District Judge Ronald B. Leighton

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

CHINOOK INDIAN NATION, an Indian Tribe and a Washington nonprofit corporation, and as successor-in-interest to The Lower Band of Chinook Indians; and ANTHONY A. JOHNSON, individually and in his capacity as Chairman of the Chinook Indian Nation; and CONFEDERATED LOWER CHINOOK TRIBES AND BANDS, a Washington nonprofit corporation,

Plaintiffs,

v.

RYAN K. ZINKE, in his capacity as Secretary of the U.S. Department of Interior; U.S. DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT; UNITED STATES OFAMERICA; and JOHN TAHSUDA, in his capacity as Acting Assistant Secretary - Indian Affairs,

Defendants.

CASE NO. C17-5668RBL

REPLY RE: DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Federal defendants hereby reply to the opposition to their motion to dismiss. As set forth herein, the grounds for opposition are not well taken. Accordingly, the motion should be granted.

ARGUMENT

I. CIN IS NOT ENTITLED TO A *DE NOVO* ADJUDICATION OF RECOGNITION

Plaintiffs' claim for a *de novo* judicial adjudication of the entitlement of plaintiff Chinook Indian Nation, Inc. (CIN) to recognition presents a nonjusticiable political question and fails to state a claim because of claim preclusion and the applicable statute of limitations, 28 U.S.C. § 2401(a).

i. Plaintiffs' recognition claim is barred by res judicata.

In a "Reconsidered Final Determination" (RFD) signed by Assistant Secretary-Indian Affairs (AS-IA) Neal A. McCaleb, on July 5, 2002, the Department of the Interior (Interior) determined that CIN "does not exist as an Indian tribe within the meaning of Federal law." Dkt. # 33-7, p. 67. Interior published notice of this determination in the Federal Register on July 12, 2002. Dkt. # 33-8.

Prior to bringing this lawsuit, CIN declined to seek judicial review of this final agency action under the APA. Thus, by operation of the applicable statute of limitations, 28 U.S.C. 2401(a), judicial review is now time barred, and federal defendants' determination that CIN does not exist as an Indian Tribe is final and effective.

Interior's unchallenged prior determination precludes a contrary ruling in any subsequent judicial action or administrative proceeding, including the case at bar. See *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-108 (1991) (Courts generally "favor[] application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality."); and see *B & B Hardware, Inc. v. Hargis Industries, Inc.*, ___ U.S. ___, 135 S.Ct. 1293, 1303, 191 L.Ed.2d 222 (2015); *Oyeniran v. Holder*, 672 F.3d 800, 807 (9th Cir. 2012).

Plaintiffs cannot avoid the doctrine of *res judicata* and its applicability to the case at bar simply by ignoring the issue in their opposition. Moreover, CIN's decision to forego judicial review of the adverse 2002 determination does not nullify its *res judicata* effect. See *Wehrli v. Cty. of Orange*, 175 F.3d 692, 694 (9th Cir. 1999) (preclusive effect is accorded to administrative

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proceedings "where judicial review of the administrative adjudication was available but unused"). As set forth in federal defendants' original memorandum, the 2002 decision denying CIN recognition is binding on this Court, precluding the advancement of any claim that CIN is entitled to recognition as an Indian Tribe.

ii. Plaintiffs' recognition claim is barred by the political question doctrine.

Plaintiffs contend that sovereign immunity does not present a barrier to their claim for a *de novo* adjudication for recognition. Even assuming this to be true, the political question doctrine still renders plaintiffs' claim nonjusticiable.

The relevant authorities were fully briefed in federal defendants' original memorandum and are only summarized here. "[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Court has] consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004). Because of this, the Supreme Court has long held that tribal status determinations are the province of the political branches alone. See *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866); and see *United States v. Sandoval*, 231 U.S. 28, 46 (1913); see also *Miami Nation of Indians of Indiana, Inc. v. United States Dep't of the Interior*, 255 F.3d 342, 347-349 (7th Cir. 2001).

Against the long line of authority that supports this proposition, plaintiffs offer only the List Act.[1] According to plaintiffs, the List Act, while on its face appearing to have only the relatively modest objective of requiring Interior to maintain and publish an annually updated list of Tribes whose existence the United States recognizes, was actually intended by Congress to sweep aside all pre-1994 jurisdictional barriers, including the political question doctrine, imbue the federal courts with the power to adjudicate *de novo* the right of a group to be recognized as an Indian tribe, compel the United States to enter into a government-to-government relationship with the otherwise unrecognized Indian group, and afford the group all the privileges and immunities that Indian tribes enjoy as a matter of law.[2]

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1 "Federally Recognized Indian Tribe List Act of 1994," Pub.L. 103-454, 108 Stat. 4791.

2 Plaintiffs' argument rests upon a single clause in the congressional findings supporting the enactment:

The Congress finds that:

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This argument proves far too much. First, nothing in the statute evinces any congressional intent to relinquish some portion of its plenary authority in this area to the judiciary. Nor do plaintiffs point to any relevant legislative history reflecting such an intent. Moreover, no "intelligible principles" are articulated in the statute directing the judiciary in how to exercise such a power. See *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (discussing the nondelegation doctrine). Specifically, the List Act contains no manageable standards for determining which groups seeking recognition should achieve that status and which groups should be denied that status. Indeed, the only change in the law made by the relevant section of the List Act is simply to require federal defendants to "publish in the Federal Register a list of all Indian tribes which the Secretary recognizes . . ." 25 U.S.C. § 5131(a). Surely if Congress intended the List Act to overturn the well-settled law in this area, something in the statute or its legislative history would so indicate.

Not surprisingly, plaintiffs do not point to a single case that supports their argument. Indeed, the notion that the political question doctrine was swept aside by this single offhanded reference in the findings of the List Act was persuasively debunked in *Shinnecock Indian Nation v. Kempthorne*, 2008 WL 4455599 (E.D.N.Y. 2008):

> As a threshold matter, the Court recognizes that, "[n]ormally, congressional findings are entitled to much deference. *Thompson v. Colorado*, 278 F.3d 1020, 1033 (10th Cir. 2001), *cert. denied*, 2002 U.S. LEXIS 3597 (May 20, 2002) (citing *Walters v. Nat'l Ass'n of Radiation Survivor*s, 473 U.S. 305, 330 n. 12 (1985)). However, as courts routinely note, a Congressional finding does "not create a substantive right." *J.P. v. County Sch. Bd. of Hanover County, VA*, 447 F.Supp.2d 553, 573 (E.D. Va. 2006); *see, e.g.*, *Pennhurst v. Halderman*, 451 U.S. 1, 19 (1981) (explaining that a Congressional finding "is too thin a reed to support the rights and obligations read into it by the court below"). Here, plaintiff urges the Court to determine that Congress intended to create a significant substantive right-namely, the right to obtain federal tribal status through the federal courts in the absence of a final agency determination under the APA-but failed to include language referring to that right in the primary text of the statute itself. The Court will not read such a significant, affirmative right into a statute, the actual language of which makes no reference to cloaking the judiciary with the co-equal role of the political branches in the federal recognition process.

Id. at **14-19.

Lastly, plaintiffs' proffered construction of the List Act would require this Court to regard as

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> (3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" *or by a decision of a United States court*;

Pub.L. 103-454, § 103 (emphasis added).

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overturned *sub silentio* at least four Supreme Court cases holding as "settled law" that tribal recognition is a political question and beyond the adjudicatory power of the federal courts. See *Sandoval* at 46-47 (and cases cited). Against this argument, however, is the rule that federal courts are not free to determine for themselves whether existing Supreme Court precedent remains "good law" in light of subsequent developments. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989); and see *Newman v. Wengler*, 790 F.3d 876, 880 (9th Cir. 2015) (refusing to disregard Supreme Court precedent in the wake of a later statutory enactment because "we do not engage in anticipatory overruling of Supreme Court precedent."). Plaintiffs' contention that the political question doctrine does not bar their claim should be rejected.

iii. Plaintiffs' recognition claim is time barred.

As is undisputed, federal defendants published notice in the Federal Register on July 12, 2002 of Interior's reconsidered final determination upon CIN's petition that CIN "does not exist as an Indian tribe within the meaning of Federal law." Dkt. # 33-8. Plaintiffs are chargeable with knowledgeable from that date forward, if not earlier, of the existence of a claim for recognition against the United States, whether asserted *de novo* or as an appeal from a final agency action *via* the APA. *Shiny Rock Min. Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990) (publication in the Federal Register is legally sufficient notice for purposes of 28 U.S.C. § 2401(a)). Plaintiffs asserted no claim for recognition against the United States in the ensuing six years. Accordingly, the statute of limitations has run on both claims and, consequently, plaintiffs have not stated a claim upon which relief may be granted. See *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 191 (D.D.C. 2011), *aff'd*., 708 F.3d 209 (D.C. Cir. 2013). Plaintiffs' opposition offers no argument to the contrary.

II. A NEW PETITION WILL NOT YIELD A DIFFERENT OUTCOME

As set forth in our original memorandum, federal defendants' challenge to plaintiffs' standing to assert their second through fifth claims requires plaintiffs to show factually that if they are allowed to re-petition a substantial likelihood exists that the outcome will be different from the conclusion reached in 2002 on their original petition for recognition. See *Loritz v. U.S. Court of Appeals for Ninth Circuit*, 382 F.3d 990, 992 (9th Cir. 2004). But, as Interior's 2002 RFD carefully

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and comprehensively demonstrated based upon the record of historical evidence developed for its consideration of CIN's petition, the present day CIN is not the legal successor of the historical Chinook Tribe. Nothing in plaintiffs' opposition shows any likelihood that, if CIN is allowed to re-petition under the 2015 version of the Part 83 regulations, the outcome will be any different.

i. The 2015 Final Rule provision on previously accepted evidence

Plaintiffs assert (incorrectly) that Interior's motion ignored the 2015 Final Rule's new provision at 25 C.F.R. § 83.10(a)(4) (2015) providing that evidence or a methodology found sufficient to satisfy a criterion in a previous decision is sufficient to satisfy a criterion for future petitioners. However, as explained in the Preamble to the Final Rule, this provision merely codified Interior's longstanding practice of treating previously accepted evidence/methodology as accepted for all subsequent petitions. Interior did so in order to "address assertions of arbitrariness and ensure consistency," 80 Fed. Reg. 37862, 37863 (July 1, 2015), *i.e.*, to preempt arguments that standards are applied inconsistently across petitioners. Plaintiffs are simply incorrect in their assertion that 25 C.F.R. § 83.10(a)(4) (2015) fundamentally changed the Part 83 process, lowered the relevant regulatory standards in their favor, or otherwise created any avenue for a different outcome on a second petition.

Plaintiffs assert that if allowed to re-petition, they would be entitled to a finding that the 1971 Chinook ICC judgment is *prima facie* evidence of plaintiffs' previous acknowledgment as of that date in 1971. According to plaintiffs, this is because the Jamestown S'Klallam Tribe was deemed previously acknowledged based upon the statutory claims judgment it received in 1925 and, thus, plaintiffs must be equally acknowledged as of 1971 per 25 C.F.R. § 83.10(a)(4), above.

Plaintiffs' argument overlooks some acute differences between the history of the Jamestown S'Klallam Tribe and CIN. First, as distinguished from CIN in regard to the 1971 ICC judgment, the Jamestown S'Klallam petitioner was the same entity that received a claims award in 1925. See, *e.g.*, Report on the History of the Jamestown S'Klallam Band of Indians at 5-7.[3]

3 See Supplemental Declaration of Brian C. Kipnis, ¶ 3, Exh. J (Proposed finding for Federal acknowledgment of the Jamestown Band of Clallam Indians) at pp. 55-57 of 84 ("The group that played a large role in the 1926 claims payment was the informal governing body of the Jamestown Clallam Tribe during the 1920's and 1930's. The group had no formal constitution, but it did have a chairman and a secretary, as well as a group of men prominent in tribal affairs.").

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Also, plaintiffs' advance the false proposition that the 1925 claims settlement alone was the reason the Jamestown S'Klallam Tribe obtained recognition. The record demonstrates the contrary. The proposed finding notes that "[t]he Clallam Tribe has been identified as Indian and the Jamestown community as a specific Indian community from historical times until the present on a substantially continuous basis until the present *by several sources*." Supp. Dec. of Kipnis, ¶ 3, Exh. J at p. 2 of 84 (emphasis added). The 1925 claims settlement is just one of the many pieces of evidence of continuous existence for the relevant era cited in the supporting "Anthropological Report on the Jamestown Clallam." See *id*. pp. 10-13 (pp. 15-18 of 84).

Third, and related to the above, plaintiffs' argument gives the wholly false impression that in regards to the Jamestown S'Klallam petition, federal defendants applied a rule which contemplates that evidence of claims activity dispositively satisfies some aspect of a petitioner's burden under Part 83. In fact, the original Final Determination on CIN's petition was reconsidered in substantial measure because of the conclusion that the application of such a rule represented a significant departure from past administrative practice. See generally Dkt. # 33-7, pp. 44-56. No different rule was applied by federal defendants in the case of the Jamestown S'Klallam petition. That said, claim activities were fully discussed in the CIN RFD and, as distinguished from the Jamestown S'Klallam Petition, the evidence in the record was found to be largely unhelpful to CIN in carrying its burden on any aspect of its required showing under Part 83. *Id*. at pp. 50-52.

ii. The 2015 Final Rule provision concerning boarding school evidence

Plaintiffs point to new 25 C.F.R. § 83.11(b)(1)(x), which allows a petitioner to offer evidence that "[c]hildren of members from a geographic area were placed in Indian boarding schools or other Indian educational institutions . . ." in support of the "community" criterion of 25 C.F.R. § 83.11(b). Plaintiffs contend that because they alleged in their complaint that CIN children were sent to the Indian boarding school at Chemawa, they satisfy the community criterion. However, while codified in the 2015 regulations, this is not a substantive change in the Part 83 regulations because, as noted in the Preamble to the 2015 Final Rule, attendance of a petitioner's children in a BIA boarding

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The Court may and is requested to take judicial notice of this public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

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school has always been accepted as evidence in support of meeting Part 83's mandatory "community" requirements. 83 Fed. Reg. at 37,871. Moreover, the existence of such evidence, while supportive of meeting the burden of proof for the community criterion, is not sufficient by itself. See *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 193-194 (D.D.C. 2011), *aff'd*, 708 F.3d 209 (D.C. Cir. 2013). And plaintiffs ignore that federal defendants specifically addressed CIN's evidence concerning Chemawa boarding school attendance in the RFD but determined that CIN's evidence *in toto* was not sufficient to meet Part 83's community requirements. Dkt. # 33-7, pp. 125-128. Thus, plaintiffs also have failed to show any reason why this technical change in the Part 83 regulations would likely result in any different outcome if CIN was allowed to re-petition.

iii. The 2015 Final Rule provision concerning political influence

The 2015 regulations added the following items to the non-exclusive list of examples of evidence weighing in favor of a finding of political influence under 25 C.F.R. § 83.11(c) (2015):

- 25 C.F.R. § 83.11(c)(1)(vi): The government of a federally recognized Indian tribe has a significant relationship with the leaders or the governing body of the petitioner.
- 25 C.F.R. § 83.11(c)(1)(vii): Land set aside by a State for petitioner, or collective ancestors of the petitioner, that is actively used for that time period.
- 25 C.F.R. § 83.11(c)(1)(viii): There is a continuous line of entity leaders and a means of selection or acquiescence by a significant number of the entity's members.

These items represent no substantive change in the Part 83 regulation. Such evidence was not precluded by the 1994 regulations. The 2015 regulations only added additional examples of evidence that could be proffered to satisfy the requirement. Thus, it is only fair to wonder why, if CIN could have put forward such evidence in support of its original petition, it failed to do so.

The only "evidence" offered by plaintiffs in support of their contention that CIN would be able to meet the political influence criterion in a new petition under the 2015 regulations, despite its inability to do so under the 1994 regulations, is set forth in Paragraph 3 of the Declaration of plaintiff Anthony Johnson, dkt. # 38. Insofar as plaintiff Johnson purports to testify about matters outside his personal knowledge, federal defendants object to this declaration. Plaintiff Johnson purports to give lay testimony (in the most conclusory of terms) about events which occurred in 1851, 1899 and 1970 without laying any foundation that he was in any position to have personal

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knowledge about the events to which he is testifying, and the Court may take judicial notice of the impossibility that plaintiff Johnson has personal knowledge of events occurring in 1853 or 1899. Thus, plaintiff Johnson's testimony about such events should be disregarded as lacking in foundation. See *Lujan v. Cabana Mgmt., Inc.*, 284 F.R.D. 50, 77 (E.D.N.Y. 2012) (lay witness testimony must be "rooted in personal perception.")

In any event, nothing in plaintiff Johnson's declaration reflects that plaintiffs have any new evidence to bring to the fore under the 2015 regulations to meet the political influence criterion. With respect to "land set aside . . . for petitioner," plaintiff Johnson's declaration lacks any evidence of such a set aside for CIN. As to the other two examples, plaintiff Johnson offers only the bare assertion that "[t]he Chinook leaders, including me, have had, and continue to have, important relationships with the Quinault and Grande Ronde Tribes and other neighboring Indian tribes." Dkt. # 38, ¶ 3. He offers further that "[t]here has been a continuous line of Chinook leaders and a means of selection or acquiescence by a significant number of Chinook dating back to at least 1899." *Id*. In other words, plaintiffs apparently propose to satisfy the requirement, and prove that they have "important relationships" with other tribes, and that the continuous line of entity leaders was chosen by "a significant number" of a petitioner's members, simply by having plaintiff Johnson restate the wording of the example as an affirmative proposition, despite his demonstrable lack of personal knowledge for much of the relevant period of time, and without pointing to any new competent evidence which might change the outcome given that CIN failed in its effort to sufficiently make this showing in its original petition. In summary, nothing suggests that plaintiffs would, or could, offer any new evidence in support of 25 C.F.R. § 83.11(c)(1)(vi)-(vii) if allowed to re-petition.[4]

III. THERE IS NO CASE OR CONTROVERSY ASSOCIATED WITH PLAINTIFFS' CLAIM FOR AN ADJUDICATION OF THEIR RIGHT TO FUNDS HELD IN TRUST FOR THE LOWER BAND OF CHINOOK AND CLATSOP INDIANS

Federal defendants have moved to dismiss plaintiffs' sixth, seventh and eighth claims for

4 As an alternative argument that CIN meets the political influence criterion of 25 C.F.R. § 83.11(c), plaintiffs assert that "[a]ctions by a petitioner's leaders with regard to attorney contracts, claims filings, and other court cases may provide evidence of political influence/authority" for the purposes of 83.11(c)'s political influence requirements. However, plaintiffs ignore that CIN already presented its evidence of CIN's claims activity and interactions with attorneys in its original petition. Federal defendants evaluated this evidence in reaching their conclusion that CIN did not satisfy Part 83's political influence requirement. Dkt. # 33-7, pp. 77-78, 125-128.

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relief for lack of subject matter jurisdiction under Rule 12(b)(1), F.R.Civ.P., which are based on allegations that federal defendants have taken trust funds which belong to them. "When subject matter jurisdiction is challenged under [Rule] 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cty.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). No presumption of truthfulness applies to the allegations of a plaintiff's complaint when evaluating the merits of jurisdictional claims. *Thornhill Pub. Co. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). In essence, when a defendant disputes the existence of subject matter jurisdiction, the law places a burden on the plaintiff to prove that jurisdiction exists before a claim can go forward.

Federal defendants have made a factual challenge to plaintiffs' assertion that the Court possesses subject matter jurisdiction in regard to their allegation that the Government has unconstitutionally "forfeited" their money. In contrast to the overblown allegations in plaintiffs' complaint, federal defendants established through the sworn declaration of Catherine E. Rugen, dkt. # 34, that no forfeiture has occurred *as to anyone*. Instead, the funds are being held in trust for the rightful beneficiaries of those funds, lawful descendants of the Lower Band of Chinook and Clatsop Indians, in whose favor the judgment was entered. *Id*. at ¶ 3.

Where, as here, a factual challenge to jurisdiction is made, a plaintiff cannot rest on the allegations of his or her complaint but must instead present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Although declarations were submitted by plaintiffs in response to this motion, none contradicts Ms. Rugen's testimony. Indeed, at various points, plaintiffs' opposition actually supports Ms. Rugen's testimony and directly contradicts the allegations of their own complaint. See, *e.g.*, dkt. # 37 at p. 12, *ll.* 3-6 ("The funds recovered, which now amount to more than $500,000, are held by BIA in trust . . .")

Thus, the uncontroverted evidence shows that, in regards to the funds in question, the United States has *not* taken property and converted it to its own use, but is instead lawfully holding those funds in trust in a fiduciary capacity for the rightful claimants. Consequently, the real question presented for possible determination by plaintiffs' claim does not concern an unconstitutional

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"forfeiture" at all. Rather, the question is whether plaintiffs, Washington corporations and a corporate officer, have some legal right to the funds in question and have been unlawfully denied those rights by federal defendants. In turn, because CIN has been legally determined *not* to be a recognized Indian tribe, the resolution of the first question depends upon it being established, through an administrative adjudication or by other means, that plaintiffs otherwise have a sufficient lawful connection to the original beneficiaries of the judgment, either as descendants or lawful representatives, which allows them to exercise any rights *vis a vis* the funds.

The jurisdictional problem for plaintiffs, whether expressed in terms of finality or the closely related concept of ripeness, is that the uncontroverted facts presented to the Court demonstrate that, for purposes of the APA, there has been no "final agency action" and, for purposes of Article III of the Constitution, there is no present case or controversy. Thus, before plaintiffs can invoke this Court's subject matter jurisdiction to adjudicate a claim that they have been wrongfully deprived of their money by federal defendants, they have to make a satisfactory evidentiary showing that there has indeed been some sort of "taking." In other words, plaintiffs must demonstrate that federal defendants took *some* action to refuse or deny them access to the trust funds in question. From a jurisdictional perspective, the problem for plaintiffs is that the uncontroverted facts before the Court show there has been no such denial or refusal. Indeed, those undisputed facts show that plaintiffs have not even made a request for access to those funds.

As Ms. Rugen testified, and plaintiffs have not denied, plaintiffs only requested an explanation from Interior as to why they were no longer being sent account statements for the trust funds in question. Dkt. # 36, ¶ 4. And the only "action" federal defendant have taken is, as requested, to provide them with an explanation. *Id*. at ¶¶, 5-6. As Ms. Rugen testified, she was not asked to make a determination as to plaintiffs' legal right to access the trust funds nor did she make such a determination. *Id*. at 7. Indeed, as she further testified, if such a request had been made, she would be forced to decline the request because she lacked the authority to make such a determination. *Id.*[5]

5 It was further noted by Mr. Rugen that a formal administrative process exists through which a party claiming a legal right may make a request to withdraw Indian trust funds. *Id*. at ¶ 8. Plaintiffs have not made such a request. *Id*.

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Placed in its proper context, Ms. Rugen's letter was simply attempting to explain that, because the United States does not recognize CIN as the existing embodiment of the historical Chinook Tribe, it has no presumptive rights *vis a vis* the funds awarded to and set aside for the Lower Band of Chinook and Clatsop Indians. Mr. Rugen's explanation is entirely consistent with federal defendants' fiduciary responsibilities. While a right of access to the funds might be present in the case of formal recognition of CIN as the existing embodiment of the historical Chinook Tribe, here the opposite situation is present because CIN has been affirmatively determined *not* to have that status. Thus, plaintiffs stand in the same shoes as any other person or entity seeking to gain access to the funds. A legal entitlement to such access must first be shown.

That is not to say, however, that plaintiffs, although not recognized, could never establish by other means, *e.g.,* a sufficient ancestral connection to the original beneficiaries or a representational right based on something other than recognition, a legal right of access. See generally, 25 C.F.R. Part 87. As plaintiffs correctly point out, the judgment funds were awarded and set aside for the Lower Band of Chinook and Clatsop Indians. But, as the unconstested facts show, plaintiffs have not requested a determination of their rights to access the funds in question as a non-recognized entity through the administrative process that has been established for that purpose and, consequently, federal defendants have made no determination concerning their rights, final or otherwise. Thus, their APA claim is jurisdictionally defective and should be dismissed because of the absence of any final agency action. See, *Havasupai Tribe v. Provencio*, 876 F.3d 1242, 1248 (9th Cir. 2017) ("'[F]inal agency action' is a jurisdictional requirement imposed by [5 U.S.C. § 704].") (internal citations omitted).

While apparently conceding that their "arbitrary and capricious" claim is jurisdictionally defective, plaintiffs nevertheless contend that their due process claims survive federal defendants' motion to dismiss because jurisdiction over them is not dependent upon "final agency action."[6] But plaintiffs must still demonstrate the existence of a live "case or controversy." *Munns v. Kerry*,

6 A recently published Ninth Circuit case lends some support to that position, and while the rationale of the case is doctrinally troubling, it appears to represent, for now, the law of the Circuit. See *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1167-1173 (9th Cir. 2017).

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782 F.3d 402, 409 (9th Cir. 2015). A justiciable case or controversy does not include any dispute of a hypothetical or abstract character. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). Rather, the controversy must be "definite and concrete," that is, "a real and substantial controversy admitting of specific relief through a decree of a conclusive character. . ." *Id.* at 241.

Plaintiffs have entirely failed to carry their burden of establishing that a live case or controversy exists. Their constitutional claims are purely hypothetical as they depend on the truth of fundamental allegations that are proven to be false by the only relevant evidence before the Court. As the undisputed facts show, the judgment funds awarded to the Lower Band of Chinook and Clatsop Indians by the ICC have not been "forfeited" to the United States but have been held and maintained in a trust account for the rightful beneficiaries of those funds by federal defendants.[7] More importantly for purposes of this motion, plaintiffs have failed to show that any existing case or controversy exists between them and federal defendants as to any presumed violation of constitutional due process because, as is not disputed, plaintiffs have never sought to be heard in regard to their right to access the trust funds in question, much less have they shown that federal defendants have actually denied them access to those funds. Clearly, a mere explanation does not rise to the level of a constitutional deprivation.[8]

Plaintiffs sixth through eighth claims for relief seek a legal opinion from this Court based upon a dispute which, at present, is purely hypothetical. Such a claim is not jurisdictionally cognizable under Article III of the Constitution.

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7 The absence of a deprivation of property puts into serious question the viability of plaintiffs' due process claims. See *Association New Jersey Rifle & Pistol Clubs v. Governor of New Jersey*, 707 F.3d 238, 241 (3rd Cir. 2013) (due process violation requires a deprivation of life, liberty or property); and see *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 228 (1985) (Powell, J., concurring) (only fundamental property interests are protected by substantive due process).

8 Plaintiffs' contention that resort to administrative processes would be futile is wholly unsupported. For the futility exception to apply, it is necessary to show that the agency's position on the question at issue "appears already set," and it is "very likely" what the result of recourse to administrative remedies would be. *El Rescate Legal Serv. v. EOIR*, 959 F.2d 742 (9th Cir.1992). Plaintiffs themselves assert that their claim of right should not, and does not, depend upon Part 83 recognition. See dkt. # 37, p. 28, *ll.* 1-2 ("Plainly, a claimant need not have been a recognized tribe to be entitled to present a claim.") Nothing plaintiffs have pointed to shows that federal defendants have an "already set" position on the question of plaintiffs' legal entitlement through proof of other ties to the funds. An informal letter explaining why the agency stopped sending plaintiff Johnson account statements can hardly be confused with a final and effective determination of plaintiffs' legal status *vis a vis* the trust funds. See generally, 25 C.F.R. Part 87.

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CONCLUSION

For the foregoing reasons, and for those reasons stated in their principal memorandum, defendants Ryan K. Zinke, the U.S. Department of the Interior, and John Tahsuda, respectfully request that their motion be granted and the action be dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

DATED this 8th day of February 2018.

Respectfully submitted,

ANNETTE L. HAYES
United States Attorney

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he 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 February 8, 2018, I electronically filed the foregoing documents 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):

Confederated Lower Chinook Tribes and Bands ttienson@landye-bennett.com

James S. Coon jcoon@tcnf.legal

Thane Walker Tienson ttienson@landye-bennett.com

I further certify that on February 8, 2018, I mailed by United States Postal Service the Notice of Appearance to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

-0-

DATED this 8th day of February, 2018.

s/ Marciano Quinonez
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