The Hon. Marsha J. Pechman

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

CHINOOK INDIAN NATION, an Indian Tribe and as successor in interest to The Lower Band of Chinook Indians; 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 Acting Assistant Secretary – Indian Affairs, Defendants.	Case No. 3:17-cv-05668-MJP **PLAINTIFFS' RESPONSE TO 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**

I. INTRODUCTION

Plaintiff organizations are the direct successors of the federally non-recognized petitioners who won compensation for ancestral Chinook lands taken by force in the nineteenth century. They are organized under the 1951 Chinook Constitution, and they and their predecessors have consistently represented the interests of the Petitioners in the Indian Claims Commission ("ICC") case denominated "Docket 234," which sought and obtained compensation for the taking of their ancestral lands. *The Chinook Tribe and Bands of Indians v. United States,*

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ICC Docket No. 234 (1970). The ICC found the Chinook to "have the capacity and the right to assert claims for their respective lands" and, in 1970, entered the following order:

> IT IS HEREBY ORDERED that the plaintiffs, for and on behalf of the Lower Band of Chinook and Clatsop Indians, shall have and recover from the defendant as a final judgment $48,692.05, in full satisfaction of the claims in docket No. 234.

Dkt. #60 at DN-000363. The plaintiffs, to whom the ICC made this award, were "The Chinook Tribe and Banks of Indians." *Id.* The award was not to the "Lower Band of Chinook and Clatsop Indians," as Defendants recite. It was to the Chinook Tribe and Bands of Indians, on their behalf.

Plaintiffs brought their present claims against the Department of Interior ("DOI") to establish their right in the Docket 234 trust fund, which consists of the money awarded in the ICC proceeding as compensation for the taken lands, plus interest. These claims are made because, after four decades of treating Plaintiffs as the rightful beneficiaries of the Docket 234 trust fund, sending them statements of account, asking their preferences as to investment and fund distribution, referring repeatedly to "the tribe's assets" and "your tribe's trust accounts,"[1] Defendants first expressed in 2015 their new view and national policy that Plaintiffs are not the beneficiaries of that trust fund and can therefore no longer receive accounting statements as they had for decades.

This Court, on Plaintiffs' motion for summary judgment, reversed Defendants' decision to stop sending Plaintiffs accounting statements, finding it arbitrary and capricious. Dkt. #113 at 13-15. But the Court declined to declare Plaintiffs the beneficiaries of the Docket 234 trust, holding that the letter of August 25, 2015, in which Regional Trust Administrator Catherine Rugen expressed Defendants' new policy, did not amount to a decision that Plaintiffs were not the trust fund beneficiaries – only that they were not entitled to receive statements of account.

[1] *See* documents summarized on pages 6-7, *infra*.

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Dkt. #113 at 11.

II. DEFENDANTS' MOTION

Defendants now move for summary judgment on Plaintiffs' due process trust fund claims, arguing that (1) Defendants have not finally decided Plaintiffs are not the Docket 234 beneficiaries, so the Court lacks jurisdiction to review its administrative action (Dkt. #128 at 15-18, 19); (2) Plaintiffs are not the legitimate successors of the Docket 234 petitioners, so they have no property interest in the trust fund for due process to protect (*id.* at 19-22); and (3) this Court should exercise its discretion under the doctrine of "primary jurisdiction" to send this case back to DOI to make its decision first. *Id.* at 23-26. Defendants' motion should be denied because (1) discovery taken since this Court's decision on Plaintiffs' motion for summary judgment reveals that it is in fact Defendant's illegal national policy that an Indian tribe that is not formally federally acknowledged (which Plaintiffs are not) cannot be an ICC trust fund beneficiary; (2) Plaintiffs are indeed the successors to the Docket 234 petitioners and no other entity has or has made any claim to that status; and (3) DOI has ignored the 1984 deadline established by Congress for designating ICC trust fund beneficiaries, so the Court should not exercise its discretion under the doctrine of primary jurisdiction to send the case back to the agency for a decision almost 40 years late.

As to each of these contentions, Defendants' summary judgment burden is to demonstrate that there is "no genuine dispute as to any material fact and [Defendant] is entitled to judgment as a matter of law." FRCP 56(a). The evidence submitted herewith, and the evidence already in the administrative record before the Court, shows that there is, at the least, a question of material fact as to each of Defendants' legal contentions. Defendants' motions should therefore be denied.

III. FACTS

A. Taking and Compensation for Ancestral Lands

Defendants and their predecessors negotiated treaties with the Chinook and other tribes

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for their ancestral lands in 1851. Dkt. #60 (Administrative Record) at 000061ff. Congress never ratified those treaties, but white settlers took the Chinook lands by force anyway, under land grants legislated by Defendants. *Id.* at 000344-346. Some 60 years later, in 1912, with persistent advocacy by the Chinook community, Congress appropriated money, in the mid-nineteenth century dollar amounts specified in the 1851 treaties, to pay for the lands taken, at about 51 cents an acre. Act of August 24, 1912, 37 Stat. 518 at 546. The Chinook actually received $26,307.95 for 76,630 acres of land – some 34 cents an acre. *Id.* at 000360.

After Native Americans contributed substantially to the Allied effort in World War II, the government set up the Indian Claims Commission ("ICC") to reconsider the century-old taking of Indian lands. In the ICC case denominated "Docket 234," the Chinook received an award of $48,692.02 (64 cents an acre)[2] for their land, and the parties agree that money has been held in trust by Defendants ever since. *Id.* at 000363. The ICC found that the Docket 234 Plaintiffs – "The Chinook Tribe and Bands of Indians" – were entitled to recover that $48,692.02 "for and on behalf of the Lower Band of Chinook and Clatsop Indians." *Id.* at 000363.

B. Plaintiffs are successors to the Docket 234 Petitioners

The Docket 234 claim was brought by

> The Chinook Tribe of Indians and the subordinate Waukikum, Willopah and the Clatsop bands of said Tribe of Indians, on relation of John Grant Elliott, Chaman of the General Council of said Tribe of Indians.

Dkt. #60, DN000032 (Opinion of the Commission)(April 14, 1958). The federal government, as it does in this case, denied that the Chinook Tribe was "authorized to represent, or present the claim of, the so-called Waukikum, Willopah and Clatsop Bands of Indians" or that any of them were such a "tribe, band or other identifiable group of American Indians" as could recover for the taking of ancestral lands under the Indian Claims Commission Act. *Id.* DN-000034. The Commission found insufficient evidence as to the Waukikum or Willopah, but decided that the

[2] As this Court has noted, "Whether this new payment was adequate or merely another

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petitioner, Chinook Tribe, did represent the interests of the Chinook and Clatsop: "The Commission therefore concludes that petitioner has the capacity to prosecute this action for and on behalf of the Clatsop and Chinook (proper) Indians." *Id.* at DN-000053.

As attested by Chinook Chairman and plaintiff Anthony Johnson, the Chinook Indian Nation and Confederated Lower Chinook Tribes and Bands, both plaintiffs here, are the successors-in-interest to the Docket 234 Chinook Tribe Petitioners:

> The Chinook Indian Nation and the Confederated Lower Chinook Tribes and Bands are the successors in interest to the petitioners in the Indian Claims Commission ("ICC") claim Docket No. 234. The descendants of the five aboriginal tribes that make up the current Chinook Indian Nation ("CIN") first joined together as the Chinook Indian Tribe ("the Tribe") under the community's first constitution in 1925. This constitution was rewritten in 1951, and it is this document that formalizes the Tribe as the governing body of our Chinook community to this day. I was duly elected Chairman under the authority of this 1951 constitution.
>
> * * *
>
> The Chinook Nation (Nation) was an entity, created within our community, to pursue the tribe's rights in front of the ICC. Our tribal membership attended meetings of both the Tribe and the Nation, and the leadership of both groups were tied together by the membership criteria of Tribe's 1951 constitution. Under the authority of that constitution, the Tribe changed its formal name to the Chinook Indian Nation (CIN) in the early 2000s.
>
> Plaintiff's Tribal Council wrote by-laws for and incorporated a not-for-profit organization in the State of Washington, known as Chinook Indian Tribe, Inc., in 1953. Its board of directors have always been the elected Tribal Council of the Tribe and CIN. This 501(c)3 organization continued to operate under its 1953 assigned Unified Busines Identification ("UBI") number until 1999. Under direction of our attorney, and to provide more separation between the not-for-profit and the elected tribal government, Chinook Indian Tribe, Inc. was reconstituted as the Confederated Lower Chinook Tribes and Bands in 2000. While this resulted in a change to the organization's name and UBI number, its existence as the descendent organization of the 1953 Chinook Indian Tribe, Inc. remains. The governing board of the new organization and its by-laws remained the same. Those 1953 by-laws and the structure of the governance of the organization (being made up of the Tribe's elected Tribal Council) continues today under the legally constituted Confederated Lower Chinook Tribes and Bands.
>
> Plaintiffs in the present case are the direct organizational descendants of the Docket 234 petitioners, and plaintiff's community and Council are direct

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injustice is a legitimate question but not the one before this Court." Dkt. #113 at 4.

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> blood descendants of the tribal individuals who brought the case before the ICC and that are identified within the administrative record. Further, we have been treated as such by the Department of Interior for more than four decades - from the ICC final judgment in 1970 until the decision in or about 2012 to stop sending our account statements for the Docket 234 trust fund created by that ICC judgment. Plaintiffs in this case have served these past fifty years as representatives of our people for purposes of receiving compensation for our ancestral lands.
>
> I was born into our Chinook community to a father, Gary Johnson, who was serving on the Chinook Tribal Council the same year that the ICC final judgment was made (1970). I was enrolled in the Tribe less than 3 months later. Docket 234, and its associated trust fund account, has been an ever-present part of my tribal life. I remember community members and Tribal Council producing and referring to the original documents and binders from the litigation to discuss the case and other important aspects of our history. I have also spent a lifetime watching, and later participating in, communications with the government regarding the award.
>
> The DOI recognized us for more than four decades as the representatives of the Chinook interest in the Docket 234 trust fund. The government has repeatedly referred to the Doc. 234 judgment as being held in trust for us and made repeated statements that the funds from Doc 234 were held in trust for the Tribe/CIN. DOI communicated with the Tribe/CIN on the subject of the trust fund for over forty years at our address Box 368 Bay Center, WA, and its predecessor address, Box 228, Chinook, WA.
>
> I have spent over two decades of my professional career working with and for neighboring and related tribes and am intimately aware of their histories and dealings with the federal government. I do not know of any evidence of the Department of Interior or any of its employees communicating with anyone other than the Chinook Tribe at the above addresses regarding the Docket 234 trust account from my work experience, my personal life or my substantial time spent with elders from the Chinook and neighboring tribal communities.
>
> As a Chinook person the truthfulness of this lived experience is as self-evident as that the sky is blue, that our ancestral lands have been taken, or that this is the English language that I am writing to you in. We have numerous examples of the Docket 234 record in our own possession (including what I believe to be the only existing examples, outside the ICC archive, of original documents presented by Chinook to the ICC).

Declaration of Anthony A. Johnson at pp. 2-4.

The administrative record already before the Court as Dkt. #60 describes a course of dealing between Defendants and Plaintiffs that states and reaffirms Plaintiffs' status as beneficiaries of the Docket 234 trust fund over a period of four decades:

> 1/26/73 Filings and correspondence regarding the Tribe's attorney and the

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attorney's government approved contract for the ICC case. These appraisals and other documents used in the Docket 234 litigation are, and have been since their creation, in the possession of plaintiffs. (DN-000682-711)

3/7/73 Senator Jackson writing on behalf of the Chinook and defendants' response that Doc. 234 funds cannot be spent without legislation and that the tribe should advise as to how they want to use funds. (DN 000712-727)

4/3/73 BIA's accounting of the repayment of the Tribe's Loan agreement for expert appraisal services in the Docket 234 case. (DN 000728-729).

6/6/74 Judgment fund "use or distribution" meeting minutes held in the Chinook community of Skamokawa, WA. Those recorded as speaking are current tribal members or have descendants enrolled. (DN-000812-864)

6/20/74 BIA review of Chinook Skamokawa hearing on use of the Doc. 234 funds. Acting Superintendent for Portland Area recommends investment and annual distribution for scholarship as Tribal Council recommended. (DN-000951-952)

7/2/74 BIA's concurrence with Tribe's recommendation, with supporting documentation. (DN-000955-987)

6/3/76 Letter from Chinook Secretary Stephen Meriwether to Rep. Don Bonker about 4/17/76 unanimous tribal vote in Bay Center to reject per capita distribution of the trust funds. (DN-001260-61)

6/9/76 Letter in which Rep. Bonker agrees with the Tribe's plan. (DN-001276-77)

7/15/76 "Chinook Indian Tribe" Memo listing Chinook people who loaned funds for the ICC Doc. 234 case and inquiring about reimbursement. (DN-001303-1312)

8/11/77 Letter from Acting Director, Office of Trust Responsibilities. "…but mere denial based on non-federal recognition of the tribe would seem to be inadequate grounds for not considering implementation of the tribal plan." (DN-001389-91).

10/17/80 BIA letter to Chinook Tribe, Box 228, Chinook WA, apologizing for "delay in processing the Doc. 234 award." (DN-001422)

10/22/84 "Chinook Indian Tribe, Inc." letter to BIA asking them not to disburse the Doc 234 trust fund. Refers to a recent meeting with BIA to discuss "our judgment fund in Doc 234." Box 228, Chinook, WA (DN-001442)

4/22/97 Office of Trust Funds Management memo re "seven tribes that are not federally recognized, but have funds held by DOI's Office of Trust Fund Management ("OTFM") for them. "Chinook, Clatsop" is one of the seven. (DN-001465)

5/19/97 Letter from the agency asking Chinook for designation of representative to "give investment instructions" and "receive reports and statements." (DN-001466)

5/19/99 Account statement for trust fund in amount $253,831 to "Chinook Tribe, Box 228, Chinook WA." (DN-001473)

7/23/01 Letter from BIA Tribal Accounts Manager asking Chairman Gary

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> Johnson of "Chinook Tribe" at Box 228, Chinook, WA, to identify "who is officially authorized to instruct OTFM to disburse funds and to make investments for your Tribe." Mr. Johnson is the father of plaintiff Anthony Johnson. (DN-001494)
>
> 1/20/06 Letter from the Department of Interior Office of Special Trustee To Chinook Tribe, Box 228, Chinook WA, asking assistance to determine the tribe's plans for future use of "the tribe's assets," including "intent to withdraw these funds soon." (DN-001529)
>
> 7/14/11 Correspondence from Fiduciary Trust Officer to Ray Gardner, Chairman of Chinook Indian Nation Box 368, Bay Center, "Seeking nominations for individuals to serve on the new Commission." on Indian Trust Administration and Reform" (DN-001547)
>
> 3/20/12 Letter from DOI Office of Special Trustee Fiduciary Gino Orazi to Ray Gardner, Chairman of "Chinook Nation" PO BOX 368, Bay Center, WA, referring to his "looking forward to an opportunity to meet with you, your Tribal Council or members of your Tribe…" to discuss (amongst other things) "…Your Tribes' Trust Accounts…" (DN-001551)

Dkt. #60. The administrative record, which Defendants represent to be the complete record concerning the Docket 234 trust fund, contains no evidence that any other tribe or group claimed, or had any claim to, beneficiary status for that trust fund.

Defendant was to have recommended to Congress, by January 1984, how the Docket 234 trust funds, which now amount to more than half a million dollars, should be used or distributed. 25 U.S.C. § 1402(b). (Funds for the Docket 234 Judgment were appropriated in 1973, and the statute requires that defendant Secretary prepare and submit a distribution plan within one year of January 12, 1983.) No such recommendation has ever been made.

Then, in 2015, Defendant stopped sending statements of account for the trust fund to Plaintiffs, relying on the Chinook's lack of status as a federally recognized Indian Tribe – a reason that squarely contradicts the Indian Tribal Judgment Funds Use Or Distribution Act of 1973, which provided for use of funds for the benefit of "any Indian tribe, band, group, pueblo, or community." Defendant not only refused to send statements of Plaintiffs' account, but they also took the position that "a non-federally recognized tribe is not a beneficiary" and that those funds "cannot benefit" the Chinook. Dkt. #60 DN-001589. This was not an error by an administrative employee; it was, according to Defendant's Regional Trust Administrator, the

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national policy of the agency. Coon Declaration, Exhibit A, Deposition of Cathleen Rugen at 2-3.

IV. ARGUMENT

A. Defendant's decision denied Plaintiffs their right to their trust fund, not just the right to receive account statements.

Defendants base much of their argument on the idea that the letter sent by its Regional Trust Administrator, Catherine Rugen, to Plaintiff CIN Chairman Anthony Johnson on August 25, 2015, was nothing more than an explanation for no longer sending the Chinook the trust account statements they had been receiving. Dkt. #128 at 5[3], 9, 11, 17, 19. Defendants argue that, since this Court has already remanded that decision to the agency on a finding that Ms. Rugen's denial of account statements was arbitrary and capricious, and since Ms. Rugen didn't really mean to say the Chinook were not entitled to their trust funds, Plaintiffs have received all the remedy they deserve. Dkt. #128 at p. 17. The legal consequences of this factual assertion, according to Defendants, are that (1) there has been no deprivation of a property interest, and (2) this Court has no jurisdiction under the Administrative Procedures Act, 5 U.S.C. § 706, because Defendants have not waived their sovereign immunity because they have not "acted or failed to act." Both legal claims fall because their factual premise is incorrect, or at least, subject to factual dispute. Defendants have indeed denied Plaintiffs their right to the Docket 234 trust fund.

Ms. Rugen's letter to Mr. Johnson said, in relevant part

[3] Defendants argue in their motion that Ms. Rugen's letter denied them account statements because "there had never been any determination by the Department that CIN has any right, title or interest in the Docket 234 trust account." Dkt. #128 at 5, line 14. That is not correct. Ms. Rugen stated in her letter and reaffirmed in her deposition, that Plaintiffs cannot be Docket 234 beneficiaries *because they are not federally recognized.* Dkt. #60 at DN 001589 ("because you are not recognized, the funds held with our office cannot benefit your tribe." Coon Dec, Exhibit A, Rugen Dep. at 22 ("A *non-recognized tribe* is not considered a beneficiary; therefore, in my experience, since they are not a beneficiary, they cannot receive statements nor funds."(emphasis added))

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> As you are aware, the Chinook Tribe is not Federally recognized. Section 25.83.2 of the Code of Federal Regulations provides that "Acknowledgment of tribal existence by the Department [BIA] is a prerequisite to the protection, services and benefits of the Federal government available to the Indian tribes by virtue of their status as tribes." Thus, because you are not recognized, the funds held with our office cannot benefit your tribe. The only suggestion that I can make to you is that you continue to pursue recognition in accordance with the regulation set forth under CFR Section 25, Part 24

Dkt. #60, DN-001589. On Plaintiffs' motion for summary judgment on their trust fund claims, Judge Leighton held that Ms. Rugen's letter denied Plaintiffs the right to receive statements of account but did not actually deny them the right to receive their trust funds:

> It is true the 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. The Court will thus limit its review to OST's decision to stop providing statements to CIN.

Dkt. #113 at 7 (emphasis by the Court). Judge Leighton's ruling on that issue is the law of the case on the record as of Plaintiffs' motion for summary judgment, but Plaintiff has now taken the depositions of Ms. Rugen and Fiduciary Trust Officer Gino Orazi.

Ms. Rugen's deposition testimony now tells a different story. Her statement in the letter to Mr. Johnson that CIN "cannot benefit" from its trust fund was not only a justification for failing to send them statements of account, but was also agency policy in itself – without federal acknowledgment as an Indian Tribe, a tribe cannot be an ICC trust fund beneficiary. Ms. Rugen testified that, as Regional Trust Administrator,

> Sir, my training and my experience is *that a non-federally recognized tribe is not a beneficiary*. I do not know the specific document that says you may not distribute a statement *or funds*, period; however, the Office of Special Trustee would never distribute funds without the approval of the Bureau of Indian Affairs, would approve only to a federally recognized tribe.

Coon Dec., Exhibit A (Rugen Deposition) at 2-3 (emphasis added).

> Q .[Mr. Tienson] Can you recall any specific training session at all in which you were informed that a non-recognized tribe could not be a trust fund beneficiary?
>
> A. [Ms. Rugen] A non-recognized tribe is not considered a beneficiary; therefore, in my experience, since they are not a beneficiary, they cannot receive statements *nor funds*. *Id.* at 3 (emphasis added).

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Ms. Rugen's deposition testimony makes clear what her letter did not. It is Defendant's national policy not to recognize as an ICC trust fund beneficiary any Indian tribe that has not been formally acknowledged as a sovereign nation. As this Court held, that policy misstates the law. Dkt. #113 at 13; 25 U.S.C. § 1401(a)(ICC trust funds to be distributed to "any Indian tribe, band, group, pueblo, or community").

The Court's previous decision on Plaintiff's motion for summary judgment does not conclude the issue of the nature of Defendant's decision in light of subsequent discovery. There is, at the very least, a question of fact as to whether Defendants have decided that a non-recognized tribe cannot be an ICC trust fund beneficiary. They have. Indeed, the deposition testimony of Ms. Rugen and Mr. Orazi suggests that that is their national policy.

B. The decision Ms. Rugen communicated to Mr. Johnson is national policy.

Ms. Rugen's testimony makes clear not only that a tribe without federal recognition cannot receive ICC-adjudicated trust funds but also that that rule is agency policy, not just a mistake by a Regional Trust Administrator. Ms. Rugen could not refer counsel to a specific policy document but testified that it was well understood by all at the agency that the BIA "would never" authorize distribution of trust funds to a non-recognized tribe. Coon Dec. Exhibit A (Rugen Dep. at 3); *see also id.* at 2 ("my training and my experience is that a non-federally recognized tribe is not a beneficiary.")

Similarly, Gino Orazi, Fiduciary Trust Officer, testified in his deposition that his understanding of the withholding of trust account statements from tribes who were not federally recognized was that it was national policy:

> Q [Mr. Tienson] So based upon your response, I'm assuming that this was a national policy, then, to discontinue sending statements regarding trust accounts to all non-recognized tribes. Is that consistent with your understanding?
> A [Mr. Orazi] Yes.

Coon Dec. Exhibit B (Orazi Deposition) at 2.

This Court's decision that the agency had not finally decided Plaintiff's entitlement to

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their trust funds may have been correct on the administrative record, with only Ms. Rugen's letter in evidence, but her deposition testimony shows her intention, and Defendants' policy, to deny Plaintiffs any access to their trust funds. At the very least, her testimony raises a question of material fact as to whether Plaintiffs have been deprived of their interest in their trust fund.

As this Court held in rejecting Defendants' argument that Ms. Rugen's letter did not amount to a final decision on providing account statements to Plaintiffs, the statement of an agency's "definitive position" with "legal consequences" is actionable. Dkt. #113 at 10-11, *quoting Bennett v. Spear,* 520 U.S. 154 (1997). Ms. Rugen's deposition testimony makes it clear that the decision that Plaintiffs cannot be beneficiaries of the Docket 234 trust is national policy. There is no evidence in the record that it is subject to exception or change in this case. Ms. Rugen stated the agency's "definitive position," and that position has "legal consequences" – depriving Plaintiffs of more than half a million dollars in payment for their ancestral lands. Defendants' argument that Plaintiffs' due process claims should be dismissed because they have suffered no deprivation should be rejected.

C. Plaintiffs have a legitimate property interest in their Docket 234 trust fund.

The Docket 234 petitioners were

> The Chinook Tribe of Indians and the subordinate Waukikum, Willopah and the Clatsop bands of said Tribe of Indians, on relation of John Grant Elliott, Chairman of the General Council of said Tribe of Indians.

Dkt. #60, DN-000032 (Opinion of the Commission)(April 14, 1958). The claim was brought in the name of "The Chinook Tribe and Bands of Indians." *Id*. The federal government, as it does in this case, denied that the Chinook Tribe was "authorized to represent, or present the claim of, the so-called Waukikum, Willopah and Clatsop Bands of Indians" or that any of them were such a "tribe, band or other identifiable group of American Indians" as could recover for the taking of ancestral lands under the Indian Claims Commission Act. *Id.* DN-000034. The Commission rejected the government's argument. The Commission found insufficient evidence as to the Waukikum or Willopah, but decided that the petitioner, Chinook Tribe, did represent the

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interests of the Chinook and Clatsop: "The Commission therefore concludes that petitioner has the capacity to prosecute this action for and on behalf of the Clatsop and Chinook (proper) Indians." *Id.* at DN-000053. The ICC found that the Docket 234 Plaintiffs – "the Chinook Tribe and Bands of Indians" – were entitled to recover that $48,692.02 "for and on behalf of the Lower Band of Chinook and Clatsop Indians." *Id.* at 000363. The judgment was in favor of the "Chinook Tribe and Bands of Indians," the organization recognized by the Commission to be acting "for and on behalf of" the Lower Band of Chinook and Clatsop. The judgment belongs to the Chinook.

As attested by Plaintiff Johnson,

> The Chinook Indian Nation and the Confederated Lower Chinook Tribes and Bands are the successors in interest to the petitioners in the Indian Claims Commission ("ICC") claim Docket No. 234. The descendants of the five aboriginal tribes that make up the current Chinook Indian Nation ("CIN") first joined together as the Chinook Indian Tribe ("the Tribe") under the community's first constitution in 1925. This constitution was rewritten in 1951, and it is this document that formalizes the Tribe as the governing body of our Chinook community to this day.

Johnson Declaration at 1. The Docket 234 petitioners were authorized under the 1951 Chinook Constitution. The ICC recognized "the Chinook Tribe and Bands of Indians" as the representatives of the Chinook and Clatsop ancestral land claims and granted them judgment "for and on behalf of the Lower Band of Chinook and Clatsop Indians." Dkt. #60 at DN-00036

Defendants argue that Plaintiffs have no property right in the Docket 234 judgment, but only a "unilateral expectation" that cannot support such a property right under black letter due process law. Dkt. #128 at 19, *quoting Bd of Regents v. Roth,* 408 U.S. 564, 577 (1972). Plaintiffs' claim to the Docket 234 trust fund is not a "unilateral expectation." It is a "legitimate claim of entitlement" recognized by the ICC in its decision on the merits, and it is a bilateral expectation, repeatedly recognized by Defendants in their dealings with Plaintiffs. Defendants have dealt consistently and exclusively with the Chinook, concurring in Plaintiffs' recommendations for proposed fund distribution (Dkt. #60 at DN-000951-52), apologizing for

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delay in processing the funds (Dkt. #60 at DN-001422), asking for investment instruction (*id.* at DN-001466), asking for designation of a Chinook representative "authorized to instruct [Office of Trust Fund Management] to disburse funds and to make investments for your Tribe." (*id.* at DN-001494), asking the Tribe's intentions for future use of "the tribe's assets," including "intent to withdraw these funds soon" (*Id.* at DN-001529) and referring to "Your Tribes' Trust Accounts" (DN-001551). *See* documents listed *supra* at pages 6-7. Plaintiffs' expectation was not unilateral; Defendants shared it for at least 40 years.

D. Defendants' continued reliance on the Chinook's lack of federal recognition is misplaced.

The legitimate beneficiaries of an Indian Claims Commission judgment are not limited to federally recognized tribes. The Indian Tribal Judgment Funds Use Or Distribution Act of 1973 provided for use of funds for the benefit of "any Indian tribe, band, group, pueblo, or community (hereinafter referred to as 'Indian Tribe')." 25 U.S.C. § 1401(a). Defendant's own regulations implementing that statute define "Indian tribe" to include "any Indian tribe, nation, band, pueblo, community or identifiable group of Indians, or Alaska Native entity." 25 C.F.R. Part 87.1(g). Defendant's policy denying statements of account and beneficiary status to the Chinook because they are not federally acknowledged is therefore plainly illegal.

Nevertheless, Defendant's motion for summary judgment continues to rely on Plaintiffs' non-recognized status in support of its argument. Dkt. #128 at 10 (Plaintiffs' "legally cognizable claim" to their trust account "ended on the date that CIN's Petition for Acknowledgment was denied by the Department"); *id.* at 20 ("First, it is undisputed that CIN is not a federally recognized Indian Tribe."); *id.* at 21 (no evidence that "CIN, as an Indian group, and not a federally recognized Indian Tribe, has any interest in the funds."). Defendants' argument should be rejected. Like DOI's actions in this case, it is based on a patently erroneous reading of the controlling statute and Defendants' own regulations.

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E. Statute of Limitations

Defendants offer a brief argument that, to the extent Plaintiffs' claims challenge any act of Defendant's occurring more than six years before they filed their complaint, those claims are time barred. Dkt. #128 at 18. To be sure, more than a century of Defendants' actions have repeatedly violated the Nation's promise that

> [T]he utmost good faith shall always be observed towards Indians; their land and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed,

Northwest Ordinance of 1789, sec. 14, Art. 3. However, the action Plaintiffs challenge is Defendants' decision that, because they are not a federally acknowledged Indian tribe, they cannot be beneficiaries of an ICC trust. That decision was communicated to them in Ms. Rugen's letter of August 25, 2015, which is within six years of the 2017 filing of the complaint herein.

F. The Court should reject Defendants' "primary jurisdiction" argument.

Defendants argue that, even if the Court denies their motion for summary judgment, it should dismiss or stay this case to allow DOI to make a determination as to the rightful ownership of the Docket 234 trust fund. Dkt. #128 at 23-27. The Court should reject that contention because the identification of the proper beneficiary of the trust fund was required by statute to be made more than 36 years ago, and no such determination has yet been made. 25 U.S.C. § 1402(b)(where funds have been appropriated before January 12, 1983, Secretary shall submit use or distribution plans within one year of that date; funds were appropriated to pay the Docket 234 judgment October 31, 1972. 86 Stat. 1498 (1972)). Defendant may point out that the Chinook themselves have asked that their distribution plan not be finalized. *E.g.*, Dkt. #60 at DN-001442. But such a request was only to delay Defendant's recommendation for the *manner of distributing the funds* – whether to individual tribal members or to the tribe for communal use, as for scholarships or community improvement. *Id.* In the 36 years since their determination was due to be made, Defendants have failed even to designate the beneficiary of the Docket 234

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trust funds. The reason is clear from the administrative record: Defendants have treated the Chinook – and only the Chinook – as beneficiaries of this trust fund. While the Chinook reasonably relied on their treatment as sole beneficiaries of the Docket 234 trust fund, the historical record has receded and grown stale.

"Primary jurisdiction" is a discretionary doctrine. *Syntek Semiconductor Co., Ltd., v. Microchip Tech. Inc*., 307 F.3d 775, 780 (9th Cir. 2002). A federal district court should decline to dismiss or stay a case where the relevant agency is aware of an issue but has "chosen not to prioritize" deciding it. *Sebastian v. Kimberly Clark Corp.,* 2017 U.S. Dist. LEXIS 208544 (2017), *citing Brenner v. Proctor & Gamble Co*., 2016 U.S. Dist. LEXIS 187303. Defendant has been aware of the Docket 234 judgment for 50 years, and the defendant's obligation to recommend a plan for distribution for 36 of those. Indeed, Defendant DOI has apologized to the Chinook for its failure to process its trust fund. Dkt. #60 at DN-001422 (apologizing for "delay in processing the Doc. 234 award."). It has, as above, not only failed to make a decision under its own rules, 25 C.F.R. Part 87, but has, without proper process or any rationale, decided the issue against the Chinook for a reason – lack of federal acknowledgment – that directly contradicts the controlling statute. The Court should decline to exercise its discretion to dismiss or stay this action on the doctrine of primary jurisdiction.

V. CONCLUSION

Defendants' motions for summary judgment and to dismiss or stay this case should be denied. Like the non-recognized Chinook Tribe that brought and won the ICC petition for compensation for the ancestral lands of the Chinook and Clatsop Tribes, they are the only legitimate claimants to the Docket 234 trust fund, and Defendants have denied them due process of law by deciding that they cannot be trust fund beneficiaries because they are not a federally

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recognized tribe.

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