Judge 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.

DAVID BERNHARDT, in his capacity as Secretary of the U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT; UNITED STATES OFAMERICA; and TARA KATUK MAC LEAN SWEENEY, in her capacity as Assistant Secretary – Indian Affairs,

Defendants.

CASE NO. C17-5668-RBL

NOTICE OF MOTION AND DEFENDANTS' MOTION FOR RECONSIDERATION RE: ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT ON CLAIMS II-V

(Note on Motion Calendar for: January 24, 2020)

Defendants David Bernhardt, the U.S. Department of the Interior, and Tara Katuk Mac Lean Sweeney, through their attorneys, Brian T. Moran, United States Attorney, and Brian C. Kipnis, Assistant United States Attorney, for the Western District of Washington, hereby move this Court pursuant to LCR 7(h) of the Local Rules of the United States District Court for the Western District

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of Washington for an order reconsidering its January 10, 2020 Order on Cross-Motions for Summary Judgment on Claims II-V (Dkt. # 112) insofar as the order dismisses CIN's claims under the Fifth Amendment's Due Process Clause (Claim III) and the First Amendment's Petition Clause (Claim V) without prejudice. As set forth below, it was manifest error not to dismiss those claims with prejudice, as requested by defendants' motion for partial summary judgment.

DATED this 24th day of January 2020.

Respectfully submitted,

BRIAN T. MORAN
United States Attorney

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The underlying facts of this lawsuit are by now well-known to the Court. Insofar as directly relevant to this motion, CIN's amended complaint challenged the validity of the Department's decision not to adopt a proposed regulation that would have permitted limited re-petitioning by Indian groups such as CIN who previously petitioned the Department for recognition but who had their petition denied by a final order of the Department.[1] CIN alleged that the decision was (1) an arbitrary and capricious final agency action within the meaning of the APA (Claim II); (2) violative of its due process rights under the Fifth Amendment (Claim III); (3) violative of its equal protection rights under the Fifth Amendment (Claim IV); and (4) violative of its right to petition the Government under the First Amendment (Claim V). Dkt. 24, ¶¶ 161-191.

On September 13, 2019, the Department filed a motion for partial summary judgment contesting each of the four claims described above and requesting judgment on those claims as a matter of law. Dkt. # 93.

While CIN opposed the Department's motion for summary judgment on Claims II (APA) and IV (equal protection), CIN conceded that Claim III (due process) and Claim V (right to petition) were without merit. Dkt. # 97, p. 23 *ll*. 15-17 ("Plaintiffs concede that they have no present ability to challenge the re-petitioning ban as a violation of their First Amended right to Petition for Redress, or to challenge their earlier denial now on Due Process grounds.").

Given, this concession, the Court dismissed CIN's Claim III, and Claim V. Dkt. 112 at fn 3. However, these dismissals were made without prejudice, *i.e.*, not on the merits. *Id.*

The Department moved for judgment on the merits on Claims III and V pursuant to Rule 56, F.R.Civ.P., and although obligated by that rule to provide legal or factual reasons why the motion should not be granted as requested, CIN chose not to oppose the Department's motion as to those claims. Because CIN provided no argument that the Department was not entitled to judgment on the

1 Hereafter, plaintiffs will be collectively referred to as "CIN," and defendants will be collectively referred to as "the Department."

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merits on Claims III and V, the Court should have ordered that the Department was entitled to judgment on the merits of those claims.

ARGUMENT

I. THE COURT ERRED IN DISMISSING CIN'S CLAIMS III AND V "WITHOUT PREJUDICE" BECAUSE A MOTION FOR SUMMARY JUDGMENT IS NECESSARILY GRANTED WITH PREJUDICE

CIN's Claims III and V were alleged against the Department by the amended complaint and those claims were joined for adjudication by the Department's answer denying those claims. CIN never withdrew or otherwise sought to dismiss those claims at any time before the filing of the Department's motion for summary judgment in which the Department requested an order granting it judgment on the merits. Indeed, as late as November 20, 2019, in their so-called cross-motion for summary judgment, CIN was still asking the Court to enter judgment in its favor on those claims. See Dkt. # 101, p. 18, *ll.* 2-4.

Because the Department's summary judgment motion sought to have those claims adjudicated on the merits, and CIN provided no reason why the Department's motion should not have been granted as requested, the Court should have dismissed those claims with prejudice.

The point was succinctly made in *Rivera v. PNS Stores, Inc.*, 647 F.3d 188, 194 (5th Cir. 2011):

> Here, the change to the judgment targeted a clerical mistake. Inadvertently designating a dismissal as being "without prejudice" instead of "with prejudice" is the type of rote, typographical error of transcription that could be committed by a law clerk or a judicial assistant. It is not an error of judgment or legal reasoning, as no chain of legal reasoning could possibly lead a court to conclude that summary judgment should be granted without prejudice. Indeed, the very concept of granting summary judgment without prejudice is internally incoherent:
>
> > "Without prejudice" indicates that the suit is dismissed without a decision on the merits and is not conclusive of the rights of the parties. Summary judgment, on the other hand, is the procedural equivalent of a trial and is an adjudication of the claim on the merits. Thus, to grant summary judgment without prejudice is to say that although there has been an adjudication on the merits, it is not conclusive as to the rights of the parties.... [This] is logically inconsistent.
>
> Rule 60(a) authorizes a district court to modify a judgment so that the judgment reflects the " 'necessary implications of the court's decision,' "and a motion for summary judgment "is necessarily granted with prejudice."

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Id. at 194-195 (footnotes omitted)[2], and see *Voight v. HAL Nederland, N.V.*, No. C17-1360 MJP, 2018 WL 4583903, at *2 (W.D. Wash. Sept. 25, 2018) ("Summary judgment is the time to 'fish or cut bait' – come forward with the evidence to support the claim/defense, or abandon it. And if summary judgment is to be granted, the Court has no option but to dismiss with prejudice.").

Here, because the Department moved for judgment on the merits of Claims III and V of the amended complaint and provided good and sufficient reasons why judgment in its favor should be granted, and CIN, although under an obligation to do so, offered no defense to the Department's motion as to those claims, it was error for the Court to dismiss CIN's claims III and V "without prejudice." The Court should reconsider its order, and dismiss Claims III and V of the amended complaint with prejudice.

2 In support of its holding that "a motion for summary judgment is necessarily granted with prejudice," the Court cited *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 722 (5th Cir.1990), *Tuley v. Heyd*, 482 F.2d 590, 594 n. 2 (5th Cir.1973) ("[A] summary judgment is always 'with prejudice.' It 'is on the merits and purports to have a res judicata effect on any later action.' " (quoting 10 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2713 (1973))., and *Wheeler v. Hurdman*, 825 F.2d 257, 259 n. 5 (10th Cir.1987) ("A grant of summary judgment resolves the issue on the merits and thus is with prejudice.").

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CONCLUSION

For the foregoing reasons, defendants David Bernhardt, the U.S. Department of the Interior, and Tara Katuk Mac Lean Sweeney, hereby request that the Court grant this motion and enter an order reconsidering its January 10, 2020 order (Dkt. # 112) insofar as it orders that CIN's Claim III and Claim V should be dismissed without prejudice, and ordering that those claims are dismissed with prejudice.

DATED this 24th day of January 2020.

Respectfully submitted,

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