Judge Leighton

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

CHINOOK INDIAN NATION, an Indian Tribe and a Washington nonprofit corporation, and as successor-in-interest to The Lower Band of Chinook Indians; and 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.

RYAN K. ZINKE, in his 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 OFAMERICA; and JOHN TAHSUDA, in his capacity as Acting Assistant Secretary - Indian Affairs,

Defendants.

CASE NO. C17-5668RBL

NOTICE OF MOTION AND DEFENDANTS' MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

(Note on Motion Calendar for: December 22, 2017)

Defendants Ryan K. Zinke, the U.S. Department of the Interior, and John Tahsuda, through their attorneys, Annette L. Hayes, United States Attorney, and Brian C. Kipnis, Assistant United States Attorney, for the Western District of Washington, hereby move this Court, pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing this lawsuit for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be

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granted. This motion is made and based on the pleadings and paper filed herein, and such oral argument as the Court may entertain.

DATED this 30th day of November 2017.

Respectfully submitted,

ANNETTE L. HAYES
United States Attorney

s/ Brian C. Kipnis
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INTRODUCTION

Plaintiff Chinook Indian Nation ("CIN") was denied federal acknowledgment or recognition as an Indian tribe in 2002. CIN, together with plaintiffs Anthony A. Johnson, CIN's Chairman, and the Confederated Lower Chinook Tribes and Bands, Inc., (collectively "plaintiffs"), filed this lawsuit against the Secretary of the Interior and officers and components of the U.S. Department of the Interior (collectively "Interior") seeking the following:

First, plaintiffs ask for a *de novo* judicial determination that CIN is a "federally recognized tribe," and for an order directing Interior to place CIN on the "Federally Recognized Indian Tribe List," with "[all] benefits accorded to federally recognized tribes . . ." Dkt. # 24, ¶ 2, *ll*. 9-18.

Second, they ask the Court to invalidate an administrative regulation, 25 C.F.R. § 83.4(d) (2015), which bans CIN, having already once unsuccessfully petitioned for recognition under the federal acknowledgment regulations, from petitioning again. *Id.* at *ll*. 18-22.

Lastly, plaintiffs ask the Court to set aside as "arbitrary and capricious" a purported final agency action denying CIN access to the proceeds of a 1970 Indian Claims Commission judgment awarded to the Clatsop Indians and the Lower Band of the Chinook Indians. *Id.* at *ll*. 22-24.

By this motion, Interior requests that all claims asserted by plaintiffs be dismissed. The question of whether an entity is a federally recognized Indian tribe entitled to a government-to-government relationship with the United States raises a nonjusticiable political question that is beyond the subject matter jurisdiction of this Court. While, under other circumstances, this Court would have subject matter jurisdiction under the Administrative Procedure Act to review Interior's 2002 denial of CIN's petition for recognition, such a claim is time-barred by the applicable statute of limitations in this case.

Interior also requests that plaintiffs' second through fifth claims for relief be dismissed for lack of standing. Plaintiffs are not injured by a regulation that prevents CIN from re-petitioning for recognition. The factual findings underlying the denial of CIN's original petition, which are based on an exhaustive analysis of the historical evidence, demonstrate immutably that CIN fails three of the seven mandatory criteria necessary for acknowledgment. Thus, plaintiffs' amended complaint rests on nothing more than unadorned speculation that Interior could, and might, reach a different

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conclusion based on the same historical facts, if only CIN was afforded an opportunity to try again. In other words, plaintiffs' amended complaint fails to allege facts demonstrating a likelihood that a favorable ruling on these claims for relief is likely to provide any redress for its claimed injury. It is therefore deficient for purposes of establishing that plaintiffs meet the requirements for Article III standing.

Finally, Interior requests that plaintiffs' sixth through eighth claims for relief be dismissed for lack of subject matter jurisdiction because of the absence of any final agency action. A letter from a subordinate employee that makes no determination of anything does not amount to a final agency action with respect to any funds Interior holds in trust for the historical Lower Chinook and Clatsop Indians, nor does it evidence any purported "forfeiture" of such funds. Thus, plaintiffs do not satisfy this jurisdictional prerequisite for asserting a claim under the Administrative Procedure Act. Indeed, plaintiffs' inability to gain access to these funds is a direct consequence of Interior's 2002 decision to deny CIN's petition for acknowledgment and not a consequence of any present-day final agency action. As noted above, any effort by plaintiffs to assert a claim challenging Interior's 2002 decision denying CIN's petition for acknowledgment is time-barred.

STATUTORY AND REGULATORY BACKGROUND

1. The Federal Acknowledgment Process

a. The Acknowledgment Process Generally

Federal acknowledgment of Indian groups as Indian tribes establishes a government-to-government relationship with the United States and is a prerequisite to eligibility for nearly all of the federal protections, services, and benefits available to Indian tribes. 25 C.F.R. § 83.2 (2015). The power to recognize Indian tribes lies with Congress and the Executive and is essentially committed to the political branches. See *United States v. Holliday*, 70 U.S. 407, 419 (1865) (noting that if executive and other political departments recognize Indians as a tribe, courts must do the same); *Price v. State of Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985) ("In the absence of explicit governing statutes or regulations, we will not intrude on the traditionally executive or legislative prerogative of recognizing a tribe's existence.")

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Historically, Indian tribes were granted federal recognition through treaties approved by Congress or case-by-case decisions of the Executive branch. In 1978, Interior established a comprehensive regulatory process for the review and approval of petitions for acknowledgment of Indian tribes. See 25 C.F.R. Part 83; see also 43 Fed. Reg. 39361 (Aug. 24, 1978). The regulations established uniform standards and procedures to answer the question "what is an Indian tribe?" *Miami Nation of Indians v. Babbitt*, 887 F. Supp. 1158, 1167 (N.D. Ind. 1995). The Office of Federal Acknowledgment ("OFA") processes petitions for acknowledgment and is composed of experts in anthropology, genealogy, and history. OFA reports to the Assistant Secretary – Indian Affairs ("AS-IA").[1]

Part 83 has seven mandatory criteria that a petitioner must meet to be acknowledged as a federally recognized Indian tribe.[2] These criteria are designed to demonstrate continuous existence as a social and political community from the historical Indian tribe. Failure to meet any one of the criteria will result in a determination that the group is not entitled to a government-to-government relationship with the United States. See 25 C.F.R. § 83.5(a) (2015).

b. The 1994 Revisions to the Federal Acknowledgment Regulations

The federal acknowledgment regulations were first revised effective March 28, 1994. 59 Fed. Reg. 9280 (February 25, 1994). Among the purposes of the revisions was to "make clearer the meaning of the criteria for acknowledgment and make more explicit the kinds of evidence which may be used to meet the criteria" but without changing the general standards for interpreting evidence used to evaluate petitions. *Id.* The revised rules also reduced the burden of proof for petitioners, such as CIN, who could demonstrate previous federal acknowledgment. *Id.* Under the 1994 revisions, petitioners who were able to demonstrate previous federal acknowledgment were

1 OFA assumed the responsibilities of BIA's Branch of Acknowledgment Research ("BAR") on July 28, 2003, and is part of the Office of the Assistant Secretary-Indian Affairs. Hence, the relevant documents concerning the CIN petition, all of which precede this transition, refer to BAR.

2 These seven criteria, presently delineated in 25 C.F.R. § 83.11 (2015), require the petitioner to demonstrate that sources identify the petitioner as an American Indian entity on a substantially continuous basis since 1900; the petitioner is a distinct community from 1900 until the present; the petitioner maintains political influence or authority over its members as an autonomous entity from 1900 until the present; the petitioner has a governing document with membership criteria; the petitioner has a membership that descends from a historical Indian tribe; the petitioner is composed principally of persons who are not members of any federally recognized tribe; and, the petitioner is not subject to congressional legislation that terminated or forbids a Federal relationship. 25 C.F.R. § 83.11 (2015).

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required to demonstrate that they met the "Community" criterion at the present time and the "Indian Entity Identification" and "Political Authority" criteria from the time of previous federal acknowledgment. *Id.* at 9282-9283. That said, under both the original regulations and the revised regulations, "the standards of continuity of tribal existence that a petitioner [was required to] meet remain[ed] unchanged." *Id*. at 9280.

Among the specific revisions made in 1994 to the Part 83 regulations was the addition of the following provision, codified as 25 C.F.R. § 83.3(f) (1994):

> (f) Finally, groups that previously petitioned and were denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title, may not be acknowledged under these regulations. This includes reorganized or reconstituted petitioners previously denied, or splinter groups, spin-offs, or component groups of any type that were once part of petitioners previously denied.

59 Fed. Reg. at 9294.[3]

c. The 2015 Revisions to the Federal Acknowledgment Regulations

In 2015, Interior issued a final rule revising the Part 83 federal acknowledgment regulations once again. Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37862 (July 1, 2015). The revisions sought to "make the process and criteria more transparent, promote consistent implementation, and increase timeliness and efficiency, while maintaining the integrity and substantive rigor of the process." *Id.* The 2015 revisions continued the two-pronged system ushered in with the 1994 revisions based on whether a petitioner was able to demonstrate previous federal acknowledgment.[4] Thus, petitioners establishing previous federal acknowledgment need to demonstrate that they meet the "Community" criterion only at the present time (instead of from 1900

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3 Also added in 1994 was 25 C.F.R. § 83.10(p) (1994), which similarly provided that:

> (p) A petitioner that has petitioned under this part or under the acknowledgment regulations previously effective and that has been denied Federal acknowledgment may not re-petition under this part. The term "petitioner" here includes previously denied petitioners that have reorganized or been renamed or that are wholly or primarily portions of groups that have previously been denied under these or previous acknowledgment regulations.

59 Fed. Reg. at 9299.

4 Plaintiffs' amended complaint refers to these provision as the "reaffirmation" process and they appear to be suggesting in their allegations that this is a new feature of the 2015 regulations. See Dkt. # 24. ¶ 129. Plaintiffs imply that CIN would be denied the benefit of having these "new" provisions applied to its circumstances if it is not allowed to re-petition. *Id*. at ¶ 135. In fact, as noted above, these provisions were part of the 1994 revisions to the Part 83 regulations, and the CIN petition, denied in 2002, was evaluated under these provisions. Decl. of Kipnis, ¶ 8, Exh. G, (RFD, pp. 12-18 of 160).

UNITED STATES ATTORNEY
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to present) and must demonstrate the "Indian Entity Identification" and "Political Authority" criteria since 1900 or from the time of previous federal acknowledgment, whichever is later. 25 C.F.R. § 83.12 (2015). These petitioners must also demonstrate that they meet the remaining 1994 criteria concerning Governing Document (25 C.F.R. § 83.11(d) (2015)), Descent (25 C.F.R. § 83.11(e) (2015)), Unique Membership (25 C.F.R. § 83.11(f) (2015)), and Congressional Termination (25 C.F.R. § 83.11(g) (2015)). 25 C.F.R. § 83.43 (2015).

The 2015 revisions were mostly intended to be clarifying. Except in two instances, discussed below, they did not substantively change the Part 83 criteria. 80 Fed. Reg. at 37863. The first instance is that criterion 25 C.F.R. § 83.11(a) (2015), which previously required evidence of external identification of the petitioner as an Indian entity, now may be satisfied by contemporaneous self-identification. *Id.* The second instance relates to how marriages are counted as evidence of "a distinct community" under criterion 25 C.F.R. § 83.11(b)(2) (2015). *Id.*

In the Notice of Proposed Rulemaking for the 2015 revisions to Part 83, Interior originally proposed to alter the ban on re-petitioning promulgated in 1994 in order to provide a limited opportunity for re-petitioning. After reviewing the many comments received on this proposal, Interior determined that allowing re-petitioning was "not appropriate." 80 Fed. Reg. at 37874-37875. As the Department explained in the final rule adopting the 2015 revisions, "[a]llowing for re-petitioning by denied petitioners would be unfair to petitioners who have not yet had a review, and would hinder the goals of increasing efficiency and timeliness by imposing the additional workload associated with re-petitions on the Department, and OFA in particular." 80 Fed. Reg. 37875. Thus, although recodified, and slightly reworded, the ban on re-petitioning was carried forward in the 2015 revisions. See 25 C.F.R. § 83.4(d) (2015).[5]

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5 25 C.F.R. § 83.4(d) (2015) provides;

> The Department will not acknowledge:
>
> * * *
>
> (d) An entity that previously petitioned and was denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title (including reconstituted, splinter, spin-off, or component groups who were once part of previously denied petitioners).

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2. The List Act

In 1994, Congress enacted the Federally Recognized Indian Tribe List Act (List Act). Under the List Act, Interior is required to publish in the Federal Register "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 C.F.R. § 83.6(a) (2015); 25 U.S.C. § 5131. The most recent list, published January 17, 2017, is found at 82 Fed. Reg. 4915. The list published in the Federal Register is ordinarily dispositive evidence of whether an Indian tribe is federally recognized. See *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997) (noting that inclusion of group of Indians on list ordinarily suffices to establish that group is sovereign power and thus entitled to immunity from suit); see also *LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993) (finding that for purposes of 25 U.S.C. § 1321, the term "Indian" includes only those persons who are members of a tribe that the Bureau of Indian Affairs has formally acknowledged).

STATEMENT OF FACTS[6]

CIN is not among the listed Indian entities that are acknowledged to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States.[7] Plaintiffs concede as much, dkt. # 24, ¶¶ 101, 156, and have filed this lawsuit seeking to alter the *status quo* by judicial fiat, *id.* at ¶¶ 22, 158.

i. CIN Petition for Acknowledgment and 1997 Proposed Finding by AS-IA Ada Deer

CIN has previously sought federal acknowledgment through the Part 83 administrative process. On June 12, 1981, CIN submitted a documented petition for Federal acknowledgment to

6 This statement of facts is drawn from the allegations of the complaint and is augmented, as appropriate, by matters of which this Court may take judicial notice. Although, generally, a district court may not consider materials not originally included in the pleadings in deciding a Rule 12(b)(6) motion, Fed.R.Civ.P. 12(d), it "may take judicial notice of matters of public record" and consider them without converting the motion into one for summary judgment. *United States v. 14.02 Acres of Land More or Less in Fresno Cty.*, 547 F.3d 943, 955 (9th Cir. 2008). Moreover, insofar as this motion is based on Rule 12(b)(1), F.R.Civ.P, proof of jurisdictional facts may be supplied by declaration, etc. *Green v. United States*, 630 F.3d 1245, 1248 n.3 (9th Cir. 2011)

7 See "Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs," 82 Fed. Reg. 4915 (January 17, 2017). The Court may take judicial notice of the absence of the Chinook from this list. See *Hou 1778 Hawaiians v. United States Dep't of Justice*, 2016 WL 335851, at *5 (D. Haw. 2016) (and authorities cited).

UNITED STATES ATTORNEY
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Seattle, Washington 98101-1271
(206)-553-7970

the Bureau of Indian Affairs (BIA). Decl. of Kipnis, ¶ 4, Exh. C (Final Determination (FD), p. 5 of 247.[8]) Because BAR identified deficiencies in the petition during its "obvious deficiency review," CIN submitted a revised petition in July 1987. *Id.* On November 1, 1988, BAR notified CIN of deficiencies in the revised petition as well. *Id.* CIN continued to research and revise its petition before the petition was placed under active consideration on January 28, 1994, at CIN's request. *Id.*

As noted above, the Part 83 regulations were revised, effective March 28, 1994. Pursuant to 25 C.F.R. § 83.3(g) (promulgated with the 1994 revisions), CIN was afforded the option of continuing the acknowledgment process under the 1994 revised Part 83 regulations or under the 1978 Part 83 regulations. Decl. of Kipnis, ¶ 4, Exh. C (FD, pp. 5-6 of 247). CIN notified Interior that it wished to continue the acknowledgment process under the 1978 regulations. *Id*, ¶ 4, Exh. C (FD at p. 6 of 247). Thereafter, on August 22, 1997, Interior published notice of the proposed finding (PF) signed by AS-IA Ada E. Deer against federal acknowledgment of CIN, applying the 1978 version of the Part 83 regulations, in the Federal Register at 62 Fed. Reg. 44714. Decl. of Kipnis, ¶ 3, Exh. B.[9]

ii. 2001 Final Determination by AS-IA Kevin Gover and Reconsideration

Following the publication of the AS-IA's PF against acknowledgment, a lengthy comment period ensued during which Interior received comments on the PF from CIN and third parties, including the Quinault Indian Nation (QIN). After the comment period closed and CIN was afforded time to consider the third party comments, CIN submitted a response to those comments. On January 3, 2001, former AS-IA Kevin Gover issued a final determination concluding that CIN

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8 "FD" refers to the "Final Determination" issued by the AS-IA on CIN's documented petition for federal acknowledgement dated January 3, 2001. Decl. of Kipnis, ¶ 4 (Exhibit C). Although entitled "final determination," a request for reconsideration filed with the Interior Board for Indian Appeals (IBIA) prevented it from becoming a final decision for Interior. 25 C.F.R. § 83.11(a)(2) (1994). This FD was later reconsidered and ultimately reversed, as documented in a "Reconsidered Final Determination" ("RFD") issued by the AS-IA on July 5, 2002. Decl. of Kipnis, ¶ 8 (Exhibit G). The RFD references the FD for the administrative history of Interior's consideration of the Chinook petition. *Id.* (RFD at p. 9 of 160).

9 It is worth noting that CIN had multiple changes of heart and requested, then backtracked, then requested again that its petition be considered under the revised regulations. Decl. of Kipnis, ¶ 4, Exh. C (FD at pp. 5-6 of 247). This request was denied and the PF against recognition was issued under the 1978 Part 83 regulations. In the FD, former AS-IA Kevin Gover concluded that the decision to deny CIN's request to proceed under the Part 83 regulations as revised in 1994 was error. Accordingly, he evaluated CIN's petition under both the 1978 and 1994 versions of the regulations. *Id.*, Exh. C (FD at p. 6 of 247).

UNITED STATES ATTORNEY
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should be federally acknowledged, notice of which was published in the Federal Register. See Final Determination to Acknowledge the Chinook Indian Tribe/Chinook Nation (Formerly: Chinook Indian Tribe, Inc.), 66 Fed. Reg. 1690 (January 9, 2001). Decl. of Kipnis, ¶ 5, Exh. D.

Thereafter, requests for reconsideration were filed with the Interior Board of Indian Appeals (IBIA) by QIN and others, and briefing followed. 25 C.F.R. § 83.11(a)(1); 36 IBIA 245 (August 1, 2001). The IBIA determined that some of the issues raised were within its jurisdiction under 25 C.F.R. § 83.11(d) (1994). Others were not. The IBIA concluded that the issues raised within its jurisdiction did not merit reconsideration of the FD. 36 IBIA 250.[10] However, the IBIA also concluded that the nine issues raised by QIN which were not within its jurisdiction should be referred to the Secretary of the Interior pursuant to 25 C.F.R. § 83.11(f) (1994).[11] 36 IBIA at 250-252 (listing the nine referred issues).

On November 6, 2001, after receiving comments from both CIN and QIN, former Secretary of the Interior Gale A. Norton, exercising her discretion in the matter, referred eight of the nine issues to the AS-IA as possible grounds for reconsideration of the FD. Decl. of Kipnis, ¶ 7 (Exhibit F).

iii. 2002 Reconsidered Final Determination by AS-IA Neal A. McCaleb

On July 5, 2002, former AS-IA Neal A. McCaleb issued a "Reconsidered Final Determination Against Federal Acknowledgment." Declaration of Kipnis, ¶ 8 (Exhibit G). Upon reconsideration, AS-IA McCaleb found error in the FD as to the weight and relevance it gave to

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10 For convenience, a copy of the IBIA decision is attached to the Declaration of Kipnis, ¶ 6, Exhibit E.

11 Subsection 83.11(f) (1994) provided:

> (1) The Board, in addition to making its determination to affirm or remand, shall describe in its decision any grounds for reconsideration other than those in paragraphs (d)(1)-(d)(4) of this section alleged by a petitioner's or interested party's request for reconsideration.
>
> (2) If the Board affirms the Assistant Secretary's decision under § 83.11(e)(9) but finds that the petitioner or interested parties have alleged other grounds for reconsideration, the Board shall send the requests for reconsideration to the Secretary. The Secretary shall have the discretion to request that the Assistant Secretary reconsider the final determination on those grounds.

This process, allowing for limited reconsideration and a hearing before an administrative judge at the IBIA, was eliminated by the 2015 revisions to the Part 83 regulations. At the same time, an option for a petitioner to elect a hearing on a negative PF before an administrative law judge was added. 80 Fed. Reg. at 37880.

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(1) three statutes; (2) the activities of CIN's Bay City members, and (3) historical claims activities. *Id.* (RFD at pp. 58-59 of 160). Accordingly, AS-IA McCaleb determined that a Reconsidered Final Determination (RFD) was required on the merits with respect to mandatory criteria (a), (b), and (c). *Id.* (RFD at p. 59 of 160).[12]

In regards to issues raised relating to whether the former AS-IA erred in evaluating CIN's petition under the revised 1994 regulations, AS-IA McCaleb decided to evaluate the petition under both the 1978 and 1994 regulations. *Id.* (RFD at p. 62 of 160). AS-IA McCaleb determined that CIN had prior federal acknowledgment but nonetheless failed to demonstrate, under either the 1978 or the 1994 regulations, that it was "identified as an Indian entity by external observers on a substantially continuous basis between 1873 and 1951." *Id.* (RFD at pp. 76-77 of 160). Thus, AS-IA McCaleb concluded that:

> Because the evidence in the record does not show that the [CIN] has been identified as an Indian entity "from historical times until the present," or from last acknowledgment in 1855 until the present, on a "substantially continuous" basis, the petitioner does not meet the requirements of criterion 83.7(a), either under the 1978 regulations or as modified by sections 83.8(d)(1) or 83.8(d)(5) under the 1994 regulations.

Id. (RFD at p. 77 of 160).

Additionally, AS-IA McCaleb determined that CIN did not present evidence of social interaction at a level sufficient to meet criterion 25 C.F.R. § 83.7(b) at any time after 1950, including at the time of the determination. *Id.* (RFD at pp. 99-100 of 160). Specifically, AS-IA McCaleb concluded that:

> Under the 1978 regulations, the [CIN] has not demonstrated that "a substantial portion of the petitioning group" has formed a community "distinct from other populations in the area" since 1950. Therefore, the petitioner does not meet the requirements of criterion 83.7(b).
>
> Under the 1994 regulations, criterion 83.7(b) has been evaluated as modified by section 83.8(d)(2), which requires previously acknowledged petitioners to demonstrate only that its members form a distinct community "at present." As explained in the previous discussion under the 1978 regulations, the petitioner does not meet the requirements of community "at present," and therefore does not meet the requirements of criterion 83.7(b) as modified by section 83.8(d)(2).

Id. (RFD at p. 96 of 160).

12 Under the 1994 version of Part 83, 25 C.F.R. § 83.7(a), (b) & (c), respectively.

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Seattle, Washington 98101-1271
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Finally, AS-IA McCaleb concluded that the evidence in the record was insufficient to show that CIN met criterion 25 C.F.R. § 83.7(c) under either the 1978 regulations or under the modified provisions of 25 C.F.R. § 83.8(d)(3) under the 1994 regulations. Under the 1978 regulations, AS-IA McCaleb determined that the available evidence did not demonstrate that CIN had exercised political influence over its members from historical times until the present. While under the 1994 regulations, a petitioner with previous Federal acknowledgment may demonstrate that it meets the criterion from the date of the last Federal acknowledgment to the present, in part with "evidence that authoritative, knowledgeable external sources have identified leaders or a governing body of the petitioning group on a substantially continuous basis," AS-IA McCaleb concluded that neither such evidence nor other evidence of political authority was found in the record. *Id.* (RFD at pp. 108-109 of 160).

In summary, Interior's final decision on CIN's petition for federal acknowledgment was as follows:

> The available evidence demonstrates that the petitioner does not meet all seven criteria required for Federal acknowledgment. Specifically, the petitioner does not meet criteria 83.7 (a), (b), or (c) under the 1978 regulations, nor those three criteria under the 1994 regulations as modified by sections 83.8(d)(1), (d)(2), (d)(3), or (d)(5). The petitioner was found to meet criteria 83.7 (d), (e), (f), and (g) in the original final determination. Those criteria were not at issue in the referral by the Secretary. In accordance with the regulations set forth in 25 CFR 83.7 [1978] and 25 CFR 83.10(m) [1994], failure to meet any one of the seven criteria requires a determination that the group does not exist as an Indian tribe within the meaning of Federal law.

Decl. of Kipnis, ¶ 9, Exh. H (67 Fed. Reg. 46204, 46206 (July 12, 2002)). This decision was final and effective on that date. 25 C.F.R. § 83.11(h)(3) (1994).[13]

iv. Communication between Interior staff and Plaintiff Johnson concerning discontinued mailings of trust fund account statements pertaining to account established by Interior for Lower Chinook and Clatsop Indians

In 1970, the Indian Claims Commission made an award of $48,692.05 in favor of the Lower Band of Chinook and Clatsop Indians. Decl. of Kipnis, ¶ 8 (Exhibit I). An account in that amount was established by Interior in trust for those beneficiaries. The account is presently managed and

13 25 C.F.R. § 83.11(h)(3) (1994) provided, in pertinent part:

> (3) If a determination is reconsidered by the Assistant Secretary because of action by the Board remanding a decision or because the Secretary has requested reconsideration, the reconsidered determination shall be final and effective upon publication of the notice of this reconsidered determination in the Federal Register.

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700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

overseen by the Office of the Special Trustee for American Indians (OST). Declaration of Rugen, ¶ 3.

On or about August 14, 2015, plaintiff Johnson made a telephone call to OST Regional Trust Administrator Catherine E. Rugen seeking an explanation as to why account statements pertaining to this account were no longer being mailed to CIN. *Id.* at ¶ 4. Ms. Rugen explained, in substance, that because Interior decided not to acknowledge CIN in 2002, it was not a proper party to receive these account statements. *Id.* at ¶ 5. Interior ceased mailing these statements to CIN when it was discovered in an internal review that OST had mistakenly been sending account statements to several organizations, like CIN, that were neither federally recognized tribes nor able to support a contention that they were a rightful beneficiary of the funds held in a particular account maintained by OST. *Id.* At plaintiff Johnson's request, Ms. Rugen wrote the letter which is attached to the amended complaint (dkt. # 24) as Exhibit D. *Id*. at ¶ 2.

Ms. Rugen made no decision on behalf of Interior in the matter. *Id*. at ¶ 6. She simply responded to an inquiry by plaintiff Johnson with factual information. *Id*. Also, at no time did plaintiff Johnson or any other person on behalf of plaintiffs submit a request for funds in the Lower Chinook/Clatsop account pursuant to the procedures for doing so set out in 25 C.F.R. Parts 87 and 115. *Id*. at ¶¶ 7-8. Even if plaintiffs had done so, Ms. Rugen had not been delegated the authority to make such a determination and thus would have been unable to make any final decision on the matter on OST's behalf. *Id*. at ¶ 9.

ARGUMENT

I. SUBJECT MATTER JURISDICTION IS LACKING FOR PLAINTIFFS' DEMAND THAT INTERIOR ACKNOWLEDGE CIN AS A FEDERALLY RECOGNIZED INDIAN TRIBE

i. Plaintiffs' Complaint Identifies No Waiver of Sovereign Immunity

Subject matter jurisdiction is a threshold issue, which should be addressed prior to any consideration of the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Federal courts presumptively lack jurisdiction "unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quotation omitted). Furthermore, because "[f]ederal courts are courts of limited jurisdiction . . . . [i]t is to be presumed that a cause lies outside

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(206)-553-7970

this limited jurisdiction, and the burden of establishing the contrary rests on the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Therefore, to survive a motion to dismiss pursuant to Rule 12(b)(1), a plaintiff bears the burden of establishing that the court has subject matter jurisdiction over its claim. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984 (9th Cir. 2008).

Moreover, when the United States, or any agency or officer thereof, is the defendant, "a plaintiff must overcome the defense of sovereign immunity in order to establish the jurisdiction necessary to survive a Rule 12(b)(1) motion to dismiss." *Jackson v. Bush*, 448 F. Supp. 2d 198, 200 (D.D.C. 2006) (citing *Tri State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003)). A waiver of sovereign immunity is thus a prerequisite to federal court jurisdiction. *Tobar v. United States*, 639 F.3d 1191, 1195 (9th Cir. 2011). Unless it waives sovereign immunity, the United States is immune from suit. *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

Only Congress enjoys the power to waive the United States' sovereign immunity. *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1090 (9th Cir. 2007). Accordingly, any waiver of sovereign immunity "must be unequivocally expressed in statutory text and will not be implied." *Ordonez v. United States*, 680 F.3d 1135, 1138 (9th Cir. 2012) (internal quotation marks, citation, and alteration omitted). Consequently, the party who sues the United States bears the burden of pointing to such an unequivocal waiver of immunity. *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983).

Insofar as plaintiffs seek a *de novo* adjudication by this Court declaring CIN to be a recognized Indian Tribe, entitled to a government-to-government relationship with the United States, plaintiffs have failed to identify any applicable statutory waiver of sovereign immunity that affords them the right to seek such relief. Having failed to point to a statutory waiver of sovereign immunity enabling them to assert this claim against the federal government, and given the legal presumption that subject matter jurisdiction does not exist, plaintiffs' first claim should be dismissed.[14]

14 Moreover, any cause of action against the Government for its alleged wrongful failure to acknowledge CIN is time-barred by 28 U.S.C. § 2401(a) in any event. See *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 191 (D.D.C. 2011), *aff'd*, 708 F.3d 209 (D.C. Cir. 2013); *Miami Nation of Indians of Indiana, Inc. v. Lujan*, 832 F. Supp. 253, 257 (N.D. Ind. 1993). Plaintiffs' claim therefore also fails to state a claim upon which relief may be granted. See *The Cloud Found., Inc. v. Kempthorne*, 2007 WL 1876486, at *6 (D. Mont. 2007).

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ii. The Claim is Non-Justiciable Under the Political Question Doctrine

Plaintiffs' complaint requests, in unequivocal terms, that this Court declare CIN to be a federally recognized Indian tribe. Dkt. # 24 at ¶¶ 158-159. However, federal recognition of Indian tribes is committed to the political branches of government, rather than the courts. See *United States v. Holliday*, 70 U.S. 407, 419 (1865); *United States v. Sandoval*, 231 U.S. 28, 46-47 (1913). Article I, Section 8, Clause 3 of the U.S. Constitution commits to Congress issues involving Indian affairs: "The Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes." And "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

"Recognition lies at the heart of the doctrine of 'political questions.'" *Miami Nation v. United States Dep't of Interior*, 255 F.3d 342, 347 (7th Cir. 2001). "The doctrine identifies a class of questions that either are not amenable to judicial resolution because the relevant considerations are beyond the courts' capacity to gather and weigh, . . . or have been committed by the Constitution to the exclusive, unreviewable discretion of the executive and/or legislative - the so-called 'political' - branches of the federal government." *Id.* (citations omitted). Thus, it is well-established that the decision 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., *Sandoval*, 231 U.S. at 4 ("Questions whether, to what extent, and for what time [Indian communities] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts."); *United States v. Rickert*, 188 U.S. 432, 445 (1903); *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015) (en banc) ("federal recognition of a tribe [is] a political decision made solely by the federal government and expressed in authoritative administrative documents"); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1276 (9th Cir. 2004) ("[t]he action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review") (internal quotation and citation omitted); and see *Wyandot Nation of Kansas v. United States*, 858 F.3d 1392, 1401-02 (Fed. Cir. 2017) (noting the "long history making clear that tribal recognition is a political question committed to the political branches.") (citation omitted).

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In summary, plaintiffs' demand that this Court order CIN's acknowledgment by Interior raises a political question that is not justiciable by this Court. See *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007) ("We hold that if a case presents a political question, we lack subject matter jurisdiction to decide that question.")

iii. A Claim for Judicial Review under the APA is time-barred.

Because it is a political question, acknowledgment may not be obtained by way of a *de novo* remedy in a United States District Court. Rather, an Indian group seeking recognition must first invoke and exhaust the administrative remedy created for that purpose in the Part 83 regulations. *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987) (The purpose of the Part 83 regulations "would be frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist"); and see *United Tribe of Shawnee Indians v. U.S.*, 253 F.3d 543, 550 (10th Cir. 2001), *Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1032-1034 (E.D. Cal. 2012), *aff'd. sub nom.*, *Robinson v. Jewell*, 790 F.3d 910 (9th Cir. 2015); *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F.Supp. 2d 76, 79 (D.D.C. 2002). After exhausting the designated administrative remedy, judicial review of Interior's final decision may be had under the APA's "arbitrary and capricious standard of review." See *Samish Indian Nation v. United States*, 419 F.3d 1355, 1372-1373 (Fed. Cir. 2005) ("The [acknowledgment] regulations create a limited role for judicial intervention, namely, APA review to ensure that the government followed its regulations and accorded due process."); *Miami Nation*, 255 F.3d at 348 ("By promulgating such [acknowledgment] regulations the executive brings the tribal recognition process within the scope of the Administrative Procedure Act.")

At least expressly, plaintiffs have not invoked that remedy here. Had they done so, however, their claim would be time-barred by the statute of limitations codified in 28 U.S.C. § 2401(a). With an exception not relevant here, 28 U.S.C. § 2401(a) declares that a six-year statute of limitations applies to "every civil action commenced against the United States." Encompassed within its gamut are actions brought under the APA. *Wind River Min. Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991).

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Interior published notice of its decision to deny CIN's petition for acknowledgment in the Federal Register on July 12, 2002. 67 Fed. Reg. 46204 (July 12, 2002). Accordingly, plaintiffs' claim under the APA was barred as of July 12, 2008. See *Shiny Rock Min. Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990) (in APA action, section 2401(a)'s statute of limitations began to run on date of publication in Federal Register); and see *Historic Eastern Pequots v. Salazar*, 934 F. Supp. 2d 272, 279 (D.D.C. 2013) (APA claim filed more than six years after publication in Federal Register of reconsidered final determination barred by 28 U.S.C. § 2401(a)).[15]

iv. CIN is not a tribe by virtue of the historical Chinook being recognized

The amended complaint posits that CIN was recognized through treaty negotiations in 1855 and, because Congress has not terminated the relationship, it continues to be recognized. Dkt. #24, ¶ 129. That is incorrect. First, there is no presumption of continuous existence as an Indian tribe. *United States v. Washington*, 641 F.2d 1368, 1374 (9th Cir. 1981) ("We reject their argument that, because their ancestors belonged to treaty tribes, the[y] . . . benefitted from a presumption of continuing existence."); *United Tribe of Shawnee Indians*, 253 F.3d at 548 ("[Descent] says nothing about whether [plaintiff] has maintained its identity with the Shawnee tribe and has continued to exercise that tribe's sovereign authority up to the present day."); *Miami Nation*, 887 F. Supp. at 1169 (upholding regulations against challenge to require presumption of continuous existence through tribal abandonment standard), *aff'd.*, 255 F.3d 342 (7th Cir. 2001).

As further articulated by the Seventh Circuit in *Miami Nation*, even assuming that the plaintiff in that case, "though limited to Indiana Miami," was the "Miami Indians" tribe referenced in the treaty, "[i]t is equally obvious that Indian nations, like foreign nations, can disappear over time . . . whether through conquest, or voluntary absorption into a larger entity, or fission, or dissolution,

15 The allegations that the RFD was inconsistent with other acknowledgment decisions, or that Interior did not follow a "consistent baseline approach", are part and parcel of a claim that the RFD was arbitrary and capricious. As already noted, such a claim is barred by the statute of limitations. For instance, the references to the Snoqualmie Tribe (acknowledged 1999) and Jamestown S'Klallam (acknowledged 1981) are to decisions that pre-date the 2002 RFD on CIN. Dkt # 24, ¶ 129. Plaintiffs' allegations, however, are also factually erroneous. For example, the amended complaint asserts that CIN was found not to have been subject to prior federal acknowledgment in contrast to the Cowlitz petitioner, which was also a part of the same Chehalis River Treaty negotiations. Dkt. #24 at ¶¶ 107; 109. But, the RFD on CIN treated them precisely the same as Cowlitz, finding federal acknowledgment to 1855. RFD 2, 31, 61. Similarly, all four petitioners identified in the amended complaint (CIN, Cowlitz, Snoqualmie, Jamestown S'Klallam) were required to meet all seven mandatory criteria. Only CIN failed to do so.

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(206)-553-7970

or movement of population." *Id.* at 346. As may be implied from the Part 83 regulations, "a tribe can indeed cease to be recognized by failing to satisfy the regulation's criteria." *Id.* at 350.

The 2002 RFD determined that CIN did not meet three of the mandatory criteria and thus is not a continuation of the historical tribe that negotiated a treaty more than a century and a half ago. The statute of limitations has run on any challenge to that decision, and it is binding here. See *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991). Accordingly, CIN is not entitled to be enumerated on the Federal Register "List of Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs," by virtue of historical Chinook recognition.

v. Conclusion

Plaintiffs' first cause of action seeking acknowledgment of CIN by judicial fiat constitutes a nonjusticiable political question that is subject to dismissal for lack of subject matter jurisdiction. To the extent that plaintiffs' amended complaint may be construed to be seeking judicial review under the APA of Interior's 2002 decision to deny CIN's petition for recognition, it fails to state a claim upon which relief may be granted because such claim is time-barred by 28 U.S.C. § 2401(a).[16]

II. SUBJECT MATTER JURISDICTION IS LACKING FOR PLAINTIFFS' CHALLENGE TO THE RE-PETITION BAN BECAUSE THEY HAVE FAILED SUFFICIENTLY TO ALLEGE STANDING

Plaintiffs' amended complaint next asserts four separate claims for relief that focus upon a provision of the 2015 Part 83 regulations that prohibits a repeat petition from an entity that has been denied. Plaintiffs argue that this regulation, 25 C.F.R. § 83.4(d) (2015), is *ultra vires* and violates the Petition Clause of the First Amendment and the Due Process and Equal Protection Clauses of the Fifth Amendment. Dkt. # 24, ¶¶ 159–188.[17] Plaintiffs have not suffered any cognizable injury as a consequence of the re-petition ban, however, because its invalidation would lead to no different result if CIN were allowed to petition again under the 2015 Part 83 regulations. See *Loritz v. U.S.*

16 Although there is a split of authority, in the Ninth Circuit, 28 U.S.C. § 2401(a) is not a jurisdictional statute of limitations. *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997).

17 The amended complaint incorrectly asserts that the re-petition ban codified in this regulation was newly enacted in 2015. In fact, although codified under a different number and with slightly different wording, this ban has been a feature of the Part 83 regulations since 1994. See, Statutory and Regulatory Background, *supra* at p. 6, *ll.* 6-11.

UNITED STATES ATTORNEY
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(206)-553-7970

Court of Appeals for Ninth Circuit, 382 F.3d 990, 992 (9th Cir. 2004) ("To assume that the court adjudicating his habeas appeal would have ruled differently is wholly speculative and unfounded, and cannot form the basis for Article III standing."). Because CIN could not achieve acknowledgment by filing a new petition under the 2015 regulations, this Court is unable to provide any redress for plaintiffs' asserted injury. Thus, plaintiffs lack standing to challenge the validity of the regulation.

A plaintiff challenging the legality of government action bears the burden of establishing that it has standing to challenge the action. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Lortiz*, 382 F.3d at 992 (plaintiff must allege sufficient facts to show that the injury is "actual or imminent, not conjectural or hypothetical").

i. The amended complaint fails to allege a factual basis for believing that CIN will be able to meet the mandatory "Continuous Identification" criterion

The overriding purpose of the revision made to the Part 83 regulations in 2015 was to "make the process and criteria more transparent, promote consistent implementation, and increase timeliness and efficiency, while maintaining the integrity and substantive rigor of the process." 80 Fed. Reg. 37862 (July 1, 2015). The 2015 revised rule only made two substantive changes to the 1994 rules under which CIN's petition was previously evaluated and denied. 80 Fed. Reg. 37863.[18] The first concerns the requirement that the petitioner demonstrate that it "has been identified as an American Indian entity on a substantially continuous basis since 1900." 25 C.F.R. § 83.7(a) (1994); 25 C.F.R. § 83.11(a) (2015).[19] As compared to the 1994 version of the regulations, the evidence

18 It should be recalled that the CIN petition was evaluated under both the original version of the Part 83 regulations and the 1994 version, and found to be wanting under both. 67 Fed. Reg. at 46206.

19 The second substantive change, discussed *infra*, at Argument Section II. ii, concerns the manner in which marriages are counted for purposes of the "Distinct Community" criterion.

UNITED STATES ATTORNEY
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(206)-553-7970

that Interior will receive under the 2015 revision is not limited to "observations by those external to the petitioner." 80 Fed. Reg. 37863. Instead, under the 2015 rules, Interior will "accept any and all evidence, such as the petitioner's own contemporaneous records . . ." *Id.*

In order to establish standing, plaintiffs must allege specific facts establishing that because of the abolition of this evidentiary limitation they will be able to offer persuasive evidence in support of their contention that CIN meets the mandatory identification criterion that it was unable to offer, and hence was not considered, at the time its original petition was before Interior. Only then can plaintiffs satisfy the standing requirement that a new petition is likely to yield a different result, *i.e.*, that this new evidence will likely convince a decision maker that CIN has been identified as an American Indian entity on a substantially continuous basis since 1900. *Loritz*, 382 F.3d at 992 ("[P]laintiff filing an action in federal court has the burden of alleging specific facts sufficient to satisfy the standing elements."). However, no allegation in plaintiffs' complaint supports such a conclusion.

A federal court cannot conclude that standing exists based on a complaint's assumption, or unadorned speculation, that a particular injury will be rectified by a favorable decision in the lawsuit. *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 43 (1976) (standing not shown where upon the allegations of the complaint it was speculative that the desired exercise of the Court's remedial powers would result in the availability of the healthcare services sought by plaintiff). But speculation is all plaintiffs offer in support of their attack on the re-petition prohibition. In conclusory, non-specific terms, plaintiffs' amended complaint offers assurances that CIN "could" or "would be able to" meet the mandatory criteria that it failed to establish in its previous bid for recognition if only CIN could try again, without any specific factual allegations as to what CIN could even potentially demonstrate now that it did not demonstrate before. Dkt. # 24, ¶¶ 177-78, 187. While the amended complaint alleges that plaintiffs possess a right to "have considered new evidence, facts, and data," *id.* ¶ 178, no allegation in the complaint sets forth as fact that plaintiffs are in possession of such materials, much less that this "new evidence" would be at all relevant to a redetermination under the 2015 regulations. As such, nothing in plaintiffs' complaint alleges a factual basis for believing that if CIN were allowed to re-petition under the 2015 regulations, it

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

would likely be able to establish that it has been historically identified as an American Indian entity on a substantially continuous basis because of the AS-IA's consideration of new material evidence in its possession that CIN failed to present at the time of its original petition under the 1978 and 1994 versions of the Part 83 regulations or to IBIA. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (tenet that court must accept complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements supported by mere conclusory statements). Only on the basis of a specific allegation that plaintiffs have such evidence is it possible, let alone likely, that their alleged injury can be redressed by a favorable decision in this lawsuit.

ii. The amended complaint also fails to allege a factual basis for believing that CIN can meet the mandatory "Distinct Community" criterion in a new petition

The only other substantive change made by the 2015 regulations concerns the requirement that a petitioner show that "[a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present." 25 C.F.R. § 83.7(b) (1994); and see 25 C.F.R. § 83.11(b) (2015) ("The petitioner comprises a distinct community and demonstrates that it existed as a community from 1900 until the present."). One of the ways that a petitioner was allowed to demonstrate the existence of a distinct community under the 1994 regulations was to establish that "[a]t least 50 percent of the marriages in the group are between members of the group." 25 C.F.R. § 83.7(b)(2)(ii) (1994). In the past, Interior's policy was to allow a petitioner to "count the number of marriages within a petitioner." 80 Fed. Reg. 37862. Under the revised rule, Interior will instead "count the number of petitioner members who are married to others in the petitioning group." *Id.* In other words, under the 2015 version of the Part 83 regulations, Interior "change[d] its approach to specify counting by individual petitioner member, rather than by marriage." 80 Fed. Reg. at 37870.

Again, plaintiffs do not allege in their amended complaint that if CIN is allowed to re-petition, the 2015 change in the method of counting marriages will likely (or even possibly) result in a different outcome for CIN's petition. Plaintiffs' amended complaint alleges *nothing* about the method of counting marriages at all. And there is no reason to believe on the basis of the allegations of the amended complaint, or otherwise, that the change in Interior's approach to counting marriages

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(206)-553-7970

would result in a change in outcome for CIN. First, as documented by the PF, little evidence existed in the record of marriages even to other Indians outside the petitioner itself. See Decl. of Kipnis, ¶ 2, Exh. A (PF at p. 20 of 148) (noting the one known case of intermarriage between relevant communities in the 1900 to 1920 timeframe).

Second, as set forth in the RFD, applying the more relaxed standard ushered in by the 1994 version of the Part 83 regulations, under which CIN was evaluated, CIN's burden was to "demonstrate only that a predominant portion of its members comprise a distinct community at present." Decl. of Kipnis, ¶ 8, Exh. G (RFD at p. 79 of 160). Although AS-IA McCaleb concluded that CIN submitted sufficient evidence to support a finding of "continuous, significant social interaction between the Indians living in Bay Center and the Chinook descendants concentrated in Dahlia or Ilwaco on the Columbia River to the south as late as 1950," *id.* Exh. G at pp. 81-82 of 160, he also concluded that CIN "provided little new evidence to demonstrate that it met criterion (b) after 1950, including the period 'at present,'" *id.* at p. 82 of 160. The RFD, over the course of several pages, extensively evaluates the evidence in the record, and explains in painstaking detail why it is lacking. *Id.*, Exh. G (See RFD at pp. 81-100 of 160). At no point in the AS-IA's discussion of the evidence is there any indication that the outcome of his determination was based to any degree on a certain way of counting marriages. Nor is there any allegation in the amended complaint that if CIN was afforded the opportunity to re-petition, the manner by which Interior is allowed to count marriages under the 2015 version of the Part 83 regulations might yield a different result in the outcome of CIN's petition.

iii. The 2015 revisions made no substantive change in the manner that the mandatory "Political Influence or Authority" Criterion is Evaluated.

Finally, CIN's original petition failed because insufficient evidence was adduced to satisfy the "Political Influence or Authority" criterion. 25 C.F.R. § 83.7(c) (1994); see also Exhibit G (RFD at pp. 108-109 of 160). Under this criterion, the petitioner's burden is to demonstrate that it "has maintained political influence or authority over its members as an autonomous entity from

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

historical times until the present." 25 C.F.R. § 83.7(c) (1994).[20] The 1994 regulations provide examples of the kinds of evidence which might be used in combination to demonstrate that the petitioner meets the criterion, but do not limit the possible evidence to these examples. 25 C.F.R. § 83.7(c)(1) (1994). They also list the types of evidence that would be sufficient by themselves to demonstrate that the petitioner meets the criterion at a specific time. 25 C.F.R. § 83.7 (c)(2) (1994).

The 2015 version of the regulations make no substantive change in this criterion. Instead, the 2015 version of the regulations simply expands the list of non-exclusive examples of possible evidence that can be used in combination to demonstrate that the criterion is met. 25 C.F.R. § 83.11(c)(1) (2015); and see 80 Fed. Reg. 37872 ("The items of evidence listed in criterion (c)(1) are examples, and are not exhaustive."). The list of the types of evidence that would be sufficient alone to meet the criterion at a specific time did not change from 1994 to 2015, aside from renumbering. 25 C.F.R. § 83.11(c)(2) (2015).

Under both the 1994 and 2015 versions of the regulations, the evidentiary burden is modified for petitioners that have been previously acknowledged by the Federal Government. The reduced evidentiary burden for this criterion, as set forth in 25 C.F.R. § 83.8(d)(3) (1994), and 25 C.F.R. § 83.12(b)(2) (2015), is that the petitioner must only provide sufficient evidence to meet the "Political Influence or Authority" criterion from the time of the last Federal acknowledgment to the present (under the 1994 regulations) or from the time of the last Federal acknowledgment or 1900, whichever is later, to the present (under the 2015 regulations).

Applying this criterion to the original CIN petition, AS-IA McCaleb concluded that because CIN was able to demonstrate federal recognition of a Chinook Indian tribe until 1855, it needed to demonstrate that it maintained political influence or authority over its members since 1855. Decl. of

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20 In pertinent part, 25 C.F.R. § 83.11(c) (2015) provides:

> (c) Political influence or authority. The petitioner has maintained political influence or authority over its members as an autonomous entity from 1900 until the present. Political influence or authority means the entity uses a council, leadership, internal process, or other mechanism as a means of influencing or controlling the behavior of its members in significant respects, making decisions for the entity which substantially affect its members, and/or representing the entity in dealing with outsiders in matters of consequence. This process is to be understood flexibly in the context of the history, culture, and social organization of the entity.

UNITED STATES ATTORNEY
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Kipnis, ¶ 8, Exh. G (RFD at p. 108 of 160). Analyzing the evidence presented with the CIN petition, *id.,* (RFD at pp. 102-107 of 160), the AS-IA summarized his findings as follows:

> The record for this case lacks examples, however, of an internal political process, either formal or informal, among the petitioner's ancestors, or of formal or informal political leadership or influence over the petitioner's ancestors as a group between 1855 and 1925. The available evidence neither shows the existence of a political process for the entire petitioning group, nor for smaller bands or localities that might later have combined to form the petitioner.
>
> There is evidence of some leadership by George Charley during the late 1920's on behalf of a federally recognized tribe and a portion of the petitioner's ancestors at Bay Center, but not on behalf of the petitioner's ancestors along the Columbia River. There is also very limited evidence that a claims organization existed in the late 1920's and early 1930's, but no evidence that it had any internal political process which resulted in group decisions. There is almost no evidence of political activities or leadership between the early 1930's and 1951. Thus, there is insufficient evidence that the petitioning group exercised political influence over its members between 1855 and 1951.
>
> There is evidence for the years between 1951 and 1970 that two organizations were active to pursue a claims case, but insufficient evidence that either organization had an internal decision-making process that embodied a bilateral political relationship between leaders and members which existed broadly among the membership of the petitioner as whole. The Cowlitz Final Determination has reaffirmed that to meet [the political influence or authority] criterion . . . a petitioner must have been more than simply a claims organization (see also the Federal district court decision in Indiana Miami (District Court 2000)). During recent decades the petitioner has had a formal political organization. The Proposed Finding concluded that there was "very little information available about the internal political processes of the petitioner from 1970 to the present," and a lack of evidence that the organization was broadly based (Chinook PF, 32). The petitioner's new evidence does not change this conclusion.

Id. (RFD at p. 108 of 160). Thus, the AS-IA concluded that the evidence in the record did not satisfy CIN's burden of demonstrating that it has exercised political influence or authority over its members from 1855, the time of last federal recognition, to the present (that is, 2002).

There is no factual allegation in plaintiffs' amended complaint that affords any clue as to how in a new petition CIN can overcome the historical evidence that demonstrated under the same mandatory criterion that since at least 1900, CIN did not maintain political influence or authority over its members as an autonomous entity.

iv. Summary

No factual allegation in plaintiffs' amended complaint demonstrates any likelihood that the outcome of a CIN petition for recognition will be any different if CIN is allowed to re-petition under the 2015 regulations. Consequently, plaintiffs are not injured by the ban on re-petitioning.

UNITED STATES ATTORNEY
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See *Miami Nation of Indians of Indiana v. Babbitt*, 112 F. Supp. 2d 742, 760 (N.D. Ind. 2000) (noting that "it appears that the Miamis would fail even under the 1994 regulations, because [25 C.F.R.] § 83.8(d)(3) (1994) would require them 'to demonstrate political influence or authority is exercised within the group at present'- on which they came up short under the 1978 regulations.")

Because the amended complaint lacks any specific factual allegations that establish any basis to believe that a new CIN petition is likely to succeed under the 2015 regulations, plaintiffs have failed sufficiently to allege that this Court can redress plaintiffs' purported injury. As such, the second through fifth claims for relief in the amended complaint should be dismissed.

III. SUBJECT MATTER JURISDICTION IS LACKING FOR PLAINTIFFS' DECLARATORY RELIEF CLAIM AS TO FUNDS HELD IN TRUST BECAUSE THERE HAS BEEN NO FINAL AGENCY ACTION

Plaintiffs' sixth through eighth causes of action appear to rest squarely upon 5 U.S.C. § 704 of the APA, which provides that "final agency action for which there is no other adequate remedy in a court are subject to judicial review." The final agency action requirement is a jurisdictional prerequisite to suit under the APA. See, *Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1199 (9th Cir. 1998) (where there was no final agency action, "28 U.S.C. § 1331 and Section 704 of the APA could not vest the district court with jurisdiction to review the order"). Thus, in order to withstand jurisdictional scrutiny, plaintiffs must demonstrate that their sixth through eighth causes of action represent a challenge to a "final agency action."

"Agency action" is defined as "the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act," 5 U.S.C. §§ 551(13), 701(b)(2); and see, *Sackett v. U.S. Env. Prot. Agency*, 566 U.S. 120, 131 (2012) (EPA compliance order constituted a final agency action). The Court has explained that "[a]ll of these categories involve circumscribed, discrete agency actions." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004). And, to be "final," the agency action must both mark the consummation of an agency's decisionmaking process and determine legal rights or obligations. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); and see, *Sackett*, 566 U.S. 120, 125-127.

OST took no final agency action concerning the funds to which plaintiffs claim entitlement. Ms. Rugen's letter to plaintiff Johnson (dkt. # 24, Exhibit 4) does not constitute an "agency action,"

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much less a "final" agency action. The informal nature of the communication and the absence of any direct effect on plaintiffs as a consequence of the Rugen letter belie any other conclusion. See *Air Cal. v. U.S. Dep't of Transp.*, 654 F.2d 616, 620 (9th Cir. 1981) (letter of FAA's General Counsel indicating belief that Board of Supervisors was violating the law and FAA's intention to pursue sanctions absent compliance was not agency action).[21] Plaintiff Johnson requested information from Ms. Rugen as to why CIN was no longer receiving account statements from OST and Ms. Rugen, in her letter, simply responded by providing him with the requested information. Nothing was *determined* by the Rugen letter one way or another.

For the same reason, there was no "final" agency action. The finality aspect of the requirement demands first, that a plaintiff be able to point to a decisionmaking process whereby "rights or obligations" are "determined," and second, that the process be "consummated." *Sackett*, 566 U.S. at 127; and see, *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1136-1137 (9th Cir. 1998). Nothing was "determined" or "consummated" by the Rugen letter. Hence, the letter cannot constitute a final agency action. See *Am. Civil Liberties Union v. Nat'l. Security Agency*, 493 F.3d 644, 677-679, 679 n.37 (6th Cir. 2007) (where only non-adjudicative agency conduct is involved, that conduct is not challengeable as a "final agency action" under the APA). Indeed, if plaintiffs seek a final agency determination from Interior as to CIN's entitlement to the Lower Chinook/Clatsop trust funds given its unrecognized status, it is incumbent upon CIN to make a formal request for access to those funds pursuant to the administrative processes established by OST for that purpose. See e.g. 25 C.F.R. Part 87 and Part 115. There is no allegation in the amended complaint that plaintiffs have ever attempted to do so.

Accordingly, because there is no final agency action which supports plaintiffs' sixth through eighth claims for relief, those claims should be dismissed for lack of subject matter jurisdiction.

21 *Cf. S. Cal. Aerial Advertisers' Ass'n v. F.A.A.*, 881 F.2d 672, 675 (9th Cir. 1989) (letter from FAA official banning fixed-wing aircraft from a specific area was a definitive statement of the FAA's position that had a direct and immediate effect on petitioner's members and carried an expectation of immediate compliance with its terms).

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CONCLUSION

For the foregoing reasons, defendants Ryan K. Zinke, the U.S. Department of the Interior, and John Tahsuda, respectfully request that their motion be granted and the action be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

DATED this 30th day of November 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on November 30, 2017, I electronically filed the foregoing documents with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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Thane Walker Tienson ttienson@landye-bennett.com

I further certify that on November 30, 2017, I mailed by United States Postal Service the Notice of Appearance to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

-0-

DATED this 30th day of November, 2017.

s/ Crissy Leininger
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