Judge Pechman

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

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 Interior; U.S. DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT; UNITED STATES OF AMERICA; and TARA KATUK MAC LEAN SWEENEY, in her capacity as Assistant Secretary – Indian Affairs,

Defendants.

CASE NO. C17-5668MJP

NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIMS VII AND VIII OR, IN THE ALTERNATIVE, TO STAY OR DISMISS PROCEEDINGS PURSUANT TO THE DOCTRINE OF PRIMARY JURISDICTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

(Note on Motion Calendar for:
Friday, November 27, 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, pursuant to

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

Rule 56, Fed.R.Civ.P., for an order granting them partial summary judgment on Claims VII and VIII of the amended complaint. In the alternative, defendants move for an order dismissing or staying the action pursuant to the Primary Jurisdiction Doctrine.

This motion is made and based on the pleadings and paper filed herein, and such oral argument as the Court may entertain.

DATED this 5th day of November 2020.

Respectfully submitted,

BRIAN T. MORAN
United States Attorney

/s/ Brian C. Kipnis
BRIAN C. KIPNIS
Assistant United States Attorney
Office of the United States Attorney
5220 United States Courthouse
700 Stewart Street
Seattle, Washington 98101-1271
Phone: 206-553-7970
Email: brian.kipnis@usdoj.gov

Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

1. Prior Proceedings.

Plaintiff "Chinook Indian Nation" (CIN), a purely fictitious name for (apparently) a group that does not exist as a legal entity[1], plaintiff Confederated Lower Chinook Tribes and Bands, Inc., a Washington non-profit corporation, and plaintiff Anthony A. Johnson, individually, and as "Chairman" of the group, filed this lawsuit requesting the following relief against the U.S. Department of the Interior, the Bureau of Indian Affairs, and various officers thereof (hereafter collectively "the Department"): (1) to have CIN judicially declared to be a federally recognized Indian Tribe; (2) to set aside an amendment to a U.S. Department of the Interior regulation pertaining to relitigations of previously unsuccessful administrative petitions for acknowledgement[2]; and (3) to set aside a decision of the Department to deny Indian groups, such as CIN, "access" to account statements pertaining to accounts held in trust for third parties, including, in CIN's case, an account consisting of the proceeds of a judgment awarded in 1970 by the Indian Claims Commission (ICC) to "The Lower Band of Chinook and Clatsop Indians."[3]

Following three separate rounds of briefing on dispositive motions, this Court adjudicated the legal merits of each of the eight claims for relief alleged in Plaintiffs' First Amended Complaint, including the two that are the subject of this motion. The Court's disposition of those claims is reflected in four separate orders, dkt. # 45 (Claim for Relief I), dkt. ##112, 118 (Claims for Relief II-

1 See Exhibit A, Plaintiffs' Response to Defendants' First Set of Requests for Admission, Response to Request for Admission No. 1 (admitting that "Chinook Indian Nation has not been incorporated in the State of Washington, or by any other State, as a nonprofit corporation, or any other class or type of business entity").

2 A petition requesting acknowledgement of CIN as an Indian Tribe was denied by the Department of the Interior in 2002, 67 Fed. Reg. 46204 (July 12, 2002). This final agency action was never legally challenged and the six-year statute of limitations applicable to such a challenge, 28 U.S.C. § 2401(a), expired long before the filing of this lawsuit.

3 Although plaintiffs have regularly represented in this lawsuit that the funds in the account "belong" to them, no proven connection exists between CIN and the Lower Band of Chinook and Clatsop Indians. *See* Dkt. # 113, p. 17, *ll.* 4-9 ("[T]here is no evidence that CIN in particular has a legitimate property interest in the funds.") It should be noted as well that there are others besides CIN who claim to have an interest in this account. *See* footnote 13, *infra*.

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(206)-553-7970

V), and dkt. # 113 (Claims for Relief VI-VIII).

In the last round of briefing, while plaintiffs' request for partial summary judgment on Claim VI was granted in part, their request for partial summary judgment on Claims VII and VIII was denied. Dkt. # 113. By the instant motion, defendants now move for partial summary judgment on Claims VII and VIII.

2. Plaintiffs' Trust Fund Claims (Claims for Relief VI-VIII)

As noted above, all of the claims alleged by plaintiffs' first amended complaint have been adjudicated on the merits except the two constitutional claims, Claims for Relief VII-VIII (collectively, "the constitutional claims"), that are the subject of this motion. Plaintiffs' Claims for Relief VI-VIII (collectively, "the trust fund claims") of which the constitutional claims are a part, concern an account containing the proceeds of a judgment entered in 1970 by the Indian Claims Commission in favor of the "Lower Band of Chinook and Clatsop Indians," which the Department continues to hold in trust for the benefit of the judgment beneficiaries and their lineal descendants.

Despite some frankly irresponsible allegations in their amended complaint averring that the Department denied plaintiffs "access" to these funds, and that they somehow suffered a "forfeiture" at the hands of the Department, plaintiffs now admit that the funds are, and have been, continuously maintained by the Department in a trust account for the judgment beneficiaries and their lineal descendants, that defendants have taken no action to deprive plaintiffs of any right, title or interest that they may have in those funds, and that plaintiffs haven't suffered any "forfeiture" because of any action taken by the Department within the six years preceding the filing of this lawsuit.[4]

As required by statute, the access of any party to these funds depends upon a prior distribution determination by the Department pursuant to 25 U.S.C. §§ 1401, *et seq.*, and a

4 See Exhibit A, Plaintiffs' Response to Defendants' First Set of Requests for Admission, Responses to Request for Admission Nos. 3-6, 8. In an effort to establish an adverse action, plaintiffs previously relied on a letter signed by former Department of the Interior Trust Administrator Catherine Rugen, but this Court concluded that the Rugen letter was not an adverse final agency action of the Department. Dkt. # 113, p. 11, *ll.* 5-6 ("DOI is correct that Rugen's letter did not constitute a final action regarding CIN's beneficiary status and ultimate right to the funds.") This ruling is now the law of the case. *See* footnote 19, *infra.*

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(206)-553-7970

distribution of the funds must follow a plan developed by the Department. Plaintiffs have made clear that they are not seeking in this lawsuit to compel the Department to draw up a distribution plan or to compel a distribution of the Lower Band of Chinook and Clatsop Indians trust fund. *See* Dkt. # 102, p. 3, n.4 ("Plaintiffs do not ask that the Court award them the trust funds themselves. Disbursement of funds adjudicated by the ICC requires specific Congressional appropriation.")

Thus, the catalyst for plaintiffs' assertion of their trust fund claims was not any real threat to the integrity of this account or the funds it contains, nor a denial by the Department of any right, title or interest that plaintiffs might have in relation to the funds. Rather, the impetus for plaintiffs' trust fund claims was, ostensibly, a change in policy whereby the Department decided to curtail its mailing of account statements to unrecognized Indian groups.[5] Because of this change in policy, the Department stopped mailing, and CIN stopped receiving, account statements for the trust fund maintained by the Department for the Lower Band of Chinook and Clatsop Indians. As applied to a party such as CIN, the policy holds that because there has never been any determination by the Department that CIN has any right, title or interest in the account set aside for the Lower Band of Chinook and Clatsop Indians, CIN has no entitlement or basis for receiving statements concerning the status of the account.

3. Plaintiffs' Motion for Partial Summary Judgment regarding the Trust Fund Claims

On November 26, 2019, plaintiffs moved for summary judgment on their trust fund claims, including the two constitutional claims. Dkt. # 102. This Court granted in part, and denied in part, plaintiffs' motion. The Court discerned only one relevant final agency action, *i.e.*, the Department's decision to stop sending account statements to unrecognized Indian groups. The Court concluded that the reasons for this decision were not adequately explained. Accordingly, the Court concluded that this decision was "arbitrary and capricious." Thus, the decision was set aside, and the matter was remanded back to the Department to reconsider its decision. Dkt. # 113, p. 17, *ll.* 4-9.

5 Without conceding that the "Chinook Indian Nation," may properly maintain an action in this Court given that it exists only as a fictitious name, for ease of reference the Department will refer to the "Chinook Indian Nation," or "CIN," as an "Indian group."

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Plaintiffs' motion was denied in all other respects. Specifically, the Court rejected plaintiffs' request for a judicial declaration that the "Lower Band of Chinook and Clatsop Indians" trust fund belongs to CIN. Dkt. # 113, p. 17, *ll.* 4-9. ("The judgment was awarded to "the Lower Band of Chinook and Clatsop Indians" . . . but CIN is not necessarily equivalent to that tribe or group.") Dkt. # 113, p. 17, *ll.* 4-9. As to Claims VII and VIII, which the instant motion brings back before the Court for adjudication on the merits, the Court ruled, "CIN's constitutional claims fail." *Id.* (emphasis added).[6]

4. Plaintiffs' Motion for Clarification

While at first glance, it appeared that the Court's order resolved all of the remaining issues in the lawsuit, after some weeks passed without the entry of a final judgment, plaintiffs filed a "motion for clarification" in which they asserted that the Court should conduct a trial *de novo* to resolve supposed genuine issues of material fact necessary to the adjudication of their constitutional claims. Dkt. # 119, p. 4, *ll.* 2-16. Specifically, plaintiffs asserted that they should be permitted to prove in a trial on the merits that they are "necessarily equivalent" to the Lower Band of Chinook and Clatsop Indians, the beneficiaries of the 1970 ICC judgment. *Id.* Accordingly, plaintiffs asked the Court to calendar a pretrial conference. *Id.* at p. 4, *ll.* 18-19.

Before receiving a response from defendants, the Court issued an order granting in part and denying plaintiffs' motion. Dkt. # 121. The Court clarified that it did not intend its order on plaintiffs' partial summary judgment motion concerning the constitutional claims to be an adjudication on the merits in the absence of a cross-motion from defendants. *Id*. p. 2, *ll*. 3-4.

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6 It is also important to point out what the Court did *not* do. The Court did *not* remand the matter back to defendants to determine whether any of plaintiffs is a "beneficiary" of the Lower Band of Chinook and Clatsop Indian trust account as plaintiffs have previously represented. *See* Dkt. # 119, p. 3, *ll.* 1-4. The Court said only that the decision to stop sending account statements to CIN would be remanded for further consideration:

> But this does not change the fact that DOI's decision to stop sending CIN account statements for the reasons set forth in Rugen's letter was in error. *That decision* is remanded to the agency for further consideration and clarification consistent with this Order.

Dkt. # 113, p. 16, *ll.* 8-10. (Emphasis added.)

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However, because of the pending reassignment of the case, the Court concluded that the reassigned judge should "decide whether to entertain another summary judgment motion from Defendants or set a Rule 16 conference date to prepare for trial." *Id.* at p. 2, *ll.* 7-12.

5. Posture of the Case Moving Forward

Against this background, the Court should appreciate the curious nature of plaintiffs' position going forward. Both of plaintiffs' remaining claims rely on the Due Process Clause of the Fifth Amendment to the United States Constitution. Hence, both require, at a minimum, a judicial determination that plaintiffs suffered a deprivation of life, liberty or property of constitutional dimensions. Plaintiffs admit, however, that they have suffered no such deprivation.[7] Yet, lacking any evidence of a constitutional deprivation, and without promising to come forward with any evidence of such a deprivation, plaintiffs' motion for clarification asked the Court to calendar a trial to adjudicate an entirely different issue that, as argued below, is not a justiciable issue in this or any other lawsuit, *i.e.*, whether "CIN" should be judicially declared to be the "necessary equivalent" of the judgment beneficiaries of the "Lower Band of Chinook and Clatsop Indians" trust account. *See* Argument V, *infra.*[8]

Nevertheless, assuming that plaintiffs have a theoretical entitlement to this form of relief in a United States District Court, and they do not,[9] plaintiffs are required to clear a series of legal hurdles

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7 See Exhibit A, Plaintiffs' Response to Defendants' First Set of Requests for Admission, Response to Request for Admission No. 8 (admitting that "There has been no action taken by any of the defendants, or anyone acting on their behalf, during the six years prior to the date this lawsuit was filed to the present day that resulted in any deprivation of any right, title or interest that was held by any legal beneficiary of the Lower Band of Chinook and Clatsop Indians trust fund prior to the taking of the action.").

8 Plaintiffs' amended complaint is devoid of any prayer for a declaration of this nature. Plaintiffs prayer for relief on Claims VI-VII provides only that:

> On their Sixth through Eighth Claims for Relief, for a declaration that the Defendants must maintain the entire value of their tribal trust account in trust for the benefit of the Chinook as of the date of the filing of this Complaint, together with interest accrued during the pending litigation.

Dkt. 24, p. 77, *ll.* 16-19. Although the requested remedy is stated to be a declaration, it is actually a prayer for injunctive relief.

9 The exclusive authority to determine the rightful beneficiaries of an ICC judgment has been placed within the primary jurisdiction of the U.S. Department of the Interior by Congress. *See* 25 U.S.C. § 1401(a); *and see* Argument at pp. 25 - 26, *infra*. As this Court found, in order for CIN to be considered a beneficiary of the Lower Band of Chinook and

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700 Stewart Street
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(206)-553-7970

in order to establish a triable claim for relief under the due process clause. Specifically, in order to (1) satisfy the applicable statute of limitations; (2) prove that this Court has subject matter jurisdiction; (3) satisfy the Article III requirement that there be a case or controversy; and (4) establish the existence of the prerequisites for a violation of the Due Process Clause, plaintiffs must prove that sometime during the six year period prior to the filing of their lawsuit, the Department took *some* action that somehow deprived them of a cognizable property right they might have in the "Lower Band of Chinook and Clatsop Indians" trust fund. But, as noted above, although plaintiffs promised in their motion for clarification to proffer competent evidence proving that they have a property interest in the trust fund (which they would like the Court to confirm), they made no promise to adduce evidence of any act of the Department that served to deprive plaintiffs of that supposed property interest.

Second, even though plaintiffs seek a trial to have themselves declared to be the "necessary equivalent" of the Lower Band of Chinook and Clatsop Indian beneficiaries, nothing has changed since the Court denied them that relief on the basis of their motion for summary judgment. This Court informed plaintiffs in unmistakable terms that an administrative determination in their favor was required. *See* Dkt. # 113, p. 17, *ll*. 4-9. ("25 C.F.R. § 87 *et seq*. spells out the process for determining whether [CIN has a legitimate property interest in the funds], but there is no evidence that DOI engaged in that process and identified CIN as a beneficiary.") Instead of acknowledging that they have no such evidence (because there has never been any administrative determination of CIN's beneficiary status pursuant to 25 C.F.R. § 87, *et seq*.) plaintiffs' motion for clarification simply pretended that this obstacle does not exist. Thus, while plaintiffs requested a trial date and promised to adduce certain evidence at trial, *they made no promise to proffer evidence of a determination by the Department pursuant to 25 C.F.R. § 87, et seq., that they are proper*

Clatsop Indians trust fund, a determination of beneficiary status *by the Department* is statutorily required. And, as the Court observed, plaintiffs proffered no evidence that the Department had ever made such a determination in their favor. Dkt. 113, p. 17, *ll*. 4-9. As the Court noted, absent evidence of such a determination, "there is no evidence that CIN in particular has a legitimate property interest in the funds" required to sustain a claim under the due process clause. *Id.* "Consequently," as this Court concluded, "CIN's constitutional claims fail." *Id*.

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(206)-553-7970

beneficiaries of the trust account. This is because, as plaintiffs admit, "[t] he U.S. Department of the Interior has never found or concluded pursuant to 25 C.F.R. § 87, *et seq*. that any of the plaintiffs is a beneficiary of the funds held in trust for the Lower Band of Chinook and Clatsop Indians."[10]

Given that the Court has already granted relief on plaintiffs' arbitrary and capricious claim, and that such relief fully remedies the only relevant "wrongful" final agency action alleged by their Trust Fund Claim that was found by the Court, the reasons for plaintiffs' decision to continue pursuing their constitutional claims are inherently suspect. It should not be overlooked that their due process claims do not seek redress for any wrongful agency action *vis a vis* the Lower Band of Chinook and Clatsop Indians trust account because, as they admit, no wrongful agency action has occurred. Specifically, as plaintiffs admit, any right, title or interest that plaintiffs may have in the Lower Band of Chinook and Clatsop Indians trust account is unaffected by, and undiminished by, any action taken by the Department in the six years prior to the filing of their complaint. Consequently, plaintiffs' amended complaint contains no prayer for damages to compensate plaintiffs for past harms allegedly suffered, nor any prayer for injunctive relief to remedy prospective irreparable injuries, because, as plaintiffs admit, no such harms exist.[11]

What then explains plaintiffs' continuing effort to litigate these claims given the clarity of this Court's January 22, 2020 order? In truth, the answer is fairly obvious. Plaintiffs are attempting an end run around the administrative process prescribed by Congress in 25 U.S.C. § 1401(a).[12] This congressionally-mandated administrative process was designed to ensure that the beneficiaries of ICC judgments were identified *by the Department*, and a fair and proper plan for the distribution of the funds was drawn up *by the Department*, in order to protect the beneficiaries of those funds and their lineal descendants from illegitimate claims and unfair distributions of proceeds. Seeking to

10 See Exhibit A, Plaintiffs' Response to Defendants' First Set of Requests for Admission, Response to Request for Admission No. 2.

11 See Exhibit A, Plaintiffs' Response to Defendants' First Set of Requests for Admission, Response to Request for Admission No. 9 (admitting that plaintiffs seek only declaratory relief).

12 If ever in question, plaintiffs' motion removes all doubt that this is their purpose. See footnote 26, *infra*.

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5220 UNITED STATES COURTHOUSE
700 Stewart Street
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(206)-553-7970

subvert that process, plaintiffs are asking this Court to render what is in effect an enforceable legal opinion in the absence of a live case or controversy declaring them to be the beneficial owners of the Lower Band of Chinook and Clatsop trust account, notwithstanding the existence of competing claims by other arguably indispensable parties who have not been joined in this lawsuit, and without any prior administrative determination by the Department.[13]

For a variety of reasons, not the least of which is that the Department has taken no action that would support subject matter jurisdiction over plaintiffs' due process claims, or result in Article III standing for plaintiffs, this is relief the plaintiffs simply cannot have. The ICC specifically entered judgment in favor of the "Lower Band of Chinook and Clatsop Indians," and the funds are held in trust for those beneficiaries and their lineal descendants. The ICC did not enter this judgment in favor of a fictitiously named nonentity, or a corporation that, notably, did not even exist at the time the ICC judgment was entered. Further, as plaintiffs admit, neither the Lower Band of Chinook and Clatsop Indian beneficiaries or their descendants ever collectively conveyed, or attempted to convey, all or some part of their right, title and interest in the trust account to any of the plaintiffs.[14] Without such an instrument, and without some administrative determination in their favor, any contention by plaintiffs, who lack recognition as an Indian Tribe, that they have any legally cognizable claim against the Lower Band of Chinook and Clatsop Indians trust account ended on the date that CIN's Petition for Acknowledgement was denied by the Department. That final agency decision, never legally challenged within the time permitted by the applicable statute of limitations, stands wholly undiminished in its finality.

13 *See e.g.*, Dkt. # 58, p. 4, *ll.* 9-17 ("The Siletz Tribe is a federally-recognized Indian tribe with members who are descendants of the Lower Band of Chinook Tribe of Indians and Clatsop Indian Tribe that are entitled to part or all of the Docket #234 judgment funds. Based on information and belief, there are a number of other currently federally-recognized tribes that also have a significant numbers of members who are descendants of these tribes.")

14 *See* Exhibit A, Plaintiffs' Response to Defendants' First Set of Requests for Admission, Response to Request for Admission No. 7 (admitting that "[there exists no legal instrument whereby any right, title or interest in the Lower Band of Chinook and Clatsop Indians trust fund has been conveyed to plaintiffs, or any of them.").

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

SUMMARY OF ARGUMENT

Even assuming for purposes of argument that there exists some unknown basis for plaintiffs to claim a legal property interest in regards to the Lower Band of Chinook and Clatsop Indians trust accounts, plaintiffs have alleged no action by the Department during the six years preceding the filing of their complaint that could conceivably be construed as a deprivation of whatever rights plaintiffs may theoretically have had in those funds. As noted before, it is an undisputed fact in this lawsuit that the Department has, and is continuing to hold this fund in trust for the rightful beneficiaries, whoever they may be. And, as has also been noted, plaintiffs have neither alleged nor offered any evidence of any action by the Department within the six years preceding the filing of this complaint that could even be arguably characterized as a constitutional deprivation. The most that has been shown is that the Department stopped sending account statements to the Indian group that calls itself CIN because it is not a federally recognized Indian Tribe. Be that as it may, the elimination of a right to receive an account statement can hardly be said to amount to a deprivation of a property right, much less the deprivation of any interest that plaintiffs may theoretically have in the account that corresponds to the account statement. Thus, no deprivation of property has been shown, or can be shown. And, because there has been no deprivation of property, there has been no violation of due process. Moreover, any wrongfulness in regards to the decision to stop sending account statements to CIN has already been rectified by this Court's previous ruling in plaintiffs' favor on non-constitutional grounds, so the claims are moot in any event.

Finally, plaintiffs cannot demonstrate that they have any cognizable property interest in the Lower Band of Chinook and Clatsop Indians trust account. That the plaintiff entities are not beneficiaries of the trust funds (absent a determination of beneficiary status by the Department) is not a subject of genuine dispute. CIN is not a legal entity at all and, as records of the Secretary of State reflect, the plaintiff corporation was not incorporated until 2000.[15] As its corporate existence

15 *See* Exhibit A, Plaintiffs' Response to Defendants' First Set of Requests for Admission, Response to Request for Admission No. 13 (admitting, "[t]he Confederated Lower Chinook Tribes and Bands, Inc., was incorporated as such under the laws of the State of Washington, in 2000, approximately 30 years after the ICC judgment was entered.").

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700 Stewart Street
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(206)-553-7970

follows the establishment of the trust fund by approximately thirty years, and without evidence of some formal conveyance to prove otherwise, none of the plaintiffs can genuinely claim to be a beneficiary of a trust created exclusively for the Lower Band of Chinook and Clatsop Indians, and their lineal descendants.[16]

In their earlier summary judgment motion, plaintiffs pointed to evidence of past interactions with the Department that they argued were consistent with a recognition by the Department of CIN's supposed ownership of the Lower Band of Chinook and Clatsop Indian trust account. However, representative status is not the same as beneficiary status. Being treated as a representative of third parties with respect to a particular asset, correctly or not, does not constitute proof of ownership. Regardless, the Department through its actions did not, and could not, convey any property interest in the trust fund to plaintiffs. Plaintiffs' claim to ownership of the funds must be evidenced by some other means. None has been alleged or proffered in this lawsuit.

In summary, because there is no subject matter jurisdiction, and because plaintiffs have not demonstrated that they have the evidence necessary to create a genuine issue to material fact in regards to their claim to having a cognizable property interest in the Lower Band of Chinook and Clatsop Indian trust account, or that there has been any constitutional deprivation of any claimed property interest, the Department should be awarded summary judgment on Claims VII and VIII.[17]

Finally, in the unlikely event that the Court determines that genuine issues remain to be adjudicated on Claims VII or VIII, the case should be dismissed or stayed under the Primary Jurisdiction doctrine. As was recognized in *United States v Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975), pursuant to 25 U.S.C. 1401,

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16 A corporation, such as the Confederated Lower Chinook Tribes And Bands, Inc., clearly cannot qualify as a lineal descendant of an original beneficiary of the trust. A descendant is "[s]omeone who follows in the bloodline of an ancestor, either lineally or collaterally." Black's Law Dictionary (10th ed. 2014). Plaintiffs admit this. *See* Exhibit A, Plaintiffs' Response to Defendants' First Set of Requests for Admission, Response to Request for Admission No. 10.

17 The Department should also have summary judgment on plaintiffs' substantive due process claim (Claim VIII) for the additional reason that plaintiffs have never alleged nor made any showing that the Department has engaged in any "egregious official conduct" *i.e.*, that its actions amount to "an abuse of power lacking any reasonable justification in the service of a legitimate governmental objective." *See Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008).

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700 Stewart Street
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(206)-553-7970

et seq., Congress specifically delegated to the Department the authority to determine the persons and Indian entities who are the present-day beneficiaries of judgments issued by the ICC. *Id*. at 400–401. Notwithstanding plaintiffs' request that it do so, this Court may not usurp the Department's statutory authority in order to adjudicate plaintiffs' due process claims. Application of the primary jurisdiction doctrine here mandates that, if the Court is of the view that plaintiffs' status as beneficiaries of the trust account remains a live issue despite the Department's motion for summary judgment, the determination of plaintiffs' beneficiary status must be made by the Department. Accordingly, even if the Court refuses to grant defendants' motion for the summary judgment, the action should still be dismissed until plaintiffs have obtained a determination by the Department that they are beneficiaries of the trust account. (Alternatively, the Court may stay this action until such a determination is made, although that would seem to be entirely unnecessary on the facts of this case.)

STATEMENT OF FACTS

The eight claims for relief alleged in plaintiffs' amended complaint can be placed in three separate categories. First, plaintiffs alleged in their First Claim for Relief, that they were entitled to an order directing that CIN be recognized as an Indian Tribe and placed on the Federally Recognized Indian Tribe List. Dkt. # 24, ¶¶ 151-160. The Court dismissed this claim, concluding, "Plaintiffs' first claim for relief presented a non-justiciable political question that is outside of this Court's subject matter jurisdiction." Dkt. # 45, p. 17, *ll.* 1-2.

Second, plaintiffs challenged the lawfulness of the Department's decision not to adopt a proposed amendment to its regulations allowing previously denied petitioning tribes to re-petition under limited circumstances. Plaintiffs challenged this decision in four separate claims for relief. Plaintiffs' second claim for relief alleged that the decision amounted to arbitrary and capricious agency action within the meaning of the APA. Dkt. # 24, ¶¶ 161-172. Plaintiffs' third, fourth and fifth claims for relief alleged that the decision violated the constitutional guarantees to due process, equal protection and to petition the government for the redress of grievances, respectively. *Id.* at

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¶¶ 173-180; 181-188; 189-191. The Court concluded, "DOI's reasons for eliminating the re-petition ban exception from the Final Rule are illogical, conclusory, and unsupported by the administrative record in violation of the APA." Dkt. # 112, p. 15, *ll.* 1-3. The decision was "remanded to DOI for further evaluation consistent with this Order. *Id.* at p. 18, *ll.* 20-22. The only constitutional claim that plaintiffs did not concede was their equal protection claim. The Court determined the claim to be "untenable as a matter of law." *Id*. at p. 20, *ll*. 11-12. Plaintiffs conceded that their remaining two constitutional claims were lacking in merit, and those were initially dismissed by the Court without prejudice. *Id.* at p. 2, n.3. However, upon reconsideration, those claims were also dismissed with prejudice. Dkt. # 118, p. 4.

Third, and most relevant to the pending motion, plaintiffs challenged the lawfulness of the Department's decision to deny them "access" to account statements in regard to funds held in trust for the Lower Band of Chinook and Clatsop Indians. This aspect of their amended complaint was expressed in three separate claims for relief. Plaintiffs' sixth claim for relief alleged that this decision amounted to arbitrary and capricious agency action within the meaning of the APA. Dkt. # 24, ¶¶ 192-176. Plaintiffs seventh and eight claims for relief alleged that this decision violated their constitutional right to procedural and substantive due process, respectively. *Id.* at ¶¶ 197-199; ¶¶ 200-202.

The Court, in its January 22, 2020, order, concluded that the Department's change of policy, whereby non-recognized Indian groups were excluded from receiving account statements, was inadequately explained and, therefore, arbitrary and capricious. Dkt. # 113, p. 13, *l*. 1 – p. 15, *l*. 19. The decision was remanded to the Department for further consideration and clarification. *Id.* at p. 16, *ll*. 8-10. As to the two due process claims, the Court concluded, "there is no evidence that CIN in particular has a legitimate property interest in the funds. *Id.* at p. 17, *ll.* 4-9. The Court observed that "25 C.F.R. § 87 *et seq.* spells out the process for determining whether that is the case, but there is no evidence that DOI engaged in that process and identified CIN as a beneficiary. *Id.* Thus, it concluded, "CIN's constitutional claims fail." *Id.*

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The Court did not say whether plaintiffs' summary judgment motion demonstrated the necessary element for a due process violation of a deprivation of constitutional dimensions. However, elsewhere in its decision, the Court concluded that the so-called Rugen letter was not evidence of such a deprivation. *Id.* at p. 113, *ll.* 5-12.

Plaintiffs sought clarification of the Court's January 22, 2020, order and requested that the case be set down for a trial on the question of whether they are the "necessarily equivalent to" the beneficiaries of the Lower Band of Chinook and Clatsop Indian trust account. Dkt. # 119. The Court denied this request without prejudice. Dkt. # 121.

ARGUMENT

I. SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' REMAINING DUE PROCESS CLAIMS REQUIRES PLAINTIFFS TO SHOW SOME WRONGFUL ACT OR FAILURE TO ACT BY THE DEPARTMENT

Before addressing the merits of plaintiffs' due process claims, the question of subject matter jurisdiction must be considered. When, as here, claims are asserted against a federal agency and federal officers, the question of subject matter jurisdiction is inextricably intertwined with the doctrine of sovereign immunity. *See Hartman v. Golden Eagle Casino, Inc.*, 243 F. Supp. 2d 1200, 1202 (D. Kan. 2003) (and cases cited).

Plaintiffs cannot maintain this action against the Department unless they can prove that their claim falls within a statutory waiver of sovereign immunity. *See, Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1168 (9th Cir. 2017).[18] The claims in plaintiffs' complaint rely exclusively on the waiver of sovereign immunity contained in the Administrative Procedure Act, as no other has been identified. Dkt. # 1, ¶¶ 3-4. And, insofar as the present motion is concerned, plaintiffs have advised that they are relying on the second sentence of 5 U.S.C. § 702 as the waiver of sovereign immunity that supports their claim. That sentence states, in pertinent part, "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an

18 Although plaintiffs contend otherwise, this principle holds true for both constitutional claims and statutory claims. *See The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 n. 9 (9th Cir. 1989) (*citing Beller v. Middendorf*, 632 F.2d 788, 797 (9th Cir.), *cert. denied*, 452 U.S. 905 (1980)).

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5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

officer or employee thereof *acted or failed to act* in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . ." (Emphasis added.)

As its wording connotes, the waiver of sovereign immunity embodied in 5 U.S.C. § 702 is not unlimited in its scope and the reach that it is given must conform to the statutory language from which it flows. Well-established law holds that waivers of sovereign immunity must be strictly construed, and any doubts or ambiguities should be resolved in favor of immunity. *See Lane v. Peña*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.") (internal citations omitted)). This limitation is also supported by language in the primary Ninth Circuit decision upon which plaintiffs rely, *Navajo Nation v. Department of the Interior*, 876 F.3d 1144 (9th Cir. 2017), in which the Court stated that "the second sentence of § 702 waives sovereign immunity broadly for all causes of action *that meet its terms . . . ,*" *id*. at 1172 (emphasis added). By its plain terms, the waiver applies only to claims "that an agency or an officer or employee thereof *acted or failed to act* in an official capacity or under color of legal authority . . ." 5 U.S.C. § 702 (emphasis added).

While the term "agency action" is broadly construed, at a minimum the claim must be based on some conduct or legal wrong that the defendant agency is alleged to have engaged in for which the plaintiff seeks review. This position is supported by other Ninth Circuit precedent. In *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989), the Court defined the waiver broadly to "to cover the full spectrum of agency conduct, regardless of whether it fell within the technical definition of 'agency action' contained in [the statute]." *Presbyterian Church*, 870 F.2d at 525. By this, the Court clearly meant to draw a distinction between a traditional "final agency action," which is a prerequisite for claims based upon the APA itself, and claims that have some other legal basis and for which the APA provides only the waiver of sovereign immunity. This

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5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

is also consistent with the holding in *Navajo Nation*. The *Presbyterian Church* decision also explained that § 702 "is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable." *Id.* Inherent in this language is a requirement that, for the waiver to apply, the plaintiffs must be challenging some wrongful conduct undertaken by the Department against them.

Here, there is no allegation nor evidence of any wrongful action of the Department. The only event alleged that in any way relates to plaintiffs' status as beneficiaries of the Lower Band of Chinook and Clatsop Indian trust fund is Catherine Rugen's letter responding to plaintiff Johnson's request that she explain why the Department stopped sending account statements to CIN. But the Court has already determined that the Rugen letter was simply explanatory of the change in policy, and not a determination of anything. Dkt. # 113, p. 11. *ll*. 5-13. ("[The Rugen Letter] did not amount to a final decision about CIN's beneficiary status.").[19]

In summary, plaintiffs have no evidence of any relevant wrongful action or inaction by the Department that could be construed as a deprivation of any putative property rights plaintiffs might conceivably possess in the Lower Band of Chinook and Clatsop Indian trust fund. Without such wrongful action by the Department, plaintiffs' due process claims are not within the waiver of sovereign immunity created by 5 U.S.C. § 702 and, consequently, the Court is without subject matter

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19 In pertinent part, the Court said:

> However, DOI is correct that Rugen's letter did not constitute a final action regarding CIN's beneficiary status and ultimate right to the funds. Although there is admittedly some confusing overlap, whether a group is a beneficiary for purposes of use and distribution of funds under 25 C.F.R. § 87 and whether a group can access funds under 25 C.F.R. § 115.800 and § 1200 are separate questions. It is true that Rugen's letter states that the funds "cannot benefit" CIN because of its non-recognized status, DN-001590, but this was part of her justification for barring CIN from accessing or receiving information about the funds. It did not amount to a final decision about CIN's beneficiary status.

This ruling is the law of the case. *Neravetla v. Virginia Mason Med. Ctr.*, No. C13-1501-JCC, 2014 WL 4094140, at *2 (W.D. Wash. Aug. 18, 2014), *aff'd*, 705 F. App'x 520 (9th Cir. 2017); *Straitshot Commc'ns, Inc. v. Telekenex, Inc.*, No. C10-268Z, 2011 WL 6013829, at *1 (W.D. Wash. Dec. 1, 2011); *see also United States v. Lummi Nation*, 763 F.3d 1180, 1185 (9th Cir. 2014) (internal citation omitted) ("Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case."); *and see Best v. Shell Oil Co.*,107 F.3d 544, 546 (7th Cir.1997) ("[T]he law of the case doctrine in these circumstances reflects the rightful expectation of litigants that a change of judges mid-way through a case will not mean going back to square one.").

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5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

jurisdiction to hear those claims. Accordingly, those claims should be dismissed pursuant to Rule 12(h)(3), F.R.Civ.P. ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.")

II. PLAINTIFFS' CLAIMS THAT RELY ON ACTIONS THAT OCCURRED MORE THAN SIX YEARS PRIOR TO THE FILING OF THIS ACTION ARE TIME-BARRED

Much of plaintiffs' 78-page, 202-paragraph amended complaint contains allegations of historical facts that have no direct bearing on the issue presented to the Court by plaintiffs' motion and defendants' cross-motion. Nevertheless, to the extent that plaintiffs' Claims VII and VIII rely on any action by defendants that occurred prior to August 24, 2011, it is barred by the six-year statute of limitations established by 28 U.S.C. § 2401(a).[20]

III. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND THE DEPARTMENT SHOULD HAVE SUMMARY JUDGMENT IN ITS FAVOR ON PLAINTIFFS' DUE PROCESS CLAIMS

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." The amendment guarantees that meaningful process at a meaningful time must accompany the deprivation of any of these interests. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal citations omitted).

Thus, the threshold question under the Due Process clause is whether a person was deprived of any cognizable interest, because, "no process is due if one is not deprived of 'life, liberty, or property.'" *Kerry v. Din*, ___ U.S. ___, 135 S.Ct. 2128, 2132, 192 L.Ed.2d 183 (2015) (Scalia, J., plurality opinion) (citing *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011)) (emphasis in original); and see *Wright v. Riveland*, 219 F.3d 905, 913 (9th Cir. 2000). Moreover, even if a plaintiff has a life, liberty, or property interest that is protected by the Due Process Clause, he or she must prove a deprivation of that interest for a due process violation to be found. *Association New Jersey Rifle &*

20 As noted, given that plaintiffs' due process claims are based on the Administrative Procedure Act, 5 U.S.C. § 702, the six year statute of limitations set forth in 28 U.S.C. § 2401(a) is applicable. *See Wind River Min. Corp. v. United States*, 946 F.2d 710, 716 (9th Cir. 1991) ("The challenge must be brought within six years of the agency's application of the disputed decision to the challenger.")

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5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

Pistol Clubs v. Governor of New Jersey, 707 F.3d 238, 241 (3rd Cir. 2013).[21]

a. There is no evidence of a constitutional deprivation.

In general, a deprivation necessary to support a due process claim can only result from deliberate government action to effect a taking of a protected interest. *See Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990), (*quoting Daniels v. Williams*, 474 U.S. 327, 331 (1986)) ("'Historically, th[e] guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property.'")

Here, plaintiffs have neither alleged nor adduced any evidence that the Department acted deliberately (or otherwise) to deprive plaintiffs of any interest that they may claim to have in the Lower Band of Chinook and Clatsop Indian trust fund. To the contrary, plaintiffs admit that defendants have taken no such action.[22] Because proof of a deprivation of a property interest is an essential element of plaintiffs' due process claims, the Department is entitled to summary judgment on those claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.")

b. There is no evidence of a property interest.

As this Court has recognized, dkt. # 113, p. 17, *ll*. 4-9, a viable due process claim requires more than a unilateral expectation in order to create a protected property interest:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972); see also *Merritt v. Mackey*, 827 F.2d 1368,

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21 These requirements apply to both the procedural due process claim and the substantive due process claim. *See Johnson v. Rancho Santiago Community College District*, 623 F.3d 1011, 1029 (9th Cir. 2010) ("To succeed on a substantive or procedural due process claim, the plaintiffs must first establish that they were deprived of an interest protected by the Due Process Clause."); *and see Neal v. Shimoda*, 131 F.3d 818, 827–828 (9th Cir. 1997).

22 Exhibit A, Response to Request for Admission No. 8.

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700 Stewart Street
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(206)-553-7970

1370-1371 (9th Cir. 1987).

Plaintiffs' allegation that CIN's is "an Indian Tribe, and . . . the successor-in-interest to The Lower Band of Chinook Indians," dkt. 24, ¶ 1, is not only unsupported by any evidence in the record, it is contradicted by all of the evidence before the Court.[23]

First, it is undisputed that CIN is not a federally recognized Indian Tribe. Dkt. # 33-8 (Decl. of Kipnis, ¶ 9, Exh. H (67 Fed. Reg. 46204, 46206 (July 12, 2002))). Thus, it is not possessed of tribal sovereignty.

Second, it is self-evident that CIN is neither a beneficiary of the Lower Band of Chinook and Clatsop Indian trust fund nor a lineal descendant of a beneficiary. CIN is not a natural person and, as plaintiffs admit, CIN is not even a legal entity. Dkt. # 6. Rather, "CIN" is nothing more than a fictitious business name for an Indian group. *Id*. As plaintiffs admit, Confederated Lower Chinook Tribes and Bands, Inc., was incorporated as such under the laws of the State of Washington, in 2000, approximately 30 years after the ICC judgment was entered.[24] Because this Corporation did not exist at the time the judgment was entered, and, by definition, is not a natural person, it also cannot have any property interest in the trust account. It is beyond dispute that a corporation cannot be a "lineal descendant" of a beneficiary of the trust account. *See also* Exh. A, Response to Request for Admission No. 10 ("Only a natural person can be a lineal descendant of a deceased person.")

Third, the Department has at least preliminarily concluded that the beneficiaries are exclusively the Clatsop and Chinook Indians cited on the so-called McChesney roll, dated July 29, 1914, and their lineal descendants. See, *e.g.*, DN-000797 (2/13/74) ("We believe that persons who are identified as Clatsop or Lower Band of Chinook on the McChesney payment roll, or who are lineal descendants of such persons are the beneficiaries in the award in Chinook Tribes and Bands of

23 Notably, CIN does not allege that it is a successor in interest to the Clatsop Indian who are beneficiaries in common.

24 Exhibit A, Response to Request for Admissions No. 13. Records accessible online indicate a "Formation/ Registration Date" for the Confederated Lower Chinook Tribes And Bands, Inc. of July 3, 2000. https://ccfs.sos.wa.gov/#/BusinessSearch/BusinessInformation

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(206)-553-7970

Indians Docket 239.").[25] As noted above, for obvious reasons, plaintiffs do not fit in either category.

In sum, setting aside the jurisdictional and general deficiencies set forth already, in order to escape summary judgment, it is incumbent upon plaintiffs to point to some evidence in the record that demonstrates the existence of a genuine issue of material fact as to whether CIN has a cognizable, present-day property interest in the Lower Band of Chinook and Clatsop Indian trust fund. In their prior summary judgment motion, plaintiffs asked the Court to simply assume CIN's ownership of the Lower Band of Chinook and Clatsop Indian trust fund based on their bare assertion of ownership coupled with their recitations of a past course of dealings with representatives of the Department. However, neither a bare representation of ownership nor evidence of past interactions with the Department are sufficient to establish that a genuine issue of material fact exists that necessitates a trial. Indeed, the Department's interactions with CIN representatives were fully consistent with the representative role that CIN sought to play. Plaintiffs point to nothing that connotes a belief on the part of any representative of the Department that CIN, as an Indian group, and not a federally recognized Indian Tribe, has any interest in the funds.

But, even assuming for purposes of argument that Department officials mistakenly treated CIN as a full-fledged owner of the Lower Band of Chinook and Clatsop Indian trust fund, that evidence would be of no moment. It is black letter law that one party is incapable of conveying to a second party an interest in property that did not belong to the party in the first place. *See* 63C Am. Jur. 2d Property § 43 ("As a matter of general property law, one who does not hold title to property or is not acting within his or her scope as an agent for the owner cannot pass or transfer title to that property. A property can be encumbered or conveyed only by the owner.") In regards to the Lower Band of Chinook and Clatsop Indian trust fund, the Department is a mere trustee, not an owner of beneficial rights in the account. No action of the Department would be legally sufficient to convey any property right in the trust account to CIN. Thus, evidence of plaintiffs' ownership must come from some other source.

25 This document is contained in the Administrative Record lodged with the Court. *See* Dkt. # 60.

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This Court has identified the only way that plaintiffs could be found to have any property interest in the Lower Band of Chinook and Clatsop Indian trust fund, and it has already determined that such evidence is missing in this case:

> As the Court previously explained, there is no evidence that CIN in particular has a legitimate property interest in the funds. The judgment was awarded to "the Lower Band of Chinook and Clatsop Indians," DN-000363, but CIN is not necessarily equivalent to that tribe or group. 25 C.F.R. § 87 *et seq*. spells out the process for determining whether that is the case, but there is no evidence that DOI engaged in that process and identified CIN as a beneficiary. Consequently, CIN's constitutional claims fail.

Dkt. 113, p. 17, *ll*. 4-9.

In summary, there is no genuine issue of material fact in regards to the question of whether plaintiffs have a sufficient property interest in the Lower Band of Chinook and Clatsop Indian trust fund sufficient to maintain a due process claim in relation to those funds. They do not. Indeed, all of the evidence points in the opposite direction.

Because, plaintiffs are unable to establish that there is a genuine issue of material fact in regards to an essential element of their due process claims, to wit, that they have a legitimate property interest in the Lower Band of Chinook and Clatsop Indian trust fund as opposed to a mere expectancy, summary judgement should be entered against them on those claims.

IV. PLAINTIFFS' SUBSTANTIVE DUE PROCESS CLAIM FAILS FOR THE ADDITIONAL REASON THAT THERE IS NO EVIDENCE OF EGREGIOUS OFFICIAL CONDUCT

Plaintiffs' substantive due process claim fails for the additional reason that plaintiffs have not established that the Department has engaged in any "egregious official conduct" *i.e*., that its actions amount to "an abuse of power lacking any reasonable justification in the service of a legitimate governmental objective." *See Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008). So long as it is "at least fairly debatable" that the Department's actions rationally furthered its legitimate interest, the Court's task is at an end. *Id*. at 1089.

Here, plaintiffs have produced no evidence that the Department engaged in any egregious official conduct amounting to an abuse of power. As plaintiffs admit, far from acting irrationally,

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5220 UNITED STATES COURTHOUSE
700 Stewart Street
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(206)-553-7970

the Department has at all times acted to preserve and protect the funds entrusted to its care on behalf of the Lower Band of Chinook and Clatsop Indians and their lineal descendants. Plaintiffs' substantive due process claim should also be rejected.

V. THE COURT SHOULD STAY OR DISMISS THE CASE PURSUANT TO THE PRIMARY JURISDICTION DOCTRINE

To be clear, the Court should grant the Department's motion for summary judgment. Plaintiffs' constitutional claims have no basis in law or fact. Not only have they failed to establish that the corporation has any property interest in the Lower Band of Chinook and Clatsop Indians trust account, plaintiffs have pointed to nothing that constitutes the deprivation of a property interest necessary to sustain a claim under the due process clause. Also, plaintiffs' substantive due process claim is deficient for the additional reason that there is a complete lack of evidence of any "egregious official conduct."

If the Court is nevertheless disinclined to grant the Department's motion for summary judgment on plaintiffs' due process claims, it still should dismiss those claims pursuant to the doctrine of primary jurisdiction. If plaintiffs wish to establish CIN's status as a beneficiary of the Lower Band of Chinook and Clatsop Indians trust account, or to advocate for the development of a distribution plan in some other capacity, they should direct their energy at the Department, not this Court, because the determination of proper beneficiaries and the development of an appropriate distribution plan are responsibilities that have been specifically delegated by Congress to the Department "[n]othwithstanding any other law."

Primary jurisdiction "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956) (citation omitted). The four factors that are "uniformly present in cases where the [primary jurisdiction] doctrine

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5220 UNITED STATES COURTHOUSE
700 Stewart Street
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(206)-553-7970

properly is invoked" are present here. These are: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration." *See United States v. General Dynamics Corporation*, 828 F.2d 1356, 1361 (9th Cir. 1987) (*citing W. Pac. R.R. Co.*, 352 U.S. 59).

All of these factors are present here. Thus, the Court in *Wolfchild v. United States*, 108 Fed. Cl. 578 (2013), applied the doctrine of primary jurisdiction under similar circumstances to those present here:

> [T]he Indian Judgment Distribution Act explicitly confers upon the Department the responsibility to develop a distribution plan and a roll of beneficiaries under the plan. [Citation omitted.] Insofar as the plan is concerned, this court's role is limited to review. Although the parties have not argued their positions in terms of "primary jurisdiction," this is an instance calling for application of that doctrine. Initial action respecting a distribution plan rests with an agency, *i.e.*, the Department, and the court should not intervene in the agency proceedings absent extraordinary circumstances.

Id. at 586.

The doctrine of primary jurisdiction is particularly applicable here, and no extraordinary circumstances warranting judicial intervention at this juncture has been identified by plaintiffs. As noted before, while plaintiffs' claims come clothed in the garb of conventional due process causes of action, they are anything but. Unlike a conventional due process claim, plaintiffs are not seeking damages as recompense for a purported due process violation. Nor are they seeking injunctive relief to enjoin a due process violation that is not amenable to a damages remedy. Instead, what plaintiffs are asking from the Court is a judicial declaration, removed from any actual case or controversy, which confers upon them the status of a beneficiary of the funds held in trust by the Department for the Lower Band of Chinook and Clatsop Indians.[26]

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26 That this is plaintiffs' purpose is made explicit by their motion for clarification:

> Because Plaintiffs had not shown, on the administrative record before the Court, that they are "necessarily equivalent to" the petitioners in the ICC proceeding, the Court denied their motion for summary judgment . . . The only remaining question is whether Plaintiffs are those same petitioners. *Plaintiffs submit they should have the chance to present at trial the evidence that shows this to be true*.

Dkt. # 119, p. 3, *l.* 13 - p. 4, *l.* 14. (Emphasis added.)

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700 Stewart Street
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(206)-553-7970

If plaintiffs had simply asked the Court to determine their ownership rights in the trust fund, rather than couching this request as a Due Process claim, they would be met at the threshold by 25 U.S.C. § 1401(a), which provides:

> *Notwithstanding any other law*, *all use or distribution* of funds appropriated in satisfaction of a judgment of the Indian Claims Commission or the United States Court of Federal Claims in favor of any Indian tribe, band, group, pueblo, or community (hereinafter referred to as "Indian tribe"), together with any investment income earned thereon, after payment of attorney fees and litigation expenses, *shall be made pursuant to the provisions of this chapter*.

Id. (Emphasis added).[27] The statutory scheme envisions the preparation and submission of a plan by the Secretary of the Interior to Congress according to principles set forth in the statute, for the use and distribution of funds such as those which were awarded to the Lower Band of Chinook and Clatsop Indians by the ICC in 1970. 25 U.S.C. §§ 1402(a), 1403. Assuming no congressional disapproval of the plan, the statute envisions that the Secretary will implement the plan. 25 U.S.C. §§ 1405(a).

Construing this statutory scheme, it has been recognized by this Court, and others, that "Congress has authorized the Secretary of the Interior to determine the persons and Indian entities who are the present-day successors in interest to tribes which the Indian Claims Commission has found ceded lands to the United States pursuant to Indian treaties. *United States v. State of Wash.*, 384 F. Supp. 312, 400–01 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975); *and see Wolfchild v. United States*, 101 Fed. Cl. 54, 86 (2011), *as corrected* (Aug. 18, 2011), *aff'd in part, rev'd in part*, 731 F.3d 1280 (Fed. Cir. 2013) ("Identification of beneficiaries of the final judgment is within the purview of the Secretary of Interior under the Indian Judgment Distribution Act.").

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27 "This chapter" is referred to in the statute as the "Indian Tribal Judgment Funds Use or Distribution Act." 25 U.S.C. § 1401(c). The use of the words "[n]otwithstanding any other law" in the opening clause of the statue is significant. As a general matter, "notwithstanding" clauses nullify conflicting provisions of law. *See United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir.2007) (*en banc*) ("The Supreme Court has indicated as a general proposition that statutory 'notwithstanding' clauses broadly sweep aside potentially conflicting laws."), *and see Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1083 (9th Cir. 2014).

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

In other words, Congress has placed this responsibility within the jurisdiction of the Department pursuant to its regulatory authority over Indian issues, recognizing that the endeavor requires both expertise and uniformity in administration. Given the above, if the Court concludes that a determination of plaintiffs' status as beneficiaries of the Lower Band of Chinook and Clatsop Indian trust fund is necessary, than the Primary Jurisdiction doctrine provides that the Court should dismiss or stay this action until such time as the determination is made by the Department.

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UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

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 granting them summary judgment on plaintiffs' Claim VII and Claim VIII. In the alternative, under the doctrine of primary jurisdiction, those claims should be dismissed without prejudice or stayed until such time as the Department has made a determination and reached a conclusion pursuant to the "Indian Tribal Judgment Funds Use or Distribution Act," 25 U.S.C. § 1401, *et. seq.*, that CIN is a beneficiary of the Lower Band of Chinook and Clatsop Indians trust account

DATED this 5th day of November 2020.

Respectfully submitted,

BRIAN T. MORAN
United States Attorney

s/ Brian C. Kipnis
BRIAN C. KIPNIS
Assistant United States Attorney
Office of the United States Attorney
5220 United States Courthouse
700 Stewart Street
Seattle, Washington 98101-1271
Phone: 206-553-7970
Email: brian.kipnis@usdoj.gov

Attorneys for Defendants