NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEN ST. MARKS, Petitioner, THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION, MONTANA, Intervenor, v. U.S. DEPARTMENT OF THE INTERIOR; RYAN K. ZINKE, in his official capacity as Secretary of the Interior, Respondents.	No. 15-71909 MEMORANDUM*

On Petition for Review of an Order of the
Department of Interior

Argued and Submitted March 12, 2018
San Francisco, California

Before: WATFORD and FRIEDLAND, Circuit Judges, and FEINERMAN,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

The Chippewa Cree Tribe ("Tribe") removed St. Marks from his position as Chairman of the Tribe's Business Committee ("Committee")—its governing body—after he reported to the Department of the Interior ("Department") that members of the Committee were misusing funds the Tribe had received through the American Recovery and Reinvestment Act ("ARRA" or "the Act"), Pub. L. No. 111-5, 123 Stat. 115 (2009). The Department awarded St. Marks approximately $650,000 in relief, including front pay, back pay, travel costs, and legal fees. St. Marks petitioned for review, raising three challenges to the Department's calculation of his award.[1]

Agency action may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We will "overturn an agency's determination of a civil penalty" only if "unwarranted

[1] The Tribe also filed a petition for review, which we deny in full in a separate opinion. St. Marks argues that we lack jurisdiction over the Tribe's petition, at least to the extent that the Tribe asks us to revisit the merits of the Department's underlying determination. It is not clear that St. Marks can challenge our jurisdiction over the Tribe's petition given that he is not a party to that proceeding, but his two arguments fail regardless. First, the Tribe timely petitioned for review of the Department's final April 2015 order under 5 U.S.C. § 551(6). Although the Department issued an earlier order in December 2014, it was not a final agency action for purposes of the Administrative Procedure Act, which governs judicial review of ARRA determinations. *See* ARRA § 1553(c)(5), 123 Stat. at 300; *Bennett v. Spear*, 520 U.S. 154, 177 (1997). Second, federal law does not require that the Tribe obtain approval for its choice of representation. *See* 25 U.S.C. § 81. And even if it did—or even if we were to consider whether tribal law imposes such a requirement—St. Marks has cited no authority for the proposition that this requirement should act as a jurisdictional bar.

in law or unjustified in fact." *Ketchikan Drywall Servs., Inc. v. Immigration & Customs Enf't*, 725 F.3d 1103, 1110 (9th Cir. 2013) (internal citation omitted). Because the Department's calculation of St. Marks's award is neither unwarranted nor unjustified, we **DENY** the petition.

First, it was reasonable for the Department to decide that St. Marks was not entitled to compensatory damages arising from his failed attempt to purchase a nearby hotel. St. Marks argues that the Tribe is responsible for this loss because his removal from the Committee prevented him from securing a loan to complete the purchase. As the Department explained, however, the evidence does not establish that St. Marks's inability to acquire a loan was directly connected to his removal. St. Marks's communication with various lenders shows that he was not guaranteed to be approved absent his conflict with the Tribe, and at least one bank denied St. Marks's request for reasons entirely unrelated to this dispute. Moreover, although St. Marks now cites to the hotel's recent profits to support his damages estimate, this figure was highly speculative at the time he submitted his request to the agency. The Department thus "articulated a rational connection" between the facts and its decision to deny relief on this basis. *See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1236 (9th Cir. 2001).

Second, the Department's attorney's fees calculation was not arbitrary and

capricious. Although the Act allows the Department to award fees "that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal," ARRA § 1553(c)(2)(C), 123 Stat. at 300, there is no requirement that the agency award fees at all, *see id.* And given the sprawling nature of St. Marks's conflict with the Tribe, it was reasonable for the Department to decline to award fees arising from later iterations of their dispute, including fees incurred in connection with the two suits the Tribe filed against St. Marks in tribal court. The Department might otherwise have been authorizing an essentially ongoing award of fees.[2]

Finally, St. Marks is not entitled to either pre- or post-judgment interest on his award. To begin, St. Marks forfeited any claim to prejudgment interest when he failed to request it from the Department. *See Reid v. Engen*, 765 F.2d 1457, 1460 (9th Cir. 1985). Because there is nothing in the statute that provides for interest on an award, it was incumbent upon St. Marks to provide the Department with an opportunity to decide in the first instance whether prejudgment interest

[2] St. Marks forfeited the separate argument that he was entitled to attorney's fees arising out of his attorney's preparation of the fee request by failing to request this relief from the Department. *See Reid v. Engen*, 765 F.2d 1457, 1460 (9th Cir. 1985) ("As a general rule, if a petitioner fails to raise an issue before an administrative tribunal, it cannot be raised on appeal from that tribunal."). As the Department explained, St. Marks could have submitted a timely addendum that included the fees incurred in preparing the underlying fee request, but he did not do so.

was appropriate. With respect to post-judgment interest, St. Marks has not identified a source of statutory authority to support this request. Although 28 U.S.C. § 1961 allows for the assessment of post-judgment interest on attorney's fees, the statute "does not extend to agency awards." *Hobbs v. Dir., Office of Workers Comp. Programs*, 820 F.2d 1528, 1531 (9th Cir. 1987); *see also* 28 U.S.C. § 1961 (allowing for the recovery of interest on "any money judgment in a civil case recovered in a *district court*" (emphasis added)).

St. Marks notes that the Department never ruled on his request that the Tribe deposit the award in escrow prior to appealing. Had the Department granted this request, his award would have earned interest during the pendency of this appeal, thus providing him a form of post-judgment interest. But St. Marks did not raise this argument in his opening brief, depriving the Department of an opportunity to respond. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) ("[I]ssues which are not specifically and distinctly argued and raised in a party's opening brief are waived."). We thus decline to use the Department's failure to rule on this request as the basis for an award of post-judgment interest. This decision is without prejudice to St. Marks's making a request to the Department that he be awarded post-judgment interest, to the extent a procedural avenue for doing so remains.

PETITION DENIED.