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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TSI AKIM MAIDU OF TAYLORSVILLE RANCHERIA,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity as Acting Secretary of the Interior; BRYAN NEWLAND, in his official capacity as Assistant Secretary-Indian Affairs of the United States Department of the Interior; and DOES 1-100,

Defendants.

Case No. 2:17-cv-01156 TLN CKD

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

Date: February 10, 2022
Time: 2:00 p.m.
Ctrm: 2, 15th Floor
Judge: Hon. Troy L. Nunley

I. INTRODUCTION

In their Second Amended Complaint, the Tsi Akim Maidu of Taylorsville Rancheria ("Tsi Akim," "plaintiff" or "tribe")[1] contends that the Department of the Interior ("Department") violated the Administrative Procedure Act ("APA") in concluding that the Tsi Akim's tribal status was terminated when the Department sold the Taylorsville Rancheria pursuant to the California Rancheria Act in 1966. The Tsi Akim ask this Court to direct the Department to immediately resume the conduct of government-to-government relations with the tribe and place them on the list of federally recognized tribes. However, this Court lacks jurisdiction to award the relief Plaintiff seeks.

The Department has created a regulatory process for obtaining federal acknowledgment, codified at 25 C.F.R. Part 83 ("Part 83"), and this process must be completed prior to filing an action in district court, whether or not the tribe has been previously recognized. *See Agua Caliente Tribe of Cupeño Indians of Pala Reservation v. Sweeney*, 932 F.3d 1207, 1219 (9th Cir. 2019) (holding that tribe seeking federal recognition "must exhaust administrative remedies and, until they do so, they are not entitled to the relief they seek"); *Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342, 346-48 (7th Cir. 2001) (non-recognized tribe had to complete Part 83 to be placed on the list of federally recognized tribes despite its treaty signatory status).

The only relief the tribe may obtain from this Court is an order concluding that the Department erred as a matter of law when it decided that the Tsi Akim may not petition for federal acknowledgment under Part 83 because Congress terminated the tribe when the Department sold the Rancheria in 1966.[2] This issue could be resolved here after preparation of an administrative record and cross-motions for summary judgment. Alternatively, in an order dismissing all claims, the Court could vacate that portion of the Department's 2015 letter stating that the sale of the Rancheria equates to Congressional legislation terminating the government-to-government relationship to ensure that the issue will receive *de novo* review by the Department within the context of the Tsi Akim's documented Part 83 petition.

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[1] For the purposes of this Memorandum, any reference to Tsi Akim as a "tribe" is for convenience only and does not in any way suggest or concede that Tsi Akim is a federally recognized Indian tribe.

[2] *See* 25 C.F.R. § 83.4 (providing that an entity subject to congressional legislation terminating or forbidding the government-to-government relationship may not be acknowledged by the Department under Part 83); *Id.*, § 83.11(g) (criteria for acknowledgment includes that petitioner is not the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship).

II. BACKGROUND

In 2015, the Department issued a decision stating that "because Congress terminated the Tsi Akim Maidu, it cannot be acknowledged by the Department [under Part 83]." The Department stated that it properly sold the Taylorsville Rancheria in 1966 pursuant to the 1964 Amendments to the California Rancheria Act and that "[t]he Department's sale of the Rancheria pursuant to Congressional mandate qualifies as Congressional termination of the Federal relationship." The Department concluded: "Accordingly, Congress has forbidden a Federal relationship with the Tsi Akim Maidu and the Group may not receive recognition by the Department [under Part 83]." 2015 decision at 1.

In 2020, the Department issued a letter concluding that "the question of whether [the Tsi Akim Maidu] is eligible to pursue Part 83 acknowledgment should have been assessed by the Office of Federal Acknowledgment in the first instance and that [the] Assistant Secretary [] came to his negative conclusion prematurely." The 2020 letter retracted the 2015 decision that the tribe was not eligible to petition under Part 83 and stated that the tribe could submit a petition for recognition under Part 83. The 2020 letter advised the tribe that it must satisfy all the applicable Part 83 requirements, "including those prohibiting entities subject to congressional termination from proceeding." 2020 retraction at 1.

III. ARGUMENT

A. The Court Lacks Jurisdiction To Award The Relief Plaintiff Seeks.

The Second Amended Complaint includes new allegations and claims for relief, including that the tribe is not challenging whether it is eligible to petition under Part 83 (ECF 65, ¶ 5), that the tribe need not petition for acknowledgment under Part 83 because its federal tribal status was never terminated (*Id.*, ¶ 7),[3] and that the Court should place the tribe directly onto the list of federally recognized tribes or compel the Department to do so. *See* ECF 65 at 31, ¶¶ I, J; *see also id*., ¶¶ 28, 29. The Court lacks jurisdiction over, and should dismiss, plaintiff's new federal recognition claims.

[3] The Second Amended Complaint continues to include allegations that plaintiff was injured by the loss of federal recognition, but this court has already ruled that plaintiff's claim that it was injured by its loss of federal recognition is time-barred, and dismissed it with prejudice. ECF 33 at 9; ECF 41 at 6-7. Those rulings are law of this case. To the extent that plaintiff is attempting to resurrect its loss of tribal status claim, the Court should dismiss it as time-barred. What is not time-barred is plaintiff's claim challenging the 2015 decision that the sale of the unoccupied Rancheria constitutes Congressional legislation terminating or forbidding the government-to-government relationship so that the tribe cannot be acknowledged under Part 83. 25 C.F.R. § 83.4.

Plaintiff seeks an order requiring the Department to "correct its administrative mistake" that plaintiff's tribal status was terminated by the sale of the Taylorsville Rancheria (*See* ECF 65, ¶ 28; *id.* at 31, ¶¶ G, L). In *Agua Caliente*, the Ninth Circuit soundly rejected the argument that a tribe can avoid the Part 83 process by seeking "correction" of the list of federally recognized tribes. *See Agua Caliente*, 930 F.2d at 1217 ("Framing the issue as one of 'correction' is unsupported by the applicable regulations and case law"). Like the plaintiff in *Agua Caliente*, the Tsi Akim does not seek to correct an entity's name on the list, it "seek[s] to add an additional indigenous entity to the list," yet it has made no attempt to exhaust the Part 83 process. *See id.*; *see also* ECF 65, ¶¶ 62, 63 (plaintiff asserts that its 1998 letter "sought clarification of the status of government-to-government relations" and was not a Part 83 petition for federal recognition); *id.*, ¶ 64 (plaintiff states that it sought clarification in 2015 "about its status as a federally recognized Indian Tribe to conduct relations with the federal government").

The Ninth Circuit likewise has rejected plaintiff's contention (*see* ECF 65, ¶ 7) that a tribe "can bypass the Part 83 process because the tribe has long been federally recognized, and the tribe's relationship with the federal government has never lapsed or been severed." *Agua Caliente*, 932 F.3d at 1217 ("A plain reading of the Part 83 regulations makes no exceptions for tribes that establish an unsevered relationship with the federal government"); *accord Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 196 (D.D.C. 2011), *aff'd*, 708 F.3d 209 (D.C. Cir. 2013) ("Whether the Verona band continued to exist as an entity after 1927 and whether the Muwekma's property right in federal acknowledgment ceased to exist along with the entity itself at the moment of dissolution are both questions the Department had to address" via Part 83); *Miami Nation*, 255 F.3d at 346 (noting that "Indian nations, like foreign nations, can disappear over time").

Indeed, the Part 83 regulations updated in 2015 require that "[a]ny petitioner who has not submitted a complete documented petition as of July 31, 2015, must proceed under these revised regulations." *Agua Caliente*, 932 F.3d at 1217 (citing 25 C.F.R. § 83.7(a)). The Department's policy guidance for the updated Part 83 regulations confirms its "intent to make determinations to acknowledge Federal Indian tribes within the contiguous 48 states *only* in accordance with the regulations established for that purpose at 25 CFR part 83." *Id.* (citing Policy Guidance, Requests for

Administrative Acknowledgment of Federal Indian Tribes, 80 Fed. Reg. 37,538-02 (July 1, 2015)). Part 83 includes "relaxed criteria for recognizing tribes that have been 'previously acknowledged as a federally recognized tribe'" and "the regulations allow for evidence of past recognition." *See id.* at 1218 (citing 25 C.F.R. § 83.12).

In sum, plaintiff "must exhaust administrative remedies [under Part 83], and until they do so, they are not entitled to the relief they seek in this lawsuit." *Agua Caliente* at 1219. Thus, the Court should dismiss plaintiff's new federal recognition claims for lack of jurisdiction.[4]

B. The Court Lacks Jurisdiction To Review The 2020 Retraction.

Finality is a jurisdictional requirement. *See Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (citing *Ukiah Valley Medical Center v. F.T.C.*, 911 F.2d 261, 264 n.1 (9th Cir. 1990)). For agency action to be final, it must both "mark the consummation of the agency's decisionmaking process" and "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Oregon Natural Desert Ass'n*, 465 F.3d at 982. "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Darby v. Cisneros*, 509 U.S. 137, 144 (1993) (citations omitted).

Contrary to the tribe's contention, the 2020 retraction letter is not a final agency action subject to APA review because it is not the consummation of the agency's decision-making process. The 2020 letter simply retracted the portion of the 2015 decision that prohibited the tribe from

[4] *See also id.* at 1218 (citing *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1986) (holding that determination of whether a tribe was federally recognized in the past or whether other factors support federal recognition "should be made in the first instance by the Department of the Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations")); *id.* ("The purpose of the Part 83 regulatory scheme is for Interior 'to determine which Indian groups exist as tribes' and that purpose 'would be frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist.'"); *id.* at 1218-19 (citing *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir. 2001) (holding that exhaustion of the Part 83 process is necessary because it is a matter of "specialized agency expertise" and Congress "inten[ded] that recognized status be determined through the administrative process"; exhaustion also "may produce a useful record for subsequent judicial consideration, especially in a complex or technically factual context.'").

submitting a Part 83 petition. Nor has the 2020 letter inflicted any actual, concrete injury on plaintiff. To the extent that the 2020 letter affects plaintiff, that effect is beneficial. Because of the 2020 retraction, the tribe is now permitted to file a Part 83 petition.[5] Plaintiff does not, and cannot, identify any concrete and particularized harm to it caused by the 2020 letter.[6] Therefore, the 2020 retraction letter is not a final agency action and this Court lacks jurisdiction to review it.

C. The Court Should Dismiss Any Rulemaking Claims.

Although not presented as a discrete claim in the Second Amended Complaint, the Tsi Akim alleges that "the 2015 Decision and 2020 [retraction] constitute informal rule-making under the [APA] . . . That rule-making is subject to review under 5 U.S.C. § 706 . . ." ECF 65, ¶ 9. Plaintiff also alleges that "Defendants[']2020 [retraction] is a rule and subject to the requirement that a reasoned explanation must be provided." *Id.*, ¶ 16. These conclusory allegations do not explain how the 2015 decision and 2020 retraction constitute rulemaking so fail to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Moreover, the APA defines "rule making" as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). A "rule" is defined as "the whole or a part of an agency statement *of general or particular applicability and future effect* designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4) (emphasis added). In contrast, an "adjudication" is the "agency process for the formulation of an order," and an "order" is "the whole or a part of a final disposition . . . of an agency in a matter other than rulemaking . . ." *Id.* §§ 551(6), (7).

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[5] Although the tribe can now petition for acknowledgment under Part 83, Federal Defendants have determined not to seek dismissal of this action on mootness grounds. However, to address plaintiff's allegations that being allowed to petition under Part 83 is an illusory right because the 2020 letter did not withdraw the 2015 letter's conclusion that the 1966 Rancheria sale terminated plaintiff's federal tribal status, Federal Defendants suggest that the Court's dismissal order could vacate that portion of the 2015 letter stating that the sale of the Rancheria equates to Congressional legislation terminating the federal relationship to ensure that the issue will receive *de novo* review by the Department within the context of the tribe's documented Part 83 petition.

[6] For the same reason, plaintiff lacks Article III standing to challenge the 2020 retraction letter and the Court should dismiss the claim for lack of jurisdiction. Article III standing is a jurisdictional requirement. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *accord Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011). To establish Article III standing, a plaintiff has the burden of establishing that it "has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Chapman*, 631 F.3d at 946 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

"[M]ost legislative rules are generally applicable. *See Safari Club Int'l v. Zinke*, 878 F.3d 316, 332-33 (D.C. Cir. 2017) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293-94 (1974) (characterizing rules as framing "generalized standard[s]" and orders as "individual" and "case-by-case") and *Neustar, Inc. v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017) ("Rulemaking scenarios generally involve broad applications of more general principles rather than case-specific individual determinations")).

Additionally, "rules generally have only 'future effect' while adjudications immediately bind parties by retroactively applying law to their past actions." *Safari Club*, 878 F.3d at 333 (citing, *e.g.*, *NLRB v. Wyman–Gordon Co.*, 394 U.S. 759, 763-66 (1969) (plurality opinion); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17 (1988) (Scalia, J., concurring) (stating that the "central distinction between rulemaking and adjudication" is that "rules have legal consequences only for the future"); *Neustar*, 857 F.3d at 895 (stating that while "it may be proper to enter an adjudicatory order without retroactive effect," "adjudication is by its nature retroactive"); *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 922 (D.C. Cir. 2013) (stating that "an adjudication must have retroactive effect, or else it would be considered a rulemaking")).

Applying these principles, the Department's 2015 decision that plaintiff was ineligible to petition for acknowledgment under Part 83 was an individual determination specific to plaintiff that did not have any legal consequences for the future, only retroactive effect. Thus, the 2015 decision was an adjudication, not rulemaking. The 2020 retraction which, as discussed above (*See supra* at III.B), is not a final agency action, also did not constitute rulemaking. Therefore, the Court should dismiss any rulemaking claims in the Second Amended Complaint.

IV. CONCLUSION

For all the foregoing reasons, the only claim properly raised in the Second Amended Complaint is whether the Department erred in concluding that the tribe may not pursue federal recognition under Part 83 because Congress terminated the tribe when the Department sold the Taylorsville Rancheria in 1966.

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This issue could be addressed within the context of this lawsuit after preparation of an administrative record and cross-motions for summary judgment. Alternatively, the issue could be fully addressed and analyzed by the parties within the context of plaintiff's documented petition for Part 83 acknowledgment, with plaintiff's right to *de novo* review of that issue protected by this Court's partial vacatur of the 2015 decision.

Respectfully submitted,

DATED: January 13, 2022

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/s/ Lynn Trinka Ernce
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