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Is this a CILS case?

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IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

LAUGHING COYOTE, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE; et al., Defendants.	CV F-93-5055 DLB ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

BACKGROUND

Plaintiff brought this motion challenging the actions of the United States Fish and Wildlife Service (USFWS), its Director, John Turner, and its Pacific Regional Director, Marvin Plenert, in refusing to accept Plaintiff's application for an Eagle Feather Permit pursuant to the Eagle Protection Act (EPA) 16 U.S.C. SS 668 *et seq.*, and its implementing regulations 50 C.F.R. SS 22.1 *et seq.* Plaintiff has also named as Defendants

Bruce Babbitt, Secretary of the Interior of the United States; Eddie Brown, Assistant Secretary, Bureau of Indian Affairs; Ronald Jaeger, Area Director, Sacramento Area Office and Harold Brafford, Superintendent, Central California Agency of the Bureau of Indian Affairs (BIA) (collectively the BIA defendants). Plaintiff maintains that the refusal of the BIA Defendants to certify to the USFWS that Plaintiff is an Indian in support of his application for an Eagle Feather Permit was contrary to the law and/or arbitrary and capricious.

DISCUSSION

Congress enacted the Eagle Protection Act in 1940 and in October 1962 Congress amended the Act "to permit the taking, possession, and transportation of specimens (of eagles or eagle parts) . . . for the religious purposes of Indian tribes, . . ." where "the Secretary of the Interior shall determine that it is compatible with the preservation of the Bald or the Golden Eagle . . .". 16 U.S.C. § 668(a).

The Secretary has enacted regulations controlling the issuance of Eagle Feather Permits for Indian religious purposes. 50 C.F.R. § 22.22. The application procedures require that the individual Indian applicant must submit an application which includes the following information:

> (1) Species and number of eagles or feathers proposed to be taken, or acquired by gift or inheritance.
>
> (2) State and local area where the taking is proposed to be done, or from whom acquired.

(3) Name of the tribe with which the applicant is associated.

(4) Name of tribal religious ceremony(ies) for which required.

(5) Applicant must attach a certification from the Bureau of Indian Affairs that the applicant is an Indian.

(6) Applicant must attach a certification from a duly authorized official of the religious group that the applicant is authorized to participate in such ceremonies.

50 C.F.R. § 22.22.

The genesis of this action is the refusal of the BIA Defendants to certify that Plaintiff is an Indian as required by 50 C.F.R. § 22.22(a)(5). The BIA maintains that because Plaintiff is not a member of a "federally recognized tribe" under 25 C.F.R. Part 83, it cannot and will not certify that he is an Indian for purposes of the application. Plaintiff maintains that both the action of the USFWS and/or the BIA are arbitrary and capricious within the meaning of 5 U.S.C. §§ 551 *et seq.*, the Administrative Procedures Act (APA).

Plaintiff maintains (without dispute from the Defendants) that he is 11/16 Mono/Choinumni Indian. He further maintains that the BIA has acknowledged that both the Mono's and Choinumni's are tribal Indian groups within California and descents of aboriginal California tribes indigenous to the San Joaquin Valley.

In a confused and unconvincing argument, Plaintiff maintains that the BIA's requirement that an applicant be a

member of a federally recognized tribe before it will certify that he or she is an Indian for the purposes of 50 C.F.R. § 22.22(a)(5) is a change in policy or interpretation of the regulations or is a new interpretative rule which was promulgated without compliance with the Freedom of Information Act (FOIA) 5 U.S.C. § 552. Plaintiff maintains this must be so because the Eagle Feather Permit regulations of 50 C.F.R. were enacted in 1974 and the regulations in 25 C.F.R. part 83 concerning federal recognition of Indian tribes were not promulgated until 1978. However, Plaintiff fails to demonstrate that there has been any change in the policy or interpretation of the regulations by either the USFWS or the BIA.

Plaintiff cites *United States v. Deon*, 476 U.S. 734 (1963) and *Rupert v. Director, United States Fish and Wildlife Service*, 957 F.2d 32 (1st. Cir. 1992) for the proposition that the regulations had previously been interpreted only to require that the applicant be an Indian as opposed to a member of federal recognized tribe in order to qualify for an Eagle Feather Permit. Neither of the opinions cited support this conclusion. *Rupert* dealt with the denial of the permit to a non-Indian pastor of an "all race" church which was denied on the basis that no members of the congregation were Indians. There was no distinction made or discussed concerning federally recognized or non-recognized tribes and the holding in the case was merely that non-Indian religious groups were not entitled to permits. Thus, Plaintiff

has failed to demonstrate that there is any change in policy or general interpretation of the regulations at issue.

Plaintiff also maintains that the BIA's action in failing to certify to the USFWS that he was an Indian was arbitrary and capricious and contrary to the plain reading of 50 C.F.R. § 22.22(a). In response, the BIA Defendants maintain that their action was not arbitrary and capricious and point out that the application itself includes a tribal membership certification form to be filled out by the BIA.

Administrative actions may be set aside only if they are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law". 5 U.S.C. § 706(2)(A). Agency actions will not be found to be arbitrary and capricious unless there is no rational basis for the action. *Friends of the Earth v. Hintz*, 800 F.2d 822, 831 (9th Cir. 1986).

The record shows that the BIA refused to provide a certification that Plaintiff is an Indian for purposes of 50 C.F.R. § 22.22 because Plaintiff is not enrolled as a member of a reservation or rancheria, i.e., not affiliated with a federally recognized reservation or rancheria. The USFWS rejected the application on the basis that it was incomplete without the BIA certification. Defendants convincingly argue what is undeniably true: That the purpose of the exemption for Indian religious ceremonies in the Eagle Protection Act is to "preserve the cultural and religious ceremonies of Indian tribes enabling them

to continue ancient customs and ceremonies of deep religious emotional significance".[1]

However, Plaintiff's application was rejected not because it was determined that he was not associated with an Indian tribe, nor because it was determined that the tribal religious ceremony(ies) requiring eagle feathers which were listed on his application were not bona fide historical tribal rituals, nor because of the lack of a certification from a duly authorized official of the religious group that the applicant is authorized to participate in the ceremonies. The application was denied as incomplete because the Bureau of Indian Affairs refused to certify that the applicant was an Indian. The BIA has read into the certification requirement set forth in 50 C.F.R. 22.22(a)(5) the requirement that the applicant be a member of a "federally recognized tribe." It appears that this requirement relates more to subparagraphs 3 and 4 of 50 C.F.R. 22.22(a) than to 5.

In order for an Indian tribe to be federally recognized pursuant to 25 C.F.R. Part 83 there must be evidence of:

> (1) Repeated identification by Federal authorities;
>
> (2) Longstanding relations with state governments based on identification of the group as Indian;
>
> (3) Repeated dealings with a county, parish or other local government in a

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[1] Comments of the Assistant Secretary of Interior, Frank Briggs, S.Rep.No. 1986, 87th Congress, 2d Sess. at 6 (1962); H. R. Rep. No. 1540, 87th Congress, 2d Sess. at 4 (1962).

> relationship based on the groups Indian identity;
>
> (4) Identification as an Indian entity by records in courthouses, churches, or schools;
>
> (5) Identification as an Indian entity by anthropologists, historians or other scholars;
>
> (6) Repeated identification as an Indian entity in newspapers and books;
>
> (7) Repeated identification and dealings as an Indian entity with recognized Indian tribes or national Indian organizations.
>
> 25 C.F.R. § 83.7 (in part)

or other *indicia* of affiliation included in 25 C.F.R. § 83.7. Lack of such federal recognition, however, may indicate only that no application for federal recognition has ever been made or, as may be true in the case of California Indians, that historical dealings with the existing local and federal governments are not sufficiently developed because of the cultural practices of the tribes or the late annexation of California into the United States. Indeed the BIA in its own regulations defines an Indian tribe as ". . . any Indian group within the continental United States that the Secretary of Interior acknowledges to be an Indian tribe" and an Indian group as "any Indian aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe". 25 C.F.R. 83.1(f) and (g). Thus the question of whether or not a tribe is

federally recognized primarily has to do with factors separate and apart from whether the tribe has "ancient customs and ceremonies that are of deeply religious or emotional significance to them". Comments of the Assistant Secretary of Interior, Frank Briggs, *i.d.*.

Defendants maintain that ". . . BIA is not in the business of defining who is an Indian and who is not an Indian without any context." [2] It is clear from the exhibits that the BIA recognizes Plaintiff as an Indian for other purposes. The BIA has issued a certification for purposes of enrollment of Plaintiff as a California Indian under the Act of September 21, 1968 (82 Stat. 860 & 861) and enrollment in the California Judgment Fund Roll of California Indians certifying that he is 11/16 Mono/Yokut. However, as previously stated, the fact of federal recognition of an applicant's tribe is, at best, only one *indicia* of whether or not the issuance of an Eagle Feather Permit is appropriate and necessary to "continue ancient customs and ceremonies that are of deep religious and emotional significance".

Accordingly, this court agrees with Plaintiff that the BIA's interpretation of the 50 C.F.R. 22.22(a)(5) requirement that it certify that the applicant is an Indian to include the requirement that the applicant be a member of a federally

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[2] Federal Defendants' reply to Plaintiff's opposition to Defendant's cross motion for summary judgment at page 6, lines 3-4.

recognized tribe is both contrary to the plain reading of that regulation and arbitrary and capricious.

Plaintiff's motion for summary judgment is GRANTED, in part, the BIA Defendants are ordered to certify to the USFWS that Plaintiff is an Indian for purposes of his eagle permit. Plaintiff's request that the USFWS be ordered to issue the permit is DENIED, the USFWS may process his application in the normal course of its operation.

The court further ORDERS that judgment be entered in favor of Plaintiff in accordance with this order.

DATED: 7/8/94

DENNIS L. BECK
U.S. MAGISTRATE JUDGE