

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

MARQUITA CARATTINI, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No.: CIV-09-489-D
)	
KEN SALAZAR, Secretary of the)	
U.S. Department of the Interior, et al.,)	
)	
Defendants.)	

**BRIEF IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT**

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June 12, 2009

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BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs Marquita Carattini, Richard Banderas and Ron Ahtone file this Brief in Support of their Motion for Summary Judgment against the Defendants Ken Salazar, George Skibine and the United States Department of the Interior (collectively “DOI”). Plaintiffs move this Court to enter judgment finding that the DOI acted arbitrarily and capriciously in: (1) determining Carattini and Banderas were properly removed from the Business Committee of the Apache Tribe of Oklahoma (“ABC”), (2) determining the election to fill their positions on the ABC had been properly conducted under the Constitution, and (3) refusing to consult with Plaintiffs prior to issuing its final decision, and that the January 29, 2009 final agency decision is contrary to law.

STATEMENT OF CASE

On May 10, 2008, Plaintiffs were elected to three of the five positions on the ABC. Within weeks of the election, ABC Chairman Alonzo Chalepah and Vice-Chairman Mary Rivera, in collusion with the Apache Tribe Election Board, determined that Ahtone was no longer on the ABC and that the next highest vote-getter in the May 10th election¹ should replace Ahtone on the ABC. DOI would subsequently overturn Ahtone’s removal as a violation of the Apache Constitution.

On July 8, 2008, the ABC convened its first meeting after the dispute involving Ahtone come to a head. ABC Secretary/Treasurer Carattini began roll call for the meeting. When she called Ahtone’s name, the ABC chairman said Ahtone was no longer

¹ The next highest vote getter was ABC Chairman Alonzo Chalepah’s cousin, Leonard Chalepah.

a member of the ABC. Ahtone, who was present at the meeting, was ultimately removed by tribal security and city police officers at the direction of the Chairman. Carattini and Banderas left the meeting at the same time. By the actions of Carattini and Banderas, Chalepah and Rivera were placed on notice that Plaintiffs would not attend any noticed ABC meetings where Ahtone was not recognized as a member. Following the July 8th meeting, the Chairman allegedly called five more special meetings over the next three weeks.

On August 1, 2008, after the sixth allegedly called meeting, Carattini and Banderas were purportedly removed from the ABC by Chalepah for failure to attend the “meetings” called by the Chairman. Except for the beginning of the July 8th meeting, no quorum was present for any of the “meetings”. In October 2008, an election was purportedly conducted to fill Carattini and Banderas allegedly vacated positions. On October 18th, the results of the election were posted. On October 22nd, the Southern Plains Regional Office (“SPRO”) in Anadarko issued a letter stating that the five persons elected in May were still recognized by the Bureau of Indian Affairs (“BIA”) as the ABC members.

On December 19, 2008, DOI directed the SPRO to make no more decisions concerning the make-up of the ABC and directed SPRO to send all records pertaining to all Apache Tribe internal disputes to Washington, D.C. where DOI would make its own decision as to who composed the ABC.

On January 29, 2009, DOI issued its decision (“DOI Final Decision”). The DOI held that (1) Ahtone had been improperly removed from office, (2) Carattini and

Banderas had been properly removed for failing to attend the called “meetings” and (3) the election to replace Carattini and Banderas was conducted consistent with the Apache Constitution. The DOI Final Decision stated that it was “final for the Department”. Plaintiffs then initiated the present action².

The DOI Final Decision reversed the SPRO’s consistent position that the ABC was comprised of the five individuals sworn into office on May 15, 2008. The results of the DOI Final Decision was that the majority government elected by the members of the Apache Tribe has been usurped based upon a determination that (1) is not in accordance of the Apache Constitution and (2) is not in compliance with the duty of DOI (as stated in the DOI Final Decision) “to ensure the legitimacy of the tribal entity”. Neither the removal of Carattini and Banderas nor the special election to allegedly replace them are supported in the Apache Constitution or the Administrative Record and thus must be reversed.

Further, the DOI Final Decision, coupled with the Administrative Record upon which the decision must be based³, does not support the DOI finding that “notice provide (sic) was sufficient to satisfy due-process requirements, and/or was sufficient to provide notice-in-fact to Carattini and Banderas, such that neither can claim to have missed any

² Since filing this, Plaintiff Ahtone has again been removed from his office by the Chairman and Vice-Chairman. It should not surprise anyone that the removal was for allegedly missing three or more consecutive special ABC meetings.

³ On February 9, 2009, DOI sent a letter with documents attached to Plaintiffs’ attorneys stating “[e]nclosed is a copy of the administrative record submitted by the SPRO and documents otherwise otherwise referred to in the letter of January 29, 2009.” See Exhibit B to Plaintiffs Complaint. Despite the DOI representation in Court Doc. 16-3 accompanying the filing of the Administrative Record, the February 9th letter contains only 34 pages of documents upon which DOI asserted its decision was based.

of the meetings due to lack of knowledge as to the time and place they were to be held.” The Record does not support this conclusion and the DOI’s decision is arbitrary, capricious and an abuse of discretion. For the reasons herein, the DOI’s decision should be reversed and this Court should enter judgment restoring Carattini and Banderas to their rightful positions on the ABC.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On May 10, 2008, Chalepah, Rivera, Carattini, Ahtone and Banderas were elected to the ABC. [*Complaint for Declaratory and Injunctive Relief*, p. 3, ¶ 9 (hereinafter “Complaint”); *Answer*, p. 2, ¶ 9]

2. On May 15, 2008, the five newly-elected officials were sworn into office. [Administrative Record, Document 23 (hereinafter AR Doc. __)]

3. On June 2, 2008, the Enrollment Director of the Apache Tribe sent Ahtone a letter stating that he had forfeited his Tribal membership because he had received payments from another tribe of which he was a member while also being a member of the Apache Tribe of Oklahoma, an act that if true would have been cause for forfeiture of membership in the Apache Tribe. [AR Doc. 41, pp. 1-2]

4. On June 20, 2008, the BIA Anadarko Agency issued a letter stating the ABC was comprised of the five individuals who were elected and sworn into office on May 15, 2008. [AR Doc. 30]

5. The ABC Chairman subsequently informed Anadarko Agency that Ahtone had been disqualified as a candidate for election to the ABC and had been replaced on the ABC by Leonard Chalepah. [AR Doc. 41]

6. On July 8, 2008, a written notice of a meeting of the ABC was created by Vice-Chairman Rivera. [AR Doc. 33]

7. The minutes of the July 8th meeting state that “Marquita Carattini and Richard Banderas showed up for the meeting that was called by Chairman Alonzo that morning by notice with Ron Ahtone.” [AR Doc. 34]

8. As ABC Secretary, Carattini began calling roll and “called Ronald Ahtone’s name for roll call.” [*Id.*]

9. The ABC Chairman “shared with her [Carattini] that he [Ahtone] is not longer an elected officer” and “asked him [Ahtone] to leave three times.” [*Id.*]

10. When Ahtone said he would not leave, “Security was called to walk him out of the meeting.” [*Id.*]

11. When Ahtone would still not leave the meeting, “Police were called and they removed him from the office.” [*Id.*]

12. Carattini and Banderas “both left with him”. [*Id.*]

13. On July 9, 2008, a written notice of a meeting of the ABC for July 10th was created by Vice-Chairman Rivera. [AR Doc. 38]

14. The minutes of the July 10th meeting declare a quorum present with “Leonard Chalepah, Mary Rivera and Alonzo Chalepah.” [AR Doc. 39]

15. The July 10th minutes declare that Carattini and Banderas “are not here.” [*Id.*]

16. On July 10, 2008, a written notice of a meeting of the ABC for July 14th was created by Vice-Chairman Rivera. [AR Doc. 40]

17. The minutes of the July 14th meeting declare a quorum present with “Leonard Chalepah, Mary Rivera and Alonzo Chalepah.” [AR Doc. 42]

18. The July 14th minutes declare Carattini and Banderas “(absent).” [*Id.*]

19. On July 24, 2008, the BIA Anadarko Agency issued a letter stating the ABC was comprised of the five individuals who were elected and sworn into office on May 15, 2008. [AR Doc. 45]

20. The minutes of a July 30, 2008 ABC meeting declare a quorum present with “Leonard Chalepah, Mary Rivera and Alonzo Chalepah.” [AR Doc. 47]

21. No written notice of the July 30th meeting of the ABC was created.⁴

22. The July 30th minutes make no reference to Carattini or Banderas. [AR Doc. 47]

23. The minutes of a July 31, 2008 ABC meeting declare a quorum present with “Leonard Chalepah, Mary Rivera and Alonzo Chalepah.” [AR Doc. 48]

24. No written notice of the July 31st meeting of the ABC was created.⁵

25. The minutes of the July 31st meeting state “Marquitta Carattini and Richard Banderas have not come in for meetings due to conflict with business committee persons. . .Richard Banderas stated that he is not recognizing Leonard Chalepah on the board. Chairman Alonzo told him to put that in writing. He [Banderas] then left the office.” [AR Doc. 48]

⁴ Unlike the written notices for the July 8th, 10th and 14th meetings, the Administrative Record does not contain written notice of the July 30th meeting. It is uncontroverted that no written notice was given. [*Complaint*, p. 10, ¶ 43; *Answer*, p. 4, ¶ 43]

⁵ See Footnote 1, *supra*. [*Complaint*, p. 10, ¶ 44; *Answer*, p. 4, ¶ 44]

26. The minutes of an August 1, 2008 ABC meeting declare a quorum present with “Leonard Chalepah, Mary Rivera and Alonzo Chalepah.” [AR Doc. 49]

27. No written notice of the August 1st meeting of the ABC was created.⁶

28. The August 1st minutes make no reference to Carattini or Banderas. [AR Doc. 49]

29. On August 1, 2008, the ABC chairman sent letters to Carattini and Banderas stating they had “now missed at least five called meetings” and had vacated their offices “for failure to attend three consecutive special or regular meetings.” [AR Docs. 50 and 51]

30. On August 13, 2008, the BIA Anadarko Agency notified the ABC chairman that it had determined Ahtone had not forfeited his membership in the Apache Tribe, Ahtone was still a member of the Apache Tribe and Ahtone would be recognized by the BIA as a member of the ABC. [AR Doc. 52]

31. On August 14, 2008, the ABC chairman filed a notice of appeal of the BIA decision that Ahtone was still an ABC member. [AR Doc. 55]

32. On August 14, 2008, the ABC chairman sent letters to Carattini and Banderas stating they had “vacated” their positions on the ABC “due to missing six (6) consecutive meetings”. [AR Docs. 56 and 57]

33. On September 10, 2008, the SPRO issued a “Press Release” stating that the BIA “continues to recognize Chalepah, Rivera, Carattini, Ahtone, and Banderas as comprising the Apache Business Committee.” [AR Doc. 84]

⁶ See Footnote 1, *supra*. [Complaint, p. 10, ¶ 45; Answer, p. 4, ¶ 45]

34. On September 12, 2008, the SPRO issued a letter to the ABC chairman stating the BIA continued to recognize the five individuals who were elected and sworn into office on May 15, 2008 as the legitimate ABC members. [AR Doc. 86]

35. On September 16, 2008, the SPRO returned an Apache Tribe resolution because the “resolution in question is not valid. . . Leonard Chalepah is not a recognized member of the Apache Business Committee.” [AR Doc. 87]

36. On September 19, 2008, a notice of election to fill Carattini and Banderas’ positions on the ABC was published. [AR Doc. 91]

37. On October 20, 2008, the SPRO received a “Certification” of the winners in the uncontested election held on October 18th. [AR Doc. 104]

38. On October 22, 2008, the SPRO issued a letter stating the ABC was comprised of the five individuals who were elected and sworn into office on May 15, 2008. [AR Doc. 106]

39. On December 19, 2008, DOI sent a memorandum to SPRO directing it to “compile [and forward to Washington, D.C.] the administrative record” related to the “dispute over the tribal leadership of the Apache Tribe of Oklahoma”, including, *inter alia*, “the Business Committee decision to remove Marquita Carratine (sic) and Richard Banderas; and the election to fill the vacancies alleged to have been created by the removal of Ms. Carratini (sic) and Mr. Banderas.” The letter further prohibited SPRO or the Anadarko Agency from rendering any further decisions concerning the Apache Tribe leadership dispute. [AR Doc. 136]

40. On January 29, 2009, the DOI issued the DOI Final Decision finding that “nothing in the Tribe’s Constitution [] would give me jurisdiction to reject the removal of Carattini and Banderas from the ABC” and “that the special election held on October 13 to 18 was conducted in a manner that [did not] directly violated the plain language of the Tribe’s Constitution.” [AR Doc. 144, p. 5]

41. The DOI Final Decision reversed the SPRO’s consistent position that the ABC was comprised of the five individuals who were elected and sworn into office on May 15, 2008. [*Complaint*, p. 7, ¶ 34; *Answer*, p. 4, ¶ 34]

STANDARD OF REVIEW

Under Fed. R. Civ. P 56 (c), summary judgment is appropriate when the pleadings and the evidence demonstrate that “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” In a case involving review of a final agency action under the Administrative Procedures Act (“APA”), 5 U.S.C.A. § 706, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas the function of the Court is to “review the agency’s decisionmaking process and conduct a plenary review of the facts underlying the challenged action. It must find and identify substantial evidence to support the agency’s action and may affirm agency action, if at all, only on the grounds articulated by the agency itself.” *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1565 (10th Cir. 1994).

A final agency action should be set aside if it is “arbitrary, capricious, otherwise not in accordance with law, or not supported by substantial evidence.” *Citizens to*

Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); See also *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004). Under an arbitrary and capricious standard, courts “must determine whether the agency considered all relevant factors and whether there has been any clear error of judgment.” *Id.* Also, “[i]n addition to requiring a reasoned basis for agency action, the ‘arbitrary or capricious’ standard requires an agency’s action to be supported by the facts in the record.” *Id.*

As the Tenth Circuit Court of Appeals has recently opined, “An agency's decision is arbitrary and capricious if the agency (1) "entirely failed to consider an important aspect of the problem," (2) "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," (3) "failed to base its decision on consideration of the relevant factors," or (4) made "a clear error of judgment.”” *State of New Mexico, et. al. v. Bureau of Land Management*, 565 F.3d 683, 704 (10th Cir. 2009), citing *Utah Envtl. Cong. V. Troyer*, 479, F.3d 1269, 1280 (10th Cir. 2007).

“[W]here the agency has failed to provide a reasonable explanation, or where the record belies the agency’s conclusion, we must undo its action”. *Petroleum Communication, Inc. v. F.C.C.*, 22 F. 3d 1164, 1172 (D.C. Cir. 1994) In the present case, the record does not support the DOI conclusions and this Court “must undo” the action of DOI by entering summary judgment in favor of the Plaintiffs.

ARGUMENT AND AUTHORITIES

In their Complaint, Plaintiffs assert that the DOI acted arbitrarily and capriciously and in a manner contrary to law:

1. In finding that Carattini and Banderas had been properly removed from office because:
 - A. the record reflected that sufficient notice-in-fact was given to Carattini and Banderas to satisfy due process requirements;
 - B. the “call [of] a meeting” constituted a “meeting” under the language in the Apache Tribe Constitution; and
 - C. the only inference that could be drawn from Carattini and Banderas missing the meetings was that Carattini and Banderas “boycotted” the meetings;
2. In finding that the special election held to fill the vacancies left by Carattini and Banderas were conducted consistent with the Constitution; and
3. In refusing to consult with Plaintiffs, despite being requested to do so, prior to issuing the DOI Final Decision.

Introduction

The Apache Tribe Constitution provides that every two years the Tribal Council shall elect the officers of the Apache Tribe. [AR Doc. 1, p. 2 (Art. IV)]. These three Tribal Council officers, plus two other committeemen, constitute the ABC. [AR Doc. 1, p. 2 (Art. V)]. On May 10, 2008 the Tribal Council elected Chalepah, Rivera, Carattini, Banderas and Ahtone as their ABC.

From virtually the day of the election, Chalepah and Rivera began a course of action designed to usurp the will of the Apache people by removing the three Plaintiffs from office. First, in collusion with the Enrollment Department, the pair immediately

began laying the groundwork for wrongfully removing Ahtone from office.⁷ Having effected the unlawful removal, and through collusion with the Election Board, the pair declared Chalepah's cousin to be an ABC member [AR Doc. 144, p.p. 2-3]. The unlawful appointment secured Chalepah and Rivera's control of the ABC—which was their intent all along.

The two then focused on removing Carattini and Banderas from the ABC, subsequently declaring that they had forfeited their offices. The complete usurpation of the will of the Apache people was accomplished within 10 weeks of the election. Even though unlawfully exercising control of the ABC, the pair's overthrow of the ABC was never recognized by the SPRO or Anadarko Agency who consistently rejected their claims that Carattini, Banderas and Ahtone were no longer ABC members. [See Undisputed Facts 4, 19, 33, 34, and 38]

I. The DOI Conclusion that Carattini and Banderas were properly removed from office is not supported in the Record or in the law and is a breach of DOI's fiduciary obligation to the Apache Tribe.

The legal effect of the DOI Final Decision was that from May 10, 2008 (the date of the election) thru August 1, 2008 (the date of Carattini and Banderas' alleged removals) the ABC was comprised of the Carattini, Banderas, Ahtone and Chalepah and Rivera. [See Undisputed Fact 41 (hereafter "Und. Fact _")] All DOI findings must first, and foremost, be consistent with this fact.

⁷ Just barely a week after the election, correspondence was taking place between the Enrollment Department and officials of the BIA and Caddo Tribe concerning some distributions Ahtone had received from the Caddo tribe when he was a minor. [AR Docs. 24, 25 and 26]. This information formed the basis for his subsequent unlawful removal.

The DOI must also interpret the Apache Tribe Constitution consistent with this fact. Article XII of the Constitution states the following:

Any person holding elective office who without an excuse from the business committee misses three regular or special meetings in succession shall automatically lose office. (emphasis added) [AR Doc. 1, p. 6]

As Courts have consistently held, the BIA/DOI has “a duty to conduct business with the lawfully-constituted governing bodies who represent the tribal membership.” *California Valley Miwok Tribe v. U.S.*, 424 F.Supp.2d 197, 201 (D.D.C. 2006).

In *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942), the Supreme Court opined that: “[i]n carrying out its treaty obligations with the Indian tribes, the Government . . . has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people . . . would be a clear breach of the Government’s fiduciary obligation.”

To act consistent with this “moral obligation[] of the highest responsibility and trust”, the DOI has the responsibility “to ensure that the Tribe make its own determination about its government consistent with the will of the Tribe.” (emphasis added) *Ransom v. Babbitt*, 69 F.Supp.2d 141, 153 (D.C.C. 1999). In carrying out this duty, the DOI:

“has both the authority and responsibility to interpret tribal law... All such interpretive efforts must offset as little disruption as possible of tribal sovereignty and self-determination. Moreover, the Federal Government is obliged to adhere to the clear meaning of statutory language if such language is plainly stated... [citation omitted]...(“A

well established principle of Indian law is that statutory words should not be expanded beyond their clear meaning where to do so would result in an intrusion upon tribal sovereignty.”) *Id.* at 150-151.

The determinations expressed in the DOI Final Decision clearly breach these moral obligations, are an affront to the expressed will of the Apache people, and so clearly misinterpret the Apache Constitution as to constitute an intrusion upon tribal sovereignty.

In upholding the removal of Carattini and Banderas, the DOI concluded:

1. As to proper notice [AR Doc. 144, p.5]:
 - “The **record before me** shows that Chairman Chalepah notified Carattini and Banderas of special meetings to be held on July 8, 10, 30, and 31 and August 1, of 2008” (emphasis added)
 - “I am satisfied that the notice provide {sic} was sufficient to satisfy due-process requirements, and/or was sufficient to provide notice-in-fact to Carattini and Banderas, such that neither can claim to have missed any of the meetings due to lack of knowledge as to the time and place there were to be held.”
2. As to proper meeting [*Id.*]:
 - “The plain language of the Constitution permits the Chairman to call a meeting. The fact that no business can be transacted at such a meeting does not turn the meeting into a non-meeting.”
3. As to being excused from attending the meetings [*Id.*]:
 - “[T]he only inference I can fairly draw from the evidence in the record is that Carattini and Banderas knowingly and purposefully boycotted the special meetings.”

These statements, contrasted with the Record, can lead to only one conclusion—the DOI “failed to fulfill their responsibility to interpret tribal laws and procedures in a reasonable manner in order to carry out their duty to recognize a tribal government.”

Ransom, 69 F. Supp. 20 at 153. The DOI's misinterpretation of the Apache Constitution is a direct undermining of the will of the Apache people in violation of the DOI's fiduciary duties to the Apache Tribe.

A. The DOI's Arbitrarily Conclusion that Carattini and Banderas received proper notice of the meetings is not supported in the Record

In Count I of the Complaint, Plaintiffs state the DOI's finding that: "The **record before me** shows that Chairman Chalepah notified Carattini and Banderas of special meetings to be held on July 8, 10, 30, and 31 and August 1, of 2008"⁸(emphasis added) [AR Doc. 144, p5] is not supported in the record. The Administrative Record states:

- For the July 8, 2008, meeting, (i) an "Official Meeting Notice" [Und. Fact 6] and (ii) "Minutes" stating that Carattini and Banderas "were absent" but showing that Carattini and Banderas were present at the meeting and left the meeting after Chairman Chalepah refused to allow Ahtone to take his seat on the Business Committee. [AR Doc. 34]
- For the July 10, 2008, meeting, (i) an "Official Meeting Notice" [Und. Fact 13] and (ii) "Minutes" stating Carattini and Banderas "are not here." [AR Doc. 39]
- For the July 14, 2008, meeting, (i) an "Official Meeting Notice" [Und. Fact 16] and (ii) "Minutes" describing Carattini and Banderas "(absent)" [AR Doc. 42]

⁸ The DOI does not mention the July 14th meeting that, according to the Chairman and Vice-Chairman, formed the basis for the removal of Carattini and Banderas. As demonstrated herein, however, whether or not the July 14th meeting was considered, the DOI's findings are not consistent with the Apache Constitution.

- For the July 30, 2008, meeting, (i) **No** “Official Meeting Notice” [Und. Fact 21] and (ii) “Minutes” do not acknowledge Carattini and Banderas as Business Committee members. [AR Doc. 47]
- For the July 31, 2008, meeting, (i) No “Official Meeting Notice” [Und. Fact 21] and (ii) “Minutes” of the July 31, 2008 Meeting states “Marquita Carattini and Richard Banderas have not come in for meetings (sic) due to conflict with business committee persons. Even though the Chairman and Vice-Chairman are here to meet. Richard Banderas stated that he is not recognizing Leonard Chalepah on the board. Chairman Alonzo told him to put that in writing. He then left the office.” [AR Doc. 48]
- For the August 1, 2008, meeting, (i) **No** “Official Meeting Notice”. [Und. Fact 27] and (ii) “Minutes” do not acknowledge Carattini and Banderas as Business Committee members. [AR Doc. 49]

The DOI states that the Record supports its finding that notice for all six meetings was sufficient to “satisfy due-process requirements, and/or was sufficient to provide notice-in-fact to Carattini and Banderas, such that neither can claim to have missed any of the meetings due to lack of knowledge as to the time and place there were to be held.”

At best, the Record shows Carattini and Banderas received notice of three of the meetings (July 8, 10 and 14) and attended the first meeting (July 8). Even the DOI cannot read the Apache Constitution requiring attendance at a meeting to mean that one cannot leave the meeting after showing up for the meeting. Thus, the Record shows that

Carattini and Banderas missed two of the three meetings to which written notice was given. For the other three meetings, no written notice was given [Und. Facts 21, 24, and 27] and thus the meetings could not be deemed missed. As supported in the Record, Carattini and Banderas could have missed no more than two meetings with notice.

How then does the DOI reach its conclusion that Carattini and Banderas received notice-in-fact to all six meetings? The only document in the Record DOI could rely is a self-serving affidavit of Vice-Chairman Rivera stating she “personally gave them (Carattini and Banderas) notice of all meetings by phone, in writing and, at times, in person.” [AR Doc. 113, p.1, ¶ 7]

This statement is not only refuted by the Record, but it is obvious on its face that the self-serving statement—created almost three months after the fact—is an ineffective and failed attempt to correct deficiencies in the Record.

First, Rivera says she “gave them notice of all meetings by phone, in writing and, at times, in person.” In other words, Rivera is swearing under oath that for **all** the meetings she gave notice (1) by phone and (2) in writing and, for some of the meetings, she gave in person notices. The Record shows Rivera’s statement is not truthful. It is an undisputed fact (See Und. Facts 21, 24, 27) that written notice was given for only the July 8th, 10th and 14th meetings. DOI cannot assign any credibility to her claim that she gave notice by phone or in person when she was not truthful concerning the one verifiable form of notice—written notice.

Second, the Record casts a negative light on Rivera’s sworn testimony. Rivera’s affidavit was executed on November 5, 2008, a full three months after the last “meeting”

was called. On August 14, 2008, contemporaneous with the removal notice served on Carattini and Banderas, Rivera swore that written notices for the July 8, 10, and 14 meetings were placed in Carattini and Banderas' mailboxes. [AR Doc. 59] There is no reference to giving any notice to Carattini and Banderas (phone, written or verbal) for the July 30, 31 and August 1 meetings.

This is consistent with the minutes of those three meeting meetings which do not even recognize Carattini or Banderas as being absent. [AR Docs. 47, 48 and 49] Rivera's blatant attempt to create a record of notice after the fact should be recognized for what it is and rejected as an after the fact attempt to create a record of proper notice that does not exist.

The Record does not contain any credible evidence supporting DOI's finding that notice for the July 30, 31 and August 1 satisfies even a basic "due process requirement" and such a finding is clearly unreasonable. "An abuse of discretion is found when, based on the evidence, the explanation offered for a particular outcome is unreasonable." *King v. Norton*, F. Supp. 3d. (E. D. Mich. 2001)

In the light most favorable to the DOI Final Decision, the Record shows that Carattini and Banderas missed, at most, the second and third meetings with notice. As the Supreme Court has held in *Bowman Transp., Inc. v. Arkansas Best Freight Systems, Inc.*, 419 U.S. 281, 285 (1974), "[t]he agency must articulate a 'rational connection between the facts found the choices made.'" The DOI's conclusion that the Record shows Carattini and Banderas missed six meetings has no rational connection to the Record facts. The DOI decision fails to offer "an explanation for its decision that runs

counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *State of New Mexico*, 565 F.3d at 704. The DOI decision must therefore be reversed.

- B. The DOI’s Arbitrary Conclusion that Carattini and Banderas were absent from three consecutive meetings is not supported by the Apache Constitution because (1) there was no quorum for the called meetings and thus no meeting was held and (2) Plaintiffs, constituting a quorum of the ABC, excused themselves from attending the meetings.

In Counts II and III of the Complaint, Plaintiffs state that DOI’s finding that a “meeting” is created by the Chairman’s call and not by a quorum being present is not supported in the Apache Constitution. The DOI has completely and arbitrarily interpreted the Constitution to conclude that Carattini and Banderas forfeited their offices by missing three consecutive meetings. DOI’s torturing of the Constitution can lead to only one conclusion—DOI abused the powers of its office in upholding Carattini and Banderas’ removal.⁹

1. Without a Quorum, there is no meeting to miss.

The DOI Final Decision correctly held Ahtone was an Apache Tribal member and still on the ABC. The finding confirmed that from May 15, 2008 through January 29, 2009, Ahtone, Chairman Chalepah, Vice-Chairman Rivera, Secretary-Treasurer Carattini and Committeeman Banderas comprised the ABC. [Complaint, p. 7, ¶ 33; Answer p. 4, ¶ 33]

⁹ The actions of these officials in Washington, D.C. resulted in Carattini and Banderas’ loss of office. As shown in the Record, and uncontroverted in the pleadings, the SPRO and Anadarko Agency had consistently held that Plaintiffs were the rightful office holders. [Und. Facts 4, 19, 33, 34, and 38]

Recognizing this decision meant the Chairman and Vice-Chairman did not have a quorum at any of the six meetings forming the basis for removal, the DOI proceeded to conduct an incoherent analysis of the Apache Constitution that can only be characterized as “unreasonable”. The DOI states [AR Doc. 144, p.5]:

Carattini and Banderas have argued that the special meetings called by Chairman Chalepah were invalid because none of those meetings was attended by a quorum of the Business Committee. This argument incorrectly grafts the provisions of Art. XV, Sec. 2 (“Three members of the business committee shall constitute a quorum to transact business at any meeting.”) onto the provision of Art. VI, Sec. 4 (“Special meetings of the business committee may be called by the chairman at his discretion. . .”). The plain language of the Constitution permits the Chairman to call a meeting. The fact that no business can be transacted at such a meeting does not turn the meeting into a non-meeting.

Carattini and Banderas are not attempting to graft anything. Instead, it is DOI who is ignoring the most important provision of the Constitution—the provision at issue here. The real question is how do the two provisions cited by DOI interact with the language in Article XIII that provides “Any person holding elective office who **without an excuse from the business committee** misses three regular or special **meetings** in succession shall automatically lose office.” (emphasis added) [AR Doc. 1, p. 6 (Art. XIII)]

Article XIII does not state a person loses office for missing three consecutive meetings “called by the Chairman”. It states a “meeting” must be missed. As the DOI correctly observes Article XV does state that “three members of the business committee shall constitute a quorum to transact business at any meeting.” If one cannot transact business, then Plaintiffs assert that a meeting has not been held under the provisions of the Apache Constitution.

This position is fully supported with a rational interpretation of Article XIII that the “meeting” must be is attended by a quorum of the Business Committee minus the person absent. The language “without an excuse from the business committee” is clear evidence that a quorum of the ABC must be present at the meeting. Otherwise, the ABC cannot act (transact business) on whether the member missing the meeting is to be excused. Article XIII is clear that the meeting to be missed is one in which a quorum is present. The DOI’s conclusion to the contrary is unreasonable and must be reversed. See Tarbell v. Department of Interior, 307 F.Supp.2d 409, 423 (N.D.N.Y. 2004) (“[DOI officials] failed to fulfill their responsibility to interpret tribal laws and procedures in a reasonable manner in order to carry out their duty to recognize a tribal government.”)

2. Carattini and Banderas were excused from attending the meetings.

The more important part of Article XIII states that a member may be excused from a meeting by the ABC. Carattini and Banderas were excused from attending any of the five meetings at issue, even if they had received notice.

It is an Undisputed Fact that Plaintiffs constituted the majority of the ABC during the time the six meetings were allegedly missed. [AR Doc. 144] The three communicated that they would not attend any further ABC meetings called by the Chairman without recognizing Ahtone, i.e. the ABC majority excused itself from attending any noticed meeting. Having been excused, Carattini and Banderas were not in violation of Article XIII. Thus, their purported removal is in violation of the Constitution and must be reversed. *Tarbell*, 307 F.Supp.2d at 423

The Constitution does not state, as DOI would have had to conclude, that the members have to be excused by the Chairman.¹⁰ Whether a member is excused is determined by the ABC. The ABC, acting through Plaintiffs, excused each and every noticed meeting that was missed.

The reasons the three members excused themselves from attending any duly noticed meetings would be obvious to any rational person (and it is not for the purpose of “boycott” as espoused by DOI. **First**, the Chairman, in not recognizing Ahtone, indicated in no uncertain terms his intent to use the ABC majority he had created—by removing (wrongfully) Ahtone and appointing (wrongfully) a replacement for Ahtone on the ABC—to run the Apache Tribe to the exclusion of the Plaintiffs. This action violated the will of the Apache Tribe General Council who elected Chalepah, Rivera, Ahtone, Carattini and Banderas to govern the Apache Tribe by majority rule. Unlike the DOI, Plaintiffs excused themselves from participating in actions that usurp the will of the Apache people.

Second, Carattini and Banderas’ absence (excused) ensured the Chairman’s fraudulent ABC majority did not appear legitimate in the eyes of the community (Indian and non-Indian) and in the eyes of the SPRO. By not participating in noticed meetings, Carattini and Banderas ensured there was never a legal quorum for the meetings thereby

¹⁰ It is insightful that the letters sent to Carattini [AR Docs. 50 and 57] and Banderas [AR Docs. 51 and 56] notifying each that they had been removed from office did not state that they were absent without ABC excuse. Such a statement would have highlighted the central issue in this case, to-wit: the Chairman and Vice-Chairman do not constitute the ABC. Therefore, the two did not have the right to even consider whether the absences were excused—that right is reserved to the ABC.

insuring that the illegitimate ABC majority would continue to see its resolutions being rejected by the SPRO because Leonard Chalepah was not an ABC member and illegitimate Chalepah created ABC did not have a quorum to conduct a meeting [Und. Fact 35]. Again, unlike the DOI, Plaintiffs were acting to ensure the will of the Apache was not being usurped.

Third, the undisputed fact that Ahtone did not receive any notice of the meetings makes the Chairman's purported call of a special ABC meeting invalid.¹¹ The Chairman did not give notice of the meeting to all five business committee members. Because the failure to attend an ABC meeting can have dire consequences for an individual member, failure to give notice of a special meeting to any ABC member would invalid that meeting under the Constitution. See e.g. *Seminole Nation of Oklahoma v. Norton*, 223 F. Supp. 2d 122, 139 (D.D.C. 2002), citing *Milam v. United States Dep't of the Interior*, 10 ILR 3013, 3016-2017 (Court concluded DOI acted in "arbitrary and capricious manner" in upholding actions taken at a meeting when evidence showed that certain members of the Council had not received the required notice of the meeting).

Finally, the Record supports that Plaintiffs were excused and that this excused absence was made known, communicated forcibly and had to have been understood by the Chairman and Vice-Chairman.

The July 8, 2008 Minutes [AR Doc. 34] state:

Marquitta (sic) Carattina (sic) and Richard Banderas showed up for the meeting that was called by Chairman Alonzo that morning by

¹¹ "Nothing in the record suggests that Mr. Ahtone was provided notice of the special meetings, nor that he had received notice-in-fact of such meetings. [AR Doc. 144, p. 5]

notice with Ronald Ahtone. Marquitta (sic) called Ronald Ahtone's name for roll call. Shared with her that he is no longer an elected officer. Chairman Alonzo Chalepah asked him to leave three times. Mr. Ahtone said that he would not. Security was called to walk him out of the meeting. Again, he would not go. Police were called and they removed him from the office. Marquitta (sic) Carattini and Richard Banderas both left with him and did not stay for the meeting.

The Record shows Plaintiffs could not have been any clearer in their position that they would not participate in any noticed meeting that did not include notice to Ahtone as an ABC member.

This was reinforced and understood at the July 31st meeting [AR Doc. 48]:

Marquita Carattini and Richard Banderas have not come in for meetings¹² **due to conflict with business committee persons**. Even though the Chairman and Vice-Chairman are here to meet. Richard Banderas stated that he is not recognizing Leonard Chalepah on the board. Chairman Alonzo told him to put that in writing. He then left the office. [emphasis added]

Absences from any noticed meeting where Ahtone was not recognized as an ABC member were excused by Plaintiffs (the ABC quorum). This excused absence was emphatically made known on July and reinforced on July 31st. Under the Apache Constitution, it is not the Chairman or the Vice-Chairman who determines whether the absence from a meeting is excused—it is the Business Committee. Thus, Carattini and Banderas did not forfeit their offices on the Business Committee because all absences were excused consistent with the Apache Constitution and DOI's findings to the contrary must be reversed.

¹² Being plural, this is a recognition that this was the reason for Carattini and Banderas not attending any of the previous meetings.

- C. The DOI's Arbitrary conclusion that Carattini and Banderas "boycotted" any duly noticed meetings is not supported in the Record and, in any event, it is the ABC granting an excuse and not the reason for missing that determines whether a meeting is missed.

In Count III of the Complaint, Plaintiffs state that they were excused from attending any noticed meeting when Ahtone was not recognized as an ABC member. The DOI conclusion that the Plaintiffs boycotted the special meetings, and that the boycott justified their removal under the Apache Constitution is "unreasonable" and constitutes a biased analysis of the law. As stated in section 1.B. above, the Record supports that Plaintiffs were excused and that this excused absence was made known, communicated forcibly and had to have been understood by the Chairman and Vice-Chairman as clearly stated in the July 8 minutes and affirmed in the July 31st minutes.

The DOI characterizes Carattini and Banderas' absences as a "boycott". In fact, as clearly shown in Sections 1.A and 1.B above, Carattini and Banderas were excused by the ABC majority from any noticed meeting where Ahtone was not recognized as a ABC member and there was a rational basis for not attending noticed meetings when Ahtone was unlawfully excluded. Under the Apache Constitution, it is not the Chairman or the Vice-Chairman who determines whether the absence from a meeting is excused—it is the Business Committee. Thus, Carattini and Banderas did not forfeit their offices on the Business Committee because all absences were excused consistent with the Apache Constitution. The DOI decision finding that Carattini and Banderas had forfeited their office was unreasonable and an abuse of discretion. *Tarbell*, 307 F.Supp.2d at 423

II. The DOI conclusion that the special election held to fill the purported vacancies caused by the removal of Carattini and Banderas is not supported in the Constitution of the Apache Tribe of Oklahoma

In Count IV of the Complaint, Plaintiffs assert the DOI's conclusion that the special election conducted to fill Carattini and Banderas' positions on the ABC is contrary to the Apache Constitution and laws. Consistent with the DOI finding that Ahtone was never removed from the ABC, if one were to exclude Carattini and Banderas from the ABC after August 1, 2008, the ABC would be comprised of Chalepah, Rivera and Ahtone. Chalepah and Rivera were not recognizing Ahtone and were continuing to act with Leonard Chalepah to conduct business even though that business was not being recognized by the SPRO. [Und. Fact 35].

Because Chalepah and Rivera did not constitute a quorum for purposes of an ABC meeting after August 1, 2008, the ABC could not have called a special election to fill the vacancies. There is no provision in the Apache Constitution or the Apache Election Regulations [AR Doc. 4] for a special election unless the ABC calls for one. No ABC meeting was validly conducted after August 1st and, therefore, the DOI determination that the special election was validly called is not consistent with the law and must be reversed.

Tarbell, 307 F.Supp.2d at 423

III. The DOI was obligated to consult with Plaintiffs prior to entering the DOI Final Decision and failure to do so violates DOI internal regulations and resulted in a decision process in which Plaintiffs were denied an opportunity to address issues raised by DOI in its December 19, 2009 letter [AR Doc. 136].

In Count V of the Complaint, Plaintiffs assert the DOI failed to follow its own policies in not consulting with Plaintiffs prior to rendering its decision. On the 19th day

of December, 2008, the recognized members of the ABC were the five elected on May 15, 2008 and sworn into office on May 15, 2008. [Und. Facts 4, 19, 33, 34, and 38]. Plaintiffs constituted a majority of the ABC. As the majority of the ABC, Plaintiffs requested a consultation with DOI, pursuant to Executive Order 13175 (November 6, 2000). The request was prompted in part by the desire to respond to December 15, 2009 letter from Chalepah and Rivera to the BIA [AR Doc. 135] setting forth their interpretation of the facts and the law that should be applied to the various intra-tribal disputes and in part to address the implication in the December 19th letter that the issue of who comprised the ABC was an issue that was on appeal to the SPRO. As has been stated several times herein, the SPRO did not have an issue with the composition of the ABC and that issue was not on an administrative appeal. Therefore, the Plaintiffs had not had the opportunity to develop the various arguments in support of its position that Carattini and Banderas were not properly removed from the ABC.

With the agency's consideration of a matter of such complexity and import [tribal leadership recognition], one naturally would envision a process which affords all interested parties a meaningful opportunity to offer support for their respective contentions. Presumably, once all position are fully aired, the agency could then issue a decision stating its conclusion regarding leadership recognition and detailing the reasoning employed to arrive at the given result. In that way, the resulting determination could then be challenged through internal agency channels and, if deemed appropriate, in the courts under the auspices of the APA and any reviewing body would have the benefit of elucidation of the agency's rationale.

Tarbell, 307 F.Supp.2d at 423 . Because the December 15th letter stated that the “final agency decision [] would be subject to subject to judicial review”, Plaintiffs sought to consult so that it could address the issues and questions that might be raised as a result

of DOI's review of the issues described in the letter. DOI's failure to provide Plaintiffs the opportunity to consult is an abuse of discretion and is contrary to the law and DOI's own internal obligation as established in the Executive Order.

CONCLUSION

The DOI arbitrarily and capriciously determined that Carattini and Banderas were removed from their positions on the ABC. The decision is an abuse of discretion and is contrary to the laws the DOI is obligated to interpret. The DOI arbitrarily and capriciously determined that the special election held to fill the vacancies created by Carattini and Banderas' was properly conducted under the Apache Constitution. Finally, the DOI failed to follow its own laws and policies when it refused to consult with Plaintiffs prior to rendering the DOI Final Decision thereby denying Plaintiffs involvement in the decision-making process. As a matter of law, DOI's actions are arbitrary and capricious, are not supported in the Administrative Record, and accordingly must be reversed.

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