UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

PLAINTIFF ONEIDA INDIAN NATION'S OPPOSITION
TO DEFENDANT DEPARTMENT OF THE INTERIOR'S MOTION TO DISMISS

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Although Indian tribes can control what they call themselves, they do not – or at least they are not supposed to – control the name by which the government (including the Department of the Interior) officially recognizes them. The name the government officially uses to federally recognize a tribe has independent consequences. Just as a tribe can ordinarily use the name it wants, a band of musicians can use a name without the approval of a federal trademark, but no one would doubt that trademark registration confers additional rights. Indeed, the only reason why the Wisconsin tribe would ever want to submit a change of name to a federal approval process is to gain the benefit of federal approval. The approval may appear to support the Wisconsin tribe's claim that it is the Oneida Nation or its litigation challenging the trademarks of the Oneida Indian Nation (the Nation), and otherwise to diminish the Nation's stature and rights. It is not credible or legally appropriate for the Department to disclaim liability on the basis that it adopts any name a tribe chooses. Such a stance would bind the government to call Cherokees Comanches and vice versa, and to disregard the complex histories of tribes that have descended from or broken away from the same ancestral tribe.

The Department's decision to cast its actions as insignificant and automatic actually confirms the APA violations the Nation alleges. The Nation alleges that the Department of the Interior violated the APA by ceding authority to the Wisconsin tribe, automatically giving federal approval to the tribe's name-change referendum, and then automatically publishing the new name in the Federal Register as the tribe's federally recognized name. The Department's motion to dismiss acknowledges that the Department took only that passive role, acting without independent federal decision-making. As demonstrated below, the Department's decisions should have been independent, were consequential, and should have conformed to applicable federal statutory and common law.

THE NATION'S CLAIMS

A. Federal Approval of Name-Change Amendment to Tribal Constitution

The Department federally recognized the Wisconsin tribe by the name Oneida Tribe of Indians of Wisconsin for many decades, as reflected in the many published lists of federally recognized tribes and in the Department's decision to approve the tribe's constitution on December 21, 1936. Complaint ¶¶21-24; *see* https://www.loc.gov/law/help/american-indian-consts/PDF/37026494.pdf (reflecting federal approval).

The Department did not intrude into tribal affairs when it approved tribe's constitution in 1936. Rather, the Wisconsin tribe made a choice to seek that approval instead of adopting a constitution on its own. Complaint ¶21. That choice was provided by the Indian Reorganization Act (IRA), which also governed the Department's recent decisions regarding the tribe's name-change amendment. Act of June 18, 1934, ch. 576, § 16; 25 U.S.C. § 5123 (formerly codified at 25 U.S.C. § 476. Section 5123(h) provides: "each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section." But a tribe can claim federal government approval of its constitution only if it proceeds under Section 5123 and obtains the approval. Because the Wisconsin tribe chose to condition its name-change on *federal* approvals, the Department's portrayal of the issues in this action as involving only a *tribal* decision falls flat.

To have a federally approved constitution, or a federally approved amendment to a constitution, Section 5123 sets two conditions. The Department must first "authorize[] and call[]" and "hold" an election in which tribal members vote. 25 U.S.C. § 5123(a)(2) & (c)(1). Such elections are called Secretarial elections. *See generally* 25 C.F.R. Part 81. Secretarial

elections are federal elections, even though voters are tribal members. 25 C.F.R. § 81.4 ("Secretarial election means a Federal election conducted by the Secretary") (italics omitted); 25 C.F.R. § 81.14 (distinguishing "Secretarial elections" from "tribal elections"); 25 C.F.R. § 81.16 ("A Secretarial election is a Federal election. . . ."). To the same point is *Thomas v. United States*, 189 F.3d 662, 664 & 667 (7th Cir. 1999), which further explained:

> Indian tribes enjoy important attributes of sovereignty, but in some key respect they are under the control of the federal government. Such is the case with elections to adopt, revoke, or amend tribal constitutions. Although these elections lay the very foundation for tribal self-governance, they must be called, held, and approved by the United States Secretary of the Interior.
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> . . .
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> It bears emphasizing that Secretarial elections, such as the one at issue here, are federal – not tribal – elections. Tribes are sovereign only to the extent that their sovereignty has not been qualified by statutes or treaties. The IRA explicitly reserves to the federal government the power to hold and approve the elections that adopt or alter tribal constitutions. As the Eighth Circuit explained, "it is not merely the number or type of federal involvement which characterize these elections as federal. . . . Rather, it is the source of the Secretary's regulatory authority over these elections, such authority having congressional[,] and not tribal, origin."
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> . . .
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> [T[he decision of Congress to privilege federal control over tribal interests in tribal constitutional elections is unmistakable. The language and structure of the statute leave no doubt where authority lies, and debates within Congress are entirely consistent with our conclusion.

Prior to the conduct of a Secretarial election, the Department must advise a tribe whether its proposed constitution or amendment contains a term that is "contrary to applicable laws." 25 U.S.C. § 5123(c)(2)-(3). If the election is held and if the constitution or amendment is adopted, it must be also be approved by the Secretary "pursuant to subsection (d) in order to be effective." 25 U.S.C. §5123(a)(2). Under subsection (d), the Secretary may *not* approve a constitution or any amendments if the approval would be "contrary to applicable laws." 25 U.S.C.

§ 5123(d)(1); *see* 25 C.F.R. § 81.45(b)(3) & (c)(3) (approval depends on whether amendments are "not contrary to Federal law" and do not "contain language that is contrary to Federal law"). One applicable law is found in Section 5123 itself, a non-discrimination provision mandating that federal agencies "shall not" "make any decision or determination pursuant to the" IRA "with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. § 5123(f). Decisions to approve a constitution or amendment also must comply with the government's trust obligation to all Indian tribes, *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (trust obligation applies to all federal decisions), and of course must not be arbitrary and capricious or contrary to law under the APA.

The "decision to approve or disapprove the governing document or amendment is a final agency action." 25 C.F.R. § 81.45(f); *see* 25 C.F.R. § 81.45(c)(4) (final agency action).

Pursuant to Section 5123, the Wisconsin tribe decided in 2010 to request federal participation concerning a name-change constitutional amendment. Complaint ¶¶33-34. The following year, 2011, the Midwest Region of the BIA, a part of the Department, informed the tribe by letter that the proposed amendment did not "appear to be contrary to law." Complaint ¶36. The Region reached that conclusion by excluding an expressed "concern" about adverse impact on the Nation and others. The Region concluded that *it* could not consider the "concern" in deciding to authorize a Secretarial election, writing to the Wisconsin tribe that it should re-think its name-change plan in light of the concern:

> A concern is that the name "Oneida Tribe of Indians of Wisconsin" has a long history including the reorganization under the Indian Reorganization Act. Changing the name will cause confusion for a number of entities engaged in business with the Oneida Tribe as well as other governments. Compounding this

> difficulty will be the name of the tribe in the state of New York, called the "Oneida Nation of New York". While the two names would not be exactly the same they are close enough so that they will undoubtedly be confused more than they are now. The Oneida Nation of New York is often referred to as the Oneida Indian Nation, including some self-determination contracts with the Bureau of Indian Affairs, which will compound the existing confusion over this matter.

Complaint ¶36. The Wisconsin tribe responded that it "recognize[d]" the "concern that the proposed name change [to Oneida Nation] may result in confusion with the Oneida Nation of New York" but said it would pursue the change anyway because the name "Oneida Nation" is "more responsive to the Tribe's governmental status." Complaint ¶39. Although the tribe was clear about its intention to change its governmental status vis-à-vis the Nation, the Midwest Region conducted the Secretarial election and, on June 16, 2015, gave the name-change amendment federal approval. The Midwest Region never communicated with the Nation or with the Eastern Region of the BIA, where the Nation is located. Complaint ¶38.

Asserting an APA claim, the Nation challenges the Region's decisions to authorize and conduct a Secretarial election and thereafter to approve the name-change amendment as arbitrary and capricious, an abuse of discretion and contrary to law on multiple grounds that the Department's papers do not acknowledge. Complaint pp. 26-31, ¶¶66-80. Summarizing: (1) The Region violated federal trust obligations because it did not consider harm to the Nation, essentially ceding federal decision-making obligations to the Wisconsin tribe. Complaint ¶79(a) & (d); *see* ¶¶36-41 &71-74. (2) Even if there were no trust obligation, the Region's exclusion of the Nation's interests from the federal decision-making calculus and assignment of that interest to the Wisconsin tribe for consideration violated the agency's obligation to consider all important facts and circumstances. ¶¶79(a) & (e); *see* ¶¶40-41 &71-75. (3) The Nation was deprived of notice of and opportunity to comment on the Region's proposed decisions, and there was no

notice to the BIA's Eastern Region, which could have notified the Nation or raised its interests. Complaint ¶¶79(b); *see* ¶38. (4) The Region gave no explanation for its decisions, violating the rule that a decision must be sufficiently explained to permit judicial review. Complaint ¶79(c); *see* ¶¶40-41. (5) The Region's approvals violated Section 5123(f) & (g)'s prohibition of decisions that enhance or diminish the legal status of an Indian tribe. Complaint ¶¶69 & 79(g); *see* ¶39. (6) The Region's approvals were unreasonable and in conflict with all available evidence. Complaint ¶79(f). (7) The Region's approval violated Section 5123(c)-(d), which bars approvals of constitutional amendments that are "contrary to applicable laws," which would include all of the foregoing. Complaint ¶¶ 67-69 & 79(g).

The Department makes two arguments for dismissal of this claim – its Argument A, that the Nation lacks standing, and its Argument D, that the Nation is outside the relevant zone of statutory interest. Otherwise, the Department does *not* argue that the complaint fails to state a claim with respect to the Region's decisions (Nation's second APA claim).

B. Change of Federally Recognized Tribal Name in Federal Register List

In 1979, the Department began to periodically publish in the Federal Register a list of federally recognized Indian tribes. Year after year the published list differentiated the Wisconsin tribe from the Nation, using the words Tribe and Wisconsin to refer to the Oneida Tribe of Indians of Wisconsin, and the words Nation and New York to refer to the Oneida Indian Nation of New York. Complaint ¶¶20-25. The published list includes only federally recognized tribes, and so the published names are those by which the federal government recognizes those tribes.

In 1994, Congress enacted the List Act, which requires the Department to publish an annual list of federally recognized tribes in the Federal Register. Pub. L. No. 103-454, 108 Stat.

4791 (Nov. 2, 1994, 25 U.S.C. § 5131(b); *see* Complaint ¶23. The List Act was Congress' response to Department decisions made "capriciously and improperly" regarding tribal recognition, including a 1993 decision regarding recognizing a new government "of the Oneida Nation of New York . . . without consulting, notifying or discussing the decision with the Oneida Nation or is its leaders." H.R. Rep. No. 103-781, at 4 (1994); *see* Complaint ¶23. The List Act provides that the Federal Register list be "accurate" and that publication of the list involves the federal "trust responsibility" to Indian tribes. Pub. L. No. 103-454 §§ 103(2) & (7).

Concerning the Wisconsin tribe, the Department changed its recognized name in the Federal Register in 2016 without discussion with the Nation or public process. 81 Fed. Reg. 26826 (May 4, 2016). The Nation learned of the change later in 2016. Complaint ¶¶44 & 53. The Federal Register contained no explanation for making the recognition change. Complaint ¶43. The federal treaty that recognized the Wisconsin tribe after its members left New York to form a new tribe does not refer to it as the Oneida Nation. 7 Stat. 66 (Feb. 3, 1838) ("First Christian and Orchard parties of the Oneida Indians residing at Green Bay").

Because the Department has not filed the administrative record, we do not know who was involved in the Department's name-change decisions, what rules were followed, or what approvals were given, other than what is shown on the face of the Federal Register notice publishing the list. The complaint alleges that responsible Department officials told Nation representataives that the Department, without thought and without publishing the relevant rule, automatically lists any name given to it by a tribe and does not make an independent decision. Complaint ¶54. The Department's moving papers make the same point. Dep't Mem. 1-2 & 8-9.

The Nation's complaint challenges the Department's decision to change the list of federally recognized tribes as arbitrary and capricious, an abuse of discretion and otherwise contrary to law, in violation of the APA. Complaint, pp. 21-25, ¶¶56-65. Summarized, the grounds for the claim are (1) that the Department violated its trust obligation to the Nation by failing to consider its interests and by adopting a name for the Wisconsin tribe that would sow confusion and appear to ratify the tribe's claim to be the genuine Oneida Nation; (2) that the Department acted arbitrarily and capriciously by failing to even consider important aspects of the name-change issue and by failing to make a federal decision; (3) that the Department afforded the Nation no notice or opportunity to comment, notwithstanding its obvious interest; (4) that the Federal Register indicated that the list was authorized by Assistant Secretary – Indian Affairs Lawrence Roberts, who was and is a lawyer for and member of the Wisconsin tribe and therefore not a neutral decision maker; (5) that the Department changed the name by which it recognizes the Wisconsin tribe pursuant to a rule as to which there was no opportunity for notice and comment and that is not even public; (6) that the Department gave no explanation for the changed name that can be properly reviewed judicially; (7) that the Department violated 25 U.S.C. § 5123(f) by enhancing or diminishing the rights of the Wisconsin tribe and the Nation; (8) that the Department violated its obligation under the List Act to accurately determine the name by which it will recognize an Indian tribe; and (9) that the Department's decision was unreasonable and in conflict with all the relevant evidence. Complaint ¶64; *see* ¶¶61-63.

The Department's motion makes three arguments for dismissal of this claim – its Argument A, lack of standing, and its Arguments B and C, that there has been no final agency action from which legal consequences flow and that there is no law to apply. Aside from these

arguments, the Department does *not* argue that the complaint fails to state a claim concerning the Federal Register recognition and listing decisions (Nation's first APA claim).

ABSENCE OF THE ADMINISTRATIVE RECORD

The Department's makes factual assertions that are outside the complaint:

- that the "Assistant Secretary – Indian Affairs authorized the Midwest Region to process the Tribe's [election] request," Gov't Mem. 3 (citing to paragraphs in the complaint that do not support the allegation;

- that the Department obtained a "legal review of the proposed amendment" before and after the election, Gov't Mem. 3;

- that Acting Assistant Secretary Lawrence Roberts, a member of and former attorney for the Wisconsin tribe, recused himself from "all issues and actions relating to the" tribe, Gov't Mem. 3, implying that he was uninvolved in the decision to publish the Wisconsin tribe's name change notwithstanding that the Federal Register publication noted his authorization, 81 Fed. Reg. 26826, 26829 (May 4, 2016);

- that, "[a]lthough 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," Gov't Mem. 4;

- that the Division of "Tribal Government Services . . . ensured that the change" of the Wisconsin tribe's name was reflected in the Federal Register list, "which was reviewed by several [unnamed] offices within the Department." Gov't Mem 4;

- that the Department changes the names in the annual Federal Register list only when a tribe is newly acknowledged or restored or changes its name, Gov't Mem. 4; and

- that the BIA has "no formal guidance" governing how it changes the names in the Federal Register list, Gov't Mem. 4, implying that there is some other guidance, an implication consistent with the reality that it is highly unlikely that staffers are left without any direction regarding the composition of a list published in the Federal Register pursuant to the List Act, 25 U.S.C. § 5131.

None of these outside-the-complaint assertions is appropriate in a Rule 12(b)(6) motion to dismiss for failure to state a claim, and, although facts outside the complaint can be relevant to a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, none of the assertions is relevant to any argument the Department makes regarding jurisdiction. Nor can the motion be converted and addressed as a summary judgment motion because the outside-the-complaint assertions are unsupported by citation to the administrative record, or anything else. *See* Local Rule 7(c). Of course, the Department could not cite to the administrative record because it has not filed the it or indicated when it will do so. The Department's unsupported factual assertions should, therefore, be disregarded, and for the reasons set forth below, the Department should be required to file the administrative record and an answer to the Nation's complaint.

ARGUMENT

A. The Nation Has Standing to Pursue Its Two APA Claims.

The Department states that the Wisconsin tribe, not the Department, made the decisions that injured the Nation, that the Department simply adopted those decisions without independent

consideration, and that, consequently, the Nation's dispute is really with the Wisconsin tribe. Recasting things that way, the Department argues that the Nation does not have standing.

But the dispute here is not one between two tribes, as paragraph 4 in the complaint makes clear. It is about federal agency decisions made pursuant to statutes obligating the Department to make them. A tribe's decisions are one thing, but federal decisions to officially approve and recognize them another, with independent consequence. The Department's admission that its decisions were non-substantive reflections of decisions made by the Wisconsin tribe does not defeat the Nation's standing but instead is a virtual confession of error on the merits.

1. The Nation Has Alleged a Concrete Injury.

The Department asserts that Article III injury in fact requires physical or tangible harm and that "[i]ntangible psychological 'injuries' such as confusion are not sufficient." Dep't Mem. 7. That is incorrect. "'Concrete' is not . . . necessarily synonymous with 'tangible.' Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Likely confusion supports standing, and can even prove certain types of liability and, more generally, irreparable harm to support injunctions. *See* note 1, *infra*; *see also Meese v. Keene*, 481 U.S. 465, 473-74 (1987) (reputational harm); *Navajo Nation v. Urban Outfitters, Inc.*, 2015 WL 11089523, at *3 (D.N.M. 2015) (same).

The Department also argues that the Nation "has not alleged a concrete or particularized harm in its complaint" because the complaint contains only "conjectural, nebulous statements" of harm. Dep't Mem. 7. But the Department points to two paragraphs, numbers 3 and 5, in the *introduction* to the complaint. Dep't Mem. 7. Literally, the Department's argument

acknowledges no other paragraph in the complaint. Dep't Mem. 7-8. By pretending away important parts of the complaint, the Department's argument concedes its own infirmity.

The complaint alleges that, for decades, the Department has distinguished the two Indian tribes by different names – "Tribe" for one, "Nation" for the other, tied to an appropriate geographic reference to Wisconsin or New York. Complaint ¶¶20-25. The new name essentially created two tribes named Oneida Nation, the name by which the Nation has long been known. Complaint ¶¶1 & ¶23 (federal courts and Congress referring to the Nation simply as "the Oneida Nation"). The likelihood of confusion is apparent. Complaint ¶¶63(d) (confusion); 31 (damage to business and governmental goodwill), 49 (investment by Nation in business), 55 (business harm). The Department's papers do not dispute that there will be confusion.[1]

Paragraphs 49 through 51 of the complaint detail the Wisconsin tribe's injurious exploitation of the Department's approvals in order to curtail the Nation's rights in its own name. In a January 16, 2017 letter relying explicitly upon the Department's approvals, the Wisconsin tribe's lawyer asserted that the Nation could not even "refer to itself as the Oneida Nation, which is the *federally recognized* name of my client;" that the Nation, "unlike ours, has never been *federally recognized* as Oneida Nation," that the Wisconsin tribe need not use an "of Wisconsin" designation; and that the Wisconsin tribe would seek to cancel Nation trademarks in the name Oneida Nation. Complaint ¶50 (emphasis added). Then on June 27, 2017 the Wisconsin tribe filed a petition before the Trademark Trial and Appeal Board (TTAB) to cancel the Nation's

[1]The complaint need not allege actual episodes of confusion. In an analogous commercial context, showing a *likelihood* of confusion as to names is sufficient to prove liability, and the irreparable harm and damage to the public interest needed for an injunction. It follows that a likelihood of confusion supports standing. *Church of Scientology Int'l v. Elmira Mission of the Church of Scientology*, 794 F.2d 38, 41-44 (2d Cir. 1986); *Halo Optical Prods. v. Liberty Sport, Inc.*, 2017 U.S. Dist. Lexis 41084, (N.D.N.Y. March 22, 2017).

trademarks in the name "Oneida Nation," again invoking the Department's approvals; that the Department approved its name change adopted the new name in the Federal Register; that it had superior legal rights in the name Oneida Nation, "its *federally recognized* name;" and, drawing on the repeated referrals to federal recognition, that it has "superior rights" in the Oneida name. Complaint ¶¶50-52 (emphasis added). It does not matter that the Nation will contend that the Department's decisions should be irrelevant to the TTAB proceedings. The Wisconsin tribe's TTAB petition to cancel invoked the Department's decisions as supporting cancellation, and the TTAB litigation itself costs the Nation time and money. *See* ¶¶65 & 80 (alleging Nation's concrete need to pay lawyers to limit confusion and to protect against cancellation of trademark rights). The Court can judicially notice the January 23, 2018 order issued by the TTAB, suspending proceedings on the Wisconsin tribe's petition to cancel the Nation's marks because this APA action "may be dispositive or have a bearing on the Board case." TTAB Jan. 23, 2018 Order (Ex. A to this Opposition); *see Utah v. Evans*, 536 U.S. 452, 464 (2002) (standing to pursue litigation where result may affect outcome of other administrative or judicial proceeding).

Paragraph 39 of the complaint alleges facts showing that the Wisconsin tribe intended that its name change harm the Nation, and the existence of such intent is strong proof of likely harm. *See Heartland Trademarks, Ltd. v. DR Flax LLC*, 2017 U.S. Dist. Lexis 120440 (N.D.N.Y. August 1, 2017). After the Midwest Region raised the confusion problem with the Wisconsin tribe, the tribe responded that it "recognize[d] this concern." Complaint ¶39(a). The Wisconsin tribe then admitted its intention to claim not just the Nation's name, despite confusion, but also to claim a new governmental status, that of the Nation, declaring that the new name is "more responsive to the Tribe's governmental status." Complaint ¶39(b); *see* ¶¶31, 64(j), 79(h); 65, 78, 80 (alleging misappropriation of tribal identity and cultural and political

diminishment). By giving the Wisconsin tribe federal approvals, the Department officially supported both the confusion and identity injuries.

Finally, paragraph 36 of the complaint alleges that the Department admitted the harm that would be caused by dropping the Tribe-Nation and geographic distinctions in the name of the Oneida Tribe of Indians of Wisconsin. The Midwest Region compellingly described the harm – stating that changing the historic practice "will cause confusion," that the names would be so close "that they will undoubtedly be confused more often than they are now," and that the more similar names "will compound the existing confusion." Complaint ¶36. These were admissions by the Department of the concrete harm that the Department's moving papers now challenge.

2. The Nation's Injury Is Traceable to the Department's Actions.

The Department argues that the Nation's injury stems only from the Wisconsin tribe's conduct. No doubt some harm would occur if the Wisconsin tribe used "Oneida Nation" without federal approval. But the allegations of the complaint are that there is additional harm attributable to federal approval of the new name and recognition of the tribe by that name.

The fact that the Wisconsin tribe *could* change its name without federal approval does not prove that the Nation's injury should be attributed only to the tribe. The Wisconsin tribe did not change its name on its own, and nothing indicates that the tribe would have acted to change its name absent federal approval. The tribe wanted federal approval because of a perception that it added value. A new name not approved and recognized by the Department would lack legitimacy. A tribe's federally-recognized name establishes its name for all executive branch agencies and for the federal courts, and as a practical matter for the world at large.

A hypothetical exposes the fallacy of the Department's position. The Wisconsin tribe's constitution describes the tribe's "territory" as extending to "the present confines of the Oneida Reservation," referring to the tribe's land in Wisconsin. If the Wisconsin tribe unilaterally amended its constitution to claim the Nation's reservation in New York, the legitimacy of that change would be different if the Department approved and recognized it.

3. The Nation's Injury Is Redressable in this Suit.

The Department's redressability argument merely restates its erroneous traceability argument. The Nation seeks to stop the harm from the federal government's approval and recognition of the name the Wisconsin tribe has started to use, as explained above. That harm is distinct from any harm the Wisconsin tribe might cause if it had chosen to call itself by a name different from the one approved by the federal government. It is a fiction that the Wisconsin tribe would do that, which also demonstrates redressability.

Reversal of the Department's action would, for example, eliminate the Wisconsin tribe's ability to rely on the Department's actions in its TTAB proceedings on the tribe's petition to cancel Nation trademarks. Although the Nation disputes the relevance of the Department's decisions to the TTAB proceeding, their prominence in the petition to cancel is plain. Despite the Wisconsin tribe's disavowal before the TTAB of its allegations in its petition to cancel concerning the Department's decisions, the TTAB has ordered suspension of all proceedings on that petition pending the final resolution of this action because a ruling setting aside the Department's decisions may affect the outcome in the TTAB. *See* Exhibit A (TTAB order of suspension). It is black letter law that the redressability element of standing is satisfied in litigation challenging an agency decision if setting aside that decision could affect the plaintiff's position in other judicial or administrative proceedings. *Utah v. Evans*, 536 U.S. 452, 463-64

(2002); *Lichoulas v. FERC*, 606 F.3d 769, 775 (D.C. Cir. 2010); *Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 7 (D.C. Cir. 2005).

The Nation's claims also concern allegations of process deficiencies: conflict of interest and following an unpublished rule with respect to the recognition and listing decisions; and, as to all challenged decisions, the absence of notice and comment or any consultation with the Nation, and failure even to consider the Nation's interests when making the challenged decisions. Complaint ¶¶6-8, 36-38, 41, 43-48, 54, 59-64, 71-79. For these claims, "[t]he requirements for standing differ" because the Nation "seek[s] to enforce procedural (rather than substantive) rights." *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014). "When plaintiffs challenge an action taken without required procedural safeguards, they must establish the agency action threatens their concrete interest," *id*., which the Nation did above. "Once that threshold is satisfied, the normal standards for immediacy and redressability are relaxed." *Id*. Under this "relaxed" understanding of redressability, the Nation does not need to establish that "correcting the procedural violation would necessarily alter the final effect of the agency's action on the plaintiffs' interest." *Id*. "Plaintiffs asserting a procedural rights challenge need not show the agency action would have been different had it been consummated in a procedurally valid manner – the courts will assume this portion of the causal link." *Id*. at 1012.

B. Changing the Federally Recognized Name of the Wisconsin Tribe in the Published List of Federally Recognized Tribes Was a Final Agency Action from Which Legal Consequences Flow.

The Department argues that the publication of the list of federally-recognized tribes does not matter and therefore is not reviewable final agency action. Dep't Mem. 11-13. The Department's decision to federally recognize the Wisconsin tribe by a new name is final by any meaning of that word. The List Act requires annual publication of the list so that other federal

agencies and the world will know which tribes are federally recognized, and once published in the Federal Register the list is final until there is another publication, usually the next year. 25 U.S.C. § 5131. The fact that the publication of a tribe's recognized name might be changed in a later year does not mean the publication decision in a particular year is not final.

The Department argues that decisions about the Federal Register publication of federally recognized tribal names are not "agency actions" at all for purposes of the APA. 5 U.S.C. § 551(13); 5 U.S.C. § 701(b)(2) (applying definition to judicial review subchapter). The whole definition is: "(13) 'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." Including a new federally recognized name for the Wisconsin tribe on a list of federally-recognized tribes published in the Federal Register pursuant to List Act mandate has legal consequences and is an agency order, sanction and relief or the equivalent of those things.

The Federal Register list officially identifies the tribes "recognized and eligible for funding and services from the Bureau of Indian Affairs (BIA) by virtue of their status as Indian Tribes." 82 Fed. Reg. 4915 (Jan. 17, 2017). Moreover, "[t]he listed Indian entities are acknowledged to have the immunities and privileges available to federally recognized 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 Tribes." *Id*. The Federal Register notice states that "[a]mendments to the list include name changes and name corrections." This statement plainly signifies that publication of the list is the agency's order, sanction or relief changing the tribe's officially recognized legal name under federal law.

C. There Is Law to Apply to Decisions of the Department to Change the Federally Recognized Name of a Tribe Published in the Federal Register List.

The Department contends there is no law to apply to its decision to change the Wisconsin tribe's federally recognized name and to publish it in the Federal Register. The law to apply is inherent in the List Act's mandate to publish a list so that federal agencies and others will know which tribes the federal government recognizes, and how. An entry on the list must, at a minimum, *identify* the entity listed and be accurate. *See* List Act, § 3(7) ("the list published by the Secretary should be accurate"); H.R. Rep. 103-781 (Oct. 3, 1994) ("federal recognition is no minor step"). Surely the Department would agree that it was not complying with the List Act if it recognized all tribes as having the same name, and the same problem exists if two tribes have the same name or if the Department gives the name that is misleading about the identity of the tribe in question – both being part of the problem here.

There is other law to apply. The Department may not act pursuant to an unnoticed, unpublished rule that it will fulfill its List Act obligations by listing any name a tribe directs it to list. *See Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001) (unpublished change of rule).

The government has a constitutional and common law trust obligation to all tribes that arises from their status as domestic dependent governments, and federal agencies must consider that obligation when making federal decisions. "One of the basic principles in Indian law is that federal government has a trust or special relationship with Indian tribes." Cohen's Handbook of Federal Indian Law § 5.04[3] at 412 (2012 ed.). The trust doctrine is derives from federal statutes and treaties dating to our country's founding. "Today the trust doctrine is one of the cornerstones of Indian law." *Id.*; *see also id.* at 414 nn. 56-58 (collecting sources). When there

is a waiver of federal sovereign immunity, as there is to equitable relief under the APA, courts enforce the government's trust obligation. *Id.* § 5.05[1][a] at 419 & n.18. Consequently, the "trust doctrine has been pivotal in delineating the agencies' duties" in APA cases. *Id.* § 5.05[3][c] at 430. One particular aspect of trust doctrine of relevance is the duty of undivided loyalty. *See id.* § 5.05[4][a] at 432-33. A decision-making process favoring one tribe over another, made by a regional office with ties to the favored tribe and an Acting Assistant Secretary who is a member of it, is inconsistent with the faithful administration of a trust.

The law required the Department to at least *consider* the harm that would be done to the Nation – and not simply leave it for consideration by another tribe. "It is fairly clear than any Federal government action is subject to the United States' fiduciary responsibilities toward Indian tribes." *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981); *see Morton v. Ruiz*, 415 U.S. 199, 236 (1974) ("overriding duty" to deal fairly with tribes because of "'distinctive obligation of trust'"); *Pueblo of Sandia v. Babbitt*, 1996 WL 808067, at *8-9 (D.D.C. 1996) ("cannot ignore fiduciary duties toward Indian tribes").

Even if there were no trust obligation, an agency has acted arbitrarily and capriciously if it "entirely failed to consider an important aspect of the problem, which the Department actually recognized here but declined to consider, "or if its decision "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

There also is law obligating the Department not to make decisions elevating one tribe's rights over another's. 25 U.S.C. § 5123(f)-(g). These obligations were not fulfilled when the Department deferred to the Wisconsin tribe and approved and federally recognized the new name

it preferred without making an independent federal judgment about the accuracy of that decision and whether it would lead the Wisconsin tribe to claim greater rights vis-à-vis the Nation.

Applicable federal law forbids involvement by a conflicted decision-maker. Complaint ¶48. There is nothing of record to indicate that Acting Assistant Secretary Roberts (a member of and lawyer for the Wisconsin tribe) recused himself from the decision to recognize and list "Oneida Nation." ¶¶ 47-48 & 64(c). The Department asserts without support that Roberts did recuse. Maybe, but the complaint's allegations are taken as true, and the Federal Register states that the list publication was "in exercise of authority delegated to the Assistant Secretary—Indian Affairs under 25 U.S.C. 2 and 9 and 209 DM 8." 81 Fed. Reg. 5019 (Jan. 29, 2016).

D. The Nation's Second APA Claim, Challenging Decisions Made by the Midwest Region, Is Not Subject to Dismissal on the Ground that the Nation Is Outside the Zone of Interest of the Laws the Department Violated.

The Department argues against standing to challenge the Midwest Region's decisions, asserting that the Nation is not within the zone of interest of 25 U.S.C. § 5123. Dep't Mem. 15-17. The Department ignores the parts of Section 5123 the Nation alleges were violated; other laws the Nation alleges were violated; and the relatively easy standard that applies:

> The prudential standing test . . . "is not meant to be especially demanding." We apply the test in keeping with Congress's "evident intent" when enacting the APA to make agency action presumptively reviewable." We do not require any "indication of congressional purpose to benefit the would-be plaintiff. And we have always conspicuously included the word "arguably" in the test to indicate that the benefit of the doubt goes to the plaintiff. The test forecloses suit only when a plaintiff's "interests are so marginally related to or inconsistent with the purposes implicit in the statue that it cannot reasonably be assumed that Congress intended to permit the suit."

Match-E-Ge-Nash-She-Wish Band v. Patchak, 567 U.S. 209, 225 (2012) (citations omitted).

1. The Nation Is Within the Zone of Interest of the Provisions of 25 U.S.C. § 5123 that the Department Ignores: Sections 5123(c)-(d) & (f).

A "plaintiff must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990); *Patchak*, 567 U.S. at 224 (same). The Department points to Section 5123(a), which authorizes tribes to adopt constitutions, and to general IRA principles supporting tribal sovereignty, arguing that only the tribe seeking to organize and its members are within the zone of interest of Section 5123. Dep't Mem. 15-17. But the Nation's complaint does not mention Section 5123(a), and the Nation is not challenging the tribal right to have a constitution. Instead, the Nation has alleged violations of Section 5123(c)-(d) and Section 5123(f), which plainly deal with more than the rights of the tribe seeking to adopt a constitution. Complaint ¶¶35, 37, 67-69 & 78.

Sections 5123(c)-(d) require the Department to determine if a constitutional provision or amendment "is contrary to applicable laws" and, if so, to disapprove the provision or amendment. *See* 25 C.F.R. § 81.45(c)(3) (constitutions and amendments will be disapproved if post-election review shows that "the proposed documents contain language that is contrary to Federal law"). The Nation has alleged, as discussed above, that the Midwest Region's decisions violated applicable laws protecting the Nation and others – including the federal trust obligation and APA restrictions on agency decision-making.

The Nation also alleges that Section 5123(f) was violated. Section 5123(f) bars decisions by any federal agency, not just the Department, if the decision classifies or enhances the privileges and immunities of one tribe, or diminishes those of another, "relative to other federally

recognized tribes by virtue of their status as Indian tribes." The Nation claims that the Midwest Region's decisions violated Section 5123(f) because they privileged the Wisconsin tribe over the Nation, enhancing and diminishing the privileges, respectively, of the former and the latter. Complaint ¶79(g). Section 5123(f) actually refers to all Indian tribes and unmistakably protects more than the interests of the tribe seeking to form or amend a constitution. Moreover, the fact that Section 5123(f) constrains all agencies, not just the Department, proves that it may be the basis for a suit by tribes other than those who want a Section 5123 election.

Congress did not limit suits to enforce Section 5123. "Action to enforce the provisions of this section may be brought in the appropriate Federal district court." 25 U.S.C. § 5123(d)(2).

The Department's arguments about the general tribal self-government purposes of the IRA, Dep't Mem. 15-16, are irrelevant because the Department did not tie them to Sections 5123(c)-(d) & (f). Indeed, Section 5123(f), the non-discrimination provision, was not enacted as part of the IRA; it is a recent enactment. And the text of Sections 5123(c)-(d) & (f) clearly reach broader interests than those of the tribe seeking to form or amend a constitution. Even if that were not clear from statutory text, certainly it is clear enough to fall within the *Patchak* presumption that an aggrieved party is entitled to APA review. *Patchak*, 567 U.S. at 225. *Patchak* was about the IRA, specifically provisions aimed at "providing land for Indians" in order "to rehabilitate the Indian's economic life." *Id*. at 226 (citation omitted). The Court, however, never hinted that the IRA's purposes were an impediment to suit by a non-Indian seeking to undo the Department's decision to hold land in trust for an Indian tribe, holding that he fell "at least arguably" within the IRA trust land provision's zone of interest. *Id*. at 227.

Citing 25 C.F.R. § 81.43, the Department also argues that the IRA's "implementing regulations . . . reserve such challenges [as the Nation has made] only for individuals who voted in the election they seek to challenge." Dep't Mem. 16. But Section 81.43 concerns who "may challenge the results of the Secretarial election," providing that such a challenge is made to "the Chairman of the Secretarial Election Board," a body that determines voter eligibility, counts ballots and issues a "Certificate of the Results of Election" based on vote counts. 25 C.F.R. §§ 81.19-81.44. None of that is involved here, and the Election Board would not even have authority to consider the claims of illegality at issue here. Under Sections 5123(c)-(d) & (f), the Midwest Regional Director had that obligation. The regulations, in fact, provide that the Director first reviews election challenges that the Election Board decided and then determines under Section 5123(d) whether amendments are contrary to law. 25 C.F.R. § 81.45(b)-(c). That second contrary-to-law decision by the Midwest Region had nothing do with the Election Board or challenges to the results of a Secretarial election that go through it, the only things addressed by the regulation on which the Department relies, 25 C.F.R. § 81.43. *Cf. Mdewakanton Sioux Indians v. Zinke*, 255 F. Supp.3d 48, 53 n.5 & 54 (D.D.C. 2017) (Indians presumably could file challenge to Department approval of another tribe's constitutional amendments).

2. The Nation Is Within the Zone of Interest of Other Laws that the Department Ignores: the Federal Trust Obligation and the APA Requirement that an Agency Consider All Important Aspects of the Problem It Is Addressing.

The Department does not question the applicability of the federal trust obligation to agency decision-making or whether the Nation is within the zone of interest of the federal trust obligation. Instead, the Department ignores those allegations of the complaint concerning violation of federal trust obligations. Complaint ¶¶71, 77 & 79(d); *see Nance v. EPA*, 615 F.2d 701, 711 (9th Cir. 1981) (trust obligation applies to all federal decisions and must at least be

considered). The complaint specifies the Department's decision to defer to the Wisconsin tribe to decide whether to hold a name-change referendum, notwithstanding confusion and harm to the Nation, instead of making an independent federal decision on the matter. Complaint ¶¶71-79; *see* Cohen's Handbook of Federal Indian Law (cited and quoted *supra* at page 18-19).

The Department likewise does not question the applicability of the APA requirement that an agency consider all important aspects of the problem it is addressing or else be found to have acted arbitrarily and capriciously, that the Midwest Region disregarded harm to the Nation when it made its decisions (without consulting with the Nation), or that the Nation falls within the zone of interest of the APA requirement the Nation alleges was violated. Complaint ¶¶70-76 & 79(a)-(e). An agency has acted arbitrarily and capriciously if it "entirely failed to consider an important aspect of the problem" or if its decision "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm.*, 463 U.S. at 43); *see* 5 U.S.C. § 706. The Midwest Region's decision to ignore acknowledged harm to the Nation puts the Nation solidly within the zone of interest of the APA requirements the Department violated.

CONCLUSION

The Department's motion to dismiss should be denied.

Dated: January 26, 2018

Respectfully submitted,

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EXHIBIT A

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: January 23, 2018

Cancellation No. 92066411

Oneida Nation

v.

Oneida Indian Nation of New York

Lalita Webb, Paralegal Specialist:

The motion (filed December 21, 2017) to suspend this proceeding pending final determination of Civil Action No. 5:17-cv-00913-MAD-TWD filed in the U.S. District Court for the Northern District of New York is granted as well taken. It is the policy of the Board to suspend proceedings when the parties are involved in a civil action, which may be dispositive of or have a bearing on the Board case. *See* Trademark Rule 2.117(a).

Accordingly, proceedings are suspended pending final disposition of the civil action.

Within twenty days after the final determination of the civil action, the parties shall so notify the Board so that this proceeding may be called up for appropriate

action.[1] Such notification to the Board should include a copy of any final order or final judgment which issued in the civil action.

During the suspension period, the parties must notify the Board of any address or email address changes for the parties or their attorneys. In addition, the parties are to promptly inform the Board of any other related cases, even if they become aware of such cases during the suspension period. Upon resumption, if appropriate, the Board may consolidate related Board cases.

[1] A proceeding is considered to have been finally determined when an order or ruling that ends litigation has been rendered, and no appeal has been filed, or all appeals filed have been decided and the time for any further review has expired. *See* TBMP § 510.02(b).