UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA INDIAN NATION, Plaintiff; v. UNITED STATES DEPARTMENT OF THE INTERIOR, Defendant.	No.: 5:17-CV-0913 (MAD/TWD)

NOTICE OF MOTION

MOTION BY:	United States Department of Interior
DATE, TIME AND PLACE:	January 16, 2018, 10:00 A.M., U.S. Courthouse and Federal Building, 445 Broadway, Albany, New York 12207
SUPPORTING PAPERS:	Defendant's Motion To Dismiss, Memorandum of Law in Support of Motion to Dismiss, and Declaration of William F. Larkin
RELIEF SOUGHT:	Dismissal of Plaintiff's Complaint

Dated: November 27, 2017

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA INDIAN NATION, Plaintiff; v. UNITED STATES DEPARTMENT OF THE INTERIOR, Defendant.	No.: 5:17-CV-0913 (MAD/TWD) DEFENDANT UNITED STATES DEPARTMENT OF THE INTERIOR'S MOTION TO DISMISS

MOTION TO DISMISS

Defendant the United States of America Department of Interior (Department), hereby moves to dismiss Plaintiff Oneida Indian Nation's Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6).

Plaintiff Oneida Indian Nation brings a Complaint alleging the Department's approval of the Oneida Nation's request to hold an election to amend its constitution and then subsequent update of the Oneida Nation's name on the list of federally-recognized tribes were arbitrary and capricious in violation of the Administrative Procedure Act (APA).

Plaintiff has not borne its burden of showing standing. It has identified no concrete injury that is traceable to the Department. Nor has Plaintiff demonstrated that the Court could redress any injury it has identified. Further, Plaintiff's first claim must be dismissed because it has failed to identify a final agency action as required by the APA, and because updating the names of Tribes on the Department's list is committed to the Department's discretion. Plaintiff's

second claim must be dismissed for failure to state a claim because Plaintiff is not within the zone of interests of the Indian Reorganization Act.

For these reasons and those stated in the accompanying Memorandum of Law, the Defendant United States Department of Interior hereby moves to dismiss Plaintiff's Complaint.

Dated: November 27, 2017

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UNITED STATES FEDERAL DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

ONEIDA INDIAN NATION,

Plaintiff;

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendant.

No.: 5:17-CV-0913 (MAD/TWD)

DEFENDANT UNITED STATES DEPARTMENT OF THE INTERIOR'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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DEFENDANT UNITED STATES DEPARTMENT OF THE INTERIOR'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

I. INTRODUCTION

This case is a dispute between two federally-recognized Indian Tribes that arose after one Tribe changed its name from the "Oneida Nation of Wisconsin" to the "Oneida Nation." The Plaintiff Oneida Indian Nation has not sued the Oneida Nation, however, but has rather sued the Department of the Interior (the Department). Plaintiff challenges the publication of the Oneida Nation's name in the list the Department maintains of all federally-recognized Tribes, and the Department's approval of the Oneida Nation's constitutional amendment changing its name. This suit should be dismissed for lack of jurisdiction. Plaintiff has not borne its burden to show standing, and neither of their claims is reviewable under the Administrative Procedure Act (APA).

Plaintiff lacks standing because it has not identified any concrete injury, and even any purported injury—"confusion" between the two tribes and speculative harm to the Plaintiff's trademark—is not caused by or traceable to the Department's actions. Indian Tribes are sovereign governments that decide for themselves what they are called. The Department did not change the Oneida Nation's name; it merely approved the Tribe's constitution and then included its new name on a list. And even more significantly, this Court cannot bind the Oneida Nation or cause it to start referring to itself by a different name. In other words, redress of any injury the Plaintiff may have stemming from the non-party Oneida Nation's name change depends on the Oneida Nation's actions, not the Department's.

Even if Plaintiff has shown standing, however, each of their claims has a further fatal defect. Plaintiff's first claim is not reviewable under the APA, because merely updating a Tribe's name on a list is not a "final agency action" as that terms is defined in the APA. Moreover the process of updating a Tribe's name is committed to the Department's discretion and hence also unreviewable under the APA.

Plaintiff also fails to demonstrate that it is within the zone of interests to raise its second claim that the Department violated the APA by approving changes to the Oneida Nation's Constitution. The Indian Reorganization Act sought to allow Tribes to manage their own

governing documents—not to allow other entities to become involved in these decisions. Plaintiff therefore cannot bring its second claim under the APA and it should also be dismissed.

At heart Plaintiffs do not challenge the Department's actions, but rather those of the non-party Oneida Nation. While this suit nominally seeks review of the Department's actions, Plaintiff's injury is not caused by or traceable to the actions of the Department, nor is it redressable by this Court. Ultimate resolution of this dispute lies not with the Department of Interior and not with the federal courts, but with the two sovereign Tribal governments.

II. FACTUAL BACKGROUND

The Oneida Nation (previously known as the Oneida Nation of Wisconsin) and the Oneida Indian Nation (previously known as the Oneida Indian Nation of New York) are two federally-recognized Indian Tribes headquartered in Wisconsin and New York, respectively. They are descendants of a larger group of Oneida people that at first contact with Europeans inhabited a large area within the Northeast. *See* Compl.¶¶ 15-16; *see generally Oneida Indian Nation of N.Y. State v. Oneida Cty.*, 719 F.2d 525, 527 (2d Cir. 1983), *aff'd in part, rev'd in part sub nom. Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985); *United States v. Oneida Nation of N.Y.*, 576 F.2d 870, 871 (Ct. Cl. 1978).

In the late 1700s, the United States entered into treaties with the Oneida in New York and set aside a reservation for them there. Complaint ¶ 16. Subsequently, some Oneida people moved from the northeast to Wisconsin and ultimately settled on a new reservation, entered into separate treaties, and began to govern themselves as a separate Tribal government. Compl. ¶ 17. The Department recognizes both Tribes as separate and distinct Tribal governments.

A. The Oneida Nation's 2015 Secretarial Election

The Oneida Nation, in accordance with its constitution and through a resolution of its Business Committee, requested authorization from the Department to hold an election on January 19, 2011 on five proposed constitutional amendments. Compl. ¶ 33. The amendment at issue in this suit states in part: "[t]he Constitution shall be amended to change the name from the 'Oneida Tribe of Indians of Wisconsin' to the 'Oneida Nation' throughout the Constitution." *Id.*

The Assistant Secretary – Indian Affairs authorized the Midwest Region to process the Tribe's request. Id. ¶ 33-34. The Secretary of the Interior is required by law to call an election for a Tribe unless proposed provisions in a Tribe's request are "contrary to applicable laws." *See* 25 U.S.C. § 5123(d)(1)(a) (previously 25 U.S.C. § 476(d)(1)(a)).[1] After legal review of the proposed amendments, the BIA Midwest Regional Director determined that none of the amendments submitted by the Nation were contrary to Federal law, and she was therefore required to conduct an election. Compl. ¶ 36.

The Midwest Regional Director authorized BIA's Great Lakes Agency Superintendent to call and conduct the election on the five proposed amendments. The election occurred on May 2, 2015, and on June 6, 2015, the Midwest Regional Director certified the results of the election and approved the amendments after a legal review. *See* 25 U.S.C. 5123 ("the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws."). *See* Compl. ¶ 41.

Kevin Washburn was the Assistant Secretary – Indian Affairs throughout the period during which the election was approved, held, and its results were certified. Acting Assistant Secretary Roberts voluntarily recused himself from all issues and actions relating to the Oneida Nation (as well as all other tribes he represented and matters he worked on while employed outside the Federal government).

Agency regulations provide the only those on the Eligible Voters list can challenge the results of an election. *See* 25 C.F.R. §§ 81.6(b), 81.43.[2] Section 81.43 provides that, "[a]ny person who was listed on the Eligible Voters List and who submitted a voter registration form

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[1] The House Office of Law Revision Counsel (OLRC) reclassified and renumbered Chapters 14 and 19 of Title 25 effective September 1, 2016.

[2] The applicable regulations were revised effective November 18, 2015. 80 Fed. Reg. 63094. All citations are to the regulations in effect at the time of the challenged decisions.

may challenge the results of the Secretarial election." The rule explicitly prohibits all other administrative challenges to the results of a Secretarial election. *See* 25 CFR § 81.21.

B. Publication of the 2016 List of Federally-Recognized Tribes

The List Act states in relevant part that "[t]he Secretary [of the Interior] shall publish [annually] 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 § 5131.

Since 1994, the year the List Act was enacted, the BIA has regularly (generally, on an annual basis) published a list of federally-recognized tribes in the Federal Register. The List differs from year to year only when a tribe has been newly acknowledged or restored to federal recognition, or has changed the name by which it wishes to be known in its nation-to-nation dealings with the United States. The BIA has no formal guidance governing how it lists Tribes on the List following a name change.

How tribes notify the BIA of changes to their official names varies significantly based upon several factors, including each individual tribe's constitution and government structure. Typically the BIA regional offices receive notification from tribes of changes, then submit relevant notifications and documents to the BIA, Office of Indian Services, Division of Tribal Government Services, which ensures that changes are reflected in updates to the annual List.

In 2015, the Midwest Regional Director notified the Division of Tribal Government Services of the results of the Oneida Nation's Secretarial election and name change. Tribal Government Services then ensured that the change was reflected in the 2016 List, which was reviewed by several offices within the Department. Although a draft of the List was routed to the Office of the Assistant Secretary – Indian Affairs for review, the List was not approved or decided upon by then Acting Assistant Secretary Lawrence Roberts.

In 2016, the BIA, published its annual list of federally-recognized tribes, as required by the Federally Recognized Tribes List Act of 1994 (List Act), 25 U.S.C. §§ 5130, 5131.

C. The Instant Complaint

On August 17, 2017, Plaintiff Oneida Indian Nation filed a complaint against the Department, arguing that the Department's actions in approving the Oneida Nation's request to hold an election to amend its constitution and then subsequently updating the Oneida Nation's name on the List of federally-recognized tribes were arbitrary and capricious in violation of the APA. Plaintiff requests that the Department's decisions be set aside and that the Department be enjoined from approving "Oneida Nation" as the name of the Tribe, or if the court determines the agency's decisions are invalid for process reasons, that the matter be remanded to the Department for "proper" administrative consideration.

III. STANDARDS OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(1)

Federal Courts have limited subject-matter jurisdiction, and "'[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.'" *Rosehoff Ltd. v. Cataclean Americas LLC*, 12-CV-1143A, 2013 WL 2389725, at *6 (W.D.N.Y. May 30, 2013) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)); *Whitaker v. Sec'y, U.S. Dep't of Homeland Sec.*, 09-MC-6003-CJS, 2009 WL 1449017 (W.D.N.Y. May 21, 2009). In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the court may refer to evidence outside the pleadings. *See Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986).

B. Federal Rule of Civil Procedure 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows dismissal of a complaint for "failure to state a claim upon which relief can be granted." When determining whether a complaint states a claim, the court must construe it liberally, accept all factual allegations as true, and draw all reasonable inferences in the plaintiff's favor. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.,* 493 F.3d 87, 98 (2d Cir. 2007). Legal conclusions, however, are not afforded the same presumption of

truthfulness. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (1955)). Labels, conclusions, or a "formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S.at 555 . Facial plausibility exists when the facts alleged allow for a reasonable inference that the defendant is liable for the misconduct charged. *Iqbal*, 556 U.S. at 678. The plausibility standard is not, however, a probability requirement: the pleading must show, not merely allege, that the pleader is entitled to relief. *Id.* at 678; Fed. R. Civ. P. 8(a)(2).

When considering a 12(b)(6) motion, a court must generally limit itself to facts stated in the complaint, documents attached to the complaint, and documents incorporated by reference. *Newman & Schwartz v. Asplundh Tree Expert Co., Inc.*, 102 F.3d 660, 662 (2d Cir.1996). However, a court may also consider documents a plaintiff relies on that are integral to the complaint, as well as public documents of which the plaintiff has notice. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991).

IV. ARGUMENT

A. Plaintiff lacks standing

Article III of the Constitution limits the jurisdiction of Federal Courts to "case[s] or controvers[ies]." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). In order to demonstrate a live case or controversy:

> First, the plaintiff must have suffered an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. (internal quotation marks, citations, and alterations omitted). As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing standing. *Id.* at 561. Moreover, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)).

1. Plaintiff has not alleged a concrete injury

Injury in fact is "the '[f]irst and foremost' of standing's three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998)). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan* 504 U.S. at 560 (1992).

A 'concrete' injury must be 'de *facto*'; that is, it must actually exist." *Id.* at 1548. Intangible physiological "injuries" such as confusion are not sufficient. *See, e.g., Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982) (holding that "psychological consequence[s]" could not confer standing).

Plaintiff has not alleged a concrete or particularized harm in its complaint stemming from the United States' approval of a Secretarial election for the Oneida Nation, or publication of the Nation's name change in the Federal Register, beyond conjectural, nebulous statements that the change of name in the Federal Register has caused "confusion" or "damage" to the Oneida Indian Nation. Complaint at 2 ¶¶ 3, 5. There is no concrete evidence of how the Department's actions have harmed Plaintiff's trademark or in any other way led to a concrete injury. *Cf. GTFM, Inc. v. Solid Clothing Inc.*, No. 01 Civ. 2629 (DLC), 2002 WL 1477821, at *26 (S.D.N.Y. July 11, 2002) (misleading use of trademark that led to lost sales sufficient injury). Mere "confusion" or speculation about how such confusion could potentially lead to an injury is not sufficient to confer standing. *See Central & South West Servs., Inc. v. United States EPA*, 220 F.3d 683, 701 (5th Cir. 2000) ("[S]ubjective fears and [a] speculative string of events cannot possibly serve as the basis for standing."); *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, 816

F.3d 1241, 1250 (9th Cir. 2016), *cert. denied sub nom. Habeas Corpus Res. Ctr. v. Dep't of Justice*, 137 S. Ct. 1338 (2017) (quoting *Summers,* 555 U.S. at 494) (Plaintiffs' "bare uncertainty…absent 'any concrete application that threatens imminent harm to [their] interests,' cannot support standing."); *Parker Madison Partners v. Airbnb, Inc.*, No. 16-CV-8939 (VSB), 2017 WL 4357952, at *4 (S.D.N.Y. Sept. 29, 2017) ("Plaintiff's general allegations of 'damage to their business,'…do not establish any cognizable injury"); *Treiber v. Aspen Dental Mgmt., Inc.*, 94 F. Supp. 3d 353, 363 (N.D.N.Y. 2015) (no standing where plaintiffs "simply allege[] [injury from]…consequences of [defendant's] business model"), *aff'd*, 634 Fed.Appx. 1 (2d Cir. 2016).

Nor can Plaintiff establish a cognizable injury based solely on an alleged violation of trademark law that has not been shown to occur. Moreover, the proper vehicle for Plaintiff's trademark claim is trademark suit before the Federal Circuit.[3] Plaintiff's alleged injuries are not concrete, nor particularized, and therefore do not meet Plaintiff's burden to establish standing and there is not jurisdiction for this suit.

2. Any injury is not traceable to the Department's actions

But even if Plaintiff had identified a sufficiently "concrete" injury, its alleged injury is not traceable to the Department's actions of the Department. It was not the Department who changed the Oneida Nation's name, and for purposes of standing it is insufficient "if the injury complained of is the result of the *independent* action of some third party not before the court." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (citation and punctuation omitted). Here, Plaintiff's alleged injury stems from action taken by the Oneida Nation; this injury is not caused by the United States.

Plaintiff alleges that the Department's action somehow impacts its interest in trademarks

[3] If Plaintiff's true injury is a violation of their trademark, then they should pursue that claim in the appropriate court. If they have a remedy to their injury in another court, the APA is inapplicable as federal courts have jurisdiction only to review "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

of the name Oneida Nation. Complaint at 2 ¶5. However as the Complaint demonstrates, it is the Oneida Nation's action, and not the United States', that Plaintiff is truly challenging. Indeed, the majority of Plaintiff's complaint is devoted to enumerating all of the ways that the Oneida Nation, and not the Department, has allegedly interfered with Plaintiff's interest in the trademark, many of which predate the challenged federal actions. Complaint at 2 ¶5, 10-12 ¶¶26-34.

Approval of the proposed Secretarial election did not initiate the name change that Plaintiff alleges has caused it harm. The Secretarial election process is merely a vehicle for tribes to decide whether to make changes to their constitutions or governing documents in accordance with the IRA and each tribe's governing structure. Plaintiff has not identified a way that the challenged federal actions—approving the constitutional amendment and updating the list—cause a harm that is separate and distinct from the underlying name change undertaken by the Oneida Nation. Therefore, as Plaintiff has not identified an injury that is traceable to the Department, it lacks standing.

3. Any injury is not redressable in this suit

Even if there were a concrete injury that was traceable to the Department, it would still not be redressable by this Court. This Court has the power to remand the BIA's decisions for reconsideration or further explanation—the proper remedy for arbitrary or capricious permit-related decisions in an APA case. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action ... the proper course ... is to remand to the agency for additional investigation or explanation."). But even assuming on remand the BIA reversed the change of the Oneida Nation's name on the List Act, this would not stop the Nation from referring to itself as the Oneida Nation.[4] *See, e.g.*, *Aguayo v. Jewell*, 827 F.3d 1213,

[4] To the extent Plaintiff does intend to bind the non-party Tribe and seek relief beyond that offered by the APA, such relief is barred by Rule 19. *See Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013) (finding that tribes did not need to be present for adequate relief to be granted in an APA action, distinguishing such a case from those in which "the injury complained of was a result of the absent *tribe*'s action"); *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001) ("Because plaintiffs' action focuses solely on the propriety of the Secretary's

1217 (9th Cir. 2016) (Tribes "retain[] inherent sovereign power to adopt governing documents under procedures other than those specified by the agency. § 476(h)."). Indeed, even if the Court were to direct the United States to change the Oneida Nation's name on the List or revisit its Secretarial election process, the harm alleged by Plaintiff—that there is undue confusion between the two Tribes and that the Oneida Nation is interfering with Plaintiff's trademark—would continue because, as Plaintiff concedes in the complaint, it is not challenging the Nation's right to call itself what it wishes. *See* Compl. ¶5.

As a result, even if the Oneida Nation's name appeared differently on the list or in its constitution, the Tribe could still identify itself as the Oneida Nation internally, including on its government website and documents.[5] Similarly, even if the Department reverses how the Tribe is referred to on the List, the Oneida Nation could still present itself to the public as the Oneida Nation including in ways that may cause "confusion" or allegedly harm the Plaintiff's Trademark.[6] In short, there is nothing this Court could order that would stop the Oneida Nation from continuing to take all the actions Plaintiff alleges are "confus[ing] the public and siphon[ing] away the goodwill that the Nation has created in its business and governmental relations." Compl. ¶ 31.

Thus, Plaintiff has no redress and lacks standing. Courts have long recognized that injuries are not "'redressable' where the injury depends not only on [the defendant's challenged conduct], but on independent intervening or additional causal factors." *Fulani v. Brady*, 935 F.2d 1324, 1329 (D.C. Cir. 1991); *Warth v. Seldin*, 422 U.S. 490 (1975). That is precisely the case here where the additional causal factor is the actions of the non-party Oneida Nation.

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determinations, the absence of the Wyandotte Tribe does not prevent the plaintiffs from receiving . . ." the requested relief).

[5] *See* https://oneida-nsn.gov (last visited November 27, 2017).

[6] *See, e.g.*, http://www.oneidacasino.net/, http://www.packers.com/news-and-events/article-1/Packers-Oneida-Nation-renew-long-term-partnership/a32b0952-76f6-49e9-befa-e651463008dd. (last visited November 27, 2017).

At best, Plaintiff is seeking to alter the Oneida Nation's actions indirectly—for instance Plaintiff may believe that if the List and Constitution do not identify the Tribe as the Oneida Nation, the Tribe may choose to refer to itself differently. But there is no assurance this will happen; it is speculative at best, and no standing exists where "the plaintiff seeks to change the defendant's behavior only as a means to alter the conduct of a third party, not before the court, who is the direct source of the plaintiff's injury." *Common Cause v. Dep't of Energy*, 702 F.2d 245, 251 (D.C.Cir. 1983). Therefore Plaintiff has not demonstrated that even if it had an injury traceable to the Department, it would be redressable by this Court. Plaintiff lacks standing and the case should be dismissed.

B. Changing a Tribe's name on the list of federally-recognized tribes is not a final agency action from which legal consequences flow

Plaintiff's first claim must also be dismissed because Plaintiff has failed to challenge "final agency action" as that term is defined in the APA.

"'[T]he United States, as sovereign, is immune from suit save as it consents to be sued ..., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The doctrine of sovereign immunity is jurisdictional in nature, and therefore to prevail, Plaintiff bears the burden of establishing that its claims fall within an applicable waiver. *Id.*

The Administrative Procedure Act ("APA"), which Plaintiff invokes, Compl. ¶¶ 9, 13, waives the sovereign immunity of the United States and provides a statutory right of judicial review to plaintiffs "suffering legal wrong because of agency action," 5 U.S.C. § 702. However, prior to reviewing whether an agency's determination is arbitrary and capricious, the APA requires that there be a "final agency action for which there is no other adequate remedy in a court." *Meisel v. FBI*, 204 F. Supp. 2d 684, 689 (S.D.N.Y., 2002) (quoting 5 U.S.C. § 704). Changing a Tribe's name on a list is not an "agency action" nor is it "final." Therefore Plaintiff's first claim is not reviewable under the APA and should be dismissed for lack of jurisdiction.

As the Supreme Court made clear in *Norton v. S. Utah Wilderness All.* ("*SUWA*"), judicial review under the APA is available only for the "agency actions" defined in Section 551(13) of the APA. *See* 5 U.S.C. § 551(13) (defining "agency action" as a "rule, order, license, sanction, relief, or the equivalent or denial thereof"); *SUWA*, 542 U.S. at 62 ("[s]ections 702, 704, and 706(a) all insist upon an 'agency action,'"). Changing the name of the Oneida Nation on the list is not an "agency action" as defined by the APA because it does not meet any of the defined categories. It is not a statement of future effect designed to implement, interpret, or prescribe law or policy ("rule"), is not a form of authorization given by BIA ("license"), does not represent BIA's prohibition of another person's freedom ("sanction"), is not an BIA's disposition in a matter ("order"), and does not constitute BIA's beneficial grant of assistance to or recognition of a claim on the application of a person ("relief"). Plaintiff may argue that changing the Tribe's name is a "license" or "order," but it is not the act of publishing a Tribe's name on the list that represents BIA's disposition of the question of whether a Tribe should be federally-recognized. There is an entire regulatory process designed to determine whether a tribe should be federally-recognized. *See* 25 C.F.R. § 83.5; *Golden Hill Paugussett Tribe of Indians v. Weicker,* 39 F.3d 51, 60 (2d Cir. 1994). The List, as its name implies, is merely a list of Tribes already Federally-recognized, not a finding that a Tribe is eligible for federal recognition, or a grant of any particular benefit.

Therefore, publishing a List that includes a Tribe's changed name does not constitute an "agency action" under the APA, and is not the type of action that the Court can review. Accordingly, Plaintiff has failed to state a claim under the APA, the United States has not waived sovereign immunity for any such claim, and the Court is without jurisdiction to consider it.

But even if the actions Plaintiff has identified did constitute "actions" as defined by the APA, they would not be "final" for purposes of the APA, and therefore would still be outside this Court's jurisdiction. An agency action is "final" when (1) the agency reaches the "consummation" of its decision-making process and (2) the action determines the "rights or obligations" of the parties or is one from which "legal consequences will flow." *Bennett*, 520

U.S. at 177-78 (1997). Without this requisite final agency action, a court lacks jurisdiction to review the agency determination. *See Air Espana v. Brien*, 165 F.3d 148, 152 (2d Cir. 1999) ("The APA explicitly requires that an agency action be final before a claim is ripe for review.... This requirement of finality is jurisdictional....").

Here, Plaintiff has not identified any rights, obligations, or legal consequences that stem from publication of the List that includes the Oneida Nation's name. While receiving federal recognition as a Tribe certainly has legal consequences, Plaintiff has identified no consequence from the ministerial act of changing an already-recognized and listed Tribe's name.

Updating a Tribe's name is a technical update that does not change anything of substance; it is thus not a final agency action amenable to suit under the APA. *See Vill. of Bensenville v. FAA,* 457 F.3d 52, 69 (D.C. Cir. 2006) (quoting *Nat'l Ass'n of Home Builders v. Norton,* 415 F.3d 8, 15 (D.C.Cir.2005)) ("[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review."); *Indep. Equip. Dealers Ass'n v. EPA,* 372 F.3d 420, 428 (D.C. Cir. 2004); *Gen. Motors Corp. v. EPA*, 363 F.3d 442, 449 (D.C. Cir. 2004) (EPA action not reviewable final agency action because it "reflect[s] neither a new interpretation nor a new policy"). Therefore Plaintiff's first claim is not amenable to review under the APA and should be dismissed.

C. There is "no law to apply" to how the Department updates a Tribe's name on the List

Even if the Department's changing of a Tribe's name on the List were a final agency action, it would not be reviewable under the APA for the additional reason that how tribes' names appear on the Department's list is committed to the Department's discretion as there are no standards governing how the Department should list them.

Where "there is no law to apply," courts cannot review the agencies' actions under the APA. *Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 778 F.3d 412, 419 (2d Cir. 2015). "To determine whether there is 'law to apply' that provides 'judicially manageable standards' for judging an agency's exercise of discretion, the courts look to the statutory text, the agency's

regulations, and informal agency guidance that govern the agency's challenged action." *Id.* *See also Storms v. United States*, No. 13-CV-811 (MKB), 2017 WL 2684013, at *19 (E.D.N.Y. June 20, 2017).

> Here the only applicable law is the List Act itself, which provides:
>
> The Secretary shall 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 U.S.C § 5131. While the List Act does require that the Department "shall" publish a list of federally-recognized Tribes, it provides no "judicially manageable standards"—no standards at all— to govern how the Department shall go about updating the names of listed Tribes. The law only provides that Tribes that the Secretary recognizes to be eligible are to be included, but even here it provides no standard to guide the Secretary in determining whether a Tribe is eligible for special programs and services such that it should be listed. This is not sufficient to show a "judicially manageable standard." *Cf. Salazar v. King*, 822 F.3d 61, 77 (2d Cir. 2016) (finding judicially manageable standard where law provided "if such student's eligibility to borrow under this part was falsely certified by the eligible institution ... then the Secretary shall discharge the borrower's liability on the loan.").

Plaintiff has identified no other law, regulation, or even informal agency guidance that provides a judicially manageable standard governing changing a Tribe's name, and no indication that the Department has violated such standard. Instead, Plaintiff alleges that it was error not to allow for the Plaintiff or "other affected parties" an opportunity to comment on changes to the List, but has identified no law or Department regulation that would require such notice or other procedure. Federal agencies' freedom to fashion their own procedural rules is a "very basic tenet of administrative law," and the Supreme Court has held that a reviewing court may not impose upon an agency procedural requirements beyond those set forth by Congress or by the agency itself. *See Vt. Yankee Nuclear Power Corp. v. Nat. Resources Defense Council, Inc.*, 435 U.S. 519, 524, 543–44 (1978); *Storms* 2017 WL 2684013, at *18.

Thus, the Lisa Act is drawn in such broad terms that there is no law to apply, and certainly there is no law to apply to the question of how the Department updates a Tribe's name on the List. *See Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 778 F.3d 412, 419 (2d Cir. 2015) How to identify Tribes on the List is committed to the Department's discretion and is not reviewable under the APA, and therefore Plaintiff's first claim should be dismissed.

D. Plaintiff is not within zone of interests of the provisions of the IRA it invokes

Plaintiff is not within the zone of interests of the portions of IRA it invokes, and so Plaintiff's second claim should be dismissed for failure to state a claim.[7]

In order to state a claim under the APA, a Plaintiff must also be "'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). "Whether a plaintiff's interest is arguably protected by the statute within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question but by reference to the particular provision of law upon which the plaintiff relies." *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1036 (8th Cir., 2002) (quoting *Bennett*, 520 U.S. at 175–76).

The purpose and intent of the IRA is to enable tribal self-determination, self-government, and self-sufficiency in the aftermath of "a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (citing H.R. Rep. No. 1804, 73d Cong.2d Sess., 6 (1934)). As the Supreme Court itself noted, "[t]he overriding purpose of [the IRA] was to

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[7] Dismissing a claim on a zone of interests basis proper under 12(b)(6) rather than 12(b)(1) because it "goes not to the court's jurisdiction—that is, '*power*'—to adjudicate a case, but instead to whether the plaintiff has adequately pled a claim." *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 201 (2d Cir. 2014) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014)). The zone of interests requirement for bringing an action under the APA was often referred to as a "prudential standing" requirement but the Supreme Court has clarified that "prudential standing is a misnomer as applied to the zone-of-interests analysis." *Lexmark*, 134 S. Ct. at 1387 (internal quotation marks omitted). *See Adson5th, Inc. v. Bluefin Media, Inc.*, No. 16-CV-143 (LJV), 2017 WL 2984552, at *5 (W.D.N.Y. July 13, 2017).

establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). To further this goal, Congress authorized Indian tribes to adopt their own constitutions and bylaws, 25 U.S.C. § 5123 (previously 25 U.S.C. § 476), and to incorporate, 25 U.S.C. § 5124 (previously 25 U.S.C. § 477). The IRA sought to have Tribes determine their own governmental structures and not have outside groups such as other governments—Tribal or otherwise—make these decisions for them. *See generally*, F. Cohen, Handbook of Indian Law § 1.05; *Aguayo v. Jewell*, 827 F.3d 1213, 1217 (9th Cir. 2016).

Plaintiff argues that it had the right to comment on and challenge the amendment of another Tribe's Constitution. The IRA and its implementing regulations do not contemplate this; indeed, they reserve such challenges only for individuals who voted in the election they seek to challenge. This is consistent with the IRA's general purpose of supporting the self-government and independence of each federally-recognized Tribe. Plaintiff—a government entity that could not and did not vote in the Oneida Nation's constitutional amendment process—is not within the zone of interests of the portion of the IRA it seeks to invoke.

Plaintiff relies on 25 U.S.C. 5123 and the related regulations at 25 C.F.R. part 81. Compl. ¶ 66. The regulations could not be more clear that challenges to the results of an election are to be made not by any interested party or other Tribe but rather only by those on the Eligible Voters list. *See* 25 C.F.R. §§ 81.6(b) and 81.43. These regulations provide strong support for the proposition that only members of the given Tribe changing its governing documents are within the zone of interests protected by this portion of the IRA.

Plaintiff also relies on 25 U.S.C. 5123, which provides "Any Indian tribe shall have the right to organize for *its* common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto." 25 U.S.C § 5123(a) (emphasis added). Thus, this section allows Tribes to manage their own government and constitution, and is not intended to allow another tribe to become involved in the governmental decisions of the Tribe seeking to govern itself.

Plaintiff's concerns over its trademark and "confusion" have nothing to do with the purposes for which Congress enacted 25 U.S.C § 5123. And the IRA generally does not require Interior to balance the interests such as the ones Plaintiff asserts when deciding to approve changes to another sovereign Tribe's governing documents. Plaintiff's argument, if adopted, could lead to an eruption of litigation by third parties challenging changes to Tribal constitutions, thus contradicting Congress's intent in enacting the IRA—to promote Indian sovereignty, self-government, and management of their own affairs without outside interference.

Plaintiff's argument would also eviscerate the prudential standing doctrine. "[A] rule that gave [a plaintiff] standing merely because it happened to be disadvantaged by a particular agency decision would destroy the requirement of prudential standing; any party with constitutional standing could sue." *Haz. Waste Treatment Council v. EPA*, 861 F.2d 277, 283 (D.C. Cir. 1988). The IRA portion Plaintiff relies on seeks to provide an Indian tribe with the means by which to reorganize and adopt or amend its constitution. Plaintiff is not challenging approval of its own government structure or documents in this case, but, rather, the process and ultimate decision to approve those of another tribe, which is outside the zone of interests contemplated by the IRA and its implementing regulations. *See, e.g.*, *United States v. Dann*, 873 F.2d 1189, 1195 (9th Cir.), *cert. denied*, 493 U.S. 890 (1989) (Nonintercourse Act, a statute that provides a cause of action only for collective Indian tribes, not the individual members of a tribe); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 579 (1st Cir.), *cert. denied*, 444 U.S. 866, 100 (1979). Thus, Plaintiff is outside the zone of interests for the IRA provisions at issue, and Plaintiff's second claim should be dismissed.

V. CONCLUSION

For the foregoing reasons, Plaintiff's suit should be dismissed. Plaintiff has not shown that its injury—to the extent it has identified one—is caused by the Department. But even if it were, there is no indication that it could be remedied in this suit, where the Oneida Nation is not a party. But even if Plaintiff had shown a sufficiently redressable injury and demonstrated standing, its

claims still suffer serious jurisdictional defects. The case should be dismissed the two Tribes should seek to address their differences outside of federal court.

Dated: November 27, 2017

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA INDIAN NATION,

Plaintiff;

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendant.

No.: 5:17-CV-0913 (MAD/TWD)

DECLARATION OF WILLIAM F. LARKIN IN SUPPORT OF MOTION TO DISMISS

Pursuant to Title 28, United States Code, Section 1746 and under penalties of perjury, William F. Larkin declares as follows:

1. I am an Assistant United States Attorney, of counsel to Grant C. Jaquith, Acting United States Attorney for the Northern District of New York. I am familiar with the facts in this case.

2. This declaration is filed to comply with Rule 7.1 of the Local Rules of the United States District Court for the Northern District of New York. Filed simultaneously in support of this Motion to Dismiss is a Memorandum of Law.

3. For the reasons stated in the Memorandum of Law, I believe the position asserted by the defendant has merit.

4. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: November 27, 2017

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By: /s/ William F. Larkin
William F. Larkin
Assistant U.S. Attorney
Bar Roll No. 102013

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2017, I electronically filed the foregoing **Notice of Motion, Motion to Dismiss, Memorandum of Law, and Declaration of William F. Larkin** with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

Meghan Murphy Beakman, Esq.
Michael R. Smith, Esq.
David A. Reiser, Esq.
Thomas L. Sansonetti, Esq.

/s/ Nicole Falkowski
Nicole Falkowski
Legal Assistant