IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

NULANKEYUTMONEN NKIHTAQMIKON, et al.,	)	
Plaintiffs,	)	Civil No. 05-cv-00168-JAW
ROBERT K. IMPSON, Acting Regional Director, Eastern Region, Bureau of Indian Affairs, et al.,	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS AND INCORPORATED MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION

For several years, the Pleasant Point Passamaquoddy Reservation (the "Tribe") has been considering leasing tribal land for the development of a Liquefied Natural Gas terminal. In furtherance of this project, the Tribe entered into a ground lease agreement with Quoddy Bay, LLC and requested approval of the agreement by the Bureau of Indian Affairs ("BIA"). The BIA provided limited approval of the agreement allowing the parties to begin the initial investigations necessary to determine the site's suitability for a potential Liquefied Natural Gas terminal. Now, Plaintiffs, members of the Tribe who oppose the construction of such a project, bring this suit alleging violations of the National Environmental Policy Act ("NEPA"), Indian Long-Term Leasing Act, National Historic Preservation Act ("NHPA"), and the Administrative Procedure Act ("APA").

Plaintiffs, however, cannot meet their burden of establishing that the Court has jurisdiction over this action. Because the BIA has not approved construction of the project or any operation activities on the tribal land at issue, Plaintiffs' NEPA and NHPA claims are not

yet ripe. Moreover, Plaintiffs rely on purely speculative injuries and therefore they lack standing to pursue their NEPA and NHPA claims. Plaintiffs also cannot adequately represent the interests of Indian Township and the Tribe; thus, they do not have standing to bring a claim pursuant to the Indian Long-Term Leasing Act. Likewise, because Plaintiffs' NEPA, NHPA, and Long-Term Leasing Act claims are not proper, their APA claim also fails. Accordingly, Defendants Robert K. Impson, Acting Regional Director, Eastern Region, Bureau of Indian Affairs, and Gale Norton, Secretary of the Interior, move to dismiss Plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1).

FACTUAL BACKGROUND

The Passamaquoddy Tribe is a federally recognized tribe. Pls.' Compl. at ¶ 60. The Passamaquoddy Reservation consists of two separate and distinct reservation areas, Pleasant Point Reservation and Indian Township. *Id*. at ¶¶ 62-64. Pleasant Point Reservation and Indian Township each have their own elected tribal government including a governor, other officers and a tribal council. Defs.' Ex. 1, 1 (Letter from BIA Eastern Area Director (Acting)). A Joint Tribal Council serves to manage lands held in common. *Id*. Each entity also has its own land base to manage. *Id*. A resolution of the Joint Tribal Council authorizes each entity to lease tribal land within their own reservation. Defs.' Ex. 2, 1 (Ground Lease Agreement); Defs.' Ex. 3, 2 (Resolution).

The Pleasant Point Passamaquoddy Reservation executed a ground lease agreement with Quoddy Bay, LCC for the purpose of developing a Liquefied Natural Gas terminal. Defs.' Ex. 4, 1-2 (Letter from Tribe). Pursuant to a Tribal Resolution, the Tribe approved this lease on May 19, 2005. *Id*. The leased property is on Pleasant Point Reservation tribal land; it is also known

as the Split Rock site. Defs.' Ex. 4, 1; Defs.' Ex. 2, Ex. B. If the project is ultimately approved, the lease will be implemented in stages. Defs.' Ex. 2, 16-18. The project will consist of four phases: Permitting, Construction, Operations, and Removal and Remediation. *Id*. The portion of the lease that BIA approved allows Quoddy Bay, LCC to conduct the following limited activities:

> Enter upon and restrict access to the [Split Rock site], at any time and from time to time, to inspect, to examine, to survey, and to conduct, soil tests, borings, installation of water monitoring wells, and other engineering geotechnical, archaeological, and architectural tests and studies on the [site] and otherwise to do that which in [its] reasonable discretion is necessary to conduct due diligence, to secure Permits[1/] and to determine the suitability of the [site] for the [Liquefied Natural Gas] Project.

Defs.' Ex. 2, 16. The lease specifies that this is a non-exclusive right. *Id*. The BIA further specified that no construction or development on the Split Rock site may take place until the project has been reviewed and licensed by the Federal Energy Regulatory Commission. *Id*., 48; Defs.' Ex. 5, 1 (Categorical Exclusion prepared by BIA).

The Tribe requested that the BIA review and approve the ground lease agreement. Defs.' Ex. 4, 1. On June 1, 2005, the BIA provided limited federal approval to allow the Tribe to lease the Split Rock site solely for the purpose of investigating the land's suitability for a potential Liquefied Natural Gas terminal. Defs.' Ex. 5, 1; Defs.' Ex. 2, 86. The BIA detailed the nature of

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[1/] Pursuant to the lease, "Permits" is defined as:

> Any action, approval, consent, waiver, exemption, variance, franchise, order, permit, certificate, authorization, right, consistency determination, license or other similar action from a Governmental Authority, and includes any zoning, environmental protection, pollution, sanitation, safety, siting or building permit.

Defs.' Ex. 2, 4.

its limited approval, stating:

> Lease approval is *solely* for the site investigation required for the Federal Energy Regulatory Commission (FERC) permitting process in the development of an Environmental Impact Statement (EIS). . . . Continuing the lease beyond the investigation period is contingent upon FERC permit approval, acceptability of the EIS analysis and insignificant impact on the leased property.

Defs.' Ex. 5, 1 (emphasis added). The limited lease approval also "require[d] that an archaeologist with the authority to halt work be present to monitor any all subsurface investigations." *Id*. The BIA further specified that "prior to any ground-disturbing investigations, a phase 1 archaeological site study will be conducted. Work beyond initial site investigation *will be contingent* on the results of the phase 1 study." *Id.* (emphasis added).

Plaintiff Nulankeyutmonen Nkihtamikon is comprised of individuals living on the Pleasant Point Reservation, who oppose the construction of the Liquefied Natural Gas terminal. Pls.' Compl. at ¶ 5.[2/] On November 2, 2005, Plaintiffs filed a Complaint for declaratory and injunctive relief alleging that the BIA's approval of the ground lease violated NEPA, the Indian Long-Term Leasing Act and Trust Obligation, the NHPA, and the APA. Pls.' Compl. at ¶¶ 108-28. Plaintiffs, however, cannot meet their burden of establishing that the Court has jurisdiction over this action. Accordingly, Defendants now bring the instant Motion to Dismiss based on the following grounds: 1) Plaintiffs' NEPA and NHPA claims are not yet ripe and Plaintiffs lack standing to pursue such claims; 2) Plaintiffs fail to establish standing to bring their Indian Long-Term Leasing Act Claim; and 3) Plaintiffs' APA claim fails. Thus, Defendants seek to have the Court dismiss Plaintiffs' Complaint.

[2/] Individually named Plaintiffs include: David Moses Bridges, Vera J. Francis, Hilda Lewis, Deanna Francis, Reginald Joseph Stanley, and Mary Basset. Plaintiffs are residents of the Pleasant Point Passamaquoddy Reservation." Pls.' Compl. at ¶¶ 5, 7, 9, 10, 14, 18.

STATUTORY BACKGROUND

I. National Environmental Policy Act ("NEPA")

In enacting NEPA, Congress was concerned with the potential impacts of major federal actions significantly affecting the physical environment. *See Metropolitan Edison v. People Against Nuclear Energy*, 460 U.S. 766, 772-73 (1983). The purpose and intent of NEPA is to focus the attention of the federal government and the public on a proposed action so that the consequences of the action can be studied before the action is implemented. 42 U.S.C. § 4321; 40 C.F.R. § 1501.10; *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). Regulations promulgated by the Council on Environmental Quality (CEQ), 40 C.F.R. §§ 1500–1508, provide guidance in the application of NEPA. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

NEPA "requires agencies to develop a detailed environmental impact statement (an "EIS") before undertaking 'major Federal actions significantly affecting the quality of the human environment.'" *Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49, 57 (1st Cir. 2001) (quoting 42 U.S.C. § 4332(2)(C)). "The NEPA regulations permit agencies to conduct a less demanding 'environmental assessment' ["EA"] to determine whether an EIS is required; if not, the agency must explain its determination in a "finding of no significant impact.'" *Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d at 57 (quoting 40 C.F.R. §§ 1501.4 (2000)). In cases involving "data gathering activities such as inventories, soil and range surveys, timber cruising, geological, geophysical, archeological, paleontological and cadastral surveys," a Categorical Exclusion excuses the BIA from preparing either an EIS or an EA. 516 DM 10.5 M(1); 40 CFR § 1508.4. NEPA's mandate to federal agencies, is "essentially procedural . . . It is to insure a fully informed

and well-considered decision . . . ." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). While NEPA mandates the procedures by which federal agencies must consider the environmental impacts of their actions, it does not dictate the substantive results. *Robertson*, 490 U.S. at 350 (1989); *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-28 (1980) (citing *Vermont Yankee Nuclear Power Corp*, 435 U.S at 558).

II. National Historic Preservation Act ("NHPA")

By enacting the NHPA, Congress directed federal agencies to: (1) consider the impact of federal undertakings on historic resources of national significance (section 106, 16 U.S.C. § 470f) and (2) assume responsibility for the preservation of historic resources that they own or control (section 110, 16 U.S.C. § 470h-2). The core of a federal agency's responsibilities under the NHPA with regard to federal agency actions can be found in section 106 of the Act, which sets forth the responsibilities of a federal agency over a proposed federal or federally assisted "undertaking." 16 U.S.C. § 470f.[3/]

The requirements set forth in section 106 of the NHPA are essentially procedural in nature. *Narragansett Indian Tribe v. Warwick Sewer Authority*, 334 F.3d 161, 166-67(1st Cir.

[3/] 16 U.S.C. § 470f provides:

> The head of any federal agency having direct or indirect jurisdiction over a proposed federal or federally assisted undertaking in any State and the head of any federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

2003) (citing *National Min. Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003)) (additional citations omitted); *see also United States v. 162.20 Acres of Land*, 639 F.2d 299, 302 (5th Cir. 1981) *cert. denied*, 454 U.S. 828 (1981) (The Act "neither . . . forbid[s] the destruction of historic sites, nor . . . command[s] their preservation."). Section 106 requires agency decision-makers to consider specified information concerning the effects of a federal undertaking on National Register-eligible resources prior to the agency's issuance of a final decision. Furthermore, as set forth in *Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 754-55 (D.C. Cir. 1995), the only activities invoking federal obligations under the NHPA include conducting an undertaking involving federal funding, or the issuance of a federal license. *See also National Min. Ass'n*, 324 F.3d at 754 ("This circuit has held that Congress' expanded definition of 'undertaking' does not alter the statutory requirement that the Council regulate only "federally funded or federally licensed undertakings.") (citation omitted).

III. The Indian Long-Term Leasing Act

The United States has a special relationship with Indian Tribes, which the Supreme Court has described as a "unique trust relationship," *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 247 (1985), and which derives from the Tribes' inherent sovereignty. As part of the trust relationship between the United States and Indian Tribes, the Indian Long-Term Leasing Act requires that any lease of lands held in trust by the United States for an Indian Tribe must be approved by the Secretary of the Interior. 25 U.S.C. § 415(a). The responsibility for approving the lease at issue has been delegated to the BIA.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of a claim if the court

lacks jurisdiction over the subject matter of a claim. A party seeking federal court jurisdiction bears the burden of demonstrating that jurisdiction exists. *McNutt v. Gen. Motors Acceptance Corp. of Ind*., 298 U.S. 178, 189 (1936); *Lundquist v. Precision Valley Aviation, Inc*., 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc*., 789 F. Supp. 32, 33 (D. Me. 1992). The Supreme Court presumes that federal courts lack jurisdiction unless the contrary appears affirmatively from the record. *United States Dep't of Energy v. Ohio*, 503 U.S.607. 614 (1992); *Renne v. Geary*, 501 U.S. 312, 315 (1991). "The court does not draw inferences favorable to the pleader." *Davric Maine Corp., v. United States Postal Service*, 2000 WL 761800 *1 (D. Me. 2000) (citing *Hodgdon v. United States*, 919 F. Supp. 37, 38 (D. Me. 1996)). As courts of limited jurisdiction, federal courts may only decide cases after the party asserting jurisdiction demonstrates that the dispute falls within the court's constitutional and statutory jurisdiction. *Rasul v. Bush*, 124 S. Ct. 2686, 2701 (2004) (quoting *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (federal courts "possess only that power authorized by Constitution and statute")). "[I]n deciding a 12(b)(1) motion, it is well established that a court is not limited to the allegations in the complaint but may consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case." *Bennett v. Ridge*, 321 F. Supp. 2d 49, 52 (D.D.C. 2004); *see also Davric Maine Corp*., 2000 WL 761800 *1 ("For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion.") (citations omitted).

ARGUMENT

I. Plaintiffs' NEPA and NHPA Claims Must be Dismissed.

A. Plaintiffs' NEPA and NHPA Claims Are Not Yet Ripe.

Because the BIA has not approved the construction and operation of a Liquefied Natural Gas terminal on the Split Rock site, Plaintiffs' NEPA and NHPA claims are not yet ripe. The Supreme Court in *Abbott Laboratories v. Gardner*, explained that the "basic rationale" of the ripeness doctrine as applied to review of administrative action:

> is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

387 U.S. 136, 148-49 (1967) (emphasis added), *rev'd on other grounds, Califano v. Saunders*, 430 U.S. 99 (1976); *see also Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732–33 (1998). "Ripeness turns on the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.'" *Community Housing of Maine v. Martinez*, 146 F. Supp.2d 36, 43 (D. Me. 2001) (quoting *Ohio Forestry*, 523 U.S. at 733).

Plaintiffs' claims are not ripe for review because "the existence of the dispute itself hangs on future contingencies that may or may not occur." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1985) (claim not ripe where it rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all")). Plaintiffs' current suit is based on a number of premature assumptions. For example, Plaintiffs allege that the BIA's approval of the ground lease "will *fundamentally and permanently* transform the Split Rock site" from a beach area to

an industrial zone. Pls.' Compl. at ¶ 5 (emphasis added); *see also* ¶ 111 ("[N]ow the land will be used for industrial purposes involving complex [Liquefied Natural Gas] facilities."). Plaintiffs, however, ignore the fact that the BIA's approval was very limited in nature; it expressly did not authorize construction of the project. Rather, the BIA merely authorized the investigation of the Split Rock site to determine if it is suitable for the proposed Liquefied Natural Gas terminal. Defs.' Ex. 5, 1. Plaintiffs' suit also assumes that they will be dissatisfied with the environmental analysis regarding the project, which will be completed as a part of the Federal Energy Regulatory Commission licensing process. *Id*. Plaintiffs also contemplate that the BIA's lease approval will, indeed, be continued beyond the initial site investigation period. At this juncture, no one can predict if these events will actually occur. Until the initial site investigation is completed, no one can know what it will reveal. As explained by the BIA, continuing the lease beyond the investigation period is contingent upon a number of factors, such as the acceptability of the EIS analysis and the project's receipt of a permit from the Federal Energy Regulatory Commission. *Id*. Accordingly, it is clear that Plaintiffs' suit is "premised upon contingent future events that may not occur as anticipated, or indeed may not occur at all" and should be dismissed. *Texas*, 523 U.S. at 300.

In any event, Plaintiffs will not experience hardship, if judicial review of their claims is delayed. The EIS that must be prepared will necessarily involve a detailed examination of the environmental impacts of the proposed Liquefied Natural Gas terminal. Defs.' Ex. 2, 39-40 (Requiring the completion of an EIS for the Liquefied Natural Gas project "as a whole, including the impacts of [Liquefied Natural Gas] Vessels and [Liquefied Natural Gas] Project Ships."). Indeed, Plaintiffs' concerns regarding alleged impacts to public health and safety, wildlife

species, use of the site, and other aspects of the human environment are precisely the sort of issues that will be examined in the EIS. *See* 40 CFR §§ 1502.14-16 (Explaining that an EIS should include discussion on alternatives, the affected environment, and environmental consequences.). Moreover, the lease provides for substantial cooperation between the Tribe and the tenant Quoddy Bay, LLC during the completion of the EIS and the regulatory process. Defs.' Ex. 2, 31-32 (Requiring representatives be appointed to act as a point of contact between the Tribe and Quoddy Bay, LLC); *id*. at 39 (Requiring each final draft environmental study and report to be provided to the Tribe); *id*. (Requiring coordination with the Tribe's representative regarding the EIS); *id*. at 48-49 (Stating that the Tribe may "review and consider the manner in which the [Liquefied Natural Gas] Project Impacts may influence, or may be addressed in" the applications for permits."). Notably, the BIA will also be involved with the environmental analysis regarding the project; the BIA will serve as a cooperating agency and contribute to the development of the EIS. Defs.' Ex. 5, 1.[4/] It also cannot reasonably be disputed that this Court would benefit from awaiting the conclusion of all of the NEPA and NHPA review regarding this project before opining on whether Defendants complied with these statutes.

As detailed above, the BIA has not approved the construction and operation of a Liquefied Natural Gas terminal on the Split Rock site. The impacts, if any, are to be evaluated during future environmental processes so that they can be taken into account by decisionmakers

[4/] Consistent with CEQ regulations, the lead agency should "[u]se the environmental analysis and proposals of cooperating agencies [such as the BIA] with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency." 40 C.F.R. § 1501.6(a)(2). Moreover, as a cooperating agency, BIA will take the lead for "portions of the environmental impact statement concerning which the cooperating agency has special expertise." 40 C.F.R. § 1501.6(b)(3).

in the future who will ultimately decide whether or not to approve the construction and operation of a Liquefied Natural Gas terminal at the site. Thus, Plaintiffs' NEPA and NHPA claims are not yet ripe and should be dismissed.

B. Plaintiffs Lack Standing.

Plaintiffs lack standing to pursue their NEPA and NHPA claims. Federal courts "are not empowered to offer advisory opinions." *Osediacz v. City of Cranston*, 414 F.3d 136, 139 (1st Cir. 2005) (citing *Rhode Island v. EPA*, 378 F.3d 19, 22 (1st Cir. 2004)). "Thus, standing to sue is an indispensable component of federal court jurisdiction." *Id.* In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court explained that "the irreducible constitutional minimum" of standing contains three elements. 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.'" 504 U.S. at 560; *see also Friends of the Earth, Inc.*, 528 U.S. at 180-81 (2000). Second, there must be a causal connection between the injury and the conduct complained of, *i.e.*, the injury has to be fairly traceable to the challenged action of the defendant. *Lujan*, 504 U.S. at 560-61. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* As the Supreme Court noted in *Lujan*, the elements of standing are "not mere pleading requirements but rather an indispensable part of [Plaintiffs'] case." *Id.* at 561. "The party seeking to invoke the federal court's jurisdiction . . . bears the burden of pleading and proof on each step of the standing pavane." *Osediacz*, 414 F.3d at 139.

Here, Plaintiffs have failed to allege any injury that is more than speculative. Plaintiffs' allegations of injury appear to be based on their prediction that a Liquefied Natural Gas terminal

will ultimately be constructed on the Split Rock site. *See* Pls.' Compl. at ¶¶ 113 & 122-25 (Alleging that the a Liquefied Natural Gas terminal will adversely affect public health and safety, have uncertain effects resulting from new Liquefied Natural Gas technology, and impact a historic property with religious and cultural significance, wildlife species, ocean and natural resources, and limit use of the site.). As noted above, no construction or development on the Split Rock site may take place until the project has been reviewed and licensed by the Federal Energy Regulatory Commission. Defs.' Ex. 2, 48; Defs.' Ex. 5, 1. Plaintiffs also suggest that their ability to utilize the site for ceremonial or religious events may be adversely affected. Pls.' Compl. at ¶ 113. An examination of the Complaint, however, makes clear that such claims are purely speculative. For example, Plaintiffs allege concerns about whether the site will be available for the ceremonial first launch of the canoe. Pls.' Compl. at ¶ 8. Plaintiffs, however, point out that "the last such ceremony was held at Spilt Rock on September 24, 2005." *Id.* The lease approval, however, occurred months before this event was conducted; thus, in reality, Plaintiffs' allegations were not borne out. *See* Pls.' Compl. at ¶ 97 (Noting that approval of the lease occurred on June 1, 2005.). Plaintiffs' mere predictions of harm, with no further support, are not enough to establish standing. *See generally Lujan*, 504 U.S. at 559. As discussed above, the Supreme Court expressly requires a showing of harm that is actual, specific and concrete. *Id.* No such specificity can be derived from Plaintiffs' conjectural allegations of harm. Clearly, Plaintiffs have not alleged any facts in their Complaint sufficient to confer standing under Article III. Therefore, Plaintiffs fail the first prong of the standing test.

Plaintiffs also fail the remaining two prongs of the standing test. Presumably, Plaintiffs intend to argue that they meet the second prong of the standing test because their predicted injury

is traceable to BIA's approval of the initial investigation of the Split Rock site. The BIA, however, has yet to approve the ultimate construction and operation of a Liquefied Natural Gas terminal on the Split Rock site; it is also possible that construction and operation of such a project on the Split Rock site will never be approved. Accordingly, Plaintiffs cannot reasonably articulate how their speculative injury might be traced to the BIA. Thus, Plaintiffs fail the second prong of the standing test.

Finally, Plaintiffs cannot meet the third prong of the standing test. Because it is not yet certain if the proposed Liquefied Natural Gas terminal will receive the requisite license and approvals necessary for its construction, it is not possible to determine if this lawsuit will address Plaintiffs' alleged injury. Further, prior to a decision on the proposed Liquefied Natural Gas terminal, Plaintiffs' alleged speculated injuries may never be at issue because Plaintiffs' concerns may be resolved by future decisions informed by the environmental processes. The EIS will serve to provide "discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 CFR § 1502.1. Moreover, the decisionmaker may choose an alternative avoiding the alleged injuries that Plaintiffs speculate will occur. In any event, because of the speculative nature of their alleged injury, Plaintiffs cannot meet the redressibility prong of the standing test. Consequently, Plaintiffs lack standing to bring this lawsuit; accordingly, their Complaint should be dismissed.

II. Plaintiffs' Indian Long-Term Leasing Act and Trust Obligation Claim Must be Dismissed.

Because Plaintiffs cannot adequately represent the interests of Indian Township and the Tribe, their Indian Long-Term Leasing Act and Trust Obligation Claim must be dismissed. "Standing doctrine comprises a mix of constitutional and prudential criteria." *Osediacz*, 414 F.3d at 139. Accordingly, "the Supreme Court has embellished the constitutional requirements attendant to standing with an array of prudential monitions." *Id*. As detailed by the First Circuit in *Osediacz v. City of Cranston*:

> The prudential aspects of standing include the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Id. (internally quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

In keeping with these principles, Plaintiffs are required to assert their own rights; they are not permitted to stake their claim for relief on "the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Plaintiffs are "a group of private citizens who are residents of the Pleasant Point Passamaquoddy Reservation." Pls.' Compl. at ¶¶ 5, 7, 9, 10, 14, 18. Plaintiffs, however, base their claim, in part, on injury allegedly sustained by Indian Township. *See* Pls.' Compl. at ¶ 67 (discussing alleged resolution of Indian Township); ¶ 96 (alleging Pleasant Point Tribal Council failed to consult with or receive approval from Indian Township); 105 (alleging Defendants failed to consult with Indian Township); ¶ 118 (alleging violations, in part, because "Defendants did not consider the wishes of Indian Township").[5/]

[5/] As explained above, Plaintiffs' NEPA claim is not yet ripe. Because Plaintiffs rely on speculative injury, they also do not have standing to pursue their NEPA claim. Further,

Indian Township and the Pleasant Point Reservation are two separate and distinct reservation areas. Pls.' Compl. at ¶¶ 62-64. Each reservation has its own elected tribal council and is treated as an individual entity by the BIA. Defs.' Ex. 1, 1. Plaintiffs fail to make sufficient allegations or offer any evidence to show that they possess standing to adequately represent Indian Township.

Moreover, Plaintiffs have no standing to claim any enforceable rights owed to the Tribe related to tribal property transactions. Tribal property interests and governmental authority flow from reserved treaty rights and are secured to recognized Indian tribes as distinguished from individual Indians. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979); *see also Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962). As explained in *Short v. United States*:

> An individual Indian's rights in tribal or unallotted property arises only upon individualization; individual Indians do not hold vested severable interests in unallotted tribal lands and monies as tenants in common.

12 Cl. Ct. 36, 42 (Cl. Ct. 1987)(citing *United States v. Jim*, 409 U.S. 80, 82-83 (1972); *Gritts v. Fisher*, 224 U.S. 640, 642 (1912)) (additional citations omitted). *See also Seneca Constitutional Rights Foundation v. George*, 348 F. Supp. 51, 59 (W.D. N.Y. 1972) ("[I]t is established that a tribe has full authority to use and dispose of tribal property and that no individual Indian has an enforceable right in the property.") (citing *United States v. Chase*, 245 U.S. 89, 92 (1917);

Defendants note that Plaintiffs' NEPA claim alleges a potential injury to Indian Township. Pls.' Compl. at ¶ 113. On this additional basis, Plaintiffs lack the requisite standing to pursue a portion of their NEPA claim.

McDougal v. McKay, 237 U.S. 372 (1915)) (additional citations omitted).

Numerous cases hold that tribal members lack standing to sue to protect a tribe's rights. *See e.g., James v. Watt*, 716 F.2d 71, 72 (1st Cir. 1983) (Individual Indians had no standing to assert tribal rights to land.), *cert. denied*, 469 U.S. 1209 (1984) (citations omitted); *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 54 n.1 (2d Cir. 1994) (Members could not assert tribe's claim to land.); *Hackford v. Babbitt*, 14 F.3d 1457, 1466 (10th Cir. 1994) (Member lacks standing to sue as to tribal asset.).

Plaintiffs are individual members of the Passamaquoddy Tribe. Pls.' Compl. at ¶¶ 5, 7, 9, 10, 14, 18. Plaintiffs do not allege that they possess a vested property right in the Split Rock site. *See generally*, Pls.' Compl. It is therefore the Tribe, which is not a party to this action, and not individual members, who would be the proper party to assert any alleged injury to rights stemming from tribal property transactions. Thus, Plaintiffs simply have no standing to claim an injury pursuant to the Indian Long-Term Leasing Act. Any responsibility that Defendants have related to the Tribe's property transactions is owed to the Tribe, not to individual Tribe members. Accordingly, Plaintiffs cannot establish standing to represent the interests of Indian Township and the Tribe.

Moreover, it appears that Plaintiffs' real issue actually lies with the Tribal Resolution authorizing the lease. Pls.' Compl. at ¶¶ 82-96. Specifically, Plaintiffs challenge the legality of the Tribe's approval of the lease by arguing, in essence, that the process for Tribe's approval the lease was improper. *Id.* Plaintiffs argue that the Pleasant Point Tribal Council's decision to approve the lease did not reflect the will of the Passamaquoddy tribal members because the referendum vote that was designed to authorize approval of the lease "was not based on the fully

informed, complete participation of all Passamaquoddy tribal members." Pls.' Compl. at ¶ 83. Plaintiffs, however, should not be permitted to use this case as a vehicle to challenge the Tribal Resolution, itself. Such a challenge would require this Court to improperly engage in the interpretation of the tribal laws setting forth the process for passing Tribal Resolutions. *See, e.g., Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) (Resolutions of dispute "involving questions of [a] tribal constitution and tribal law is not within the jurisdiction of the district court.") Rather, Plaintiffs' challenge to the Tribal Resolution should be resolved through the dispute resolution mechanisms provided by the governing documents of the Passamaquoddy Tribe. *See, e.g., National Farmers Union Insurance Companies v. Crow Tribe of Indians,* 471 U.S. 845, 857 (1985) (Allowing the tribal court to interpret the relevant tribal law will allow it "to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review."); *Wheeler v. Swimmer*, 835 F.2d 259, 262 (10th Cir. 1987) (Plaintiffs "must seek their remedy through th[at] available tribal forum."); *Smith v. Babbitt*, 875 F. Supp. 1353, 1362 (D. Minn. 1995), *aff'd*, 100 F.3d 556 (8th Cir. 1996) ("Federal courts do not have jurisdiction to resolve tribal law disputes. These disputes are within the exclusive jurisdiction of the [] tribal court.").

Furthermore, "[f]ederal court jurisdiction does not reach this matter simply because the [P]laintiffs carefully worded their complaint" as an APA action. *Smith v. Babbitt*, 100 F.3d at 559. As the Eighth Circuit stated in *Smith v. Babbitt*, this case "is essentially an intra-tribal dispute. As such, this court does not have jurisdiction to consider this [action]. Consequently, we find that this case is most properly left to tribal authorities [to resolve]." For these reasons, Plaintiffs' Indian Long-Term Leasing Act and Trust Obligation Claim, as well as their NEPA

and NHPA claims, should be dismissed.

III. Plaintiffs' APA Claim Must be Dismissed.

As set forth above, Plaintiffs' NEPA, NHPA, and Long-Term Leasing Act claims warrant dismissal; thus, Plaintiffs' APA claim must also fail. The APA provides the waiver of sovereign immunity for Plaintiffs to bring their challenge to BIA's actions; it does not, in and of itself, create a private right of action. Rather, the APA requires a separate, relevant statutory basis ". . . to demonstrate that the claimant has suffered a "legal wrong," such that there is federal jurisdiction to address that wrong." *Califano v. Sanders*, 430 U.S. 99, 104 (1977). Accordingly, because Plaintiffs' NEPA, NHPA, and Long-Term Leasing Act claims warrant dismissal, their APA claim cannot stand by itself. Therefore, Plaintiffs' APA should, likewise, be dismissed.

CONCLUSION

Based on the aforementioned, Defendants respectfully request that this Court grant their Motion to Dismiss and dismiss Plaintiffs' Complaint.

Dated: January 24, 2006.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2006, I electronically filed Defendant's Motion to Dismiss and Incorporated Memorandum of Law with the Clerk of Court using the CM/ECF system which will send notification of such filings to the following:

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