No. 24-3629

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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/Appellants,

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/Respondents.

No. 24-3629
D.C. 3:17-cv-05668-MJP

PLAINTIFF'S-APPELLANT'S OPENING BRIEF

On Appeal from a Judgment of the United States District Court
for the Western District of Washington), Entered May 9, 2024
by the Honorable Marsha J. Pechman

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Regulations, and Rulings

Secondary Sources

Other

PLAINTIFF-APPELLANT'S BRIEF

I. Jurisdictional Statement

This is an appeal from the district court's final judgment dismissing plaintiffs' claim for relief for federal acknowledgment as an Indian Tribe under the Federally Recognized Indian Tribe List Act, Public Law 103-454, sec. 103 ("List Act"). The question on this appeal is whether the district court had jurisdiction under the List Act. This court has jurisdiction over this appeal from the district court's final decision under 28 U.S.C. 1291. The district court's Judgment was entered May 9, 2024 (ER 22-23) and plaintiff filed his notice of appeal June 3, 2024 (ER 21), which is within the 60 days provided in FRAP 4(a)(1)(B) where a United States agency, such as defendant, is a party.

II. Issue Presented for Review

Did the trial court err in holding that it had no jurisdiction to decide plaintiff's claim to federal recognition as an Indian Tribe where the List Act's findings provide that an Indian Tribe may become federally recognized "by a decision of a United States court," and no other Congressional enactment delegates authority to decide tribal recognition to any court or agency.

III. Statement of the Case

Plaintiffs Chinook Indian Nation ("CIN") and its Tribal Council Chair Anthony Johnson filed this action against the Secretary and Department of Interior for, among other things,[1] federal recognition as an Indian Tribe, in 2017. Defendant moved to dismiss plaintiffs' claim for federal recognition,[2] and the trial court granted defendant's motion to dismiss on the ground that federal recognition of an Indian Tribe is a non-justiciable political question. ER 35-40. The court's decision became final when the court entered judgment May 9, 2024 (ER 22-23) (Judgment)), and plaintiffs filed this appeal. ER 21 (Notice of Appeal).

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[1] Plaintiffs' claims also included (1) a challenge to defendant's 25 CFR Part 83 regulation barring re-petitioning by a Tribe previously denied federal recognition and (2) a challenge to defendant's decision to deny them access to trust funds adjudicated in 1970 by the Indian Claims Commission ("ICC") for the taking of Chinook ancestral lands. ER 156-165 (re-petitioning); 165-168 (trust fund claims). The trial court ruled for plaintiffs on both issues, remanding to the agency for further proceedings. Defendant has now proposed a rule that would allow re-petitioning by tribes previously denied recognition (89 Fed Reg 57097) and has paid to CIN all of the trust funds adjudicated by the ICC for the taking of Chinook lands. Plaintiffs' trust fund claims have therefore been dismissed as moot. ER 22-23 (final judgment).

[2] "Federal recognition," also known as "federal acknowledgment" means the recognition by the United States of a government-to-government relationship with an Indian Tribe and includes a range of rights to self-government and financial, medical, housing and other benefits to the recognized Tribe. 25 CFR Part 83.

IV. Statement of Facts[3]

Against the historical background of changing and conflicting government policies, the United States have pursued a course of dealing with the Chinook Tribe as representatives of their people government-to-government, consistently, repeatedly, and in a number of ways. The Chinook were a recognized Indian Tribe, representing their people as of the mid-nineteenth century treaty era, signing a treaty with the United States in 1851 at Tansey Point. ER 101-102. Defendants recognized, almost a century later, in 1954:

> We are fully aware that the *Chinooks are an Indian Tribe*, and it is unfortunate that no treaties were ever executed with them. However, you are familiar with the circumstances, undoubtedly, surrounding the [1855 Chehalis River] treaty negotiations, and it was not at that time assumed that any serious consequences could arise in the future years because of the failure to enter into this treaty.

ER-122 (emphasis added). Indeed, in 1931, the U.S. Supreme Court had recognized the Chinook Tribe, holding that, under the General Allotment Act of 1887, "the Chehalis, Chinook and Cowlitz tribes are among those whose members

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[3] The facts are taken from the First Amended Complaint. On a motion to dismiss for lack of subject matter jurisdiction, "all of the facts alleged in the complaint are presumed true, and the pleadings are construed in the light most favorable to the nonmoving party. *Bates ex rel. Bates v. Mortgage Elec. Registration Sys*., 694 F.3d 1076, 1080 (9th Cir. 2012), *citing Rowe v. Educ. Credit Mgmt. Corp.,* 559 F.3d 1028, 1029-30 (9th Cir. 2009).

are entitled to take allotments within the Quinaielt Reservation, if without allotments elsewhere." *Halbert v. U.S.,* 283 U.S. 753, 760 (1931).

The General Allotment Act of 1887 provided for allotments of Indian reservation land to Indians living on those lands, and 1890-era allotments to Chinook tribal members have been taken into trust by BIA, which has also taken in trust for Chinook members other historically Chinook lands. ER 122-123. Congress appropriated funds in 1912, 25 years after the Allotment Act, to be "paid to" Chinook Tribes in Oregon and Washington for tribal lands taken under unratified treaties in 1851, and, though those amounts would later be found to have been unconscionably insufficient, they were paid to the Chinook Tribe two years later in 1914. ER 123-124. Those payments were made to the tribes, as representatives of their people, in settlement for their ancestral lands that were taken under the unratified Tansey Point treaty with the federal government. 37 Stat. 518, 535 (1912); ER 123-124. The payment of those sums ratified the 1851 treaty under which Plaintiffs' land had been taken. *E.g., IHP Indus. v. C.J. Mahan Constr. Co., LLC*, 2016 U.S. Dist. LEXIS 170743, *14-*15 (2016) (where a party's conduct is consistent with either an unsigned or unwritten agreement, courts may enforce the agreement as constructively ratified).

With the new Eisenhower Administration in 1953, the government undertook to terminate its trust relationship with Indian tribes in an effort to end

federal benefits and services to tribes "as soon as possible." H.R. Res. 108, 83rd Cong. (1953). As part of assessing termination possibilities, Defendants met with the Chinook and other tribes in Washington in 1953 and 1954, twice in the ancestral Chinook village that is now Bay Center, Washington. ER 127. Defendants contracted with the Chinook, as a tribe, for a loan from a federal revolving fund that provided financial assistance to tribes making claims before the Indian Claims Commission (ICC). ER 124-125. The ICC recognized the Chinook Tribe as representative of its people claiming compensation for lands ceded in the 1851 treaty. 6 Ind. Cl. Com. 229a. (Chinook "have the capacity and the right to assert claims for their respective lands" described in the Commission's findings.) The funds adjudicated in 1970 by the ICC were held in trust by Defendant BIA and amounted to about $500,000 at the time of the filing of the complaint below. ER 151. After the trial court remanded Plaintiffs' trust fund claim to the agency, those funds were paid to Plaintiff Chinook Indian Nation. ER 1-4; 5-20. (Amended Motion for EAJA Attorney Fees; Declaration of Anthony Johnson).

The Chinook have received federal services and benefits designated by statute for Tribes that are "recognized" as eligible for such services and benefits "because of their status as Indians." 25 U.S.C. § 1903(8). These include healthcare for Chinook tribal members admitted to BIA medical facilities because of their membership in the Chinook Tribe. ER 128-129. Defendants also consult with the

Chinook in matters relevant to Defendants' original probate jurisdiction under 25 U.S.C. §§ 372 and 373. ER 129. Defendants have kept and reported accounts pursuant to their accounting responsibility for Indian trust funds and corresponded concerning them directly with plaintiff Chinook Indian Nation. ER 130.

The Chinook have also received economic development support made available to recognized Indian tribes under 25 U.S.C. § 1452. ER 130-131. BIA has funded a feasibility study for a tribal charter boat business. *Id*. The Chinook also received a 1979 grant for tribal clerical and planning services and a 1982 grant for tribal office maintenance. *Id*.

Other federal agencies, such as the National Park Service, have consulted with the Chinook on a government-to-government basis concerning the establishment of national parks and monuments such as Fort Clatsop (where the Chinook helped the Lewis & Clark Corps of Discovery survive the winter of 1805), environmental and salmon recovery projects and the repatriation of ancestral remains. ER 131-132. Federal agencies also consult with the Chinook and formally-recognized tribes under the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq*. The Chinook are the only tribe among those regularly consulted who have not been formally recognized by Defendants. ER 132.

The U.S. Fish and Wildlife Service and U.S. Navy have, in 2017, initiated required consultation with the Chinook Indian Nation under 36 C.F.R. § 800.2, implementing the National Historic Preservation Act, with respect to tribal lands and historic properties of significance to the Tribe. ER 133-134. These agencies consult with Plaintiffs under these requirements as representatives of the Chinook people pursuant to regulations defining "Indian Tribe" as "federally recognized Indian tribes and Alaska Native Corporations." 36 C.F.R. § 230.2.

In sum, and as alleged in the FAC, for well over 100 years, and in a broad array of the circumstances in which the United States can deal with an Indian tribe on a government-to-government basis, Defendants have, in fact and in practice, recognized and engaged in a course of dealing with the Chinook Tribe as the authorized and governing representative of the Chinook people. They have constructively ratified the 1851 Tansey Point treaty by statutory payment of treaty amounts in 1912 and 1925, by ICC judgment for further payment for those lands, by paying those adjudicated amounts on remand in this case and by their repeated actions acknowledging their obligation to consult and deal with the Chinook Indian Nation as representative of the Chinook people.

V. Summary of Argument

Defendant argued below that tribal recognition is a political question not subject to decision by the judiciary and that the government had not waived its

sovereign immunity as to plaintiffs' claim.[4] However, in the List Act, enacted in 1994, Congress explicitly found that

> Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" *or by a decision of a United States court;*

Public Law 103-454, sec. 103(3)(emphasis added). Indeed, to this day, defendant's Bureau of Indian Affairs ("BIA") website states that the List Act Formally established three ways in which an Indian group may become federally recognized:[5]

> By Act of Congress,
> By the administrative procedures under 25 C.F.R. Part 83, or
> *By decision of a United States court.*

(emphasis added). The trial court erred in holding, to the contrary, that it had no power to recognize an Indian Tribe on the ground that tribal recognition is a political question on which a court must defer to Congress or the Executive

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[4] Defendant also argued that the statute of limitations had run on plaintiffs' claims for recognition and that the government had not waived its sovereign immunity as to plaintiffs' claim. However the trial court ruled only on the government's "political question" argument, finding its decision sufficient on that basis. ER 35.

[5] https://www.bia.gov/faqs/how-federal-recognition-status conferred#:~:text=Also%20in%201994%2C%20Congress%20enacted%20Public%20Law%20103-454%2C,or%20By%20decision%20of%20a%20United%20States%20court. (accessed September 14, 2024 (emphasis added).

Branch. ER 36-40. A court does not defer to Congress by declining to follow the language Congress chose to use in a statute.

The trial court found the List Act findings to be insufficient to convey Congressional intent to delegate to federal courts the power to decide questions of tribal recognition. *Id.* The problem with that rationale is that the List Act findings are the only expression of Congress's intent to delegate that power to anyone. The statutes on which Defendant relies for its authority to decide tribal recognition, 25 USC 2 and 9[6], delegate only the most general powers over Indian affairs, without mentioning any policy to guide the exercise of those powers. They do not mention tribal recognition, and they articulate no "intelligible principle" for bestowing or withholding it, which a delegating statute must do to meet the requirements of the separation of powers. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Since there is no other effective delegation of authority to the Department to decide tribal recognition, such authority must be found, if at all,

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[6] 25 USC 2 (1830): "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."

25 USC 9 (1830): "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs."

in the List Act findings. If not, Defendant's 46 year-old 25 CFR Part 83 system for deciding tribal recognition violates the non-delegation doctrine. This Court should construe the List Act, including its findings, as an effective delegation of authority to Defendant and to the federal courts. It applies to both or to neither.

This is especially true here in view of the often-repeated statutory and judicial principle that "the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians,* 471 US 759, 766 (1985).

> In determining congressional intent, we are cautioned to follow "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'

McClanahan v. Arizona State Tax Comm'n, 411 US 164, 174 (1973), *quoting Carpenter v. Shaw,* 280 US 363, 367 (1930). Congress' statement that a "decision of a United States court" may recognize an Indian tribe is not doubtful. Though a proud people, the Chinook are indeed "weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." The trial court erred in construing the List Act so as to ignore part of its language and disregard as a "political question" a decision already made by Congress that "a United States court" has the power to consider plaintiffs' claim to be recognized.

VI. First Assignment of Error

The trial court erred in dismissing plaintiffs' first claim for relief on the ground that federal recognition of an Indian Tribe is a political question over which the court had no subject matter jurisdiction.

A. Preservation of Error

Plaintiff's First Claim for Relief below was a claim that the Court should grant plaintiff CIN federal recognition as an Indian Tribe. ER 153-156. Defendant moved to dismiss that claim on the ground that federal recognition is a political question, so the court had no subject matter jurisdiction. Plaintiffs opposed that motion and that argument. The trial court granted defendants' motion to dismiss for lack of subject matter jurisdiction on the political question ground. ER 35-40. The question whether the trial court had subject matter jurisdiction is preserved.

B. Standard of Review

Whether a trial court has subject matter jurisdiction over a plaintiffs' claim is a question of law, which this court reviews de novo, without deference to the trial court's decision. The facts in plaintiffs' complaint are taken as true and viewed in the light most favorable to plaintiffs. *Bates,* 694 F3d at 1080. The question before this court is the legal question whether the trial court had subject matter jurisdiction over plaintiffs' claim for federal recognition as an Indian Tribe.

C. Argument

Federal statutory construction is a search for Congressional intent. Congressional findings are important indicators of Congressional intent. *E.*g. *Turner Broad. Sys. v. Fcc*, 520 U.S. 180, 195 (1997)("We owe Congress' findings deference"); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 588 (1992)("finding" emphasizing loss of species "in the United States" relied on to limit Endangered Species Act consultation to U.S.); The findings Congress provided with the List Act cannot be disregarded because they express the only delegation by Congress of its power to recognize Indian tribes. If those findings do not delegate the power of recognition to federal courts, neither do they delegate that power to the Department of Interior. No other statute delegates the power of tribal recognition at all, and, *a fortiori,* no other statute provides the "intelligible principles" required for delegation of Congressional power to an agency.

1. No Congressional statement other than the Findings in the List Act enunciates any intelligible principle for delegating the question of tribal recognition to any agency or court.

Congress has plenary constitutional authority over relations with the Indian tribes. United States Constitution, Article I, section 8, par. 3: "the Congress shall have power … [t]o regulate Commerce … with the Indian Tribes." It has delegated that authority in extremely general terms to the Executive Department under two nineteenth century statutes:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations

25 USC 2 (1830).

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

25 USC 9.

No act of Congress specifically delegates the recognition of Indian Tribes to any agency. Such recognition was historically granted *ad hoc* by decisions of federal courts as well as Acts of Congress and various kinds of administrative action:

> before 1978, requests from Indian groups for Federal acknowledgment as tribes were determined on an *ad hoc* basis. Some tribes were acknowledged by Congressional action. Others were done by various forms of administrative decision within the Executive Branch of the Federal Government, *or through cases brought in the courts*."

Shinnecock Indian Nation v. Kempthorne, 2008 U.S. Dist. LEXIS 75826, *57-60 (emphasis added). In 1975, Congress established the American Indian Policy Review Commission to review the status of relations between the Federal Government and the Indian Tribes. P.L. 93-580. No new legislation concerning tribal recognition came out of the Commission's report, but the Department of Interior, in 1978, created *sua sponte* an administrative structure for the purpose of deciding recognition issues, in 25 CFR Part 83:

> By the end of the 1960s, tribal leaders, the Red Power movement, scholars, nonfederally recognized tribes, and other advocates mounted a highly visible campaign for the U.S. government to abandon its termination policy and develop a more formal, structured process for recognizing Indian nations. The existence and plight of nonfederally recognized tribes gained national attention as Indian nations litigated land claims along the East Coast and treaty fishing rights in Washington State. As a result, the federal government considered several options for developing a policy and process for recognizing Indian nations. *Congress, however, never enacted legislation crafting such a policy.*
>
> In 1978, the BIA stepped into the vacuum left by Congress and adopted regulations for recognizing Indian nations. *The BIA concluded that it must have general authority to determine tribal status in order to administer statutes providing benefits and services to Indians and Indian tribes. The agency identified such authority in two statutes, enacted in the 1830s, which convey the "management of all Indian affairs and of all matters arising out of Indian relations" to the Commissioner of Indian Affairs.* Part 83 of the Code of Federal Regulations created a comprehensive administrative process for recognizing Indian nations.
> …
> Congress has yet to enact legislation either establishing an administrative process or reforming the currently enacted administrative regulations in 25 C.F.R. part 83.

Kirsten Matoy Carlson, "Congress, Tribal Recognition, and Legislative-Administrative Multiplicity," 91 *Ind. L.J.* 955, 960, 964 n.7 (2016)(emphasis added). Some courts including this Court, have said, in passing, that Defendant "exercised its delegated authority" when it adopted the Part 83 administrative system in 1978. *E.g Kahawaiolaa*, 386 F.3d at 1273, *quoted in Shinnecock 2008 USDist LEXIS 75826* at *57. However no delegation is actually mentioned, and no principled delegation of tribal recognition authority actually exists.

The agency still relies, as statutory authority for Part 83, on the two nineteenth century statutes quoted above, the List Act (which requires the Department to keep a list of recognized tribes), and 43 USC 1457, another nineteenth century omnibus statute[7] which provides, in relevant part: "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies: *** Indians."

Congress may not delegate its powers without including some kind of "intelligible principle" to describe, limit or otherwise define the delegation. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Congress has, other than in the List Act in 1994, never mentioned delegating the recognition of Indian Tribes to Defendant at all, let alone subject to any intelligible principles. Its pre-List Act delegations to the Department have consisted of "the management of all Indian affairs and of all matters arising out of Indian relations,"[8] "carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs,"[9] and "public business relating to,,, Indians."[10]

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[7] First enacted in 1879, R.S. sec. 441, ch 182 , 20 Stat. 394; last amended in 1957, P.L. 85-86, 71 Stat. 157.

[8] 25 USC 2.

[9] 25 USC 9.

[10] 43 USC 1457.

A permissible delegation of Congressional power must include "intelligible principles," by which the Supreme Court means Congress must "ma[k]e clear to the delegee "the general policy" he must pursue and the "boundaries of [his]authority." *Gundy v. United States*, 588 U.S. 128, 146 (2019). The statutes on which Defendant relies for its Part 83 enactments include no "boundaries," because they delegate to the agency the management of all "Indian affairs," which is a broader portfolio that the Constitution gives Congress to regulate "Commerce … with the Indian Tribes." Const. Art. I sec. 8. Further, these 19th century delegations include no indication of "policy" at all. They include no requirement of reasonableness, no suggestion of what the goals might be. Are the Indians to be dealt with in the public interest? Justly and reasonably? Fairly and equitably? To protect public safety or the public health? All of these are policy standards held sufficient by the Supreme Court to uphold Congressional delegations. *Gundy* at 146 (citing cases). The handing over to Defendant of "Indian affairs" includes no suggestion of how Congress wants those affairs to be managed, what general outcomes are desired. Even under the very broad standards the Court approves, this "delegation" fails the "intelligible principles" test. It includes no principles at all. [11]

[11] The Supreme Court has struck down only two Congressional attempts at delegation, both in 1935, and both parts of the National Recovery Act. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 49 (1935); *Panama Refining*

It is only in the List Act findings that Congress has provided intelligible principles to guide the agency, and these must pass the non-delegation test if the delegation of tribal recognition to Defendant or to the courts is to survive.

2. Intelligible Principles in the List Act

The complete List Act findings provide:

> The Congress finds that—
>
> (1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;
>
> (2) ancillary to that authority, the United States has a trust responsibility to recognize Indian tribes, maintains a *government-to-government relationship* with those tribes, and *recognizes the sovereignty of those tribes*;
>
> (3) *Indian tribes presently may be recognized* by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated Procedures For Establishing that an American Indian Group Exists as an Indian Tribe;" or *by a decision of a United States court*;
>
> (4) a tribe which has been recognized in one of these manners *may not be terminated* except by an Act of Congress;
>
> (5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;

Co. v. Ryan, 293 U.S. 388 (1935), One might argue that those decisions are unique to the relationship between the Court and Congress in the Depression recovery era, but the present Supreme Court, in overruling the *Chevron* doctrine has not shown an inclination to expand agency power. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024). In any case, the non-delegation doctrine has been reaffirmed in recent cases. *Gundy, supra.*

> (6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;
>
> (7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to *determine the eligibility of certain groups to receive services from the United States*; and
>
> (8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are *eligible for the specific programs and services provided by the United States to Indians because of their status as Indians.*

P.L.103-454 sec. 3.

The "Findings" in Section 103 of the List Act are the only Congressionally enacted language from which intelligible principles can be derived to guide decisions whether or not to recognize an Indian Tribe. Those principles are not found in section 104, which says only that the Secretary shall publish annually a list of tribes that qualify for special federal programs and services. Those principles appear only in the section 103 findings, as follows:

> **"[T]he United States has a trust responsibility to recognized Indian tribes." Finding (2).**

"Trust responsibility" is a well-understood common law and statutory concept that imports a panoply of duties from trustee to beneficiary. *E.g. Hill v. United States DOI*, 699 F. Supp. 3d 1 (D. D.C. 2023). The idea that the U.S is acting as a trustee and that a tribe qualifies as an appropriate beneficiary of the relationship gives the decision maker a strong indication that that a trust

relationship exists, thus that that tribe is appropriately recognized. Federal management for half a century of Chinook funds paid for their ancestral lands under the 1970 ICC award[12] is, among others, a relevant indicator of an existing trust relationship.

The United States "maintains a government-to-government relationship" with the tribe and recognizes its sovereignty. (Finding 2)

The historical relationship between the federal government and the tribe has a great deal to say about whether recognition is appropriate because it serves as historical precedent that defines the existing relationship and addresses reliance interests on both sides. As has been true for the government and the Chinook, there can be many ways in which the government has treated the tribe as the authorized, sovereign representative of its people. As this Court said in *Kahawaiolaa v. Norton*, 386 F3d 1271, 1273 (9th Cir. 2004).

> Federal recognition may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity.

Quoting William C. Canby, Jr., *American Indian Law in a Nutshell* 4 (4th ed. 2004). From treaty negotiations in the 1850s to claims brought by the Chinook on behalf of their people at the end of the 19th century, to payment of those claims by Congress in 1914 and 1925, to Reorganization Act consultations in the 1930s, to

[12] ER 130. (FAC 38)

further land claims before the ICC in the 1950s and the 1970 ICC award for Chinook lands, to the providing of Chinook governing documents to the BIA in 1953,[13] to the modern day providing of healthcare on the basis of tribal membership, to consultation in probate matters,[14] to trust fund management for Chinook beneficiaries, to economic development support and consultation concerning the protection and repatriation to the tribe of ancestral graves and artifacts,[15] to consultation between the U.S. Navy and the Chinook about military training exercises,[16] the findings define a "government-to-government" course of dealing with a tribe as a sovereign as an important factor supporting recognition.

> **A tribe may be recognized "by a decision of a United States court. (Finding 3). Recognition of a tribe may not be terminated (Finding 4).**
>
> These findings state two specific intelligible procedural principles.
>
> **Recognized tribes may not be terminated. Recognized tribes that have been terminated should be reinstated. (Finding 5).**
>
> The principle stated in this finding is clearly intelligible.
>
> **This list should be current and accurate because it is used to determine the eligibility of certain groups to receive services from the United States. (Finding 7).**

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[13] ER 127.

[14] ER 129.

[15] ER 131-132.

[16] ER 134.

Stating the purpose of the list helps to clarify which tribes should be recognized by indicating which of them have needs that are met by the benefits and services provided in the statutes that describe those benefits and services.

The "findings" section of the List Act is the only place where Congress has articulated intelligible principles by which and agency or a court can decide whether to recognize an Indian tribe. It is the sole indication of Congress' intent. If those findings are held not to express Congress' intent, there is no principled basis for the delegation to the Department of Interior of the power to make tribal recognition decisions. Indeed, there is no intelligible principled delegation at all. And while those eight findings suggest intelligible principles in varying degrees, one of them is clear and unequivocal:

> Indian tribes presently [in 1994] may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" *or by a decision of a United States court.*

(emphasis added). This Court should defer to that finding as the only relevant expression of Congressional intent.

3. "Political question" abstention is error where it contradicts the only indication of Congressional intent.

The "political question" doctrine is a judicial construct designed to accord due respect, as a matter of separation of powers, to the authority of the political branches over matters assigned to them by the Constitution. *E.g. Corrie v.*

Caterpillar, 503 F.3d 974, 980 (9th Cir. 2007), *citing Baker v. Carr,* 369 US 186, 211 (1962).

Under the List Act, according that respect means following the explicit terms of Congress's allocation of authority to recognize Indian tribes "by a decision of a United States court." The court properly defers to Congress by honoring the language of that delegation because, as above, there is no expression by Congress of its intention concerning the recognition of Indian tribes other than its findings in the List Act. The intention of Congress is clear and uncontradicted -- "a United States court" may decide whether or not a tribe should be recognized. Where Congress has made clear its intent to delegate a decision to a federal court, that court cannot refuse the delegation on the ground that it is up to Congress to make that decision.

4. Federal Court Decisions applying the List Act findings.

This Court has recently said "A group of Indians may achieve federal recognition in three ways: (1) by Congressional act; (2) by Secretarial acknowledgment or (3) by a decision of a United States court." *Frank's Landing Indian Cmty. v. Nat'l Indian Gaming Comm'n*, 918 F.3d 610, 614 (2019), *citing* the List Act *and United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015).

The Tenth Circuit Court of Appeals noted the List Act findings with approval in its introductory statement of the law in *Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074, 1076 (10th Cir. 2004):

> The law governing Federal recognition of an Indian tribe is, today, clear. The Federally Recognized Indian Tribe List Act of 1994 provides Indian Tribes may be recognized by: (1) an "Act of Congress;" (2) "the administrative procedures set forth in part 83 of the Code of Federal Regulations[;]" or (3) "a decision of a United States court." Pub. L. No. 103-454, § 103(3), 108 Stat. 4791.

The court held that the Department of Interior's decision recognizing the Delaware Indians in Oklahoma was invalid because it was contrary to two Supreme Court decisions "and violated sec. 103(3) of the Federally Recognized Indian Tribe List Act," the very finding the trial court declined to apply in this case.

Similarly, in the District for the District of Columbia,

> [I]n the List Act, Congress *expressed a number of important findings,* including that " Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or *by a decision of a United States court*" and that "a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress."

Stand Up for California! v. U.S. DOI, 204 F. Supp. 3d 212, 301 (D.C. Cir. 2016), *aff'd* 994 F.3d 616 (2021) (emphasis added). The List Act "expressed a number of important findings," one of which the trial court erred in ignoring in this case.

The District Court for the Eastern District of California relied on the same language in a recognition termination case as follows:

> According to this provision, and contrary to [defendant's] arguments, Congress "expressly repudiated" the termination policy, and expressly allows a tribe to become federally-recognized after termination "by a decision of a United States Court."

U.S. v. Livingston, 2010 U.S. Dist. LEXIS 97598 at *33-34 (E.D. Cal. 2010). The List Act findings concerning termination of tribal recognition were dispositive.

The District Court for the Eastern District of New York said of this language:

> Although not incorporated into the text of the statute, the background findings of the statute indicate that "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in Part 83 of the Code of Federal Regulations ... ; or by a decision of a United States court." Pub. L. No. 103-454, § 103(3) (1994). Nothing in the language of the statute indicates that it is removing from *Congress and the courts their ability to recognize tribes*; instead, the statute merely gives the Secretary the power to publish a list of such recognized tribes. As such, several courts have indicated that a decision of a *United States court can result in federal recognition of a tribe*, see *Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074, 1076 (10th Cir. 2004); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547-48 (10th Cir. 2001), and hence [tribal] sovereign immunity, *see Wolfchild v. United States*, 72 Fed. Cl. 511, 536 (Fed. CL 2006); *but see W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1056 (10th Cir. 1993) (predating the Tribe List Act and stating that "the limited circumstances under which *ad hoc* judicial determinations of recognition were appropriate have been eclipsed by federal regulation").

Gristede's Foods, Inc. v. Unkechauge Nation, 2006 U.S. Dist. LEXIS 98321, *17-*18 (E.D.N.Y. 2006) (emphasis added). Neither the trial court's decision below nor the defendant's arguments presented there reckon with any of these authorities.

It bears noting that this Court has applied other List Act findings as substantive law. In *Jamul Action Comm. v. Simermeyer,* 974 F.3d 984, 993(9th

Cir. 2020) the Court relied on the fourth and fifth List Act findings to limit the withdrawal of federal recognition or the limitation of a recognized tribe's rights:

> Congress also enacted further reforms to limit the BIA's ability to withdraw federal recognition or limit the rights of a recognized tribe. See Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791.

Id. The List Act findings implement Congressional intent.

2. Cases applying the "political question" doctrine to Indian tribe recognition have not considered the List Act findings.

All but one of the cases cited below by Defendants for the application of the "political question" doctrine to some Indian tribe recognition questions ignore the "or by a United States court" List Act finding. Defendants relied on *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1276 (9th Cir. 2004) in which the court held that the political question doctrine *did not bar jurisdiction* over a claim by native Hawaiians that their exclusion from the Department of Interior's recognition regulations violated Equal Protection. The court, in its general *dicta* about the political question doctrine, did not mention the List Act provision that United States courts can decide recognition questions.

Defendants relied on a non-binding case in which the Seventh Circuit held forth at length on the political question doctrine but ultimately rejected an APA challenge to Interior's decision that the Indiana Miami Tribe no longer existed. The

court did not mention the List Act or its findings. *Miami Nation v. US. DOI,* 255 F.3d 342 (7th Cir. 2001).

Defendant cited *U.S. v. Zepeda,* 792 F.3d 1103 (9th Cir. 2015), a criminal prosecution in which the recognition status of the defendant's tribe was held to be a question of law for the trial court. The decision mentions the List Act as showing the names of recognized tribes, but it does not quote or discuss the finding that provides for recognition of tribes "by a decision of a United States court."

Defendants cited several cases below that include general statements about the political question doctrine but were decided before the 1994 enactment of the List Act. *U.S. v. Holliday,* 70 U.S. 407, 409 (1865); *U.S. v. Sandoval,* 231 U.S. 28, 46-47 (1913); *U.S. v. Rickert,* 188 U.S. 432,445 (1903); *Price v. State of Hawaii,* 764 F.2d 623, 628 (9th Cir. 1985). The "long history"[17] of decisions applying the political question doctrine and reserving to Congress questions surrounding recognition of Indian tribes is subject to change and has been changed by Congress. The enactment of the List Act in 1994 added Congress's clear statement that Indian tribes may be "recognized ... by a decision of a United States court." That is Congress's view, and it controls.

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[17] *Wyandot Nation of Kansas v. U.S,* 858 F.3d 1392, 1401-02 (2017).

3. The only case that discusses and rejects the List Act provisions misreads their plain language and relies on inapposite authority and reasoning that contradicts that plain language.

The parties and the Court below found only one case that squarely confronts and declines to follow the List Act's "by a decision of a United States court" finding. In the unofficially reported *Shinnecock Indian Nation v. Kempthorne,* 2008 U.S. Dist. LEXIS 75826 (E.D.N.Y. 2008) at *54-56, the court conceded that "normally Congressional findings are entitled to much deference" but argued that "a Congressional finding does '"not create a substantive right,"' *citing J.P. v. County Sch. Bd. of Hanover County, VA,* 447 F. Supp. 2d 553, 573 (E.D. Va. 2006) and *Pennhurst v. Halderman,* 451 U.S. 1, 19 (1981). Neither case stands for the proposition that Congressional findings cannot "create a substantive right." And neither case concerns congressional findings as to what the law is. Rather, *J.P.* and *Pennhurst* discuss findings as to the general background or purpose of a statute. *Pennhurst,* 451 U.S. at 19 (findings expressing congressional preference for certain kinds of mental health treatment); *Hanover County,* 447 F. Supp. 2d at 573 (finding that education of disabled children is more effective with parental involvement). The List Act findings state clearly what the law is, and, as above, they have been cited with approval and relied upon in a number of federal court decisions. That is especially appropriate because the List Act findings are the only Congressional statement that delegates authority to make decisions concerning

tribal recognition. Without them there is no intelligible principle for delegation of that authority to anyone.

Shinnecock and the trial court below also misread the text of the third List Act finding. Both decisions characterize that finding as "historical," a recitation of a former state of affairs, before the 1978 creation of the Part 83 administrative process:

> [T]he Congressional findings in the List Act, appear to simply be a reflection of the historical practice of the political branches—prior to establishing any regulations, criteria, or procedures for recognition to adopt on an ad hoc basis judicial determinations of tribal status resulting from particular litigation. This historical practice of the political branches relying on such court decisions, however, does not lead to the conclusion that courts possess this inherent power; to the contrary, no constitutional or statutory provision provides such authority.

Shinnecock at *17, *quoted in* ER at 38. However, the List Act finding plainly states the *present* state of the law: "Indian tribes *presently* may be recognized by … a decision of a United States court." This is 1994, 16 years after Defendant, without an intelligibly principled delegation, created the Part 83 recognition process. *Shinnecock* and the trial Court below misread Congress's text.

Congress has provided that Indian tribes may be recognized by federal courts. This court should not refuse to enforce that Congressional provision under the "political question" doctrine, the point of which is for the court to defer to the intent of Congress. Refusal to follow plain language is not deference. Congress's

clearly expressed intention should control, and Defendants' motion to dismiss based on the "political question" doctrine should have been denied.

V. CONCLUSION

The trial court erred in dismissing the Chinook claim for tribal recognition for lack of subject matter jurisdiction as a "political question." The court's decision should be reversed and the case remanded for further proceedings.

DATED this 24th day of September, 2024.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiff states pursuant to Circuit Rule 28-2.6 that there are no known cases related to this case.

Dated September 24, 2024.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 24-3629

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