Judge Jones

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RUDY ST. GERMAIN, MICHELLE ROBERTS, enrolled Nooksack Tribal members,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; SALLY JEWELL, Secretary of the Interior; KEVIN K. WASHBURN, Assistant Secretary of Indian Affairs; STANLEY SPEAKS, Northwest Regional Director; SCOTT AKIN, Acting Northwest Regional Director; JUDITH R. JOSEPH, Superintendent for the Puget Sound Agency,

Defendants.

CASE NO. C13-0945-RAJ

DEFENDANTS' REPLY RE: MOTION FOR ORDER DETERMINING APPLICABLE STANDARD OF JUDICIAL REVIEW

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INTRODUCTION

Plaintiffs oppose defendants' request for an order relieving the parties of obligations that would otherwise apply in conventional civil litigation to make initial disclosures, participate in a discovery conference, and prepare a discovery plan in light of exemptions to those requirements for record review actions. *See* Rule 26(a)(1)(B)(i), (f)(1), F.R.Civ.P. Discovery, and these associated requirements, are a part of conventional civil litigation because the very purpose of such litigation is to develop an evidentiary record upon which a Court can make findings on disputed facts, reach conclusions of law based on those findings, and decide a claim for relief *de novo*. The exemptions to these requirements exist because judicial review of agency action is not conventional civil litigation.

Plaintiffs' opposition accuses defendants of "conflating" the standard of review with the standard of discovery in an attempt to "shoehorn" a protective order into the instant motion. Dkt. # 30, p. 2, *ll*. 9-12. However, as the Court may recall, the catalyst for defendants' request to file this motion was a dispute about the applicability of the aforementioned discovery requirements based on a disagreement as to whether plaintiffs' claims were to be decided conventionally or on the administrative record. The applicability of these requirements is inextricably intertwined with a determination as to the standard of review as is the availability of discovery more broadly speaking.

We fundamentally disagree with plaintiffs' observation that "the Federal Rules contemplate these preliminary discovery obligations in order to flesh out the claims and defenses raised in the case – which *then* determines the scope of allowable discovery." Dkt. # 30, p. 1, *l.* 23 – p. 2, *l.* 1 (emphasis original). If that is true in conventional civil litigation, nevertheless, the opposite is true here, as is unmistakably evidenced by the very existence of the Rule 26(a)(1)(B)(i) and Rule 26(f)(1) exemptions. Indeed, this Circuit has long recognized as a general rule that discovery is fundamentally inconsistent with judicial review of agency action. *See, e.g., Public Power Council v. Johnson*, 674 F.2d 791, 793-796 (9th Cir. 1982) (noting "the general rule that agency actions are to be judged on the agency record alone, without discovery," and describing exceptions to that rule).[1] Instead, the legality of agency action is generally to be adjudged on the basis of the administrative

1 This is particularly true when the purpose of such discovery is to probe the mental process of a decisionmaker. *See, U.S. v. Morgan*, 313 U.S. 409, 421-422 (1941). Plaintiffs' representation that *Asarco, Inc. v. EPA,* 616 F.2d. 1153 (9th Cir. 1980), authorized "plenary" review, dkt. # 30, n. 2, cannot be reconciled with any fair reading of the decision.

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record that the agency presents to the Court and not on matters external to the record which, by definition, formed no part of the agency decision.

Because of these rules, and contrary to plaintiffs' argument, unrestricted discovery is not allowed in administrative record review cases just so that it can later be determined that discovery was inappropriate in the first place. This notion is nonsensical on its face. Rather, where review is based on an administrative record, a plaintiff must demonstrate to the satisfaction of the Court than an exception to the general rule exists *before* discovery can occur. *See, Animal Defense Council v. Hodel*, 840 F.2d 1432, 1438 (9th Cir. 1988) (district court properly refused to permit discovery absent "adequate justification"). All that said, the order sought by defendants will simply establish the rules under which the parties are to operate going forward. Plaintiffs would not be foreclosed from seeking leave to conduct discovery, based on a proper showing of particularized need.

ARGUMENT

I. CONSTITUTIONAL CLAIMS ARE SUBJECT TO THE APA

Relying primarily on a Fifth Circuit case, *Porter v. Califano,* 592 F.2d 770 (5th Cir. 1979), plaintiffs assert that by utilizing the simple expedient of characterizing a claim as "constitutional," a near-magical transformation occurs. According to plaintiffs' argument, not only does mere labeling automatically liberate their claims from the final agency action requirement, the administrative record requirement, and the arbitrary and capricious standard of review, but it also makes available to them the full panoply of discovery tools.[2] Whatever may be the holding of the *Porter* case, other Circuits read the law quite differently, *see, e.g.*, *Grier v. Secretary of the Army*, 799 F.2d 721 (11th Cir. 1986) (distinguishing *Porter*).

2 We raise here a point of federal subject matter jurisdiction. In order to invoke the Court's subject matter jurisdiction under 28 U.S.C. § 1331 to hear civil actions "arising under the Constitution," it is required that those claims be "substantial." *See, Hagans v. Lavine,* 415 U.S. 528, 536–37 (1974) ("federal courts are without power to entertain claims otherwise within their jurisdiction if they are so attenuated and unsubstantial as to be absolutely devoid of merit.") (*internal quotations omitted*). Plaintiffs' complaint alleges in substance that the Secretary conducted a discriminatory election in violation of their 5th Amendment right to due process and their 15th Amendment right to vote regardless of "race, color, or previous condition of servitude." Dkt. # 3, ¶¶ 91-92. It is undisputed that the Secretary conducted an election concerning the proposed Nooksack constitutional amendment which was open to *all* enrolled members of the Nooksack Indian Tribe, including plaintiffs. Plaintiffs' complaint contains no allegations which allege otherwise. It is patently inconceivable that an election which was equally open to all enrolled members of the Tribe could be discriminatory as to any one member. Rather, plaintiffs' substantive allegations focus on alleged peripheral misconduct of Nooksack Tribal Chairman Bob Kelly, who is not an officer, employee, nor agent of defendants (and plaintiffs do not allege otherwise). No discriminatory action by defendants is alleged in the complaint.

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In the Ninth Circuit, the state of the law on this point remains somewhat unsettled. Plaintiffs' argument does find some support in *The Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir.1989). In analyzing whether there was valid waiver of sovereign immunity, the court in *Presbyterian Church* held that "§ 702's waiver of sovereign immunity is not limited to suits challenging 'agency action.'" *Id.* at 525 n. 8. Although *Presbyterian Church* has not been overruled, its continuing vitality is in question. In *Gallo Cattle Co. v. Department of Agriculture*, 159 F.3d 1194 (9th Cir.1998), the Ninth Circuit unequivocally held that "the APA prescribes standards for judicial review of an agency action . . ." *Id.* at 1198. The tension between *Presbyterian Church* and *Gallo Cattle* was recognized, but not resolved, in *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir.2006), where the court said:

> Under *The Presbyterian Church*, § 702's waiver is not conditioned on the APA's "agency action" requirement. Therefore, it follows that § 702's waiver cannot then be conditioned on the APA's "final agency action" requirement . . . But that is directly contrary to the holding in *Gallo Cattle* where we stated that "the APA's waiver of sovereign immunity contains several limitations," including § 704's final agency action requirement.

Id. at 809 (*citing Gallo Cattle*, 159 F.3d at 1198). Although the court in *Gros Ventre* declined to resolve the conflict between the two cases, it noted that it "saw no way to distinguish *Presbyterian Church* from *Gallo Cattle*." *Id.* at 809. Subsequent to *Presbyterian Church*, however, the Supreme Court decided *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), wherein the Court made clear that waiver of sovereign immunity under § 702 is constrained by the provisions contained in § 704. *Id.* at 882-883 ("[T]he person claiming a right to sue [under § 702] must identify some 'agency action' that affects him in the specified fashion...."). Also, the Ninth Circuit has since reiterated this proposition, holding that when a suit is brought against an agency pursuant to a waiver of sovereign immunity under the APA, the suit must challenge agency action. *Rattlesnake Coalition v. U.S. E.P.A.*, 509 F.3d 1095, 1103 (9th Cir. 2007).

II. THE § 476 CLAIM IS SUBJECT TO ARBITRARY AND CAPRICIOUS REVIEW

As set forth in our prior memorandum, under the applicable case law, where a statute creates a remedy affording judicial review of agency action, but does not establish any particular standard for the review of that action, the APA's arbitrary and capricious standard of review is to be applied. *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715, (1963); *Doraiswamy v. Secretary of*

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Labor, 555 F.2d 832, 839-40 (D.C. Cir. 1976). Plaintiffs concede, as they must, that 25 U.S.C. § 476, while affording them judicial review, does not establish a standard of review. Thus, plaintiffs try to distinguish *Carl Bianchi* and *Doraiswamy* on their facts. This argument, however, is not particularly persuasive. Plaintiffs contend that this rule does not apply here because the Secretary's actions did not involve "public fact-finding." However, the *Carlo Bianchi* rule has been widely applied to a host of statutory schemes which, as here, involve informal decisionmaking rather than "public fact finding." *See, e.g., Tribal Village of Akutan v. Hodel,* 869 F.2d 1185, 1193 (9th Cir. 1988) (ESA); *Northwest Resource Information Center v. National Marine Fisheries Service*, 56 F.3d 1060, 1066 (9th Cir. 1995) (NEPA); *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1992) (Arizona-Idaho Conservation Act); *Franklin Savings Association v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1137 (10th Cir. 1991) (FIRREA); *Avoyelles Sportsmen's League, Inc. v. Marsh,*715 F.2d 897, 904 (5th Cir. 1983) (Clean Water Act).

Without pointing to any supporting language in the statute, plaintiffs also surmise that Congress could not have contemplated anything but *de novo* review of the Secretary's actions in 25 U.S.C. § 476(d)(2). However, *Carlo Bianchi* and its progeny establish the opposite presumption where, as here, the statute is silent.[3] Indeed, when Congress wishes to take the unusual step of providing *de novo* judicial review of agency actions, it knows precisely how to word a statute to accomplish such a feat. *See, e.g.,* 18 U.S.C. § 923(f)(1)(3) ("*de novo* judicial review" of gun dealer license revocations); 5 U.S.C. §552(a)(4)(B) (in FOIA actions, courts "shall determine the matter *de novo*."); 8 U.S.C. § 1421(c) (review of denials of naturalization applications "shall be *de novo* . . ."); *and see* 7 U.S.C. § 2023(a)(15) (validity of FNS actions determined "by trial *de novo*.")

3 Plaintiffs rely heavily on the purportedly "oft-cited analysis and holding" of *Shoshone-Bannock Tribes of Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306 (D. Or. 1997), to support their position. This case, as distinguished from the one at bar, involved a statute, 25 U.S.C. § 450m–1(a), which contained unique language and a unique remedy, *i.e.*, monetary damages, for the enforcement of self-determination contracts between certain Tribes and HHS or BIA. These circumstances were crucial to the decision in *Shoshone-Bancock*, as well as the decisions of the District Courts also cited in plaintiffs' memorandum which followed it in subsequent cases. *Id.* at 1305-1306 ("Congress' use of the phrase 'civil action' in combination with 'original jurisdiction' supports *de novo* review.") Even so, the district courts have hardly achieved anything approaching unanimity on this question. Indeed, three District Courts, including the Western District of Washington, have reached precisely the opposite conclusion. *Id.* at 1314 (citing, *California Rural Indian Health Board, Inc., et al. v. Donna Shalala, et al.*, No. C-96-3526 DLJ, U.S.D.C (N.D. Cal. April 24, 1997) and *Yukon-Kuskokwim Health Corporation, Inc. v. Donna E. Shalala, etc., et al.*, No. A96-155 CV (JWS) (D. Alaska, April 15, 1997)); *and see, Suquamish Indian Tribe v. Gover*, C96-5468RJB (W.D. Wash., September 17, 1998), Dkt. ## 29, 70, p. 2, *ll.* 6-17.

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III. PLAINTIFFS DO NOT HAVE A COGNIZABLE COMMON LAW CLAIM

Plaintiffs, relying primarily on *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d. 765, 776 (7th Cir. 2011), argue that their common law claims for "breach of trust" are not subject to the final agency action requirement. Of note is that the *Michigan* case relies heavily on *Veterans for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. 2011), citing it repeatedly as support for its rationale. Indeed, if that Ninth Circuit panel opinion was still good law, plaintiffs would have a much easier time of it. However, *Veterans for Common Sense* was subsequently vacated by an *en banc* panel of the Ninth Circuit. *See, Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) (*en banc*).

Instead, the current state of the law in the Ninth Circuit is represented by *Gros Ventre Tribe v. U.S.*, 469 F.3d 801 (9th Cir. 2006), in which the Court of Appeals specifically refused to embrace the argument made by plaintiffs here, recognizing the existence of an intra-circuit conflict. *Id* at 808-810. Rather, as the *Gros Ventre* Court concluded, "because the Tribes do not have a cognizable non-APA claim, we agree with the district court that the Tribes are required to comply with the APA's "final agency action" requirement. *Id*. at 803. The Tribes in *Gros Ventre* did not have a cognizable non-APA claim because their breach of trust claim did not relate to a pervasively regulated trust resource, such as land or timber. *Gros Ventre Tribe,* 469 F.3d at 813. The same is true here, and plaintiffs make no argument to the contrary.

IV. AN INACTION CLAIM DOES NOT ENTITLE PLAINTIFFS TO DISCOVERY

In substance, plaintiffs contend, notwithstanding the allegations of the third cause of action in their operative complaint, which only concerns agency *actions*, that they are really seeking a remedy for agency *inaction*. According to plaintiffs, this "switch-in-time" entitles them to discovery.

They are incorrect. 5 U.S.C. § 706(1), does not afford them a pathway to unregulated discovery.[4] A party cannot seek an order to compel an agency to take some action in the abstract. Rather, the agency must have an enforceable legal duty to act under the circumstances presented

4 Under the APA, 5 U.S.C. § 706(2)(A) creates a judicial remedy to "hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. On the other hand, under 5 U.S.C. § 706(1), a District Court may "compel agency action unlawfully withheld or unreasonably delayed."

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before such a claim may be brought. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (federal agency may be compelled to act under the APA only if a legal duty to act exists). Thus, the relief available under 5 U.S.C. § 706(1) is equivalent to mandamus. *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir.1997). The only order available based on such a claim, is one which compels the agency to take an action it is legally required to take and which it has either failed to take or "unreasonably delayed" taking. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. at 65 (when the manner of an agency action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be). Assuming the existence of an enforceable legal obligation to act, the only legal question potentially having factual elements under 5 U.S.C. § 706(1) is whether any *delay* in acting was "unreasonable." As plaintiffs correctly point out, where there has been a failure to act, there will not be an administrative record. And when the agency's position is that, notwithstanding a legal obligation to act, it has been *delayed* in acting for justifiable reasons, a party *might* be entitled to discovery in order to test the *bona fides* of the agency's justification for its delay. That is precisely the holding of the single case cited by plaintiffs for this proposition.[5]

Here, however, there has been no delayed action by defendants. The Secretarial election concerning the proposed amendment to the Nooksack Constitution has been conducted and completed. Declaration of Joseph, ¶¶ 3-4. Thus, there is no further agency action contemplated in regards to this election, much less any delay (reasonable or unreasonable) in taking administrative action which may be compelled by plaintiffs. Moreover, the agency is fully capable of preparing and lodging a record for its approval of the amendment to the Nooksack Constitution.

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5 *See, National Law Center on Homelessness and Poverty v. U.S. Dept. of Veterans Affairs*, 842 F.Supp.2d 127 (D.D.C. 2012) ("Therefore, 'there may well be reason for discovery, since agency delay is not necessarily a discrete event resulting from a decision based upon some sort of administrative record, but may be simply ... after-the-event justifications [ ] which may need to be explored by plaintiffs.'" *Id*. at 130 (*quoting, Milanes v. Chertoff*, No. 08 Civ. 2354(LMM), 2008 WL 2073420, at *1 (S.D.N.Y. May 13, 2008)). The other cases cited by plaintiffs stand for the more general proposition that a Court may sometimes appropriately consider extrinsic evidence "when the 'processes utilized and factors considered by the decisionmaker require further explanation for effective review'" Dkt. # 30, p. 10, *l.* 15 – p. 11, *l.* 2. That may be so, but as explained earlier in this memorandum, and as established by *Public Power Council*, *supra*, 674 F.2d 791, such cases in the Ninth Circuit are the exception, not the rule, and a specific showing is required that the circumstances fit within one of the recognized exceptions. Such a showing is absent from plaintiffs' memorandum, which is a necessary consequence of the fact that an administrative record has not yet been prepared or lodged with the Court.

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CONCLUSION

For the foregoing reasons, and for those reasons stated in their original memorandum, defendants respectfully request that their motion be granted as prayed.

DATED this 31st day of January 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on January 31, 2014, I electronically filed the forgoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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I further certify that on January 31, 2014, I mailed by United States Postal Service the foregoing to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

-0-

Dated this 31st day of January 2014.

s/ Christine Leininger

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