, a request for reconsideration of the positions this Department took during the numerous discussions with the ad hoc group, or, as addressed above, a request for reconsideration of positions taken in the Miami litigation, all of which positions were reaffirmed in the Department's November 1 and 27, 1995, letters. To the extent the December submission requests reconsideration of positions taken by the Department in the ad hoc group discussions, and in the "draft letter," we note that the Department stated that it did not have the authority to use the 1934 date absent Congressional action. Also, the Department did not recommend other requested changes in the acknowledgment regulations. As such, we considered the December submission not as a petition for rule-making, but simply as yet another reiteration of your position **[*16]** which had been just recently rejected by the Department.

Finally, the December submission requested that the Department reevaluate each of the 13 pre-1994 acknowledgment decisions. This requested was rejected as to the Miami by letter of March, 1996. The other authors of the December submission, the United Houma, Mashpee, Shinnecock, and Pamunkey, do not have adverse decisions issued under the 1978 regulations and indicated no authority to speak on behalf of the 12 petitioners who had such adverse decisions. This request, too, is a request for reconsideration, not a petition for rule-making.

Based on the foregoing, we consider the December submission to be more accurately described as a

> request for reconsideration of decisions made by the Department in the fall of 1995. To the extent any issues remained pending in the December submission after the October and November letters, they were addressed by the Department by letter of March 12, 1996. Finally, if the December submission is considered a petition for rule-making which is still pending, it is denied for all the reasons stated above, including the reasons delineated in the letters, briefs and other documents referenced [*17] in the letters cited above.

Id.

On September 10, 1996, UHN filed the four-count Complaint in this matter under 28 U.S.C. § 1331 and the Administrative Procedures Act, 5 U.S.C. §§ 701-706. In Counts One and Two, UHN contends that the Department's refusal to change its regulations to be in accord with the 94 Amendments is arbitrary and capricious and otherwise in violation of law. In Count Three, UHN asserts that the acknowledgment regulations should be modified in accordance with its December 1995 Petition. And, in Count Four, UHN seeks a stay of consideration of its petition for acknowledgment pending the conclusion of the instant suit.

On October 1, 1996, consistent with Count Four, UHN moved for a preliminary injunction to freeze the administrative process, staying further review of its petition. After hearing argument on October 23, 1996, this Court denied UHN's motion, holding inter alia, that the plaintiff had failed to show both a likelihood of success on the merits and irreparable harm. See Mem. Op. and Order at 11 (Oct. 28, 1996). The defendant's Motion to Dismiss was filed the next month, and, after the Court granted both parties' requests to extend [*18] the briefing schedule, the motion to dismiss became ripe several months thereafter.

II. Discussion

The government seeks to dismiss Counts One and Two of the Complaint on the ground that the 94 Amendments did not affect the federal acknowledgment regulations in 25 C.F.R. Part 83, which regulations are entitled to deference under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). See Motion to Dismiss at 20-30; Reply at 6-18. Additionally, the government argues that Count Four is moot, see Motion to Dismiss at 19-20, and that Count Three, if not moot, id is at least ripe for adjudication. See Reply at 18-21.

A. The standard of review.

Since both parties have submitted material outside of the pleadings, and the Court has exercised her discretion to consider those materials, the Motion to Dismiss will be converted to a motion for summary judgment. Fed.R.Civ.P. 12(b) (last sentence); Carter v. Stanton, 405 U.S. 669, 671, 31 L. Ed. 2d 569, 92 S. Ct. 1232 (1972); Wilson v. Pena, 316 U.S. App. D.C. 352, 79 F.3d 154, 160 n.1 (D.C. Cir. 1996); see 5A Wright & Miller, Federal Practice and Procedure: Civil 2d § 1366, at 493-96 (2nd ed. 1990) ***HN4*** ("Once the Court [*19] decides to accept matters outside the pleading, it must convert the motion to dismiss into one for summary judgment, and several courts have held that it is reversible error to consider outside matter without converting the motion to dismiss into a motion for summary judgment.") (citing cases).

HN5 Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is a need for trial--whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The role of the Court on a motion for summary judgment is not to weigh the evidence, but to determine whether genuine issues of material fact exist for trial. Abraham v. Graphic Arts Int'l Union, 212 U.S. App. D.C. 412, 660 F.2d 811, 814 (D.C. Cir. 1981). To survive summary judgment, the nonmoving party must offer more than mere allegations, Anderson, 477 U.S. at 249, by going "beyond the pleadings [*20] and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the material facts proffered by the nonmoving party are subject to diverse interpretations, summary judgment is not available. Tao v. Freeh, 307 U.S. App. D.C. 185, 27 F.3d 635, 638 (D.C. Cir. 1994). Any doubts must be resolved in favor of the nonmoving party, Abraham, 660 F.2d at 815, and the nonmoving party is entitled to all justifiable inferences. Anderson, 477 U.S. at 255.

In this Circuit, ***HN6*** the Court's scope of review of an agency's refusal to initiate rulemaking procedures under the Administrative Procedure Act is *"very narrow."* Arkansas Power & Light Co. v. I.C.C., 233 U.S. App. D.C. 189, 725 F.2d 716, 723 (D.C. Cir. 1984) (emphasis in original); see also Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Mut. Ins. Co., 463 U.S. 29, 41, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983); Consumer Fed'n of America v. Consumer Product Safety Comm'n, 280 U.S. App. D.C. 129, 883 F.2d 1073, 1078 (D.C. Cir. 1989). See generally Bernard Schwartz, Administrative Law § 4.5, at 174 (3rd ed. 1991). The Court's role "is limited to **[*21]** ensuring that the agency has adequately explained the facts and policy concerns it relied on, and that the facts have some basis in the record." Arkansas Power & Light Co., 725 F.2d at 723 (citing WWHT, Inc. v. FCC, 211 U.S. App. D.C. 218, 656 F.2d 807, 818 (D.C. Cir. 1981)). An agency decision to not initiate rulemaking will be overturned "only in the rarest and most compelling circumstances," Western Fuels-Illinois, Inc. v. I.C.C., 878 F.2d 1025, 1027 (7th Cir. 1989) (quoting WWHT Inc., 656 F.2d at 818), "which have primarily involved 'plain errors of law, suggesting that the agency has been blind to the source of its delegated power.'" American Horse Protection Ass'n, Inc. v. Lyng, 258 U.S. App. D.C. 397, 812 F.2d 1, 5 (D.C. Cir. 1987) (quoting State Farm Mut. Auto. Ins. Co. v. Department of Transportation, 220 U.S. App. D.C. 170, 680 F.2d 206, 221 (D.C. Cir. 1982), vacated on other grounds, 463 U.S. 29, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)); see also id. 812 F.2d at 4-5 ("an agency's refusal to initiate rulemaking proceedings is at the high end of the range" of deference to which an agency is entitled); National Ass'n of Regulatory Util. Comm'rs v. Department of Energy, 271 U.S. App. D.C. 197, 851 F.2d 1424, 1430 (D.C. Cir. 1988) (same).

B. Counts One and Two.

Before **[*22]** the Department published its Proposed Findings on UHN's petition, Congress enacted the 94 Amendments, which amended Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 987 (June 18, 1934). UHN construes these amendments to preclude the Department from making any regulatory distinctions between historic and non-historic tribes, thus rendering void the criteria at issue in 25 C.F.R. § 83.7(e) (and, of course, the related provisions in §§ 83.7(a) and (b)). [8] UHN also contends that the "historical descendence" requirement contained in 25 C.F.R. Part 83, which was implemented in the 1978 regulations, "was never valid and has, in fact, been specifically repudiated by Congress." Plaintiff's Opp. at 13. The defendants present a different view of the acknowledgment regulations' genesis and, in particular, they interpret the 94 Amendments to have no effect upon the acknowledgment process established by those regulations.

[*23] The defendants' analysis of the case law is persuasive and clearly outlines the fundamental distinction between the political classification of groups as Indian tribes and the racial classification of persons as Indians. Failure to recognize this distinction results in the misperception that nonrecognition as a tribe is equivalent to a refusal to recognize a person's Indian heritage. *See, e.g.,* Final Report of the American Indian Policy Review Commission (May 17, 1977), quoted in H.R. Rep. No. 782, 103d Cong., 2d Sess. 14-15 (Oct. 3, 1994) (reporting on H.R. 4462, Indian Federal Recognition Administrative Procedures Act of 1994). ***HN7*** Historical descendance of a group of Indians is required as one component leading to political recognition as an independent sovereign and a government-to-government relationship with the United States. This is the premise underlying the defendants' succinct statement that "miscellaneous Indians do not make a tribe." Reply at 10.

Having accepted this premise, the Court's opinion nevertheless rests on different grounds. As this Court has concluded before, Congress has not spoken directly to the question of the federal acknowledgment process or the criteria **[*24]** relevant thereto. See Mem. Op. and Order at 11. No statute directly addresses the acknowledgment process or whether the Department is barred from considering "historical descendance" as one consideration of federal recognition.

While the plaintiff points to Section 16 of the Indian Reorganization Act [9] **[*25]** and a "longstanding policy of

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[8] "Congress' intent is clear as reaffirmed by the 1994 amendments to the IRA, 25 U.S.C. § 476(f) and (g) - it has been a longstanding policy of Congress to acknowledge tribal existence without demanding the tribe to show historical descendance and those acknowledged tribes should not be treated any differently than historic tribes." Plaintiff's Opp. at 16-17.

[9] ***HN9*** Section 16 of the Indian Restoration Act of 1934 provides:

Congress," [10] this Court is unpersuaded. Section 16 of the IRA, as originally enacted or as amended in 1994, simply does not deal with the process by which the Executive branch is to acknowledge Indian tribes as sovereigns. [11] [*26] And, while the agency (and this Court) would be bound by congressional intent reflected through a statutory enactment addressing the acknowledgment process, a longstanding policy of Congress, even assuming arguendo that it exists, has no direct legal effect. ***HN8*** Congress can, of course, recognize Indian tribes directly under its own authority and it may do so however it so chooses. *See, e.g.,* Act of Sept. 18, 1978, Pub.L.No. 95-375 (recognizing Pascua Yaqui tribe of Arizona), discussed in H.R. Rep. No. 204, 103d Cong., 1st Sess. (Aug. 2, 1993), attached to UHN's Opp. at Ex. K. [12]

[*27] ***HN12***

While Congress may enact legislation to grant specific Indian tribes recognition based on whatever policy

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> Any Indian tribe or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

[10] See Plaintiff's Opp. at 16-17.

[11] Like Section 16's original text, the 94 Amendments are similarly silent regarding the acknowledgment process. While the 94 Amendments, codified at 25 U.S.C. §§ 476(f) and 476(g), prohibit making distinctions among those Indian tribes that have attained federal recognition, neither amendment addresses the process by which Indian tribes actually achieve federally recognized status:

> ***HN10*** (f) Privileges and immunities of Indian tribes; prohibition on new regulations.
>
> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.***HN11***
>
> (g) Privileges and immunities of Indian tribes, existing regulations.
>
> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

94 Amendments, supra.

[12] This 1993 House Report, which appears to be one of the examples of a "longstanding policy" to which the plaintiff points, is fully consistent with the 94 Amendments. While the Report takes issue with the Department's apportionment of tribal powers based upon whether a tribe is "created" or "historic," like the 94 Amendments, neither this Report (nor the Act which followed) reflect any congressional intent (or even a policy) to prohibit consideration of historic descendance as one criterion for federal acknowledgment. Rather than provide support for the plaintiff's arguments, the Report actually undermines it by noting that a "wealth of historical documentation [exists] to trace the tribe's history back to the [ancient] Toltecs." H.R. Rep. No. 204, at 4. Instead of indicating that Congress has expressly repudiated reliance upon historical descendence, it appears that when Congress exercised its own legislative powers to recognize the Pascua Yaqui tribe, the tribe's historical descendence was a relevant factor. In sum, like the 94 Amendments, both H.R. Rep. No. 204 and the Act of Oct. 14, 1994, Pub.L.No. 103-357, 102 Stat. 3418 (confirming federal acknowledgment of the Pascua Yaqui tribe and quoted in UHN's Opp. at 14), merely reflect Congress' intent that the Department cannot apportion rights based upon whether a tribe was "historic" or "created."

criteria it deems appropriate see H.R. Rep. No. 204 at 5, [13] the Department acts based on the statutory authority provided by Congress. And, simply put, that authority is ambiguous on the precise question of federal acknowledgment presented here. Since the Department's statutory authority is ambiguous, and Congress has nowhere expressed a clear intent contrary to the "historical descendance" element in the acknowledgment regulations, the agency's acknowledgment regulations are entitled to deference under Chevron. This Court has previously concluded that the agency's regulations are a reasonable interpretation of its statutory authority. See Mem. Op. and Order at 11. And, in opposition to the Motion to Dismiss, the plaintiff has offered nothing persuasive to demonstrate that the Court's earlier conclusion, in ruling on the motion for a preliminary injunction, was in error. Nor is this Court persuaded that the regulations, first implemented in 1978, exceeded the agency's authority. *Miami Nation of Indians v. Babbitt, 887 F. Supp. 1158, 1168-69 (N.D. Ind. 1995)*. **[*28]**

While this Court always exercises caution when construing legislative silence in the form of Congress' failure to enact a statute, it cannot ignore the evidence indicating that **[*29]** Congress is aware of the agency's regulations, which include the historical descendance requirement, but has nevertheless failed to act. *See* H.R. Rep. No. 782, supra, at 13-14 ("For an unacknowledged Indian group to become an acknowledged Indian tribe, the group must meet all seven mandatory criteria found specifically in *25 C.F.R. § 83.7(a)-(g)*); Federal Recognition Administrative Procedures Act: Hearing on S. 479 Before the United States Senate Committee on Indian Affairs, S. Hrg. No. 277, 104th Cong., 2d Sess. 1 (July 13, 1995), reprinted at 1995 WL 418449, at 3 (F.D.C.H.) (opening statement of Senator John McCain, (Chairman, U.S. Senate Committee on Indian Affairs) ("The bill would not alter the existing standards, published in *25 CFR Part 83*, that are now used to determine whether a petitioning group can be recognized as a tribe."). Despite this awareness, Congress has opted not to express a contrary intent through a statute.

Shortly after enacting the 94 Amendments, Congress enacted the "Federally Recognized Indian Tribe List Act of 1994," 108 Stat. 4791 (Nov. 2, 1994). In the accompanying House Report, federal recognition is described as "[a] formal political **[*30]** act, [which] permanently establishes a government to government relationship between the United States and the tribe." H.R. Rep. No. 781, 103d Cong., 2d Sess. 1 (1994). While the House Report contains references to the acknowledgment regulations, it contains not a whisper that those regulations, in present form since 1978, are in any way contrary to Congress intent.

On October 3, 1994, (also after the 94 Amendments were enacted), the House passed H.R. 4462, the Indian Federal Recognition Administrative Procedures Act of 1994. This bill was not enacted before the expiration of the 103rd Congress. However had it been enacted, it would not have clearly repudiated the historical descendence requirement. While the standard in the bill may have varied from that in the Department's current regulations, contrary to the plaintiff's claim of clear repudiation, the House appeared to value a requirement for historical continuity: "A petition must contain specific evidence demonstrating that the Indian group has been identified as an American Indian entity on a substantially consistent basis since 1871." H.R. Rep. No. 782, supra, at 19. Regardless of whether this bill would have changed **[*31]** the substantive requirement, both H.R. 4462 and H.R. Rep. No. 782 make clear that the 94 Amendments had no effect upon the acknowledgment regulations and that Congress has, in fact, reflected upon the criteria for recognition. Yet, for whatever reason, Congress has so far declined to express a contrary intent.

Over a year after the enactment of the 94 Amendments, Senator McCain made a statement that suggests that Congress' failure to speak directly to the acknowledgment criteria has been no accident. As previously noted supra, during a hearing following the introduction of his proposed bill, S. 479, the Indian Federal Recognition Administrative Procedures Act to the 104th Congress, Sen. McCain stated:

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[13] "With the exception of the framework imposed by the Judicial Branch, the formulation of Indian policy is virtually the sole province of the Congress and the Indian tribes." Id. (emphasis added). While courts do not tread in matters of policy, the quoted statement from the report does not appear to discuss that both Congress and the President have such powers, which implicate Indian policy. Compare U.S. Const. art. I, § 8 (Indian ***commerce clause***) with id. art. II, § 2 (President's treaty power). See McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with the Indians and for treaty making.").

> The bill would not alter the existing standards published in *25 CFR Part 83* that are now used to determine whether a petitioning group can be recognized as a tribe. . . . I have become more and more persuaded that changing these standards in any substantial way would cause more problems than it would fix.

Federal Recognition Administrative Procedures Act: Hearing on S. 479 Before the United States Senate Committee on Indian Affairs, S. Hrg. No. 277, 104th Cong., [*32] 2d Sess. I (July 13, 1995), reprinted at 1995 WL 418449, at 3 (F.D.C.H.).

In the same introductory remarks, Sen. McCain noted that "if an Indian tribe, as a government, has actually survived the trials of history, Congress can improve the process by which the executive branch extends federal recognition to that government." Id., 1995 WL 418449, at 2 (emphasis added). While S. 479 was not enacted during the 104th Congress, these statements by its sponsor (who was also the author of the 94 Amendments) undermine the plaintiff's argument that the extant criteria in the acknowledgment regulations are at odds with Congress' clearly expressed intent. [14] Contrary to the plaintiff's view, Senator McCain's statements support the historical descendance requirement in the acknowledgment regulations.

[*33] Because the 94 Amendments do not address the federal acknowledgment process or the specific criteria contained therein, the Department's decision to not initiate a rulemaking to change its regulations based on those amendments cannot be considered as arbitrary and capricious or contrary to law. The agency has adequately explained the facts and policy concerns underlying its decision, *Arkansas Power & Light Co., 725 F.2d at 723*, and judgment will therefore be entered in favor of the defendants as to Counts I and II.

C. Count Three

In Count Three, the plaintiff seeks a Court order directing the defendants to initiate a rulemaking to remove the historic tribe requirement and to incorporate other procedural and substantive changes in the acknowledgment regulations. See Compl. PP44-45. The undisputed administrative record makes clear that the Department has considered (and then reconsidered) the plaintiff's requests for a rulemaking to revise the historic requirement (and related criteria) in the acknowledgment regulations. While the plaintiff may disagree with the decision, the Department has articulated (and then rearticulated) the basis for that decision. In any [*34] event, this Court cannot find here a lawful basis under which to compel the agency to initiate a rulemaking as requested. See *Arkansas Power & Light Co., 725 F.2d at 723*. Therefore, judgment will be entered in favor of the defendants as to that portion of Count III dealing with the request in UHN's December 1995 petition for removal of the historic tribe requirement.

Similarly, judgment will be entered in favor of the defendants as to certain other changes requested in the December 1995 petition, because the undisputed administrative record makes plain that the Department has rejected the plaintiff's requests and has adequately explained the basis fur such decisions. The Department has stated that, as it has previously advised the plaintiff during the discussions with the ad hoc group (which included the plaintiff), it lacks the authority to limit the showing of tribal existence from 1934 to the present. Similarly, the Department has repeatedly explained its position regarding the plaintiff's request to change "the community and political authority criteria," and its decision not to re-evaluate the decisions pre-dating the 1994 revisions to the acknowledgment regulations is [*35] sufficiently articulated to withstand scrutiny under the narrow standard of review applicable here.

Standing on a different footing, however, is the Department's reason for rejecting the requested changes to the regulations to include a formal adjudicatory hearing, the involvement of the ultimate decisionmaker in the acknowledgment process, and a requirement to notify acknowledgment petitioners of ex parte contacts regarding their petitions. While the undisputed administrative record makes clear that these requests have been rejected, what is not clear is why. The Court is not able to untangle all of the communications to the plaintiff, which frequently incorporate by reference other communications and briefs in other litigation. For example, the letter of March 12, 1996, attached to the Department's Reply at Ex. D, states as follows:

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[14] S. 479 also would have addressed some of the issues raised by UHN in its petitions for rulemaking to the Department. See, e.g., Section 9 (adjudicatory hearing), reprinted in Westlaw at 1995 CQ US S 479 (104th Cong., 1st Sess.) (introduced in the Senate on Feb. 28, 1995, and referred to the Committee on Indian Affairs).

> The Department's position concerning formal hearings in acknowledgment matters is explained in the letter of October 27, 1995 and the briefs referenced in that letter.

Reply at Ex. B.

However, while the letter of October 27, 1995, states the Department's position, it does not explain it. Additionally, while the letter mentions **[*36]** cases in which the issue was apparently raised, the relevant brief(s) was (were) not provided for this Court's review. The standard of review regarding a decision not to initiate a rulemaking is, of course, a highly deferential one. But the Court must have more to review than just the Department's bottom line, and the plaintiff is entitled to a response to its request which states both a decision and explains the basis therefor. Because the undisputed administrative record does not reflect that the plaintiff has received the latter regarding three of its requests, that portion of Count Three will be remanded to the Department for action consistent with this opinion.

D. Count Four. The Court has previously considered, and denied, the plaintiff's motion for injunctive relief. See Mem. Op. and Order at 11-14. In its papers, the plaintiff has offered nothing that changes the Court's earlier analysis. In any event, the request for a stay of the administrative proceedings pending the completion of the instant litigation is now moot. Judgment will therefore be entered in favor of the defendants on Court Four.

III. Conclusion

Accordingly, for the reasons stated above, **[*37]** it is hereby

ORDERED that the defendants' motion is GRANTED. Pursuant to *Fed. R. Civ.P. 58*, judgment will be entered separately in favor of the defendants on Count One, Count Two, Count Three (in part, as detailed supra) and Count Four; and it is

FURTHER ORDERED that the portion of Count Three, as described supra, is remanded to the agency for action consistent with this opinion.

IT IS SO ORDERED.

July 8 1997.

JOYCE HENS GREEN

United States District Judge