UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HISTORICAL EASTERN PEQUOT TRIBE, Plaintiff, v. OFFICE OF FEDERAL ACKNOWLEDGMENT, BUREAU OF INDIAN AFFAIRS, Defendant,	1:23-CV-00054-JEB OCTOBER 4, 2023

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The plaintiff is an historic Indian tribe located in Eastern Connecticut that has tried, for a quarter of a century, to get federal recognition as an Indian tribe. It filed suit in this case as an act of despair. Despite waiting for almost six years for final agency action on its application, it received nothing. It filed this action to compel an answer. By way of its motion to dismiss, the agency contends it sent a courtesy copy of a letter to the tribe in 2019 notifying the tribe of final action. The tribe is prepared to contest such a letter was ever sent. Even more, the defendant's motion suggests that a 2019 letter would have been unnecessary as the matter was closed long beforehand. Because there are serious issues of material fact about notice of final agency action, this case warrants further proceedings and discovery. Accordingly, the defendant's motion to dismiss should be denied.

I. Legal Standard

The defendant has moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Such a motion tests the legal sufficiency of a complaint; a reviewing Court need not accept as facts speculative inferences or allegations devoid of

substance. *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004). On the other hand, a plaintiff is not required to prove his case in his Complaint, but merely to advance a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In evaluating the sufficiency of a plaintiff's complaint under Rule 12(b)(6), the Court may consider "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint[,] and matters of which [the Court] may take judicial notice," including "public records." *Equal Emp't Opportunity Comm'n v. St. Francis Xavier Parochial Sch*., 117 F.3d 621, 624 (D.C. Cir. 1997); *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004).

II. The Well-Supported Allegations of the Second Amended Complaint

To say that the tribe has been worn down by neglect is an understatement.

Although the Connecticut colony first established a reservation for tribe in 1683, Second Amended Complaint, hereinafter "Cpl," at para. 3, the tribe has yet to receive federal recognition. Indeed, the tribe was despoiled of thousands of acres of land in violation of the Indian Trade and Intercourse Act, a federal statute requiring federal approval of sales of Indian land. Id., paras. 5-6.

In June 1978, one faction of the Historical Eastern Pequot tribe, the Eastern Pequot Tribes of Connecticut, submitted a letter of intent to petition for tribal recognition to the defendant; eleven years later, in 1989, a different faction of the tribe also submitted a letter of intent. Nine years later, the defendant consolidated the case. Id., para. 9. The agency's pace is glacial, to say the least.

On March 31, 2000, the defendant gave notice of its intent to recognize the tribe. Id., para. 11. A final determination of acknowledgement was published in the Federal

Register on July 1, 2002. Id. State and local municipalities in Connecticut thereafter petitioned for reconsideration, Id., para 12, and, on October 14, 2005, the agency issued a reconsidered final determination, declaring that the tribe did not satisfy recognition requirements. Id., para. 12. Thereafter, the tribe sought review of the final agency determination in a filing dated January 13, 2006. Id., para. 14.

Nine years later, and apparently without deciding the tribe's petition to review the reconsideration, the agency revised its rules effective July 15, 2015,[1] eliminating review of reconsideration requests. Id., para. 15.

Thereafter, the tribe once again sought review, claiming that it was a "previously recognized tribe." Id., para. 17. On January 12, 2017, an administrative law judge (ALJ) dismissed the matter, ruling that the tribe was "previously denied" and that the tribe had not received a "negative proposed finding." The ALJ noted, however, the possibility that there might be a factual basis for review. Id. The ALJ's decision was in a "Recommended Decision." Id. para. 18.

At the time of the filing of the complaint, the agency did not list a final decision regarding this matter on its list of petitions on a public website. Id., para. 19.

The tribe asserted futility in waiting any longer for a final decision, filing just as the six-year statute of limitations for an action against the Government under the UAPA was set to expire Id., para. 20.

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[1] The plaintiff committed a scrivener's error in his Complaint that only became apparent in preparation of this memorandum. Paragraph 15 of the Second Amended Complaint notes that final rules regarding reconsideration of final determinations of tribal status was published in the Federal Register on July 1, 2016. The correct date is one year earlier, on July 1, 2015. See https://www.federalregister.gov/documents/2015/07/01/2015-16193/federal-acknowledgment-of-american-indian-tribes (last accessed on October 2, 2023).

III. The Government's Factual Contentions in its Motion to Dismiss

While a motion to dismiss is ordinarily tethered to the well-pled factual allegations of a complaint, a reviewing Court is permitted to consider facts alleged in the complaint or other items of which a Court may take judicial notice. The Government has offered several items as appendices to its motion to dismiss that were neither asserted nor inferred in the Complaint, and of which judicial notice would be inappropriate. In particular, Exhibit 4 is a letter dated, apparently, June 25, 2019, and purportedly sent to a representative of the Connecticut Attorney General's Office noting that the tribe had exhausted both its administrative and judicial options. The letter was "cc'ed" to counsel for the Historical Eastern Pequot Tribe.

This is precisely the sort of filing Courts should be wary of relying upon in a motion to dismiss. "In *Jankovic v. International Crisis Group*, 494 F.3d 1080, 377 U.S. App. D.C. 434 (D.C. Cir. 2007), a defamation case, we drew on a filing in an unrelated case as a record of what was said. *Id.* at 1088. But we did not, and could not, rely on it for the truth of the matter asserted. *Id.*; *see* 21B Fed. Prac. & Proc. Evid. § 5106.4 (2d ed.) ("[A] court cannot take judicial notice of the truth of a document simply because someone put it in the court's files.")." *Hurd v. District of Columbia*, 864 F.3d 671, 686, 431 U.S. App. D.C. 83, 98, 2017 U.S. App. LEXIS 13693, *33, 98 Fed. R. Serv. 3d (Callaghan) 140, 2017 WL 3202627.

First, this is not an agency ruling or determination. It is correspondence presumably sent in response to an inquiry from the State of Connecticut asking the same question the tribe had been asking – when is the agency going to take action on the ALJ's

"recommended decision" of January 12, 2017? The response, apparently typed in one type-face then appears to bear a hand-stamped date, raising questions about when the date was placed on the letter.[2] Judicial notice of the letter is inappropriate. The plaintiff raises this issue in this context because it is expected in discovery that the agency will not be able to prove it sent this letter, and tribal representatives are expected to deny receiving it. Certainly, the tribe would not have waited until the eve of expiration of the statute of limitations to file this claim if they had received – years earlier – some sort of notice of a final decision. The letter is not a "proper subject of judicial notice." *Herron v. Fannie Mae*, 2012 U.S. Dist. LEXIS 206057, *4. Had notice actually been sent to the tribe at any point, or published anywhere, one suspects the notice would have been produced at this stage of the proceedings. These issues, of course, require discovery to flesh out.

Next, the agency contends the tribe was placed on notice, again by way of correspondence, this time to a Post Office Box, that it will "no longer accept requests of acknowledgment outside the Part 83 process" and that previously denied petitioners cannot be acknowledged. Exhibit 1. This is not an agency order, and is not a proper subject for judicial notice. While more reliable on its face that Exhibit 4 – the exhibit is at least sent directly to a tribal representative, as the context of the letter makes clear – it begs the question to be decided in this case – was the tribe entitled to further review of its submissions? On the record before this Court no definite conclusion can be reached.

[2] In fairness, Exhibit 1, another letter from the agency, also has a hand-stamped date on a letter written in a different type-face. Perhaps that is simply how correspondence is generated at the agency.

On the one hand, the agency sent a letter dated June 2, 2016, purportedly telling the tribe that it had exhausted both its administrative and judicial remedies. That is a fairly direct and succinct way of saying "case closed." However, an ALJ was incapable of reaching a similar conclusion six months later, in January 2017, declining, in a Recommended Decision, to find jurisdiction. However, The ALJ noted, the possibility that there was a factual basis for review. Cpl., para. 18. As the agency notes in its papers, the issues presented here reflect complex issues of fact and law. See note 6, p. 7, noting that some Courts appear to be open to re-petition for previously denied petitions as part of the Rule 83 process and noting that one Court has ordered the agency clarify the issue in either a new final rule or new proposed issue by October 31, 2023. *Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt,* 613 F. Supp. 128563 (D.D.C. 2020). See also, *Chinook Indian Nation v. Bernhardt*, 2020WL 128563 (W.D. Wash. Jan. 10, 2020). This issue goes well beyond the scope of a motion to dismiss and requires further briefing and factual development.

IV. Why the Case Should Avance to Discovery

Connecticut is still recovering from the shock of federal recognition of the Mashantucket tribe, recognition that came not from the Bureau of Indian Affairs, but from a Special Act of Congress. The "tribe" so recognized operates one of the world's largest gaming enterprises and had to overcome a presidential veto to gain Congressional recognition. It gained recognition despite no discernable Indian heritage or bloodlines.[3]

[3] The story of how the Mashantucket "tribe" gained recognition without proof of historic roots and legacy as a tribe is shocking. Benedict, Jeff, *Without Reservation: How a Controversial Indian Tribe Rose to Power and Built the World's Largest Casino* (2000). The "tribe" was so desperate for members it dispensed with blood lineage requirements

Property owners in the region vowed "never again." Local politicians joined forces to compel reconsideration of the recognition the agency proposed for the plaintiff, and ultimately procured denial of the quest for recognition.

The Historical Eastern Pequot Tribal Nation lacked the finesse and polish of the lobbyists who ushered the Mashantucket entity through Congress. They depended on the Bureau of Indian Affairs, and the bureau failed them. It should not be permitted to benefit from its failure by means of a motion to dismiss.

Applications were filed in June 1978 and 1989 by factions of the tribe. Nine years later, the agency consolidated the claims. More than a decade after the second claim was filed, and more than 20 years after the first claim was filed, the agency acted, notifying the tribe of its intent to afford federal recognition. In 2002, a final determination of recognition was promulgated. Interested third parties – state and municipal officials – intervened and asked for reconsideration. Three years later, in 2005, the agency responded reversing course and denying recognition to a tribe with an actual history and Indian bloodlines. The tribe sought review of that in 2006. In 2015, the agency acted.

Confused by these marathon proceedings, the tribe sought relief. An ALJ rejected their claim in a recommended decision. The tribe waited, again for years, for a decision, finally turning to this Court to force the issue. If ever there were a case in which agency dereliction warranted laches, this is it. But laches is a defense and it does not apply to claims for injunctive relief. "Moreover, it is well established that laches generally does not apply to bar claims for prospective injunctive relief. *See Nartron Corp.*, 305 F.3d at

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for those willing to gamble on membership. p. 294. The gamble repaid handsome dividends.

412 (Laches "does not prevent plaintiff from obtaining injunctive relief or post-filing damages."); *Lyons P'ship, L.P.*, 243 F.3d at 799 ("[I]f the claim is one for injunctive relief, laches would not apply. A prospective injunction is entered only on the basis of current, ongoing conduct that threatens future harm." *Gaudreau v. Am. Promotional Events, Inc*., 511 F. Supp. 2d 152, 159, 2007 U.S. Dist. LEXIS 72055, *18.

V. Conclusion

The parties' papers reflect uncommonly difficult issues of fact and law that simply cannot be resolved satisfactorily by a motion to dismiss. On the papers before the Court, the motion to dismiss should be denied in its entirely, To the extent the defendant attacks remedies sought in the prayer for relief, those issues simply aren't ripe for a motion to dismiss. The plaintiff asks that the Court deny the motion to dismiss.

THE PLAINTIFF

By: **/s/ Norman A. Pattis**

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Dated: October 4, 2023

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the above-captioned date, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties of record by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Norman A. Pattis
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