HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHINOOK INDIAN NATION, et al., Plaintiffs, v. DEB HAALAND et al., Defendants.	Case No. 3:17-cv-05668-MJP PLAINTIFF'S AMENDED MOTION FOR ATTORNEY FEES UNDER 28 U.S.C. § 2412 **NOTE ON MOTION CALENDAR: OCTOBER 11, 2024**

Plaintiffs move the Court for an order allowing the Chinook Indian Nation ("CIN") attorney fees under the Equal Access to Justice Act (EAJA), 28 USC 2412(d)(1)(A).

I. Prevailing Party

The EAJA requires a showing that plaintiffs are prevailing parties, and plaintiffs have satisfied that element in this matter, having prevailed on two of

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their three general claims – (1) for reversal and remand of defendant's 2015 rule barring Indian Tribes who have been denied federal recognition from applying again ("re-petitioning"); and (2) for reversal and remand of defendant's decision to cease its 40-year practice of sending plaintiff accounting statements for the trust account established for funds adjudicated by the Indiana Claims Commission ("ICC") for the taking of ancestral Chinook lands ("Docket 234 claim"). As to the first, on remand, defendant has now proposed for comment a revised rule that *allows re-petitioning* for tribes that can show that rule changes or new evidence merit reconsideration.[1] As to the second, defendant has implemented a plan to pay all of the ICC Docket 234 trust fund assets to CIN, and those assets have all been transferred to CIN. Declaration of Anthony Johnson. Plaintiff did not prevail on its request that the Court order federal recognition of CIN.

A prevailing party under the EAJA is a party that "has been awarded some relief by a court." *Buckhannon Bd. Care & Home Inc. v. W.Va. Dept of Health &*

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[1] https://www.federalregister.gov/documents/2024/07/12/2024-15070/federal-acknowledgment-of-american-indian-tribes.

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Human Res, 532 US 598, 603 (2001). Plaintiffs obtained a judgment on the merits against defendant for remand and reconsideration of both the anti-re-petitioning rule and the decision to stop sending CIN trust fund accounting, thus achieving a "material alteration of the legal relationship of the parties." *Id.* at 605. Further, this Court's remands on both the re-petitioning and the trust fund claims resulted in favorable results for plaintiffs.

II. Substantial Justification.

Because plaintiff is a prevailing party, in order to avoid an award of fees under the EAJA, defendant has the burden to show that its "position … was substantially justified." 28 USC 2412(d) (1)(A), *Meier v. Colvin,* 727 F.3d 867, 870 (9th Cir. 2013), *cited in Koonwaiyou v. Blinken*, 2024 U.S. Dist. LEXIS 49698, *11 (WD WA). The "government's position" includes both the position the government took before litigation and the position it took during the litigation. The EAJA provides that, "'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(2)(D), *quoted in Meier* at 870.

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Defendant cannot meet this burden for the position it took with respect to either the 2015 anti-repetitioning rule or the Docket 234 trust account.

A. Defendant's position on its anti-re-petitioning rule was not substantially justified.

This Court held defendant's 2015 rule banning re-petitioning arbitrary and capricious under the Administrative Procedures Act and remanded to the agency for reconsideration. Dkt 112 (Order on Cross-Motions for Partial Summary Judgment on Claims II-IV) at 18/20-22. On remand, defendant has now proposed a new rule to "create a conditional, time-limited opportunity for denied petitioners to re-petition for Federal acknowledgment as an Indian Tribe." [2]

This Court's decision striking down defendant's anti-repetitioning rule was not a close call. The Court summarized the "arbitrary and capricious" standard of review, boiling it down to review for "reasoned decisionmaking" and "a rational connection between the facts found and the choice made." Dkt 112 at 11/20 –

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[2] https://www.federalregister.gov/documents/2024/07/12/2024-15070/federal-acknowledgment-of-american-indian-tribes.

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12/2. The Court noted that defendant had based its prohibition of re-petitioning on "consistency", "fairness" and "efficiency." *Id.* at 13/16-18, *quoting* 80 Fed. Reg. at 37875 (AR0009813). The Court found each of these bases made no sense. .

1. "Consistency"

The anti-re-petitioning rule did not serve consistency in recognition decision making at all. Because the 2015 rule also eased the standards for recognition that had been applied under prior 1978 and 1994 rules in several important ways, different tribes would have been subject to different rules depending on when they had petitioned for recognition. If formerly denied tribes could not re-petition, the result was in fact *inconsistent* decisions for new petitioners considered under more lenient rules than tribes formerly denied. Dkt 112 at 15-17. The Court characterized as "bizarre[]" the fact that defendant's initial 2014 proposed rule would have allowed re-petitioning in order to afford consistent decisions for all tribes, while the final 2015 rule offered the same "consistency" justification for *prohibiting* re-petitioning. *Id*. at 15/8. Defendant had no answer in this Court but offered *res judicata* in response, arguing that denying re-petitioning promotes "finality." That is true, but finality has nothing to do with promoting consistency

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in decision making where the rules of decision have changed. In any event, "finality" was not part of defendant's explanation for the rule at the agency level, and the rule must be judged on the reasons given by the agency, not by counsel on judicial review. *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943). *Id.* "Consistency" offers no substantial justification for banning re-petitioning.

2. "Fairness to New Petitioners"

Defendant agency gave "fairness" as a justification for denying the right to re-petition, arguing that, if re-petitioning were allowed, agency personnel would have to spend time on re-petitions, thus diverting attention from first-time petitioners. *Id.* at 17-18. As this Court noted, defendant ignored the simple remedy of giving first-timers priority over re-petitioners. *Id.* That obvious work-around is now included in defendant's pending 2024 proposed rule on remand. "Fairness to new petitioners" gave no substantial justification for the 2015 anti-re-petitioning rule.

3. "Efficiency"

Finally, defendant relied on "efficiency," complaining that allowing re-petitioning would overburden the Office of Federal Acknowledgment (OFA). Dkt

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112 at 18. As the Court pointed out, the original 2014 proposal allowing re-petitioning assigned the task of screening applications for re-petitioning to the Office of Hearings and Appeals (OHA), not to OFA. Defendant did not explain why the job was reassigned to OFA or why that would have affected anyone's "efficiency." One can always worry that more work is more work, but, as the Court said, if previously denied tribes "have valid claims to recognition under the new standards, shutting them out to further some vague notion of administrative efficiency seems the definition of arbitrary." *Id.* at 18/17-18.

None of the reasons on which defendant relied to support its anti-re-petitioning rule provided any substantial justification for its position, either during the rulemaking process or in this litigation. Defendant's position on the anti-re-petitioning claim was not substantially justified.

B. Docket 234 Trust Account

Defendant's position that plaintiff could not receive accountings for its ICC Docket 234 trust funds was not substantially justified.

1. Defendant abandoned its prelitigation position.

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In her letter of August 25, 2015, responding to plaintiff's inquiry as to why it was no longer receiving Docket 234 trust accountings as it had for 40 years, defendant's agent, Katherine Rugen wrote: "because you are not recognized, the funds held with our office cannot benefit your tribe." As authority for her position, Ms. Rugen quoted 25 CFR 83.2, which provides

> Federal recognition * * * is a prerequisite to the protection, services, and benefits of the Federal Government available to those that qualify as Indian tribes and possess a government-to-government relationship with the United States.

First Amended Complaint, Ex. D (Rugen letter).

The regulation on which Ms. Rugen's letter relied expresses only a tautology: federal recognition is a prerequisite to receiving benefits that are available to federally recognized tribes. It says nothing about *which* services and benefits are available only to recognized tribes. Defendant's decision to use the lack of federal recognition to take away plaintiff's right to funds adjudicated by the ICC contradicted 40 years of treating those funds as if they belonged to plaintiffs. It also contradicted the governing ICC statute):

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> 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.

25 USC 1401(a)(emphasis added). The statute includes any "tribe, band, group, pueblo or community" among those to whom ICC-adjudicated and appropriated funds must be distributed. It provides no limitation to federally recognized tribes. There is no dispute that the Docket 234 funds at issue in this case had been adjudicated by an ICC judgment, appropriated by Congress and were held in trust by defendant. The statute therefore applied to them.

Indeed, defendant conceded in its briefing before this Court that, contrary to the position it took in Ms. Rugen's 2015 letter, federal recognition is not necessary to claim a beneficial interest in ICC-adjudicated funds:

> A *non-federally recognized tribe or group of Indians* that can show it is the present day successor in interest to a Indian tribe or Indian group recipient of a ICC judgment award that is presently held in trust may obtain access to and withdraw said judgment funds pursuant to and in accordance with 25 C.F.R. Part 87.

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Dkt 109 at 13 (Defendants' Memorandum of Points and Authorities in Opposition to Motion for Partial Summary Judgment re Claims VI-VII at 13/13-16) (emphasis added).

Defendant abandoned its pre-litigation position in favor of an argument that no final agency action had been taken so that plaintiff had failed to exhaust its administrative remedies. *Id.* at 10-14. In fact it used the fact that non -recognized tribes *can access and withdraw judgment trust funds* to argue that further Chinook efforts to obtain the funds would not have been futile, hence remedies had not been exhausted:

> The Department concedes that access to the trust funds through the avenue of recognition is now permanently foreclosed to CIN. But that is not the only means available to CIN of obtaining a say as to how the funds are to be used and distributed.

Id. at 13/9-12. Defendant should not now be heard to claim that Ms. Rugen's prelitigation position was substantially justified when it not only conceded in the litigation that the position was wrong but also tried to use the fact that it was wrong to support an alternative argument that plaintiff had failed to exhaust

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administrative remedies. Again, the agency's action must stand or fall on the reasons the agency gave in the original decision. *SEC v. Chenery,* 318 U.S. at 87.

2. Defendant's trust fund decision was "about as far from notice and comment rulemaking as possible."

This Court not only held that the policy relied on in Ms. Rugen's letter violated defendant's own regulations; it also held that the process by which it had been decided was arbitrary and capricious, "about as far from notice and comment rulemaking as possible." Dkt 113 at 13/9. After 40 years of consulting with the Chinook and sending them regular accounting statements for their Docket 234 funds, the agency decided, by a process the record does not reveal, to stop. The decision was not only wrong on the merits; it was reached arbitrarily, with no evident procedure other than what this Court called "cryptic emails." *Id.* at 13/3.

Defendant made no effort on plaintiff's motion for summary judgment to defend the process by which it came up with the erroneous rule that federal recognition was required for a tribe to be entitled to accountings for ICC adjudicated funds for the taking of its lands. It devoted most of its briefing to the idea that plaintiff had failed to exhaust its administrative remedies and to

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establishing that, if the agency's decision were to be reversed, the proper remedy was remand for further proceedings. Dkt 109 at 10-17. Defendant's position in the litigation therefore was not substantially justified except for its successful attempt to avoid an outright judicial award to the Chinook of their Docket 234 trust funds. Plaintiff's remedy was remand to the agency, and, on remand, defendant awarded the entire Docket 234 trust fund to plaintiff CIN. Declaration of Chairman Anthony Johnson at 2.

3. Defendant's litigation positions did not justify its prelitigation position.

As above, the government's prelitigation position that plaintiff's lack of federal recognition barred any right to the ICC Docket 234 Chinook trust fund accountings lacked any substantial justification, and defendant abandoned it before this Court. "[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Commissioner v. Jean*, 496 US 154, 163 (1990), *quoted in United States v. Marolf*, 277 F3d 1156, 1163 n.4 (2002):

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> A reasonable litigation position does not establish substantial justification in the face of a clearly unjustified underlying action. *See Wilderness Soc'y v. Babbitt*, 5 F.3d 383, 388-89 (9th Cir. 1993) (holding government was not substantially justified in allowing grazing in wildlife refuge even though government presented reasonable ripeness defense during litigation); *Andrew V. Bowen,* 837 F.2d 875 at 877-80 (9th Cir.1988)(holding government was not substantially justified in issuing regulation without complying with statutory notice requirements even though government presented reasonable litigation defense that movants had not exhausted administrative remedies); *see also* [*Commissioner v. Jean,* 496 U.S. at 157 n.7 ("[Congress intended] to provide for attorney fees when an unjustifiable agency action forces litigation, and the agency then tries to avoid such liability by reasonable behavior during the litigation.") (quoting H.R. Rep. No. 98-992, pp. 9, 13 (1984)); *McDonald v. Secretary of HHS*, 884 F.2d 1468, 1476 (11th Cir. 1989) ("In the present case we can concede that many of the government's litigating positions were reasonable and, hence, 'substantially justified.' The central question facing us, however, is whether the underlying agency action was reasonable.").

Marolf, 277 F3d at 1163-64. Plaintiff does not concede that defendant's exhaustion defense was substantially justified. This Court rejected it, holding that

> whatever opaque decision-making process took place within OST concluded when the agency determined that CIN should not receive statements because of its nonrecognized status and statements ceased to be mailed out.

Dkt 113 Order at 10/21-23. Defendant had decided in a few emails and undocumented conversations that accounting statements for non-recognized tribes'

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trust accounts would be "file copy only" and had put that new policy into effect. There was no further process available. There was no substantial justification for the exhaustion defense.

In any event, plaintiff had to come to court for relief, and the EAJA is intended to make that possible as explained in *Marolf* and the cases on which it relies, quoted above. Further, as with the anti-re-petitioning rule, the agency's action must be judged on the reasons given when its decision was made and implemented, not on the arguments of counsel on review. *SEC v. Chenery,* 318 U.S. at 87.

III. Attorney Fee Amount

Plaintiff submits herewith time sheets documenting work performed by Mr. Tienson and Mr. Coon as attorneys and by one legal staffer, Mr. Joe Larson. Ex. A; Ex. B. Plaintiff requests enhanced hourly rates for Mr. Tienson at the rate of $510/hour because of his specialized expertise documented in his declaration, and based on prevailing market rates for an attorney of his standing and 42 years of practice in the Pacific Northwest, focused on native fisheries, treaty rights and environmental complex litigation. Mr. Tienson died January 21, 2021, but his

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declaration, drafted December 3, 2020 and edited by Mr. Coon, attached hereto with his time sheets, shows that he has long experience with Indian law in the Pacific Northwest on fishing and other issues in litigation with other tribes and state and federal agencies. Plaintiff requests the standard hourly EAJA rates for Mr. Coon because, before working on this case, he had no substantial experience or expertise in Indian affairs.

Total fees request for Mr. Tienson are $211,828.50, for Mr. Coon $27,703.28 and for Mr. Larson $7,656.00.

DATED this 4th day of September, 2024.

s/ James S. Coon
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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. Participants in this case who are registered eFilers will be served via the electronic mail function of the eFiling system as follows:

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