CASE NO. 13-4095

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Edson Gardner, and Lynda Kozlowicz, and Mary C. Jenkins, and Melvin Jenkins Sr., and Roger Kochampasaken, et al., In Re; Uinta Corporate Charter, And Tabeguache/Uncompahgre Corporate Charter,

Plaintiff/Appellants,

v.

Kenneth Salazar, U.S. Secretary Department of the Interior,

Respondent/Appellee,

On Appeal From The United States District Court For The District Of Utah
D.C. No. 2;11-CV-00719-BSJ
Hon. Bruce S. Jenkins, District Judge

BRIEF OF PLAINTIFF/APPELLANTS

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Oral Argument Is Not Required

SUMMARY OF CASE

Plaintiff/Appellate, Edson Gardner, Lynda Kozlowicz, Mary C. Jenkins, Melvin Jenkins Sr., and Roger Kochampasakens, Allottees Uintah Corporate Charter, and Allottees Tabeguache/ Uncompahgre Corporate Charter, pursuant to Patents to be held in trust; descent and partition, 25 U.S.C. 348, seeks an order directing Secretary of the Interior to call an election for Incorporation of Indian tribes; charter; ratification by election, 25 U.S.C. 477, the Tribe, under Organization of Indian tribes; constitution and bylaws and amendment thereof; special election, 25 U.S.C. 476, which will allow it to form tribal government under written charter approved by the Secretary. To be eligible for the election, the Tribe must be an Indian tribe pursuant to Indian Reorganization Act in Definitions, 25 U.S.C. 479, defines an Indian tribe as recognized Indian tribe now under federal jurisdiction.

The Secretary's approprietry used notice-and-comment rulemaking, rather adjudication, to identify those waters were public lands, for purpose of determining scope, In John v. United States, Case No. 09-36122, 09-36125, 09-36127 (9th Cir. July 5, 2013). Pursuant to Alaska National Interest Lands Conservation Act, 16 U.S.C. 1301, rural subsistence priority, and Secretary's reasonably concluded adjacent waters were

appurtenant to, and could be necessary to fulfil primary purposes of federal reservations identified in 1999 rule, and Secretary did not act aritrarily or contrary to law in refusing to extend federal rural subsistens priority to waters upstream and downstream from federal reservations.

Plaintiff pursuant to 25 U.S.C. 479 as clear and uambiguous, and word now in the statute means 1934. In 1981, the Secretary adopted as Tribal reorganization under A federal statute, in Definitions, 25 U.S.C. 81.1 (W), defining word recognized in 479 to mean tribe, on list of Indians entitled for Secretary to publish in Federal Register. The Tribe is not on current list, but was recognized and under Federal jurisdiction in 1934. The Ute Tribe.

Defendants cross-motion for summary judgment, and Plaintiffs motion for summary judgment on cause of action. Plaintiffs alleges Defendants denial of Plaintiffs petition for federal acknowledgment as an Indian tribe violated Administrative Procedure Act and constitutional rights. In, Hansen v. Salazar, Civil Action No. 11-11953-PBS Hon. John C. Coghenour (Order Granting Plaintiffs Motion For Summary Judgment On First Cause Of Action), dated March 21. 2013.

Table of Authorities ..... i, ii, iii

OPINION BELOW 1

JURSIDICTION 1

STATEMENT OF FACTS

a. Unambiguous Federal Acknowledgment of Plaintiff Uinta Corporate Charter for Allottees, and Plaintiff Tabeguache/Uncompahgre Corporate Charter for Allottees as Tribes 2

A). REASON FOR GRANTING APPEAL AND INTRODUCTION AND RELIEF REQUESTED AND STANDARD OF REVIEW 3

a. Application of Revised 1994 Regulations to Plaintiffs and Election of 1994 Regulations 7

b. Department's Evaluation of Plaintiffs Petition Department's Proposed Finding On Ute Tribe Corporation 8

ARGUMENT

B). Plaintiffs Qualify For Evaluation Under Reduced Evidentiary Burden Of 1994 Regulations 8

a. Tribal Existence 12

b. Community 13

c. Political Influence Or Authority 14

d. Evidence Of Uambiguous Acknowledgment 14

e. Risk Of Error and Department Acted Arbitrarily and Capriciously By Departing From Plaintiff Indian Allottees Precedent Without Explanation 15

C). Department's Failure To Evaulate Plaintiff Indian Allottees Under Regulations, Prejudiced Plaintiff Indian Allottees 17

V. CONCLUSION 18

TABLE OF AUTHORITIES

CASES;

John v. United States, Case No. 09-36122, 09-36125, 09-36127 (9th Cir. July 5, 2013 ..... passim

Hason v. Salazar, Civil No. 11-11953-PBS dated March 21, 2013 ..... Passim

Ute Indian Tribe of the Uintah and Ouray Reservation v. State Utah, 114 F. 3d 1513 (10th Cir. 1997) 2, 3, 15, 17, 18

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 4

Lands Council v. McNair, 629 F. 3d 1070 (9th Cir. 2010) 5

Cal. Energy Comm'n v. Dep't of Energy, 585 F 3d 1143 (9th Cir. 2009) 5

Westar Energy, Inc. v. FERC, 473 F. 3d 1239 (D.C. Cir. 2007) 5

Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd., 4032 F. 3d 771 (D.C. Cir. 2005) 5

Muwekma Ohlone Tribe v. Kempthorne, 452 F. Supp. 2d 105 (D.C.C. 2006) 5

Williams Gas Processing Gulf Coast Co. v. FERC, 475 F. 3d 319 (D.C. Cir. 2006) 5

FCC v. Fox Television Stations, 556 U.S. 502 (2009) 6

Hall v. McLaughlin, 864 F. 2d 868 (D.C. Cir. 1989) 6

Ramaprakash v. F.A.A., 346 F. 3d 1121 (D,C. Cir. 2003) 6

Jicarilla Apache Nation v. U.S. Dep't of Interior, 613 F. 3d 1112 (D.C. Cir. 2010) 6

Shinseki v. Sanders, 556 U.S. 396 (2009) 6

Cal. Wilderness Coal v. U.S. Dep't of Energy,
631 F. 3d 1072 (9th Cir. 2011) 6

PDK Laboratories Inc. v. U.S. D.E.A.,
362 F. 3d 786 (D.C. Cir. 2004) 7

S. Shore Hosp., Inc. v. Thompson,
308 F.3d 91 (1st Cir. 2002) 16

Bushman v. Schweiker, 676 F.2d 352, 358 (9th Cir. 1982). 17

STATUTES;

25 U.S.C. 348 ..... passim, 1, 7, 9

25 U.S.C. 477 ..... passim

25 U.S.C. 476 ..... passim

25 U.S.C. 479 ..... passim

25 U.S.C. 81.1(w) ..... passim

25 U.S.C. 1331 1

28 U.S.C. 1361 1

28 U.S.C. 1291 1

18 U.S.C. 1151 ..... 2, 15, 18

25 C.F.R. 83 ..... 7, 8, 10, 11, 12, 13 14, 16, 17

OPINION BELOW

1. The opinion in District Court of Utah in, Kozlowicz, et al v. Salazar, dated June 18, 2013. Hon. Bruce S. Jenkins, U.S. Senior District Judge (Order Of Dismissal)(**attached herein**).

JURSIDICTION

2. The United States District Court for the District of Utah had jurisdiction over Plaintiff/Appellate Attorney Pro-Ses, Edson Gardner, Lynda Kozlowicz, Mary C. Jenkins, Melvin Jenkins Sr., and Roger Kochampasakens, Allottee Uinta Corporate Charter, and Allottee Tabeguache/Uncompahgre Corporate Charter, pursuant to Patents to be held in trust; descent and partition, 25 U.S.C. 348, claims based upon the following: 25 U.S.C. 1331, in Plaintiff/Appellants claims arise under the Constitution and laws of United States, and 28 U.S.C. 1361, in Plaintiff/Appellants seeks to compel officers and employees of the Secretary of the Interior of the United States and his agencies to perform their duties owed to Plaintiff/Appellant allottees. The 10th Cir. Court of Appeals has jurisdiction over this appeal based upon; 28 U.S.C. 1291, in Plaintiffs as appealing final judgment to United States who is trustee over allottees; The final judgment was entered by District Court on June 18, 2013, dismissing allottees claims;

Plaintiff/Appellants filed notice of appeal and because Defendant/Appellees, Secretary of the Interior, Kenneth Salazar and his agencies of United States who are being sued in their official capacities. The filing of this notice of appeal after entry of Judgment was timely filed; and
The Judgment granting Federal Official motion to dismiss is violations of regulations and as trustee responsibilities.

STATEMENT OF FACTS

a. Unambiguous Federal Acknowledgment of Plaintiff Uinta Corporate Charter for Allottees, and Plaintiff Tabeguache/Uncompahgre Corporate Charter for Allottees as Tribe

3. The Patents to be held in trust; descent and partition, 25 U.S.C. 348, gave District Court jurisdiction to decide Plaintiffs claim brought by Uinta Indians, and Tabeguache/Uncompahgre and/or bands had entered into, and ratified, or ruled on in, Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah, 114 F. 3d 1513 (10 the Cir. 1997), pursuant to Allotment Act pursuant to Indian Country, 18 U.S.C. 1151. The Tenth Cir. Court of Appeals findings in 1997, included Plaintiffs allotments. The Federal Court of Utah dismissed Plaintiffs claims even when APA were followed to the letter. The Court of Utah held, that it had no jurisdiction to resolve Plaintiffs claims and as Plaintiffs had ceased to exist in an organized form.

A). REASON FOR GRANTING APPEAL AND INTRODUCTION AND RELIEF REQUESTED AND STANDARD OF REVIEW

4. Plaintiffs Uinta Corporate Charter, and Tabeguache/ Uncompahgre Corporate Charter, as Indian Allottees entity whose acknowledged through their allotment and are recognized under federal regulations and statutes on petition in the Department of the Interior, without first being evaluated under more favorable regulations. As Department itself acknowledges, those regulations that does allow Petitioner Uinta Allottees and Tabeguache/Uncompahgre Allottees having demonstrated unambiguous previous Federal acknowledgment being outside of the Ute Tribe Corporation, to proceed using reduced evidentiary burden. Under Department precedent, Plaintiff Allottees have demonstrated unambiguous previous Federal acknowledgement and therefore have right to be evaluated under 1997 regulations. Plaintiff Allottes are direct descendants of Uinta Valley and Ouray Indian Reserves who signed Uinta Valley and Ouray Reservation in, Ute Indian Tribe of the Uintah and Ouray Reservation v. v. State Utah, 114 F. 3d 1513 (10th Cir. 1997), that Federal government can prove an unbroken chain of shared activities connect Plaintiff Indian Allottees claims today, and those signed The Uinta and Ouray Indian Allotments benefits of 1997 regulations, but given no opportunity. Its error must be rectified.

5. The Department acted arbitrarily and capriciously in refusing to consider Plaintiff Indian Alloments petition, under 1997 regulations because, in so doing, it treated similarly situated petitions differently without offering reasoned explanation for going so. It also failed to follow -- or even acknowledge, its own prescendent. When new regulations became effective in 1997, both Plaintiff Uinta Allottees and Plaintiff Tabeguache/Uncompahgre affimatively elected to proceed under preexistng 1997 regulations. The Department applied 1997 regulations in evaluating Plaintiffs petition on Appeal. Nine months later, the Department completely ignored this precendent and considered Plaintiff Indian Allotment petition under 1997 regulations. In decision, the Department's sole explanation for doing so, the Plaintiffs had elected in 1997 to be evaluated under 1997 regulations, but was equally true of Plaintiff Indian Allottees having respectfully requested the Court do just that..

6. Under APA, agency action must be reserved and remanded if it is artbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or if action failed to meet statitory, procedural, or constitutional requirements. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), any Agency action is arbitrary and

capricious if agency fails to consider an important factor or aspect of probable cause or fails to provide reasoned explanation for its action. Lands Council v. McNair, 629 F. 3d 1070 (9th Cir. 2010); Cal. Energy Comm'n v. Dep't of Energy, 585 F 3d 1143 (9th Cir. 2009). An agency's reasoned explanation must be given within challenged decision itself and be supported by record for that decision. Therefore, may not consider purported explanations raised for time during litigation. Westar Energy, Inc. v. FEBRC, 473 F. 3d 1239 (D.C. Cir. 2007).

7. An agency fails to engage in reasoned decision-making, and thus acts arbitrarily and capriously, if it applies different standards situated entities and fails to support this disparate treatment with reasoned explanation and evidence in record. In, Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd., 4032 F. 3d 771 (D.C. Cir. 2005); also Muwekma Ohlone Tribe v. Kempthorne, 452 F. Supp. 2d 105 (D.C.C. 2006), if an agency makes an exception in one case, it must either make an exception in similar case or point to relevant distinction between two cases.

8. In Williams Gas Processing Gulf Coast Co. v. FERC, 475 F. 3d 319 (D.C. Cir. 2006), if an agency departs from prior precedent without addressing precedent in decision, the

agency fails to satisfy most basic requirements of APA, FCC v. Fox Television Stations, 556 U.S. 502 (2009). An agency cannot depart from prior policy sub===== silentio but must instead address prior precedent to display awareness that it is changing position. If an agency diverges from prior precedent agency thus must give reasoned explanation, supported by evidence in the record, for doing so. Hall v. McLaughlin, 864 F. 2d 868 (D.C. Cir. 1989). An agency's reasoned analysis is critical to ensure prior precedent is being deliberately changed, as opposed to casually ignored. Ramaprakash v. F.A.A., 346 F. 3d 1121 (D,C. Cir. 2003). silence in face of inconvenient precedent is not acceptable. Jicarilla Apache Nation v. U.S. Dep't of Interior, 613 F. 3d 1112 (D.C. Cir. 2010).

9. The party challenging agency action must establish agency's error was not harmless, but harmless error rule is not .. particularly erroreous requirement. Shinseki v. Sanders, 556 U.S. 396 (2009). An error is harmless only if it had no bearing on procedures used or substance of decision reached. Cal. Wilderness Coal v. U.S. Dep't of Energy, 631 F. 3d 1072 (9th Cir. 2011). To establish harm, Plaintiff Uinta Corporate Charter, and Plaintiff Tabeguache/Uncompahgre Corporate Charter, for Allottees pursuant to Patents to be

held in trust; descent and partition, 25 U.S.C. 348, are not required to prove Department's decision would have been different, only that it might have been different. PDK Laboratories Inc. v. U.S. D.E.A., 362 F. 3d 786 (D.C. Cir. 2004).

a. Application of Revised 1994 Regulations to and Plaintiffs Election of 1994 Regulations

10. The 1994 regulations automatically applied to Plaintiffs petitions in active consideration after March 28, 1994. 25 C.F.R. 83.3(g), as Indian groups petitions in active consideration on March 28, 1994;

> May choose to complete their petitioning process either under these regulations or under the previous acknowledgment regulations in part 83 of this title. This choice must be made by April 26, 1994.

As of March 28, 1994, number of tribes had petitioned under 1978 acknowledgment regulations, still had petitions under active consideration. Petitions included Plaintiff Uinta Indian Allottees, and Plaintiff Tabeguache/Uncompahgre Indian Allottees. The Department applied 1994 regulations to Plaintiffs petition. The Department considerations, that Plaintiff Uinta Indian Allottees, and Plaintiff Tabeguache/ Uncompahgre Indian Allottees have been unambiguously acknowledged after 1997. Plaintiff Uinta Indian Allottees, and Plaintiff Tabeguache/Uncompahgre Indian Allottees, still

benefited from burden of proof of 1994 regulations; Plaintiff Allottees had to prove existence of community in present, not historical times (as required under 1978 regulations). 25 C.F.R. 83.8(d)(2).

b. Department's Evaluation of Plaintiffs Petition and Department's Proposed Finding On Ute Tribe

11. The Department of Interior, because Ute Tribe Corporation purportly did not exist before 1934, it could not satisfy 83.7(a),(b), or (c) of 1997 regulations before 1934. The Department of Interior, there was no evidence of identification of Ute Tribe Corporation between 1800 and 1934, no evidence of Ute tribal community between 1800 to 1934 (although Department did concede there was an increase in group activities beginning in 1934s), and no evidence of political influence or authority between 1800 to 1934. The Department of Interior thus concluded Ute Tribe Corporation did not satisfy 83.7(a),(b), or (c) of 1978 regulations.

12. The Department of Interior should agree Plaintiff Indian Allottees satisfied 83.7(d)-(g) of 1978 regulations.

ARGUMENT

B). Plaintiffs Qualify For Evaluation Under Reduced Evidentiary Burden Of 1994 Regulations

13. The Department of Interior, determination on Plaintiff Uinta Allottees, and Plaintiff Tabeguache/

Uncompahgre Allottees, petition must be reversed and remanded with instruction to apply 1994 regulations. The Department of Interior failed to follow its own precedent, and failed to distinguish or even acknowledge precedent, as artbitrary and caprious.

14. The Plaintiff Uinta Corporate Charter, and Plaintiff Tabeguache/Uncompahgre Corporate Charter, The Petitioners Were Similarly Situated.

15. A party asserting disparate treatment must show evidence the parties were similarly situated to Allottees in that; (a) petitioners chose to proceed under 1978 regulations; (b) under 1994 regulations, Department of Interior was required to determine whether Plaintiff Uinta Indian Allottees, and Plaintiff Tabeguache/Uncompahgre Indian Allottees qualified for evaluation under section 83.8; (c) Plaintiff Allottees gualified for evaluation under section 83.8 of 1994 regulation; and (d) Plaintiff Allottees would benefit from evaluation under section 83.8 of 1994 regulations; and (e) there was evidence the Federal Government had acknowledged Plaintiff Allottees in Patents to be held in trust; descent and partition, 25 U.S.C. 348. This jurisdictional Act, that required Department to apply 1994 regulations to Plaintiffs.

16. Plaintiff Indian Allottees chose to proceed Under 1978 Regulations;

17. In 1994 regulations, relevant time period for making an election of regulations in 25 C.F.R. 83.3(g). Plaintiff Indian Uinta Allottees, and Plaintiff Tabeguache/ Uncompahgre Indian Allottees chose to proceed under 1978 regualtions during this period.

18. The Department Of Interior Was Required To Evaluate Any Unambiguous Acknowledgment;

19. The 1994 regulations require Department of Interior to evaluate evidence of previous unambiguous acknowledgment, whether or not Plaintiffs arguments was previously acknowledged. Section 83.10(b)(3). Petition claims previous Federal acknowledgment and/or includes evidence of Federal acknowledgment, the Department's technical assistance review will include review to determine evidence sufficient to meet reeuirements of previous federal acknowledgment . . . .; also section 83.8 (b)determination of adequacy of evidence of previous federal action acknowledging tribal status shall be made . . . Plaintiff Uinta Indian Allottees, and Plaintiff Tabeguache/Uncompahgre Indian Allottees presented substantial evidence of prior acknowledgment. Previous Federal acknowledgment means action by Federal government clearly

premised on identification of tribal political entity and indicating clearly recognition of relationship between entity and United States, and includes: evidence group has had federal statute relations with United States; evidence group has been denominated tribe by act of Congress or Executive Order; and evidence group has been treated by Federal Government as having collective rights in tribal lands or funds. 25 C.F.R. 83.8(c). Additionally, courts have power to confirm recognition after examining federal statutes, and executive orders to determine whether or not political relationship has been established and maintained. John Ragsdale, Jr., The United Tribe of Shawnee Indians: The Battle for recognition, 69 UMKC L. Rev. 311, 322-23 (2000). Plaintiffs, federal statute previous unambiguous acknowledgment, shows subsequent evidence Department of Interior would be required to evaluate, includes distribution of appropriations under federal statutes, subsequent appropriations statutes, and special Jurisdictional Act. Act of Congress gave federal Court jurisdiction to determine whether claimant Plaintiff Uinta Indian Tribe, and Plaintiff Tabeguache/Uncompahgre Indian Tribe were in fact historic to Ute Tribe Corporation and federal Court to claim and determine they were federally recognized outside of Ute Tribe's

Corporation and having equal status.

20. Plaintiff Uinta Indian Allottee, and Plaintiff Tabeguache/Uncompahgre Indian Allottees, qualify for evaluation under 83.8. The 1994 regulations do not envision Plaintiffs demonstrating, that it meets acknowledgment criteria in order to be evaluated under section 83.8. To qualify for evaluation under section 83.8, Plaintiff Indian Allottees must show the following:

21. The Government acknowledged, by its actions, government-to-government relationship between United States and being an Indian Tribe;

22. Predominant portion of petitioner's members descend from previously acknowledged tribe; and,

23. Plaintiff Indian Allottees will be able to advance in their claim, some of its members or ancestors with descent from their historical tribe participated in group activities at various times since last Federal acknowledgment.

a. Tribal Existence

24. Under 1994 regulations, previous unambiguous Federal acknowledgment conclusively establishes Plaintiff Indian Allottees existence as tribe up to the point of last such acknowledgment. C.F.R. 83.8(a),(b). If Plaintiff Indian Allottees will then only be required to demonstrate that;

25. Plaintiff Indian Allottees group has been identified as an American Indian entity since point of last federal acknowledgment (even not since historical times), and as same tribal entity was previously acknowledged, or as portion has evolved from entity;

26. Plaintiff Indian Allottees group comprises distant community at present (but need not provide evidence to demonstrate existence as community historically);

27. Political influence, or authority has been exercised since point last federal acknowledgdment (even since historical times) where political influence, or authority can be shown by identifying subtantially continuous historical identification, by authoritative,knowledgeable external sources, of leaders and/or governing body who exercise political influence, or authority, together with demonstration of one form of evidence listed in 83.7(c). In 25 C.F.R. 83.8 (d). The Plaintiff Indian Allottees is only required to submit evidence showing that tribe continued in existence after last point of unambiguous Federal acknowledgment. Contemporaneous unambiguous Federal acknowledgment conclusively establishes tribal existence up to that point.

b. Community

28. Under 1994 regulations, previously-acknowledged

plaintiff Indian Allottees must establish community in present, not since historical times. 25 C.F.R. 83.8(d)(2). Department acknowledged community activity among Plaintiff Indian Allottees increased begining in 1997s by Plaintiff Indian Allottees. The years of continuous existence as an Indian entity is evidence of community. 25 C.F.R. 83.7(b)(1)(viii). The 1978 regulations do not contain analogous provision. Plaintiff Indian Allottees (unlike Ute Tribe) has existed at least since 1800s through 1934-well over 30 years.

c. Political Influence Or Authority

29. The 1994 regulations require showing of political influence or authority since last point of ambiguous acknowledgment, not since historical times. additionally, previously acknowledged tribes can satisfy rule by showing subtantially continuous historical identification, by authoritative, knowledgeable external sources, of leaders and/or governing body who exercise political influence or authority, together with demonstration of one form of evidence listed in 83.7(c). In 25 C.F.R. 83.8(d)(3), Plaintiff Indian Allottees can thus use external identification of their board directors as part of evidence needed to establish this element.

d. Evidence Of Uambiguous Acknowledgment and Risk of Error

30. The Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah, 114 F. 3d 1514 (10th Cir. 1997), where Allottees claims are within Indian Country 18 U.S.C. 1151, decisions are far more supportive of Plaintiff Indian Allottees tribal status, than they were of Ute tribe Corporation status. Example:

31. Plaintiff Indian Allottees asserted they were historical Indian tribe; the government did not dispute this.

32. Plaintiff Indian Allottees claims identified Plaintiff Indian Tribe as historic Indian Tribe.

33. Plaintiff Indian Allottees claims found in Plaintiff Indian Allottee's favor on an expressly tribal claims and entered monetary judgment.

34. The Department of Interior has an obligation to not ignore this evidence in ruling on Plaintiff Indian Allottees petition, and to instead evaluate it under 1994 regulations.

e. Risk Of Error and Department Acted Arbitrarily and Capriciously By Departing From Plaintiff Indian Allottees Precedent Without Explanation

35. If the Duwamish were unambiguously acknowledged in 1925 and/or 1934, then the Department erred in concluding that Plaintiffs did not exist as a tribe at that point. The 1994 regulations guard against this risk of error by giving the appropriate weight to the contemporaneous judgment of the

Extecutive branch, Congress, or Courts. The Department of Interior used 83.8 to evaluate evidence, the chinook did not cite; yet the Department of Interior closed its eyes to the same evidence after the Duwamish cited it and creating an unnecessary risk of error.

36. The Department of Interior's decision on Plaintiff Indian Allottees Petition was precedent at least on points. The Department of Interior had authority to waive Plaintiff Indian Allottee's choice of 1978 regulations. Department should waive Plaintiff Indian Allottees choice of 1978 regulations if doing so would benefit Plaintiff Indian Allottees. If there was evidence of unambiguous acknowledgment Department could not in fairness ignore these facts.

37. Plaintiff Indian Allottees decision is precedent because it was ruled from official policy makers and Interior's agencys whose decisions binds Department of Interior. S. Shore Hosp., Inc. v. Thompson, 308 F.3d 91 (1st Cir. 2002). By Department of Interior's own definition in this litigation, Plaintiff Indian Allottees decision is precedent, because it was published. Department of Interior's acknowledgment sets precedent specially when identifies as precedent not only Plaintiff Indian Allottees petitions, which have been received with final determinations . . . but also

petitions which have received only proposed findings .... Because even proposed findings count as precedent, Plaintiff Indian Allottees final determination counts as precedent.

C). Department's Failure To Evaulate Plaintiff Indian Allottees Under Regulations Prejudiced Plaintiff Indian Allottees

38. To justify remand, Plaintiff Indian Allotees must show Department's APA violations were not harmless. Department's error was not harmless and certainly not clearly harmless. Bushman v. Schweiker, 676 F.2d 352, 358 (9th Cir. 1982). The Department of Interior ruled favorably on Plaintiff Indian Allottees petition when 1994 and 1978 regulations were applied, yet ruled against petition when only 1978 regulations were applied. It is certainly conceivable Department of Interior might reach a different result when 1994 regulations were applied. An unexplained departure from precedent is not harmless where Department of Interior may, on remand, decide to follow precedent and apply 1994 regulations to Plaintiff Indian Allottees decision. This particularly true where it is clear Department of Interior did not use 83.8 to evaluate important evidence. In, Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah, 114 F. 3d 1513 (10th Cir. 1997), claims decision The Department of Interior would be required to evaluate under 83.8 today.

CONCLUSION

39. Department revised its acknowledgment regulations in 1994 because it recognized there were serious flaws in 1978 regulations, prejudiced Plaintiff Indian Allottees. Department should be conscious, and within Plaintiff Indian Allottees decision, was conscious of possibility applying regulations might have different results. In, Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah, 114 F. 3d 1514 (1997), the Indian Allottees are in Indian Country, 18 U.S.C. 1151 and holds both Reserves' land base. The Department of Interior has guarded against this risk of error by never denying petition without first evaluating it under more favorable in 1994 regulations-except in case of Plaintiff Indian Allottees.

40. Remand as matter of simple justice, Survival, or extinction of prominent Indian tribes within Ute Tribe Corporation, and same tribes are closely interwined with Ute Tribe Corporation histroy, is an issue of fundamental importance. It is historic accident Plaintiff Indian Allottees will be last known historic tribe, Plaintiff Indian Allottees for whom election provision of 1994 regulations is an issue. There can be no reasonable dispute that if Plaintiff Indian Allottees Petition has been decided, The Department of

Interior would have evaluated Plaintiff Indian Allottees petition under 1994 regulations just as did Plaintiff Indian Allottees. Unless remanded, Plaintiff Indian Allottees decision will forever stand for proposition that an Indian Plaintiff can be denied full and fair evalution of its tribal status by an accident of timing leading to its evaluation by one administration rather than another.

41. All Plaintiff Indian Allottees ask for in this Appeal is the 10th Circuit Court Order, and that Department of Interior to evaluate its petition under 1994 regulations. This is something the Department of Interior has done before, most notably in matter of Plaintiff Indian Allottees. All evidence in record points to conclusion the Department of Interior's decision to treat Plaintiff Indian Allottees unfavorably and was an unexamined one. Remand for purpose of having the Department of Interior consider and address its own precedent is not only appropriate but required. Plaintiff Indian Allottees respectfully request this 10th Circuit Court enter an appropriate Order granting this matter.

Respectfully submitted

Edson Gardner, Pro-Se. July 15 2012

Lynda Kozlowicz, Pro-Se. July 16 2012

Mary C. Jenkins, Pro-Se. July 15th 2013

Melvin Jenkins, Pro-Se. July 15 2013

Roger Kochampasaken, Pro-Se. July 15 2013

CERTIFICATION OF SERVICE

This is to certify true and correct copy of **BRIEF OF PLAINTIFF/APPELLANTS**, foregoing document was delivered by mail first class, postage prepaid and addressed as follows on this 16, day of July 2013.

Kenneth Salazar, U.S.
Secretary of the Interior,
Department of the Interior,
1849 C Street, N.W.,
Washington, D.C. 20240

David Barlow, U.S. Attorney,
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

* * * * * * * * *

EDSON GARDNER, LYNDA KOZLOWICZ, MARY C. JENKINS, MELVIN JENKINS SR., and ROGER KOCHAMPASAKEN, in re: Uinta Corporate Charter, and Tabequache/ Uncompahgre Corporate Charter, Petitioners, vs. KENNETH SALAZAR, U.S. Secretary of the Interior, Respondent.	Civil No. 2:11-CV-0719 BSJ **ORDER OF DISMISSAL**

* * * * * * * * *

On March 27, 2013, this court entered a Memorandum Opinion & Order providing in part that "the plaintiffs must submit proof in writing of the final disposition of their most recent appeal to the Interior Board of Indian Appeals (case no. IBIA 12-044), within twenty (20) days of the entry of this Order. Absent the submission of such proof, the Secretary's motion to dismiss (CM/ECF No. 16) will be granted for lack of ripeness and the above-captioned proceeding will be dismissed without prejudice."[1]

Petitioners Edson Gardner and Lynda Kozlowicz subsequently filed two documents: "Petitioner's Notice of Removal of Action to U.S. Secretary of Dept. Of the Interior – (Petition for Federal Recognition)," filed April 2, 2013 (CM/ECF No. 31), and "Plaintiff's Letter of Intent to Interior Board of Indian Appeals, Petition to Secretary of Interior for Appellants Federal

[1](Memorandum Opinion & Order, filed March 27, 2013 (CM/ECF No. 30.)

Acknowledgement as Indian Tribe Under Treaty," filed April 22, 2013 (CM/ECF No. 32).

From these two documents, it appears that Mr. Gardner and Ms. Kozlowicz are seeking federal recognition for the "Uinta Indians" and the "Tabeguache/Uncompahgre Indians" as distinct Indian tribes, separate and apart from the Ute Indian Tribe of the Uintah and Ouray Reservation, an existing federally recognized Indian tribe, *see* List of Federally Recognized Indian Tribes, 77 Fed. Reg. 47873 (August 10, 2012); *see also* The Ute Indian Tribe, *at* http://www.utetribe.com/.

The procedure for tribal acknowledgment is prescribed in Part 83 of Title 25 of the *Code of Federal Regulations*, and in the first instance is the responsibility of the Office of Federal Acknowledgment ("OFA") within the Office of the Assistant Secretary - Indian Affairs of the Department of the Interior. *See* Office of Federal Acknowledgment (OFA), *at* http://www.bia.gov/WhoWeAre/AS-IA/OFA/. It seems clear from the two documents that Mr. Gardner and Ms. Kozlowicz understand that the Interior Department – not this court – has primary jurisdiction over their petition for federal recognition.

What is not clear from the two documents is the current status of their pending administrative appeal before the Interior Board of Indian Appeals (IBIA) (Case No. IBIA 12-044), that is germane to the subject matter of the above-captioned action. Mr. Gardner and Ms. Kozlowicz provide *no further information at all* concerning that appeal, let alone its final disposition.

Mr. Gardner and Ms. Kozlowicz having failed to satisfy the terms of this court's March 27, 2013 Memorandum Opinion & Order,

IT IS ORDERED that the Secretary's motion to dismiss (CM/ECF No. 16) is

GRANTED for lack of ripeness only, and the above-captioned action shall be and hereby is DISMISSED without prejudice.

DATED this 18th day of June, 2013.

BY THE COURT:

BRUCE S. JENKINS
United States ~~Senior~~ District Judge

16 U.S.C.
United States Code, 1994 Edition
Title 16 - CONSERVATION
CHAPTER 29 - WATER BANK PROGRAM FOR WETLANDS PRESERVATION
Sec. 1301 - Congressional declaration of policy; authority of Secretary
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§1301. Congressional declaration of policy; authority of Secretary

The Congress finds that it is in the public interest to preserve, restore, and improve the wetlands of the Nation, and thereby to conserve surface waters, to preserve and improve habitat for migratory waterfowl and other wildlife resources, to reduce runoff, soil and wind erosion, and contribute to flood control, to contribute to improved water quality and reduce stream sedimentation, to contribute to improved subsurface moisture, to reduce acres of new land coming into production and to retire lands now in agricultural production, to enhance the natural beauty of the landscape, and to promote comprehensive and total water management planning. The Secretary of Agriculture (hereinafter in this chapter referred to as the "Secretary") is authorized and directed to formulate and carry out a continuous program to prevent the serious loss of wetlands, and to preserve, restore, and improve such lands, which program shall begin on July 1, 1971.

(Pub. L. 91–559, §2, Dec. 19, 1970, 84 Stat. 1468.)

SHORT TITLE

Section 1 of Pub. L. 91–559 provided: "That this Act [enacting this chapter] may be cited as the 'Water Bank Act'."