CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112

JOHN J. HOFFMAN
Acting Attorney General

MICHELLE L. MILLER
Acting Director

December 23, 2015

VIA HAND DELIVERY
Clerk of the Superior Court
Law Division, Civil Part
Mercer County Courthouse
175 South Broad Street - 1st Floor
Trenton, New Jersey 08650-0068

Re: Nanticoke Lenni-Lenape Tribal Nation vs. John Jay Hoffman, Acting Attorney General of New Jersey
Docket No. MER-L-2343-15

Dear Sir/Madam:

This office represents defendant, John J. Hoffman, Acting Attorney General of New Jersey in the above referenced matter. Enclosed for filing are an original and two (2) copies of the following documents:

1. Notice of Motion to Dismiss Plaintiff's Complaint pursuant to R.4:6-2(a) and (e),

2. Order,

3. Certification of Service,

4. Certification of Stuart M. Feinblatt,

5. Brief in Support of State Defendant's Motion to Dismiss Plaintiff's Complaint; and

6. Case Information Statement.

Kindly file the foregoing and return a "filed"-stamped copy of same in the self-addressed stamped envelope. **THERE IS NO FILING FEE BECAUSE THIS PLEADING IS FILED ON BEHALF OF A PUBLIC ENTITY OF THE STATE OF NEW JERSEY.**

Very truly yours,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

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

Encl.
c: Frank C. Corrado, Esq. (w/encl.)

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)
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 ORDER

THIS MATTER having come before the Court on a motion by 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 ("Defendant"), for an Order granting the Defendant's Motion to Dismiss the Complaint pursuant to R. 4:6-2(a) and (e), and the Court having considered the papers submitted and having entertained oral argument of counsel, if any, and for good cause shown,

IT IS on this _____ day of _____, 2016,

ORDERED that the Defendant's Motion to Dismiss the Complaint is hereby GRANTED; and it is further

ORDERED that the Complaint is hereby DISMISSED, in its entirety, WITH PREJUDICE; and it is further

ORDERED that a copy of this Order shall be served upon all counsel of record within seven (7) days of tis receipt by counsel for the moving party.

_____
Hon. Anthony M. Massi, J.S.C.

This Motion was

____ Opposed.

____ Unopposed.

JOHN J. HOFFMAN
Acting Attorney General of New Jersey
R.J. Hughes Justice Complex
25 Market Street
PO 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, Plaintiffs, 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 CERTIFICATION OF SERVICE

I, Lisa Haws, of full age, hereby certify that:

1. I am an Administrative Assistant in the Division of Law, Department of Law and Public Safety, State of New Jersey.

2. On December 24, 2015, at the direction of Stuart M. Feinblatt, Assistant Attorney General, I caused to be filed an original and one (1) copy of Defendant's Notice of Motion to Dismiss Plaintiff's Complaint, supporting brief, proposed Order, Certification of Stuart M. Feinblatt, and this Certification of Service, with the Clerk of the Civil Part, Superior Court of New

Jersey, Mercer County, 175 South Broad Street, 1st Floor, Trenton, New Jersey, via hand delivery.

3. I also caused on this date to be served a copy of the within motion papers in the above-captioned matter by mailing same via overnight UPS mail, to:

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

4. In addition, on this date, I e-mailed a set of the within motion papers to Mr. Corrado at fcorrado@capelegal.com.

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.

Lisa Haws

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)
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 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/ Stuart 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
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

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.

For COUNTY OF HUDSON, [*4] Respondent, Cross Defendant, Cross Claimant: MICHAEL L. DERMODY, LEAD ATTORNEY, OFFICE OF HUDSON COUNTY COUNSEL, JERSEY CITY, NJ.

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.

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

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.

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

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.

For OCEAN COUNTY, COUNTY OF OCEAN, Cross Defendants: MARY [*5] JANE LIDAKA, LEAD ATTORNEY, BERRY, SAHRADNIK, KOTAZ & BENSON, PC, TOMS RIVER, NJ.

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

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. . .

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. . . .
>
> ***
>
> 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

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

BRIEF IN SUPPORT OF STATE DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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
ATTORNEY FOR DEFENDANT
(609) 984-9504
Stuart.Feinblatt@lps.state.nj.us

Stuart M. Feinblatt (NJ #018781979)
Assistant Attorney General
Of Counsel and On the Brief

Laura M. Console (NJ #015242012)
Deputy Attorney General
On the Brief

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PRELIMINARY STATEMENT

Plaintiff, Nanticoke Lenni-Lenape Tribal Nation, seeks an order compelling the State of New Jersey from denying or repudiating claimed prior official recognition of the Plaintiff as an authentic American Indian tribe of the State. As demonstrated in this brief, the factual and legal predicate for this suit is misguided. In any event, this case cannot proceed in state court due to the political question doctrine. The recognition issues raised here are political questions within the sole power of the Legislature to determine.

In addition, the Court should dismiss the state law claims for failure to state a claim. The state substantive due process claim cannot proceed because Plaintiff cannot identify a protected liberty or property interest in "continued" State recognition of an American Indian tribe and has not plausibly alleged government conduct that "shocks the conscience." Similarly, the procedural due process claim fails as a matter of law because there is no protected liberty or property interest derived from state law and Plaintiff necessarily has failed to allege what process might be due given that New Jersey has no statutory or administrative standards or procedures for recognition of American Indian tribes. In addition, the Equal Protection Claim should be dismissed because Plaintiff does not allege that it has been treated differently than

other putative American Indian tribes or other similarly situated groups.

Plaintiff's two common law claims should also be dismissed as a matter of law. First, Plaintiff asserts that the State of New Jersey should be equitably estopped from repudiating its earlier claimed official recognition of the Plaintiff. This doctrine, very rarely invoked against the State, should be dismissed for several reasons including that that there are no representations, particularly by the Defendant, upon which the Plaintiff reasonably relied, that the Plaintiff does not allege that it would have taken a different course based on the alleged misrepresentations by the Defendant and the claim is stale on its face given that the Defendant allegedly first repudiated the recognition 14 years ago. Second, Plaintiff's claim of something called "arbitrary and capricious action under state common law" should be dismissed because no such claim has been recognized in our state.

STATEMENT OF THE CASE

A. Plaintiff's Complaint

On or about October 9, 2015, Plaintiff Nanticoke Lenni-Lenape Tribal Nation ("Nation") filed a Complaint in state court for injunctive and declaratory relief and damages against a single defendant, Acting Attorney General John Hoffman, in his individual and official capacities. Previously, the same plaintiff had filed a complaint against the same defendant in federal court. Nanticoke Lenni-Lenape Tribal Nation v. 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 allegations in the federal case are essentially the same as those asserted here. A motion to dismiss the federal complaint in its entirety is pending. (Certification of Stuart M. Feinblatt ("Feinblatt Cert.")dated December 24, 2015, ¶ 4).

Plaintiff alleges in this case that the Nation "is a constitutionally organized, self-governing, inherently sovereign American Indian tribe." (Compl. ¶ 2). After asserting that the Nation was mistreated by the State over a period of three centuries (Compl. ¶¶ 6-10), the Complaint then avers that "[i]n the early 1980's, New Jersey began to reverse the historical course of its maltreatment of American Indians by implementing a process of state recognition." (Compl. ¶ 11). In particular, on December 16, 1982, a

concurrent resolution was passed in which "the New Jersey legislature officially recognized the Nation as an American Indian tribe."[1] (Compl. ¶ 14). The Complaint then asserts that "[f]or decades thereafter New Jersey routinely reaffirmed recognition of the Nanticoke Lenni-Lenape Nation—as well as the other two tribes [Ramapough Mountain Indians and the Powhatan-Renape Nation]—through a series of actions consistent with and necessarily predicated upon that recognition." (Compl. ¶ 16). Although the Complaint acknowledges that the Nation is not a federally recognized tribe (see Compl. ¶ 17), the Complaint avers that certain federal benefits are available to state-only recognized tribes. (Compl. ¶ 17).

The Complaint then alleges that the state now wrongfully attempts to deny and repudiate the earlier recognition of the Nation. (Compl. ¶ 21). Although the Complaint attempts to characterize the State's purported repudiation of its recognition of the Nation as a recent development, the Complaint belatedly

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[1] As noted later in this brief, the Concurrent Resolution in fact did not formally "recognize" the Nation, but merely "designated" the Nation as an alliance of tribes in the area. See Feinblatt Cert., Exhibit A. In evaluating a Motion to Dismiss, the court may properly consider "documents that form the basis of a claim." Banco Popular N. Amer. v. Gandi, 184 N.J. 161, 183 (2005). "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 of that claim by failing to attach the relied upon document." LT Propco, LLC v. Westland Garden State Plaza L.P., 2010 N.J. Super. Unpub. LEXIS 3116, *9-10 (App. Div. Dec. 28, 2010) (quotation omitted). (Feinblatt Cert., Exhibit C).

acknowledges that as early as 2001, the Division of Gaming Enforcement stated that the New Jersey has no state-recognized tribes. (Compl. ¶ 27; Feinblatt Cert., Exhibit B). The Complaint then alleges that the "Nation's status was undermined fundamentally" in 2012 when a staff member of the New Jersey Commission on American Indian Affairs (a cultural heritage committee within the Department of State) informed the federal General Accounting Office that New Jersey has no state-recognized tribes. (Compl. ¶ 30).

The Complaint contains five counts, all directed at the purported repudiation of the State's alleged official recognition of the Nation. Count I of the Complaint asserts deprivation of procedural due process under the New Jersey Constitution. Count II asserts violations of substantive due process under the New Jersey Constitution and Count III alleges equal protection violations under the state Constitution. Count IV attempts to assert a claim of equitable estoppel under state law. Finally, Count V alleges a claim under state law labelled "arbitrary and capricious action."

Plaintiff seeks an order enjoining the Defendant from "denying, repudiating, or otherwise impairing the Nation's status as an American Indian tribe officially recognized by the State of New Jersey." (Compl., p. 21). Among other things, Plaintiff also seeks an order that the "Defendant is estopped from denying or repudiating the Nation's status as an American Indian tribe

officially recognized by the State of New Jersey". Id. Plaintiff also seeks compensatory and punitive damages.

B. Recognition of American Indian Tribes

Although this case is focused on state recognition of a putative American Indian tribe, the United State Constitution has indisputably assigned Congress the sole authority to regulate relations and commerce with American Indians, including the power to recognize tribes. U.S. Const., art. I, ¶ 8, cl. 3. See Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes.").

The term "recognition" or "recognize" has been used in two senses in the context of federal government relations with American Indians. First, it has been used in the "cognitive" sense that federal representatives "knew" or "realized" that a purported Indian tribe existed. Second, the term has been used in a more formal jurisdictional sense to refer to when the federal government "formally acknowledges a tribe's existence as a 'domestic dependent nation' with tribal sovereignty and deals with it in a special relationship on a government-to-government basis." William V. Quinn, Jr., Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept, 34 Am. J. of Legal Hist., 331, 333 (Oct. 1990).

The federal Department of Interior has established an elaborate administrative process for American Indian tribes to obtain formal federal recognition of their existence.[2] This process is administered by the Bureau of Indian Affairs (BIA). See 25 C.F.R. § 83.7. A tribe must meet certain anthropological, historical, and genealogical criteria that demonstrate, among other things, that the tribe has been identified as an American Indian entity on a substantially continuous basis since 1900; that a predominant portion of the group comprises a distinct community and has existed as a community from first sustained contact with non-Indians; that the tribe has maintained political influence or authority over its members as an autonomous entity from 1990 to the present and that the group's membership consists of individuals who descend from a historical Indian tribe (or from historical Indian tribes that combined and functioned as a single autonomous political entity). See 25 C.F.R. § 83.11.

A federally recognized tribe is "recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations and obligations attached to that designation, and is eligible for funding and services from the Bureau of Indian Affairs." Bureau of Indian Affairs Frequently

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[2] American Indian tribes can also be formally recognized through an Act of Congress and by a decision of a United States court. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No.103-454, § 103, 108 Stat. 4791, 4792 (1994).

Asked Questions, http://www.indianaffairs.gov/FAQs/index.htm (last visited September 14, 2015). Such tribes are also "recognized as possessing certain inherent rights of self-government (i.e., tribal sovereignty) and are entitled to receive certain federal benefits, services and protections because of their special relationship with the United States." Id. There are currently 566 federally recognized American Indian and Alaska Native tribes and villages. Id. Plaintiff is not currently a federally recognized tribe. (Compl. ¶ 17).

The Defendant acknowledges, as noted in Plaintiff's Complaint, ¶ 19, that certain states have adopted various procedures to "recognize" American Indian tribes in some form. New Jersey does not have established procedures or criteria for recognizing tribes other than requiring passage of a formal statute of recognition. In particular, N.J.S.A. 52:16A-56 provides that the sole authorized method of "recognition" is through Legislative action by formal statute. That statute, in enumerating the duties of the New Jersey Commission on American Indian Affairs and expressly stating that the Commission is not authorized to recognize the authenticity of any tribe, mandates that "recognition shall require specific statutory authorization."

As referenced in the Complaint, in 1982, the Senate passed Concurrent Resolution No. 73. (Compl. ¶ 14; Feinblatt Cert., Exhibit A). This Resolution "designated" the Confederation of

Nanticoke-Lenni Lenape Tribes of southern New Jersey "as an alliance of independent surviving tribes of the area" and "memorialized" the U.S. Congress "to acknowledge the Confederation of Nanticoke-Lenni Lenape tribes as such." The resolution specifically noted that the designation was made in order to assist the Nation in qualifying for appropriate federal funding for American Indians. Although the Complaint asserts that this Resolution "officially recognized" the Nation as an American Indian tribe (Compl. ¶ 14), it is clear from the use of the terminology "designate," that the recognition was only in the limited cognitive sense of marking, signifying or identifying the Tribe. See Oxford University Press, Oxford Dictionaries (U.S. English) (2015), http://www.oxforddictionaries.com/us/definition/american_english/designate (defining "designate" as to "signify; indicate"). The Resolution cannot be plausibly read as a formal acknowledgement that the Nation is an authentic sovereign government as might be found by the BIA.

Moreover, in this context, the Concurrent Resolution is not an act of legislation and does not have any binding legal effect outside of the legislature. See General Assembly of New Jersey v. Byrne, 90 N.J. 376, 388-89 (1982) (relying on In re N.Y. Susquehanna & Western R.R. Co., 25 N.J. 343, 348 (1957) (a concurrent resolution is "without legislative quality of any coercive or operative effect"). These very points were clearly made

by the Director of the Division of Gaming Enforcement in his December 14, 2001 letter. See Feinblatt Cert., Exhibit B.

As noted in the Complaint, ¶ 16, the Legislature has passed at least two other statutes that refer to the Nation by name. These and other actions identified in the Complaint again reflect a designation that the Nation and certain other purported American Indian tribes exist in New Jersey. They appear motivated at least in part to assist the Nation and certain other tribes in obtaining whatever funds, services and other benefits they might be entitled to under federal programs. These actions, however, cannot be viewed as a formal recognition of the status of these tribes as independent and sovereign political communities with defined territory. Finally, to the extent the State might have designated the Nation or other tribes in some form in the past, there are no statutes or regulations precluding the State from reconsidering or rescinding that designation at a later date.

STANDARD OF REVIEW

Rule 4:6-2(e) permits a defendant to move to dismiss the complaint in lieu of an answer on the basis that the complaint fails to state a claim upon which relief may be granted. To resolve such a motion, courts examine "the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). Although courts search the complaint "in depth and with liberality" to ascertain

"whether the fundament of a cause of action may be gleaned," a plaintiff may not file a conclusory complaint with the intention of finding out later whether a cause of action exists. Id. at 746, 768. Thus, a complaint "must plead the facts and give some detail of the cause of action" to survive a motion to dismiss for failure to state a claim. Id. at 768. "[I]f the complaint states no basis for relief and discovery would not provide one, dismissal is the appropriate remedy." Banco Popular N. Am. V. Gandi, 184 N.J. 161, 166 (2005).

Here, the facts as alleged by Plaintiff do not state a claim for relief under the operative law. The complaint raises non-justiciable political questions and Plaintiff fail to state cognizable claims for relief. Therefore, the complaint should be dismissed for failure to state a claim upon which relief can be granted.

LEGAL ARGUMENT

POINT I

PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED BECAUSE THE ISSUES PRESENTED ARE NONJUSTICIABLE POLITICAL QUESTIONS.

The principle precluding courts from deciding non-justiciable political questions is a function of the separation of powers doctrine. Gilbert v. Gladden, 87 N.J. 275, 280-281 (1981). The State Constitution sets forth the separation of powers doctrine as follows:

> The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.
>
> [N.J. Const., art. III, ¶ 1.]

The purpose of this doctrine is to "safeguard the essential integrity of each branch of government." Gilbert, supra, 87 N.J. at 281 (citation omitted).

In Gilbert, the New Jersey Supreme Court adopted the same test established by the Supreme Court of the United States in Baker v. Carr, 369 U.S. 186 (1962), to determine the presence of a non-justiciable question. A case presents a non-justiciable political question if any of the following circumstances are "inextricable from the facts and circumstances of the case in question:"

> 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 deciding without an initial policy determination of a kind clearly for non-judicial discretion;
>
> 4) or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
>
> 5) or 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.

[Gilbert, supra, 87 N.J. at 281 (quoting Baker v. Carr, supra, 369 U.S. at 217)].

Under this framework, claims that present a political question are nonjusticiable and outside the purview of the Court. See generally Baker, supra, 369 U.S. 186. The presence of a political question exists where any *one* of the six factors is found. See INS v. Chadha, 462 U.S. 919, 941 (1983).

Here, the issue of recognition raised by Plaintiff is a political question entrusted to the Legislature to decide. Plaintiff seeks an order from this Court compelling the State to recognize, or continue to recognize, Plaintiff as an American Indian tribe. In New Jersey, official recognition of an American Indian Tribe can only be achieved through statutory enactment by the legislature. See N.J.S.A. 52:16A-56(g). Therefore, as detailed below, whether a tribe should be recognized as an official tribe by the State is a clear political question that is within the sole power of the Legislature to determine. See Shinnecock Indian Nation v. Kempthorne, No. 06-5013, 2008 U.S. Dist. LEXIS 75826, at *4 (E.D.N.Y. Sept. 30, 2008)(Feinblatt Cert., Exhibit E) ("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"). Although Plaintiff's Complaint relies on a 1982 legislative Concurrent Resolution for the proposition that the State has already "recognized" the Nation as an official American Indian tribe, that resolution is not an act of legislation and does not have binding legal effect. In re N.Y. Susquehanna & Western R.R. Co., supra, 25 N.J. at 348. The Legislature has never passed a formal statute "recognizing" the Nation in some form.

Given this state of affairs, this case meets at least four of the independent grounds for finding a political question. First, there is a lack of judicially discoverable and manageable standards for resolving the issue. At the outset, it must be repeated that the whole concept of "recognition" is muddled when applied to the states. Certainly, Plaintiff cannot cite to any statutory or regulatory standards for recognition of American Indian tribes by New Jersey because they simply do not exist. Indeed, Plaintiff cannot establish that New Jersey has a legal duty to create such standards. Second, in the absence of prescribed criteria, there may be an infinite number of good reasons for the Legislature not to pass legislation recognizing Plaintiff, or other putative American Indian tribes, as an "official" tribe of the State. These reasons may include consideration of important policy implications and are exclusively within the province of the Legislative Branch. Thus, the third factor identified in Baker, namely the impossibility of

deciding the issue without an initial policy determination reserved for nonjudicial discretion, is also met.

Third, there is the impossibility of a court's undertaking independent resolution of this issue without expressing a lack of respect for the coordinate branches of government. "The test of respect for another branch of government, . . . lies in judicial restraint not when a court agrees with that branch, but when it disagrees." DeVesa v. Dorsey, 134 N.J. 420, 442 (1993) (Pollack, J., concurring). "A court must stay its hand if the public and its elected representative are to assume their responsibilities." Id. at 443. Because the remedy Plaintiff seeks can only be achieved by enacting a statute, the Court cannot resolve this matter without treading on the province of the Legislature. For the same reason, if the Court were to act here, in the absence of legislative action, there would clearly be the potential for "embarrassment from multifarious pronouncements by various departments on one question." Thus, the sixth Baker factor is also satisfied.

The same violation of the separation of powers would occur even if Plaintiff could somehow successfully argue that it has already been granted binding official recognition by this State. Plaintiff asserts in its Complaint that later pronouncements and actions by the State (at least as early as 2001), "denied" or "repudiated" the claimed earlier official recognition. There is, however, no statute or regulation that precludes the State from

reevaluating or rescinding "recognition" of an American Indian tribe or that sets forth the criteria for such actions. Indeed, as noted above, there are no available criteria addressing state recognition at all. Thus, the Court would be confronted with the same Baker factors noted above if it were to wade into the question of whether the State validly "rescinded" its earlier claimed official recognition of the Nation. In sum, because Plaintiff seeks relief that it can obtain only from the Legislature, this matter must be dismissed for lack of justiciability.

POINT II

COUNTS I and II OF THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO STATE A DUE PROCESS CLAIM UNDER THE NEW JERSEY CONSTITUTION.

Counts I and II of Plaintiff's Complaint raise substantive and procedural due process claims against the State "directly under the New Jersey Constitution and pursuant to N.J. Stat. Ann. § 10:6-2(e)."[3] (Compl. ¶¶ 42 and 48). As demonstrated below, these counts fail as a matter of law to assert viable substantive and procedural due process claims.

A. Substantive Due Process

Plaintiff's Complaint relies on Article I, Paragraph 1 of the New Jersey Constitution for its substantive due process claim.

[3] N.J.S.A. 10:6-2, a provision of the New Jersey Civil Rights Act ("CRA"), is not in itself a source of rights but rather a means of vindicating rights. Gormley v. Wood-El, 218 N.J. 72, 98 (2014).

(See Compl. ¶ 49).[4] In evaluating substantive rights under this provision of the New Jersey Constitution, New Jersey courts "have adopted the general standard followed by the United States Supreme Court in construing the Due Process Clause of the Fourteenth Amendment of the Federal Constitution." Lewis v. Harris, 188 N.J. 415, 434 (2006); see also Filgueiras v. Newark Public Schools, 426 N.J. Super. 449, 469 (App. Div. 2012), certif. denied, 212 N.J. 460 (2012).[5] To state a valid claim for a violation of substantive due process, Plaintiff must show that the State exercised power "without any reasonable justification in the service of a legitimate governmental objective." Cty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). In other words, substantive due process "protects individuals from the 'arbitrary exercise of the powers of government' and 'government power [...] being used for the [the] purposes of oppression'" Felicioni v. Admin. Office of the Courts, 404 N.J. Super. 382, 392 (App. Div. 2008), certif. denied, 203 N.J. 440 (2010) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). "[S]ubstantive due process is reserved for the most egregious

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[4] Article I, paragraph 1 of the New Jersey Constitution states that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const., art. I, ¶ 1.

[5] Similarly, the elements of a substantive due process claim under the CRA are the same as those brought under Section 1983. See, e.g., Filgueiras v. Newark Public Schools, supra, 426 N.J. Super. at 468.

governmental abuses against liberty or property rights, abuses that 'shock the conscience or otherwise offend . . . judicial notions of fairness. . . [and that are] offensive to human dignity.'" Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 366 (1996)(quoting Weimer v. Amen, 870 F.2d 1400, 1405 (8th Cir. 1989)).

The threshold inquiry in these claims is whether a plaintiff has a protected property or liberty interest that gives rise to due process protection. Nicholas v. Pennsylvania State Univ., 227 F.3d 133, 139-40 (2000). "'[O]nly fundamental rights and liberties which are deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty'" are afforded substantive due process protection. River Nile Invalid Coach & Ambulance, Inc. v. Velez, 601 F. Supp. 2d 609, 621 (D.N.J. 2009) (quoting Chavez v. Martinez, 538 U.S. 760, 775 (2003)).

Determining whether a fundamental right exists involves a two-step inquiry. "First, the asserted fundamental right must be clearly identified. Second, that liberty interest must be objectively and deeply rooted in the traditions, history, and conscience of the people of this State." Lewis v. Harris, supra, 188 N.J. at 435 (citations omitted).

Examples of fundamental rights and liberties include the right to marry, to have children, to direct the upbringing of one's children, to use contraception, to bodily integrity and to abortion. Washington v. Glucksberg, 521 U.S. 702, 720 (1997). See

also Gormley v. Wood-El, supra, 218 N.J. at 98 (fundamental rights include right to marital privacy, to have children, to bodily integrity and safe conditions for forced confinement).

Once a "fundamental" right is identified, a plaintiff must allege a deprivation by government conduct that "shocks the conscience." Chainey v. Street, 523 F.3d 200, 219 (3d Cir. 2008). Whether an incident "shocks the conscience" is a matter of law for the courts to decide. Benn v. Universal Health Sys., 371 F.3d 165, 174 (3d Cir. 2004). Substantive due process protects individuals from government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense. Disability Rights N.J., Inc. v. Velez, 974 F. Supp. 2d 705, 724 (D.N.J. 2013), aff'd, 2015 U.S. App. LEXIS 13553 (3d Cir. Aug. 4, 2015) (citing Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994)). Substantive due process "does not protect 'against government action that is incorrect or ill-advised' but against those circumstances in which 'government action might be so arbitrary that it violates substantive due process regardless of the fairness of the procedures used." Ibid. (internal references omitted). In other words, "[w]ith the exception of certain intrusions on an individual's privacy and bodily integrity, the collective conscience of the United States Supreme Court is not easily shocked." Rivkin v. Dover Twp. Rent Leveling Bd., supra, 143 N.J. at 366 (citing Irvine v. California, 347 U.S. 128, 133 (1954)).

Plaintiff's substantive due process claim lacks merit because Plaintiff cannot make the threshold showing of deprivation of a fundamental constitutional or statutory right. Plaintiff's Complaint does not attempt to identify the fundamental interest at stake. The Count merely vaguely refers to its tribal status as a state-recognized American Indian tribe. (Compl. ¶¶ 49-50). But, as addressed earlier in this brief, New Jersey does not have established procedures, standards or requirements for the "recognition" or continued recognition of American Indian tribes. The right of an American Indian tribe to be recognized by the State, or for the State to be prevented from changing or repudiating an earlier recognition, simply does not fall within the limited list of fundamental rights and liberties that are deeply rooted in this country's history.

Even if Plaintiff were able to identify a protected liberty or property interest, it has not plausibly alleged government conduct that "shocks the conscience." This case does not deal with invasions of "privacy and bodily" integrity. A State's decision not to formally recognize an American Indian tribe in some form, or to modify or disavow an earlier recognition, could only plausibly fall into the realm of possible "incorrect or ill-advised" government action. It cannot, particularly based on the allegations here, plausibly fall into the realm of outrageously egregious action that "shocks the conscience."

In sum, Plaintiff has failed to plead the deprivation of a protected property or liberty interest through government conduct that "shocks the conscience." Thus, the substantive due process claim should be dismissed.

B. Procedural Due Process

Although Article I, paragraph 1 of the New Jersey Constitution does not specifically enumerate the right to due process, it "protects against injustice and, to that extent, protects 'values like those encompassed by the principle[] of due process.'" Doe v. Poritz, 142 N.J. 1, 99 (1995) (quoting Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985)). An examination of a procedural due process claim requires a court "first [to] assess whether a liberty or property interest has been interfered with by the State, and second, whether the procedures attendant upon that deprivation are constitutionally sufficient." Id. at 99.[6]

"'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" Midnight Session, Ltd. v. City of Philadelphia, 945 F. 2d 667, 680 (3d Cir. 1991) (quoting

[6] There is no procedural due process cause of action under the New Jersey Civil Rights Act. Tumpson v. Farina, 218 N.J. 450, 477 (2014) ("[s]ection 1983 provides remedies for the deprivation of both procedural and substantive rights while N.J.S.A. 10:6-2(c) provides remedies only for the violation of substantive rights").

Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972)). That entitlement is created by an "independent source," such as state law, which secures the benefit for the plaintiff. Baraka v. McGreevey, 481 F.3d 187, 205 (3d Cir. 2007).

Generally speaking, adequate procedural due process requires notice and a fair opportunity to be heard. Division of Youth and Family Services v. M.Y.J.P., 360 N.J. Super. 426, 464 (App. Div. 2003), certif. denied, 177 N.J. 575 (2003), cert. denied, 540 U.S. 1162 (2004) (citing Matter of C.A., 146 N.J. 71, 94, (1996)). Where governmental action is taken, due process requires a balancing of: "(1) identification and specification of the private interest that will be affected by the official action; (2) assessment of the risk that there will be an erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) evaluation of the governmental interest involved, including the added fiscal and administrative burdens that additional or substitute procedures would require." Id. at 465 (relying on Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Here, Plaintiff has not alleged a protected liberty or property interest. Plaintiff claims that it has a "property interest, protected under state law, in protecting and preserving its tribal identity and its recognition by New Jersey as an official American Indian tribe…." (Compl. ¶ 43). This state

"recognition" is based on the 1982 Concurrent Resolution. (Compl. ¶¶ 13-14). However, the Concurrent Resolution does not have the force and effect of law and cannot confer any due process rights on Plaintiff. It is not an act of legislation and does not have any binding legal effect outside of the Legislature. General Assembly of New Jersey v. Byrne, supra, 90 N.J. at 388-89 (relying on In re N.Y. Susquehanna & Western R.R. Co., 25 N.J. 343, 348 (1957)). It is well-settled that "a concurrent resolution is ordinarily an expression of sentiment or opinion, without legislative quality of any coercive or operative effect." Application of New York, S. & W. R. Co., 25 N.J. 343, 348-349 (1957). Thus, because the Concurrent Resolution is not state law and lacks the force and effect of a law, it cannot serve to create the kind property or liberty interest analyzed in Poritz and does not entitle Plaintiff to any due process.

Furthermore, even if a protected interest were present, Plaintiff necessarily fails to allege what process might be due. See N.J. Sand Hill Band of Lenape & Cherokee Indians v. Corzine, No. 09-683, 2010 U.S. Dist. LEXIS 66605, at *69 (D.N.J. June 30, 2010)(Feinblatt Cert., Exhibit D) (procedural due process claim asserted by Native American tribal family was dismissed due to failure to allege what process was due in the selection of Commission members). The Complaint alleges that Defendant disavowed or repudiated the State's earlier recognition without proper notice

or opportunity to be heard. (See Compl. ¶ 44). Given that there are no statutory or administrative standards or procedures in New Jersey for recognition of American Indian tribes, the threadbare allegations that the State, in part through the Acting Attorney General, did not provide "proper" notice or other process "required by law" constitute mere legal conclusions and labels. Consequently, the procedural due process claim should be dismissed.

POINT III

COUNT III OF THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO STATE AN EQUAL PROTECTION CLAIM UNDER THE NEW JERSEY CONSTITUTION.

In Count III of the Complaint, Plaintiff asserts an Equal Protection claim based on the theory that the State discriminated against Plaintiff, as an American Indian tribe, when it allegedly repudiated official recognition of the tribe. (Compl. ¶¶ 51-56). Plaintiff alleges that such action constitutes discrimination based on race in violation of Article I, Paragraph I of the New Jersey Constitution ("Equal Protection Clause") and that the tribe has been irreparably injured as a result. (Compl. ¶¶ 54-56).

Although the equal protection analysis under the State Constitution differs somewhat from that under the federal Constitution, the New Jersey Supreme Court has recognized that the two approaches are "substantially the same," Drew Assocs. of NJ, LP v. Travisano, 122 N.J. 249, 258-59 (1991), and "will often yield

the same result." Barone v. Dep't of Human Servs., 107 N.J. 355, 368 (1987). The "crucial issue" is "'whether there is an appropriate governmental interest suitably furthered by the differential treatment' involved." Id. (quoting Borough of Collingswood v. Ringgold, 66 N.J. 350, 370 (1975), appeal dismissed, 426 U.S. 901 (1976)). To sustain a cause of action on Equal Protection grounds under the federal constitution, Plaintiff must allege that it is a member of a protected class that was treated differently from members of a similarly situated class. Bradley v. U.S., 299 F.3d 197, 206 (3d Cir. 2002). Persons are similarly situated when they are alike "in all relevant aspects." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

In construing the right to equal protection implied in Article I, Paragraph 1 of the New Jersey Constitution, New Jersey Courts employ a balancing test. J.D. ex rel. Scipio-Derrick v. Davy, 415 N.J. Super. 375, 386 (App. Div. 2010). This test considers "'the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.'" Id. at 386-87 (quoting Greenberg v. Kimmelman, 99 N.J. 552, 567(1985)). In applying this test, the court will review whether a distinction between the two similarly situated classes of people "bears a substantial relationship to a legitimate governmental purpose." Ibid. (quoting Lewis v. Harris, 188 N.J. 415, 443 (2006)). As a threshold matter, the court must consider

whether the equal protection analysis is "properly applicable to the [legislation] challenged." Id. at 387.

Plaintiff's Equal Protection claim should be dismissed because Plaintiff has not alleged that the tribe was treated differently than members of a similarly situated class—an essential element of an equal protection claim. Plaintiff alleges that as an American Indian tribe, it is a suspect class (race) and that the State's failure to recognize Plaintiff as an official tribe of the State constituted discrimination based on race. (Compl. ¶¶ 53-54). The Complaint, however, fails to address *how* the State selectively discriminated against Plaintiff. Importantly, Plaintiff does not claim that it has been treated differently than other similarly situated groups. If the State action does not distinguish between two or more relevant persons or groups, the action does not deny equal protection. Johnson v. Rodriguez, 110 F.2d 299, 306 (5th Cir. 1997).

Here, Plaintiff does not allege that the State's "recognition" of American Indian tribes can be compared to the State's treatment of other racial groups. When properly limited to the realm of American Indian tribes, Plaintiff fails to allege a single fact that suggests that the State singled out the Nation, or treated this tribe any differently from similarly situated tribes. To the contrary, at various points in the Complaint, Plaintiff asserts that the State wrongfully repudiated its claimed recognition of the

Nation, as well as that of two other tribes, the Ramapough Mountain Indians and the Powhatan Renape Nation. (See, e.g., Compl. ¶¶ 21-23). Thus, Plaintiff fails to state a claim that the State violated its equal protection rights and this claim should be dismissed.

POINT IV

COUNT IV OF THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO STATE A CLAIM OF ESTOPPEL AGAINST THE DEFENDANT.

Generally speaking, equitable estoppel "is conduct, either express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law." McDade v. Siazon, 208 N.J. 463, 480 (2011). The doctrine is generally invoked to avoid injustice. Heckler v. Community Health Servs., 467 U.S. 51, 59 (1984).

The concept of equitable estoppel, however, is not applied against the State to the same extent as it is applied to private entities. O'Neill v. State Highway Dep't of N.J., 50 N.J. 307, 319 (1967). Indeed, the doctrine is rarely invoked against the government and its force is strictly limited such that it cannot prejudice essential governmental functions. Cipriano v. Dep't of Civil Serv., 151 N.J. Super. 86, 91 (App. Div. 1977); Sellers v. Bd. of the Police & Firemen's Ret. Sys., 399 N.J. Super. 51, 58 (App. Div. 2008). Estoppel will only reach to the State where the interests of justice, morality and common fairness dictate. Ibid. To apply equitable estoppel against the State, Plaintiff must

demonstrate a "knowing and intentional misrepresentation" by the State. O'Malley v. Department of Energy, 109 N.J. 309, 317 (1987).

The fourth count of Plaintiff's Complaint asserts estoppel under the common law. The claim is predicated on the asserted "representation by the state that it officially recognized the Nation as an American Indian tribe." (Compl. ¶ 58). Plaintiff alleges that these representations took place between 1982 and at least 2010. Ibid. Plaintiff avers that it "reasonably and in good faith" relied upon these representations from the State that it officially recognized Plaintiff as an American Indian Tribe. (Compl. ¶¶ 60-61). Plaintiff further avers that the State's alleged repudiation of that recognition has "redounded to the [Plaintiff's] detriment." (Compl. ¶ 62). Plaintiff ultimately alleges that the State should be equitably precluded or estopped from repudiating its claimed prior recognition. (Compl. ¶ 63).

This count is fatally flawed for several reasons. First, the Complaint mischaracterizes the State's communications about the status of the Nation. As noted earlier in this brief, the 1982 legislative Concurrent Resolution relied on heavily by Plaintiff did not "officially recognize" the Nation as an authentic sovereign government. Rather, the Concurrent Resolution merely designated or identified the Nation "as an alliance of independent surviving tribes of the area" and "memorialized" or urged the U.S. Congress to acknowledge the tribes as such. Further, the Concurrent

Resolution is not an act of legislation and is not binding outside of the Legislature. See General Assembly of New Jersey v. Byrne, supra, 90 N.J. at 388-89 (1982).

Indeed, as previously noted, these very points were made by the Director of the Division of Gaming Enforcement, an agency within the Office of the Attorney General, in his letter dated December 14, 2001. (See Compl. ¶ 27 and Feinblatt Cert., Exhibit B). Significantly, the Complaint itself acknowledges that periodically thereafter, a division of the Attorney General's Office sent similar letters. (Compl. ¶ 28). Despite these communications, the Complaint asserts that the "[d]efendant [the Acting Attorney General] is equitably precluded or estopped from denying or repudiating its prior recognition of the Nation." (Compl. ¶ 63) (emphasis added). Yet, the Complaint acknowledges that the Attorney General's Office did not historically "recognize" the Nation as an authentic American Indian tribe. Thus, there is no basis for estoppel whatsoever as to the Attorney General.

Essentially, Plaintiff is trying to weave together an estoppel case by picking and choosing from certain communications uttered by certain state representatives over a span of 28 years (between 1982 and 2010) while ignoring others that do not fit its legal theory. This approach should be rejected as it is not supported by any case law applying equitable estoppel. Equitable estoppel, even when applied to private parties, focuses on specific and limited

communications or omissions between the plaintiff and the defendant. See Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979) (defendants union and union pension fund equitably estopped by their conduct and omissions directed at plaintiff from asserting that plaintiff had forfeited accumulated pension credits).

In addition, the alleged communications about the Nation's status necessarily do not provide a reasonable basis for reliance because the State was always free (and not precluded by any statutes or regulations) to reevaluate or rescind any positions as to the status of the Nation. Indeed, Plaintiff's own Complaint relies on a 1992 letter from the Governor's office noting that any recognition "remain[s] in effect until rescinded." (Compl. ¶ 16b) (emphasis added). Thus, the claimed recognition was always predicated on the Legislature's right to rescind. In short, by its very nature, any statements by state representatives as to the status of the Nation cannot support the required showing of a "knowing and intentional misrepresentation."

Beyond these fatal deficiencies with the estoppel claim, Plaintiff cannot show that it would have taken a different course of action or detrimentally changed its position based on alleged misrepresentations by the State. The Complaint asserts that "[s]ince 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." (Compl. ¶ 18). Without any details, the Complaint also alleges that the "Nation and its members have expended time, money, and energy in reliance on the state's recognition. . ." Ibid. (See also Compl. ¶ 61).

To prevail on an equitable estoppel claim, the plaintiff must rely on the defendant's misrepresentation and "change his position for the worse . . . ." Carlsen, supra, 80 N.J. at 339. The Complaint does not plausibly allege such a change of position for the worse. To the contrary, Plaintiff alleges that it "relied" on the State's alleged recognition and in fact obtained certain federal benefits for a number of years. Certainly, Plaintiff cannot be asserting that it would not have expended time and money to obtain those federal benefits if it knew that the State was allegedly going to rescind its position on recognition at a later date. See O'Malley v. Department of Energy, supra, 109 N.J. at 318 (plaintiff did not demonstrate detrimental reliance because he benefited from temporary provisional appointment prior to return to lower paying permanent position).

Finally, even if the State is deemed to have officially recognized Plaintiff in 1982 for the purposes of this motion, Plaintiff itself acknowledges that as early as 2001, the State took action indicating a change in position. (Comp. ¶ 27). Thus, even accepting Plaintiff's scenario as true for the moment, Plaintiff's estoppel claim first presented itself in 2001. Yet, Plaintiff has

waited 14 years to bring this action and assert its alleged right to equitable estoppel. Estoppel is designed to do equity. O'Neill, supra, 50 N.J. at 319. It would be wholly inequitable and contrary to public interest to allow Plaintiff to bring an estoppel claim against the State after Plaintiff slept on its alleged rights for 14 years. For these many reasons, Plaintiff's equitable estoppel claim should therefore be dismissed.

POINT V

COUNT V OF THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO STATE A CLAIM FOR ARBITARY AND CAPRICIOUS ACTION UNDER STATE COMMON LAW.

The last count of Plaintiff's Complaint states that Plaintiff has been "irreparably injured" by the State's alleged repudiation of Plaintiff's status as a state-recognized American Indian tribe. (Compl. ¶ 67). Plaintiff alleges that such action was "arbitrary, capricious, unreasonable, and contrary to law." (Compl. ¶ 66). There is no cause of action for an independent "arbitrary and capricious action" claim under common law. As there is no case law to support this claim, and Plaintiff cannot point to any New Jersey statute to support a finding that the State's alleged action was "contrary to law," Count V should be dismissed.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed in its entirety for lack of justiciability and failure to state a claim.

Respectfully submitted,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for Defendant

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

Dated: December 24, 2015

Appendix XII-B1

CIVIL CASE INFORMATION STATEMENT (CIS)

Use for initial Law Division
Civil Part pleadings (not motions) under *Rule* 4:5-1
Pleading will be rejected for filing, under *Rule* 1:5-6(c), if information above the black bar is not completed or attorney's signature is not affixed

FOR USE BY CLERK'S OFFICE ONLY
PAYMENT TYPE: CK CG CA
CHG/CK NO.
AMOUNT:
OVERPAYMENT:
BATCH NUMBER:

ATTORNEY / PRO SE NAME	TELEPHONE NUMBER	COUNTY OF VENUE
Stuart M. Feinblatt, AAG	(609) 984-9504	Mercer

FIRM NAME (if applicable)	DOCKET NUMBER (when available)
Department of Law & Public Safety, Division of Law	MER-L-2343-15

OFFICE ADDRESS	DOCUMENT TYPE
25 Market Street Trenton, New Jersey 08625	Brief & Notice of Motion to Dismiss
	JURY DEMAND ☐ YES ■ NO

NAME OF PARTY (e.g., John Doe, Plaintiff)	CAPTION
John Jay Hoffman, Acting Attorney General of New Jersey	Nanticoke Lenni-Lenape Tribal Nation vs. John Jay Hoffman, Acting Attorney General of New Jersey

CASE TYPE NUMBER (See reverse side for listing)	HURRICANE SANDY RELATED?	IS THIS A PROFESSIONAL MALPRACTICE CASE?
005	☐ YES ■ NO	☐ YES ■ NO IF YOU HAVE CHECKED "YES," SEE *N.J.S.A.* 2A:53 A -27 AND APPLICABLE CASE LAW REGARDING YOUR OBLIGATION TO FILE AN AFFIDAVIT OF MERIT.

RELATED CASES PENDING?	IF YES, LIST DOCKET NUMBERS
■ YES ☐ NO	1:15-cv-5645-RMB-JS

DO YOU ANTICIPATE ADDING ANY PARTIES (arising out of same transaction or occurrence)?	NAME OF DEFENDANT'S PRIMARY INSURANCE COMPANY (if known)
☐ YES ■ NO	■ NONE ☐ UNKNOWN

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE.

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

DO PARTIES HAVE A CURRENT, PAST OR RECURRENT RELATIONSHIP?	IF YES, IS THAT RELATIONSHIP:
■ YES ☐ NO	☐ EMPLOYER/EMPLOYEE ☐ FRIEND/NEIGHBOR ■ OTHER (explain) Referenced in concurrent resolution ☐ FAMILIAL ☐ BUSINESS

DOES THE STATUTE GOVERNING THIS CASE PROVIDE FOR PAYMENT OF FEES BY THE LOSING PARTY? ■ YES ☐ NO

USE THIS SPACE TO ALERT THE COURT TO ANY SPECIAL CASE CHARACTERISTICS THAT MAY WARRANT INDIVIDUAL MANAGEMENT OR ACCELERATED DISPOSITION

DO YOU OR YOUR CLIENT NEED ANY DISABILITY ACCOMMODATIONS?	IF YES, PLEASE IDENTIFY THE REQUESTED ACCOMMODATION
☐ YES ■ NO	
WILL AN INTERPRETER BE NEEDED?	IF YES, FOR WHAT LANGUAGE?
☐ YES ■ NO	

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).

ATTORNEY SIGNATURE: Stuart M. Feinblatt 12/23/15

Side 2

CIVIL CASE INFORMATION STATEMENT
(CIS)

Use for initial pleadings (not motions) under *Rule* 4:5-1

CASE TYPES (Choose one and enter number of case type in appropriate space on the reverse side.)

Track I - 150 days' discovery

151 NAME CHANGE
175 FORFEITURE
302 TENANCY
399 REAL PROPERTY (other than Tenancy, Contract, Condemnation, Complex Commercial or Construction)
502 BOOK ACCOUNT (debt collection matters only)
505 OTHER INSURANCE CLAIM (including declaratory judgment actions)
506 PIP COVERAGE
510 UM or UIM CLAIM (coverage issues only)
511 ACTION ON NEGOTIABLE INSTRUMENT
512 LEMON LAW
801 SUMMARY ACTION
802 OPEN PUBLIC RECORDS ACT (summary action)
999 OTHER (briefly describe nature of action)

Track II - 300 days' discovery

305 CONSTRUCTION
509 EMPLOYMENT (other than CEPA or LAD)
599 CONTRACT/COMMERCIAL TRANSACTION
603N AUTO NEGLIGENCE – PERSONAL INJURY (non-verbal threshold)
603Y AUTO NEGLIGENCE – PERSONAL INJURY (verbal threshold)
605 PERSONAL INJURY
610 AUTO NEGLIGENCE – PROPERTY DAMAGE
621 UM or UIM CLAIM (includes bodily injury)
699 TORT – OTHER

Track III - 450 days' discovery

005 CIVIL RIGHTS
301 CONDEMNATION
602 ASSAULT AND BATTERY
604 MEDICAL MALPRACTICE
606 PRODUCT LIABILITY
607 PROFESSIONAL MALPRACTICE
608 TOXIC TORT
609 DEFAMATION
616 WHISTLEBLOWER / CONSCIENTIOUS EMPLOYEE PROTECTION ACT (CEPA) CASES
617 INVERSE CONDEMNATION
618 LAW AGAINST DISCRIMINATION (LAD) CASES

Track IV - Active Case Management by Individual Judge / 450 days' discovery

156 ENVIRONMENTAL/ENVIRONMENTAL COVERAGE LITIGATION
303 MT. LAUREL
508 COMPLEX COMMERCIAL
513 COMPLEX CONSTRUCTION
514 INSURANCE FRAUD
620 FALSE CLAIMS ACT
701 ACTIONS IN LIEU OF PREROGATIVE WRITS

Multicounty Litigation (Track IV)

271 ACCUTANE/ISOTRETINOIN
274 RISPERDAL/SEROQUEL/ZYPREXA
278 ZOMETA/AREDIA
279 GADOLINIUM
281 BRISTOL-MYERS SQUIBB ENVIRONMENTAL
282 FOSAMAX
285 STRYKER TRIDENT HIP IMPLANTS
286 LEVAQUIN
287 YAZ/YASMIN/OCELLA
288 PRUDENTIAL TORT LITIGATION
289 REGLAN
290 POMPTON LAKES ENVIRONMENTAL LITIGATION
291 PELVIC MESH/GYNECARE
292 PELVIC MESH/BARD
293 DEPUY ASR HIP IMPLANT LITIGATION
295 ALLODERM REGENERATIVE TISSUE MATRIX
296 STRYKER REJUVENATE/ABG II MODULAR HIP STEM COMPONENTS
297 MIRENA CONTRACEPTIVE DEVICE
601 ASBESTOS
623 PROPECIA

If you believe this case requires a track other than that provided above, please indicate the reason on Side 1, in the space under "Case Characteristics.

Please check off each applicable category ☐ **Putative Class Action** ☐ **Title 59**