22-5197

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

KURT KANAM, PILCHUCK NATION
PLAINTIFFS-APPELLANTS,
v.,

BUREAU OF INDIAN AFFAIRS ET AL
DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
For the District of Columbia
(No. 21-cv-01690) (Hon. Richard J. Leon)

KURT KANAM, PILCHUCK NATION REPLY BRIEF (CORRECTED)

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedures Act
BIA	Bureau of Indian Affairs
DOI	U.S. Department of Interior
BIA et al	The Bureau of Indian Affairs ("BIA"), Deb Haaland, Bryan Newland, and Darryl LaConte
Pilchuck et al	Kurt Kanam and Pilchuck Nation

SUMMARY OF THE ARGUMENT

This reply is divided into three sections. First, Pilchuck et al addresses the significant arguments that they made to which appellee either made no response or made one that does not answer the essence of appellants' challenge. Second, Pilchuck et al responds to the new issues previously waived. Third, Pilchuck et al responds to issues brought up outside the scope of the District Court's ruling.

Before addressing those issues below, Pilchuck et al argues the agency has made a final agency action which has determined the rights of Pilchuck et al. Despite the allegation by the agency that administrative remedies have not been exhausted, the agency has determined that federal tribal recognition cannot be done by the Judicial Branch.

If it is true that Judiciary Branch tribal recognition was eliminated, which Pilchuck et al argues has not, there must be an agency record of that determination and any court would need to have such a record to rule on this case. Even the additional issues raised by BIA et al counsel must have first been raised by the agency itself on an agency letterhead. Until this court has an agency record to uphold or overturn, this court is merely adding post hoc rationalization to post hoc rationalization.

That is why this case must be remanded to the agency.

I. WHAT THE BIA ET AL BRIEF DOES NOT ANSWER.

What is most notable about the BIA et al 32-page answering brief are the number of significant arguments made by appellants that the BIA et al does not address or does not address seriously. These arguments in these subsections are conceded. A court can treat "specific arguments as conceded" when a "party fails to respond to arguments in opposition papers." *Dinkel v. MedStar Health*, 880 F.Supp.2d 49, 58 (D.D.C. 2012) (internal quotation marks and citations omitted).

A. The Answer Does Not Address Whether BIA ET AL Agreed to Remand in Part.

Pilchuck et al argued BIA et al agreed to a remand in part. Pilchuck et al cited appendix pages 82-83 as proof.

BIA et al does not address that argument and has conceded they agreed to a remand in part.

B. The Answer Makes Skeletal Arguments Whether Counsel or the District Court Were Allowed to Speak for the Agency.

Pilchuck et al argued the District Court erred failing to bar post hoc rationalizations by agency counsel and the District Court.

The BIA et al has cited no authority allowing an Appellate Court to utilize post hoc rationalizations and also does not address Circuit Court or

U.S. Supreme Court case law. Their skeletal arguments do not answer the essence of the Appellants post hoc rationalization arguments. "We do not consider arguments raised in such skeletal form." *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005). Courts are not required "do counsel's work" when faced with a "skeletal" argument. *New York Rehab. Care Mgmt., LLC v. N.L.R.B*., 506 F.3d 1070, 1076 (D.C. Cir. 2007).

BIA et al conceded the post hoc rationalizations by agency counsel and the District Court cannot be accepted as an actual agency policy.

C. The Answer Makes Skeletal Arguments Whether the Whole Record Was Required.

Pilchuck et al argued the U.S. Supreme Court and District of Columbia Circuit Court precedent required the "whole record" to uphold an Agency Action.

The BIA et al cited no authority allowing an Appellate Court to make a ruling without an agency record. The BIA et al addressed those legal arguments in skeletal form but do not answer the essence of the case law arguments made and have conceded the whole record is needed.

D. The Answer Does Not Address All Statutory Interpretation Arguments or the Repeal by Implication Arguments.

Pilchuck et al made ministerial duty arguments for subsections, three, four, six, seven and eight of the "List Act" and argued they were not repealed. Pilchuck et al also argued no tribe has had to file a writ of Mandamus or a "Part 83" application, after Congressional recognition.

The BIA et al addresses these legal arguments with skeletal references but does not meet the essence of the Appellants challenge that a ministerial duty text exists and has conceded there are ministerial duties for the Judicial Branch in the "List Act."[1]

E. The Answer Does Not Address Whether the Claim Preclusion Issue Had to be Addressed in a Cross Appeal.

Pilchuck et al argued the District Court did not rule on the matter of whether Kanam's 2018 claims were barred and argued a cross appeal is not allowed because the BIA et al would be seeking to enlarge the scope of the District Court judgment. Appellants also argued a cross appeal at this stage is barred by Fed.R.App. P. 3 and Fed.R.App. P. 4, because it is untimely after 30 days. (See also *T Street Dev. v. Dereje,* No. 08-7123 (D.C. Cir. Apr. 1, 2009).

[1] Federally Recognized Indian Tribe List Act of 1994, Pub. L. I03- 454, tit. I, I08 Stat. 4791 (List Act).

BIA et al provides no reference to the appendix were such a ruling is and does not address any of the case law in appealing issues outside the scope of the ruling.

The BIA et al has conceded the District Court dismissed Kanam's case because he did not file a Part 83 application and because "Circuit Court" precedent required it, not because his claims were precluded.

F. The Answer Does Not Address Whether BIA ET AL Was Barred by Claim Preclusion.

Pilchuck et al argued, the District Court erred because the BIA et al had full and fair opportunity to challenge the identical issue in both the Karluk Tribal Court and the U.S. District Court for the Western District of Washington and was barred from doing it collaterally in this case.

The BIA et al also does not address these legal arguments or any of the case law in support of them and has conceded BIA et al was barred by res judicata.

G. The Answer Does Not Address All the Jurisdiction Issues.

Pilchuck et al argued, that the U.S. District Court for the District of Columbia lacked jurisdiction to make a judgment in a collateral attack of the Karluk or the U.S. District Court order.

The BIA et al addresses these legal arguments with skeletal references and has conceded the U.S. District Court for the District of Columbia was the wrong forum.

H. The Answer Does Not Address Whether Karluk Tribal Court Remedies Needed to be Exhausted.

Pilchuck et al argued DOI failed to allow the Karluk Tribal Court the first opportunity to evaluate the factual and legal bases for the BIA et al challenge to Karluk Tribal Court jurisdiction and averred BIA et al was estopped by claim preclusion from raising that issue.

The BIA et al also does not address these legal arguments or any of the case law in support of them and has conceded tribal remedies must be exhausted.

I. The Answer Does Not Address Whether Fed. Reg. 37538-02, 2015 WL 3958642 (July 1, 2015) is Substantive or Interpretive.

Pilchuck et al argued BIA et al could not have both a substantive rule which determined rights of parties and an interpretive rule which was not a final agency action. Pilchuck et al also argued this post hoc rationalization of this agency policy was not substantially justified.

The BIA et al does not address these legal arguments and has conceded there is both a substantive and interpretive rule and that the policy was not substantially justified on appeal.

J. The Answer Does Not Address Whether The BIA ET AL Policy is Ultra Vires.

Pilchuck et al argued any agency or court action placing Judiciary Branch federal tribal recognition authority under "Part 83" would be ultra vires and should be invalidated by this court.

The BIA et al does not address the case law in support of the ultra vires argument and has conceded it.

K. The Answer Does Not Address Stillaguamish Tribe V. Kleppe, 1976 U.S. Dist. LEXIS 17381).

Pilchuck et al argued they had same rights as the Stillaguamish tribe in *Stillaguamish v. Kleppe*, No 75-1718 (Sept. 24, 1976). The BIA et al incorrectly states Pilchuck cited no cases to support its theory of Judiciary Branch recognition and does not address that case.

2. NEW ARGUMENTS BY BIA ET AL WERE WAIVED.

The District of Columbia has long held that new issues and legal theories will ordinarily not be heard on appeal. The general proposition that issues not raised before judgment in the district court are usually considered to have been waived on appeal. "We are, of course, precluded from

considering any issue raised by a party for the first time on appeal." See *Pirlott v. NLRB,* 522 F.3d 423, 433 (D.C.Cir.2008).

The U.S. Supreme Court has also held that Issues and legal theories presented for the first time on appeal ordinarily will not be heard on appeal. See *Liberty Prop. Trust v. Republic Props. Corp*., 577 F.3d 335, 341 (D.C. Cir. 2009). "we generally decline to consider questions not passed upon below."

BIA et al has not presented any argument why their new issues and theories could not be raised at the District Court, so the following arguments should be ignored by the Panel.

A. Whether the U.S. District Court for the Western District of Washington Order was Valid.

The District Court ruling only addresses the Karluk Tribal Court ruling and did not make any rulings on the decisions by the U.S. District Court for the Western District of Washington. Only on appeal has the BIA belatedly put forth the argument that the U.S. District Court for the Western District of Washington order made no real tribal recognition determinations. However, not only is this issue and theory new, but it is also wrong. The U.S. District Court for the Western District of Washington is a U.S. Court for the purposes of the List Act.

The U.S. District Court for the Western District of Washington determined that the Pilchuck Tribe was entitled to a judgment in their favor. When the U.S. District Court for the Western District of Washington was presented with a judgment for the Pilchuck Nation, the Clerk of the Court checked to see if all parties were served, which they were,[2] then registered the judgement and recognized the Pilchuck Party as an entity capable of obtaining the judgment in the process.

B. Whether the Karluk Tribal Court Contract was Valid.

The BIA et al wants to address whether the contract signed by the Karluk Tribal Court contained specific language giving specific authority to rule on the orders before this court.

However, BIA et al did not make this argument at the District Court and it has been waived.

C. Whether the Karluk Order was Properly Served.

The BIA et al wants to address whether the Karluk Tribal Court order [3] or the U.S. District Court orders were served.

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[2] APP. 291-310.
[3] The Karluk Tribal Court order was served on DOI. APP. 346.

However, BIA et al did not make this argument at the District Court and the argument has been waived.

3. ARGUMENTS OUTSIDE THE SCOPE OF THE DISTRICT COURT RULING.

The BIA et al wants to address several issues outside the scope of the District Court ruling. However, that is not permitted because the BIA et al would be seeking to enlarge the scope of the District Court judgment. (See *Crocker v. Piedmont Aviation, Inc*. 49 F.3d 735 (D.C. Cir. 1995).

A. The District Court Did Not Rule on CR 41(B).

BIA et al claims Kanam's 2018 case barred him from seeking relief in this case. However, the District Court did not decide whether hypothetical Jurisdiction prevented a judgment on the merits pursuant to CR 41 (b) and the BIA et al abandoned that issue in reply.

In addition, according to the BIA et al arguments, the District Court would not have personal or subject matter jurisdiction over Kanam's 2018 claims for Judiciary Branch federal tribal recognition, because there was not an APA process to effectuate the text "or by a decision of a U.S. Court," and because Kanam did not file a "Part 83" application.

Furthermore, this Circuit has held that: "A dismissal for lack of personal jurisdiction is not a decision on the merits for the purposes of res

judicata." *See Bioconvergence LLC v. Singh* 21-cv-2090 (CRC) (D.D.C. Aug. 22, 2022) quoting Fed.R.Civ.P. 41(b) (providing that a dismissal "for lack of jurisdiction" does not "operate as an adjudication on the merits"); 18A Edward H. Cooper, Federal Practice & Procedure Jurisdiction § 4436 (3d ed. Apr. 2022 update) (explaining, per Rule 41(b), the lack of "res judicata effect[] of a judgment that dismisses an action for lack of subject-matter or personal jurisdiction"); *Shipkovitz v. Mosbacher*, No. 90-cv-2159, 1991 WL 251864, at *6 (D.D.C. Nov. 12, 1991)..(would not represent a final judgment on the merits.) see also *Crockett v. Mayor of the Dist. of Columbia,* 279 F. Supp. 3d 100, 108 (D.D.C. 2017), ("[A] dismissal 'for lack of jurisdiction' does not operate 'as an adjudication on the merits." (quoting Fed. R. Civ. P. 41(b).

B. The District Court Did Not Rule on Local Rule 7 (n) (1).

BIA et al argues the District Court had discretion to review the case without an agency record. However, the District Court ruling does not mention Local Rule 7 (n) (1). In addition, the Circuit Court has held it is a fundamental rule of litigation that the court's discretionary pronouncements are for it— not the parties— to enforce. *Barnes v. District of Columbia,* 289 F.R.D. 1, 20 (D.D.C. 2012). BIA et al itself cannot invoke that rule and only the District Court can.

C. The District Court Did Not Rule on the 2014 Letter or Whether the List Act was not Properly Cited.

BIA et al impermissibly brings up Kanam's 2014 letter to BIA et al and a List Act statute dispute. However, the District Court ruling does not mention the 2014 letter from Kanam or whether the List Act was not properly cited.

All the issues raised above in subsections A-C are not only wrong, but they should have been addressed on cross appeal.

CONCLUSION

Wherefore, for the foregoing reasons and those presented in appellants' opening brief, Appellant respectfully moves this court for an order remanding this to the Department for a period of not to exceed Thirty days, during which time Department of Inferior shall either affirm the current policy position or act on Appellants claims they have the same rights as the Stillaguamish Tribe in *Stillaguamish v. Kleppe*; and shall report to the court within such period the action taken on said policy position or request/petition; and further order that this court will retain jurisdiction over this matter pending a determination by the Secretary of Interior in order to resolve other possible pending issues.

Dated: April 6, 2023,

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation because it contains 2,475 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Cir. R. 32(a)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

Dated: April 6, 2023,

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25(c), that on April 6, 2023, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Respectfully submitted, this 6th day of April 2023.

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