Judge Pechman

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

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.

DEB HAALAND, in her 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 BRYAN NEWLAND, in his capacity as Assistant Secretary – Indian Affairs,

Defendants.

CASE NO. C17-5668MJP

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' PETITION FOR FEES AND EXPENSES PURSUANT TO EAJA

INTRODUCTION

Plaintiffs request that they be awarded a total of $247,187.78 in EAJA fees as compensation for the legal work of their *pro bono* attorneys and their staff. Although Plaintiffs assert that they are

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

the prevailing party and, indeed, they were able to obtain some limited relief from the Court, on the whole Plaintiffs did not achieve any of the relief they sought when they filed this lawsuit. Consequently, Plaintiffs are appealing the court's judgment on their most important claim to the United States Court of Appeals for the Ninth Circuit.

Plaintiffs' petition for fees should be denied entirely because the position of the Government was substantially justified. Alternatively, Plaintiffs should receive a greatly reduced award because of the relatively limited results achieved by the litigative efforts of their attorneys. Additionally, elements of Plaintiffs' claim should be reduced or disallowed because of improper and excessive charges. With these reductions and disallowances, if fees are awarded, Plaintiffs should recover no more than $37,128.16, for the work of their attorneys on this lawsuit.

STATEMENT OF FACTS

Plaintiffs' amended complaint states eight claims for relief. Plaintiffs did not obtain the relief they sought on any single one of these claims.

i. Claim to Compel Tribal Recognition (Claim I)

On the most important of Plaintiffs' claims, they sought a declaration from the Court that Plaintiff Chinook Indian Nation should be formally recognized by the United States government as a successor-in-interest to the historical Chinook Indian Tribe and therefore that the Court should order the Court that Chinook Indian Nation be placed directly on the Department of the Interior's List of Federally Recognized Tribes. Dkt. # 24, Claim I. This claim was dismissed in its entirety. Siding with the Department's position, the Court concluded that the issue raised was a non-justiciable political question. Dkt. # 45, pp. 12-17.

ii. Claims to Establish Right to Re-Petition for Acknowledgement (Claims II-V)

The next four of Plaintiffs' claims alleged, under various theories, that the Department lacked any legal authority to bar previously denied petitioners from re-petitioning for federal acknowledgement following the administrative denial of their petitions. Dkt. # 24, Claim II (APA); Claim III (Due Process); Claim IV (Equal Protection); Claim V (Right to Petition). On the basis of

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

these claims, Plaintiffs sought both a declaration that the Department had no legal authority to proscribe re-petitioning for Tribal recognition at all and an injunction "to allow the Chinook to reapply for recognition or reaffirmation and to have their application considered promptly . . ." Dkt. # 24, p. 77, *ll.* 8-15. Neither the declaration nor the injunction sought by Plaintiffs was granted.

Claims III through V were dismissed outright. As to Claim II, the Court afforded Plaintiffs a limited form of relief *that Plaintiffs never requested*. The Court set aside and remanded for reconsideration the Department's decision not to adopt the proposed amended regulation because the Court determined that the reasons for the Department's decision were not adequately explained in the record. Dkt. # 112, pp. 11-18.

iii. Claims to Have Plaintiffs Declared the Rightful Beneficiaries of the Trust Fund (Claims VI-VIII)

Notwithstanding Plaintiffs' claim that they achieved success in this litigation in the form of a distribution to them of trust funds awarded to the "Lower Chinook and Clatsop Indians" by the Indian Claims Commission in 1970, that is relief they never sought. To the contrary, Plaintiffs affirmatively asserted that this was *not* a goal of their lawsuit. Dkt. # 102, p. 3, *n.*4. Instead, Plaintiffs sought a declaration from the Court that they were the rightful beneficiaries of these funds to the exclusion of all other contending parties. *Id.* p. 3, *ll.* 9-12; p. 13, *ll.* 9-11.

Here too, Plaintiffs failed. On Plaintiffs' motion for partial summary judgment, the Court, siding with the position of the Department, denied Plaintiffs' request, concluding that "the Court lacks authority under the APA to issue the declaratory judgment requested by CIN." Dkt. # 113, p. 16, *ll.* 4-5; *and see* p. 17, *ll.* 4-9. Further, in the absence of "any evidence" that Plaintiffs were the true beneficiaries of the trust funds, the Court, again siding with the position of the Department, concluded that it was required to also deny their motion with respect to their Constitutional claims. *Id.* at pp. 16-17.

Once again, however, the Court afforded some minimal relief to Plaintiffs that they did not request. While agreeing with the Department that a letter written by a Department employee

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

explaining why Plaintiffs were no longer receiving account statements was not itself a final agency action within the meaning of the APA, the Court determined that the letter was indicative of a prior agency decision, found by the Court to be a "final agency action," to stop sending out trust account statements to non-federally recognized entities. *Id.* at p. 13. The Court concluded that, because neither the prior decision nor the rationale for the decision were set out in the administrative record, the unexplained decision to stop sending account statements to unrecognized tribes had to be set aside and remanded to the Department as arbitrary and capricious. Dkt. # 113, p. 11, *l.* 15 - p. 15, *l.* 17.

iv. Distribution of Trust Assets

Later, the Department moved for summary judgment on the remaining claims in the lawsuit, Plaintiffs' Claim VII (Procedural Due Process) and Claim VIII (Substantive Due Process). Alternatively, the Department requested that, pursuant to the doctrine of primary jurisdiction, those claims should be dismissed without prejudice or stayed pending an administrative determination of, *inter alia*, the appropriate distribution of the funds by the Department pursuant to 25 U.S.C. § 1401, *et. seq.* Dkt. # 128, pp. 23-26.

The Department's assertion of primary jurisdiction was opposed by Plaintiffs. Dkt. # 129, pp. 15-16. Nevertheless, over Plaintiffs' opposition, this part of the Department's motion was granted, and the lawsuit was ordered stayed pending an administrative determination of the matter. Dkt. # 133, p. 14, *ll.* 2-8. Following administrative determination and a distribution of the trust assets, these two remaining claims, Claim VII and Claim VIII, were dismissed as moot and final judgment was entered in the case. Dkt. # 157, 158.

ARGUMENT

I. THE POSITION OF THE DEPARTMENT WAS SUBSTANTIALLY JUSTIFIED

EAJA authorizes the award of attorney fees and expenses, "[e]xcept as otherwise specifically provided by statute," to parties who prevail against the United States in all civil actions (except tort cases and tax cases), but only if certain conditions are met.

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

The Department concedes that, under EAJA's undemanding standard, Plaintiffs are prevailing parties. However, the Department does not concede that its position in this lawsuit was other than substantially justified. "Substantially justified" does not mean "'justified to a high degree,' but rather 'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

In *Commissioner, INS v. Jean*, 496 U.S. 154 (1990), the Supreme Court held that the statute's references to the singular "position" of the United States confirm "that only one threshold determination for the entire civil action is to be made." *Id*. at 159. And, "[w]hile the parties' postures on individual matters may be more or less justified, the EAJA – like other fee-shifting statutes - favors treating a case as an inclusive whole, rather than as atomized line-items." *Id*. at 161-62; *see also Al-Harbi v. INS*, 284 F.3d 1080, 1085-86 (9th Cir. 2002).

In defiance of that standard, Plaintiffs' argument focuses entirely on two areas in which they obtained limited relief – *distinguishable from the relief they actually sought* – without any consideration of the Department's prevailing position, fully or in part, on each and every one of their original claims.

i. Federal Recognition as an Indian Tribe

The most important issue in the lawsuit was Plaintiffs' effort to force the Department to place the Chinook Indian Tribe directly on the Department's list of federally recognized tribes outside of the Department's federal acknowledgement process. This is evidenced by the over one hundred paragraphs in the complaint devoted to this issue. The Department categorically prevailed on the most significant issue in the lawsuit.

ii. The Department's Authority to Proscribe Re-Petitioning

Plaintiffs also sought to establish that the Department lacked the legal authority to proscribe re-petitioning, and they sought an injunction compelling the Department to permit them to re-petition for federal acknowledgement. Plaintiffs did not obtain this relief either. The Department obtained dismissal of Plaintiffs' three constitutional claims and the Court sided with the

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

Government's position in holding that the Department did indeed have the legal authority to ban re-petitioning. Thus, Plaintiffs obtained neither the declaration nor the injunction they sought. Indeed, the relief ordered by the Court - a remand to the Department for reconsideration of its decision to maintain the long-standing re-petition ban - fell far short of the relief that Plaintiffs actually requested. And while the Court did not find that the Department provided "good reasons" for maintaining the ban on re-petitioning, it can hardly be said that the Department lacked substantial justification for its position. Its reasons were set forth in the administrative record and reflected the substantial opposition to the proposed amendment the Department received from the affected community during rulemaking proceedings. Indeed, the Court clarified that it would not "judge the appropriateness" of various justifications for the Department's position, only that the Department had to articulate a satisfactory explanation incorporating those justifications if it chose to keep the ban. Dkt. # 93, p. 17, *ll.* 13-15; *see also id*. at p. 21, *ll.* 4-5. While the Court found the reasons stated in the 2015 final rule to be unconvincing, it did not conclude that the Department's position to uphold the ban was "unreasonable." *See Boulden v. Comm'r of Soc. Sec.*, Civil No. 07–4343 (RMB), 2009 WL 963660, at *1 (D.N.J. Apr. 8, 2009)*; and see Automatic Plastic Molding, Inc. v. United States*, 276 F. Supp. 2d 1362, 1370 (C.I.T. 2003) (Government's position, while unconvincing, was not unreasonable).

Moreover, the fact that the government did not prevail on one or more issues in a case does not raise a presumption that its position was not substantially justified. *Scarborough v. Principi*, 541 U.S. 401, 415 (2004). Here, where the Department categorically prevailed on the most prominent issue in the case and substantially prevailed on the less important issues, it cannot be said that its position in the case, viewed as an inclusive whole, was not substantially justified. *See W.M.V.C. v. Barr*, 926 F.3d 202, 210 (5th Cir. 2019).

iii. Establishing Plaintiffs' Status as the Beneficiaries of the Trust Fund

Thirdly, Plaintiffs sought a judicial order declaring Plaintiff Chinook Indian Nation to be the true beneficiary of the Lower Band of Chinook and Clatsop Indians trust fund. Dkt. # 102, p. 3,

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

ll. 9-12. Here too, Plaintiffs were unsuccessful. Agreeing with the Department, this Court refused to declare Plaintiffs to be the beneficiaries of the trust fund. Dkt. # 113, p. 17, *ll*. 4-9. Instead, the Court merely remanded the matter to the Department to reconsider its decision to cease sending Plaintiffs copies of routine statements as to the status of the account. *Id.* at p. 17, *ll.* 11-14. Given the thrust of Plaintiffs' claims, and the fact that this was not the relief they specifically requested, their success on this lesser claim was relatively insubstantial.

iv. Distribution of Trust Assets

Plaintiffs' attorneys count as one of their successes in this lawsuit the distribution of the "Lower Band of Chinook and Clatsop Indians" trust fund to them, even though that distribution resulted from administrative proceedings that were entirely separate and independent from this lawsuit. Dkt. # 170, p. 2, *ll.* 12-17. This is incongruous. As Plaintiffs affirmatively represented to this Court, the lawsuit was not brought for this purpose. Dkt. # 102, p. 3, n.4. And this distribution did not result from an adjudication of the relevant issues by the Court. Thus, for EAJA purposes, this does not count as a success. EAJA does not permit a recovery from the Government based on separate, non-adversarial administrative proceedings. *See W. Watersheds Project v. U.S. Dep't of the Interior*, 677 F.3d 922, 926 (9th Cir. 2012). EAJA also does not permit a recovery from the Government on the theory that the lawsuit was the "catalyst" for some administrative action. *See Citizens For Better Forestry v. U.S. Dep't of Agric.*, 567 F.3d 1128, 1134 (9th Cir. 2009). Lastly, it should be noted that Plaintiffs ultimately did not prevail on Claims VII and VIII as those were dismissed as moot. *See Van Truong v. Holder*, No. 2:10–cv–797 CW, 2012 WL 845399, at *2 (D. Utah Mar. 12, 2012).

II. THE COURT SHOULD NOT ACCEPT THE HOURLY RATE SOUGHT FOR THE WORK OF ATTORNEY THANE TIENSON

Plaintiffs claim an hourly rate for the work of attorney Thane Tienson that is in excess of the statutory rate prescribed by EAJA. According to Plaintiffs, "special factors" require that Mr. Tienson's work be compensated at a rate of $510.00 per hour because of "his specialized

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

expertise . . . 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." Dkt. # 170, p. 14, *ll.* 19-24.

Three requirements must be met before EAJA's statutory rate can be exceeded. "First, the attorney must possess distinctive knowledge and skills developed through a practice specialty. Secondly, those distinctive skills must be needed in the litigation. Lastly, those skills must not be available elsewhere at the statutory rate." *Love v. Reilly*, 924 F.2d 1492, 1499 (9th Cir. 1991). The burden of establishing the existence of these factors belongs to the fee claimant. *Nat. Res. Def. Council, Inc. v. Winter*, 543 F.3d 1152, 1161 (9th Cir. 2008).

Plaintiffs have not met their burden of establishing that they are entitled to a compensation rate of $510.00 per hour for the work of Mr. Tienson. First, the purported Tienson declaration cannot be accepted as evidence in these proceedings. For evidence to be admissible, it also must be shown to be authentic. *Schwarz v. Lassen Cnty. ex rel. Lassen Cnty. Jail*, No. 2:10–cv–03048–MCE–CMK, 2013 WL 5425102, at *9 (E.D. Cal. Sept. 27, 2013), *aff'd*, 628 F. App'x 527 (9th Cir. 2016). Unfortunately, Mr. Tienson passed away on January 21, 2021, before this litigation was completed. Dkt. # 134. According to Mr. Tienson's co-counsel, before his death Mr. Tienson prepared a declaration intended to support an EAJA fee petition. Dkt. # 173, p. 2, *ll.* 13-20. But *that* declaration has not been presented to the Court. Instead, Plaintiffs have put forward a declaration of Mr. Tienson, purportedly dated December 3, 2020, but, "edited" by co-counsel "for clarity and brevity . . . but . . . not changed in substance." Dkt. # 173, p. 2, *ll.* 13-20. The declaration of Mr. Tienson put forward by Plaintiffs, therefore, is an altered version of the original and is, by definition, inauthentic. It should be ruled inadmissible. Fed. R. Evid. 901(a).

That problem aside, assuming the declaration satisfies the first factor set forth in *Love*, the second and third factors are not met. This action did not concern native fisheries or complex environmental litigation, nor did it turn on treaty rights. Thus, assuming purely for purposes of argument that these claimed areas of expertise would be sufficient to support a special factor

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

determination, Plaintiffs have not shown that these claimed distinctive skills were needed in the litigation. Moreover, Plaintiffs have made no showing that attorneys with the requisite level of skill were not available as the statutory rate. Thus, like his co-counsel, the time expended by Mr. Tienson on this litigation should be compensated at no more than EAJA's adjusted hourly rate ceiling.

Should the Court conclude that Plaintiffs have indeed made a sufficient showing of special factors, Plaintiffs have failed to adequately justify the claimed rate of $510.00 per hour for Mr. Tienson. The purported declaration of Mr. Tienson contains an unrealistic comparison of his requested rate to the rates supposedly charged by two of the most prestigious and high-paying law firms in the Seattle market. However, attorneys who work in those firms can command high hourly rates because of the elite credentials possessed by attorneys who are hired by those firms and the exclusive roster of clients who can afford to retain them at those rates. In other words, rates commanded by the few attorneys who are selected to work at those firms do not establish the prevailing market rate for most attorneys in the Seattle-Tacoma market.

Plaintiffs also rely upon a matrix, the "USAO Attorneys' Fees Matrix," that purportedly shows hourly rates for attorneys practicing in the District of Columbia. Dkt. # 172, ¶¶ 11-14. The Ninth Circuit has questioned whether such matrices are an appropriate tool for determining attorney rates in the Western United States. "[J]ust because the *Laffey* matrix has been accepted in the District of Columbia does not mean that it is a sound basis for determining rates elsewhere, let alone in a legal market 3,000 miles away." *Id.* The use of such matrices for calculating EAJA fees has been rejected in at least two recent cases in this District. See *Xiaosi Hu v. Munita*, Civil ActionNo. 2:19-cv-01302-RAJ, 2020 WL 2199473, at *2 (W.D. Wash. May 6, 2020); *Koonwaiyou v. Blinken*, Case No. 3:21-CV-05474-DGE, 2024 WL 1193111, at *8–9 (W.D. Wash. Mar. 20, 2024).

Also, notably absent from the purported Tienson declaration is any indication of the hourly rate at which he normally billed his clients. What an attorney "charges clients is powerful, and perhaps the best, evidence of his market rate." *Dillard v. City of Greensboro*, 213 F.3d 1347, 1354

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

(11th Cir. 2000). While Mr. Tienson's purported declaration never discloses his ordinary billing rate, the timesheet submitted to document the value of Mr. Tienson's hours, Dkt. # 17-1, is calculated on the basis of an hourly rate of $425.00 per hour.

Assuming $425.00 per hour is the rate that Mr. Tienson normally billed clients for his services, which seems likely, there is no reason that the United States should pay a premium of $85.00 per hour.

III. THE COURT SHOULD DISALLOW IMPROPERLY CLAIMED AND EXCESSIVE HOURS

The Court should disallow compensation for excessive billing and improperly claimed hours.

a. Excessive Hours Drafting Pleadings

Under the federal rule a complaint is required to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Federal Rule of Civil Procedure 8(a)(2). In defiance of this requirement, Plaintiffs filed an original 75-page complaint (Dkt. # 1) followed shortly thereafter by an amended 78-page complaint (Dkt. # 24). According to Plaintiffs' timesheets, these two complaints took Plaintiffs' attorneys 45.5 hours to draft and review at a claimed cost of approximately $21,326.00 (based on a $425.00 per hour rate for Mr. Tienson). The complaints both contain over 100 paragraphs primarily alleging unnecessary historical facts in support of Plaintiffs' failed claim for judge-mandated Tribal recognition of their organization. *See, e.g.*, Dkt. # 24, ¶¶ 18-150. Pleading at this level of detail is unnecessary in the federal system and particularly unnecessary here as the law plainly establishes that it is not within the jurisdiction of federal courts to adjudicate this claim. At least 50% of these claimed hours should be disallowed.

b. Hours Expended Opposing the Motion to Intervene

Plaintiffs' attorneys' timesheets show that they devoted a total of 28.75 hours to opposing a motion filed by the Confederated Tribe of Siletz Indians. The United States took no position on the Siletz Tribe's motion to intervene. Dkt. # 59. Yet, Plaintiffs seek to bill the United States for their time opposing this motion for a total amount of $9,453.15 (based on a $425.00 per hour rate for

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

Mr. Tienson). All fee compensation for time expended by Plaintiffs' attorneys for opposing the Siletz Indians motion for intervention should be disallowed. Those hours are not chargeable to the United States under EAJA. *Love*, 924 F.2d at 1496.

c. Unrelated Matters

On March 16, 2018, the following entry appears on Mr. Tienson's time sheet:

> JDB 3/16/2018 0.50 247.50 Review deal regarding purchase of small parcel of land; outline list of considerations and process to close transaction;

This time entry appears to be wholly unrelated to work necessary for this lawsuit. Accordingly, absent more, these claimed hours should be disallowed.

IV. IF THE COURT CONCLUDES THAT THE DEPARTMENT'S POSITION WAS NOT SUBTANTIALLY JUSTIFIED, PLAINTIFFS' CLAIM FOR FEES SHOULD BE SUBSTANTIALLY REDUCED BASED ON LACK OF SUCCESS

If the Court concludes that Plaintiffs are entitled to fees, their award should be substantially reduced based on lack of success. Courts should exclude from the fee calculation "hours that were not 'reasonably expended.'" *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). In *Hensley*, the Supreme Court held that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees . . . [W]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 440.

Hensley establishes a two-part test for calculating an appropriate fee award where a party is only partially successful. First, the court must determine whether the plaintiff "fail[ed] to prevail on claims that were unrelated to the claims on which he succeeded." *Hensley*, 461 U.S. at 434. If the successful and unsuccessful claims are unrelated, the hours spent on the unsuccessful claims must be excluded. *Id*. Second, if the successful and unsuccessful claims are related, then the court must determine whether "the plaintiff achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Id*. "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain

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

grounds is not a sufficient reason for reducing a fee." *Id*. at 435. However, where the claims are related and "the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 440.

Under the first part of this two-part test, all claimed fees associated with Plaintiffs' claim for court-mandated federal recognition as an Indian tribe should be disallowed. This claim is unrelated to the other two sets of claims asserted by Plaintiffs in the lawsuit. "Claims are 'unrelated' if they are 'entirely distinct and separate' from the claims on which the plaintiff prevailed." *Sorenson v. Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001). Hours spent on unrelated, unsuccessful claims should be excluded from the fee award. *Id*. "[I]t is the court's prerogative (indeed, its duty) to winnow out excessive hours, time spent tilting at windmills, and the like." *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 295-96 (1st Cir. 2001).

Plaintiffs' claim for court-mandated recognition is just such a claim. It is long settled law that the United States' decision whether or not to recognize Indian tribes is a non-justiciable political question because of the political nature of recognizing a government-to-government relationship. *See, e.g., United States v. Sandoval*, 231 U.S. 28, 46 (1913); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1276 (9th Cir. 2004).

Moreover, this claim was entirely distinct from Plaintiffs' other two sets of claims that sought to establish the Tribe's right to re-petition for federal acknowledgment and to have itself declared as the beneficiary of a trust fund. Those other two sets of claims did not constitute alternative theories for obtaining the same result, *i.e.* court-mandated recognition. Accordingly, all claimed hours associated with this argument should be disallowed.

Because of the lack of success on this claim, a fee reduction of not less than one-third is justified.

Plaintiffs also did not achieve their other two goals in this lawsuit. First, Plaintiffs' demands for a declaration that the Department had no authority to proscribe re-petitioning and for an injunction requiring the Department to allow it to re-petition for acknowledgement were rejected

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

because the Court agreed with the arguments of the Department. And Plaintiffs' demand for an order declaring themselves to be the rightful beneficiaries of the Lower Band of Chinook and Clatsop Indians trust fund was also denied because, again, the Court sided with the arguments of the Department. An additional fee reduction of one-third for the lack of success on both of these claims is justified.

In summary, Plaintiffs achieved none of the relief they sought from the Court in bringing this lawsuit. While the Court awarded them some relief, the relief they obtained as a result of their litigative efforts fell far short of their goals and, indeed, was not the relief they requested. As a consequence, any calculation of a fee award to Plaintiffs should include a two-thirds reduction in compensable hours.

CONCLUSION

For the foregoing reasons, the Department submits that Plaintiffs' petition for fees should be denied.

CERTIFICATION

I certify that this memorandum contains 4,164 words, in compliance with Local Civil Rule LCR 7(e)(2).

DATED this 27th day of September 2024.

Respectfully submitted,

TESSA M. GORMAN
United States Attorney

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

Attorneys for Defendants