The Honorable Richard A. Jones

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

RUDY ST. GERMAIN, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	CASE NO. C13-945RAJ **NOTICE OF MOTION AND DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** (Note on Motion Calendar for November 21, 2014)

Pursuant to Rules 12(c), 12(h)(3), and 56, Fed.R.Civ.P., federal defendants hereby move this Court for an order directing the partial dismissal of plaintiffs' lawsuit.[1]

This motion is made and based on the accompanying Memorandum of Points and

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1 Federal defendants' counsel met and conferred with plaintiffs' counsel regarding this motion and the motion for a protective order via telephone on October 28, 2014.

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Authorities, the pleadings, papers and exhibits filed herein, and such oral argument as the Court may entertain.

DATED this 29th day of October, 2014.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This lawsuit was filed by plaintiffs Rudy St. Germain and Michelle Roberts on May 31, 2013. The complaint was last amended on June 13, 2013. Dkt. # 3. At the time the lawsuit was filed, a request had been received by the Secretary from the Nooksack Tribe to conduct a Secretarial Election for the purpose of submitting a proposed amendment to the Nooksack Tribal Constitution for ratification by enrolled members of the Nooksack Tribe.[2] As of the date the complaint was last amended, the voter registration deadline had expired, but the election had not yet been conducted or completed. The complaint has not been further amended or supplemented to encompass events occurring after the election. At the time plaintiffs filed their amended complaint they also sought a temporary restraining order, which was denied. Dkt. # 25.

The operative complaint, dkt # 3, alleges five separate causes of action. These five causes of action are as follows:

(1) Violation of the Indian Reorganization Act. Dkt. # 3, ¶¶ 84-90.

(2) Violation of the 5th and 15th Amendments. Id. ¶¶ 91-92.

(3) Violation of the Administrative Procedure Act. Id. ¶¶ 93-102.

(4) Violation of the Freedom of Information Act. Id. ¶¶ 103-104.

(5) Breach of Trust Duty. Id. ¶¶ 105-107.

Federal defendants answered the complaint on September 12, 2013, dkt. # 26, and moved for an order determining the applicable standard of review, dkt. # 29. In substance, federal defendants requested a ruling that all of plaintiffs' claims (other than the FOIA claim) were subject to the arbitrary and capricious standard of review and hence did not support discovery. On June 8, 2014, the Court issued an order terminating the motion concluding essentially that the issues were not ripe, particularly because the administrative record had not yet been filed. *Id.* Accordingly, federal defendants were directed to produce an administrative record, and if the parties failed to reach

2 The constitutional amendment proposed to eliminate one ground of eligibility for membership in the Tribe set forth in Article II, § 1(h) of the Nooksack Constitution. Section 1(h) made the following persons eligible for enrollment in the Nooksack Tribe: "Any person who posseses at least one-fourth (1/4) degree Indian blood and who can prove Nooksack ancestry to any degree."

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agreement on its completeness, plaintiffs were authorized to conduct discovery by a date certain, and federal defendants could move for a protective order by a date certain. *Id.*[3] The Court also noted that "[n]othing in this order shall be construed as precluding the parties from filing dispositive motions consistent with this District's Local Rules." Dkt. # 33, p. 6.

On July 10, 2014, federal defendants lodged their administrative record with the Court. Dkt. #34. In the interim, having failed to reach agreement on certain matters which plaintiffs believe reflect a lack of completeness of the administrative record, plaintiffs have propounded certain discovery on federal defendants.

By this motion, federal defendants seek partial summary judgment and request that the Court dismiss the 1st, 2nd and 5th causes of actions for the reasons set forth herein. If the motion is successful what will remain are plaintiffs' 3rd cause of action under the APA alleging "arbitrary and capricious" agency action and plaintiffs' 4th cause of action under FOIA. In the ordinary course, neither of these types of claims ordinarily support discovery except in unusual and exceptional circumstances. Accordingly, federal defendants are simultaneously filing a motion for a protective order.

STATEMENT OF FACTS

As alleged in their complaint, plaintiffs are enrolled members of the Nooksack Tribe who, along with three hundred other tribal members, are facing disenrollment in proceedings conducted by the Tribal Government. Dkt. # 3, ¶ 2. Because of tribal sovereign immunity, the Nooksack Tribe is not a defendant in this lawsuit and the legality of the tribal disenrollment proceedings is not before the Court. At the same time, the Nooksack Tribe, on March 1, 2013, formally requested the Secretary of the Interior to conduct a so-called "Secretarial Election," pursuant to 25 U.S.C. 476(a). On April 25, 2013, the Secretary, acting through defendant Judith Joseph, issued a Notice of Secretarial Election. Dkt. # 3, ¶ 51. The notice set the closing date of the Secretarial Election for June 21, 2013, and the deadline for voter registration as May 10, 2013. *Id*. On June 17, 2013, just prior to the closing date of the election, plaintiffs filed the operative amended complaint and an application for a temporary restraining order. Dkt. 3, 4.

3 On federal defendants' motion, the deadline for a protective order was extended until October 29, 2014, because their counsel required a medical leave of absence for the better part of the month of September 2014. Dkt. # 36.

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In the three causes of action challenged by this motion, plaintiffs assert that the Secretary violated the Indian Reorganization Act by failing to advise the Tribe prior to the election that the proposed constitutional amendment was contrary to "applicable laws" as that term is defined in the statute. Further, plaintiffs allege that in conducting the election, the Secretary violated plaintiffs' rights to equal protection of the laws under the 5th Amendment to the United States Constitution and their right to vote freely in a federal election without racial discrimination in violation of the 15th Amendment. Lastly, plaintiffs contend that by proceeding with the election, the Secretary violated her fiduciary responsibility to them. We address why each of these arguments should be dismissed below.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO SEEK RELIEF BASED ON THE SECRETARY'S ALLEGED FAILURE TO PROVIDE PRE-ELECTION NOTICE TO THE TRIBE OF THE AMENDMENT'S PRESUMED ILLEGALITY

The substance of plaintiffs' argument is captured in paragraph 90 of their first amended complaint. Dkt. # 3. Plaintiffs allege that:

> Defendants have violated federal law, as codified in the Indian Reorganization Act, 25 U.S.C. § 476(c)(2)(B), by failing to notify the Tribe that the proposed amendment is in conflict with federal law. The proposed amendment, which has a discriminatory purpose and effect and which is motivated by racial animus toward an identifiable group and protected class, violates the equal protection guarantees of the Indian Civil Rights Act, 25 U.S.C. § 1302(a)(8).

Id. Parsed logically, the simple formula underlying this allegation is as follows: (1) The proposed constitutional amendment (*in plaintiffs' opinion*) violated the Indian Civil Rights Act, specifically, 25 U.S.C. § 1302(a)(8); (2) the Secretary failed to notify the Tribe of this "fact;" (3) therefore, the Secretary violated 25 U.S.C. § 476(c)(2)(B).

Each element of plaintiffs' allegation is fraught with problems. For starters, there is the question of plaintiffs' standing to raise it. Second, because the allegation focuses on the (presumed) illegality of the amendment under ICRA rather than on the legality of the Secretary's actions under 25 U.S.C. § 476(c)(2), it both asks the Court to decide the wrong question and fails to take account of the applicable standard of review which the Court must apply in answering the correct question. The question is not whether the amendment is "lawful" in an absolute sense, but whether the Secretary acted arbitrarily and capriciously in failing to notify the Tribe of any *found potential*

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unlawfulness. Stated another way, even if the amendment were ultimately authoritatively determined to be unlawful by a federal court, the Secretary does not necessarily act "unlawfully" by arriving at a different conclusion prior to such an authoritative ruling (and hence not notifying the Tribe of a finding of illegality which the Secretary never made). Third, even assuming arbitrary and capricious conduct by the Secretary in failing to notify the Tribe *in advance of the election* that it might disapprove the proposed amendment upon ratification as inconsistent with applicable laws, any such "violation" of Section 476(c)(2) was rendered moot by the Secretary's subsequent *post-election* approval of the amendment as *consistent* with applicable laws pursuant to 25 U.S.C. § 476(d)(1). Dkt. # 34 at USA-B-000066. Finally, if the Court concludes at plaintiffs' urging that it is required to conduct a *de novo* evaluation of the now-enacted amendment for consistency with 25 U.S.C. § 1302(a)(8), it is evident that nothing in the amendment deprives any person of equal protection of the law or due process.

i. Statutory Analysis

25 U.S.C. §476(c) provides, in pertinent part:

> (c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings
>
> (1) The Secretary shall call and hold an election as required by subsection (a) of this section--
>
> (A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or
>
> (B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.
>
> (2) During the time periods established by paragraph (1), the Secretary shall--
>
> (A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and
>
> *(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.*
>
> (3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify *the tribe*, in writing, whether and in what manner *the Secretary has found* the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

Id. (emphasis added).

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The statutory language plainly calls for pre-election Secretarial review of a proposed amendment for any inconsistency with "applicable laws."[4] Along with "technical advice and assistance," the statute further requires that the Secretary notify the Tribe of any inconsistency between the proposed amendment with applicable laws that he or she "*has found.*" The statute does not prescribe any particular form of review nor does it require that the Secretary follow any formal review procedure. And the statute, at least by its express terms, requires nothing of the Secretary if *no* inconsistency is "found." In other words, the statute does not require the Secretary to provide the Tribe with any kind of pre-election notification of c*onsistency* with applicable laws. In that situation, under a fair reading of the statutory text, silence on the subject is legally acceptable.

The plain and evident purpose of this statutory requirement is to confer upon the proposing tribal authority, *and only the proposing tribal authority*, the benefit of pre-election "technical advice and assistance." The statute also imposes a duty upon the Secretary to notify the proposing tribal authority, *and only the proposing tribal authority*, of any *foreseen* potential conflict with applicable laws. Presumably, this provision is intended to give *a tribe* fair warning that the Secretary might ultimately disapprove a proposed amendment even if it is eventually ratified by the electorate in a Secretarial election. The proposing tribal authority is thereby afforded an opportunity to either fix the problem, withdraw the proposed amendment before the election occurs, or gird for a possible legal challenge of the Secretary's disapproval. It should be noted, however, that *nothing* prevents a proposing tribal authority from pressing ahead with its request for a Secretarial election to ratify a proposed amendment, *even if* the Secretary has informed the tribal authority of her opinion, based on pre-election legal review, that the amendment is in conflict with applicable laws. Nevertheless, the

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4 The term "applicable laws" is a term of art in the statute, which does not encompass the many alleged transgressions of tribal law and procedure by Nooksack Tribal Chairman Kelly set forth in the complaint. Section 102 of Pub.L.100-581 provides that:

> For the purpose of this Act, the term—
>
> (1) 'applicable laws' means any treaty, Executive order or Act of Congress or any final decision of the Federal courts which are applicable to the tribe, and any other laws which are applicable to the tribe pursuant to an Act of Congress or by any final decision of the Federal courts . . .

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proposing Tribe is forewarned as to the Secretary's thinking on the eventual "approvability" of the amendment if it passes, and can plan accordingly.[5]

Significantly, the statute confers upon the Secretary only the power and the duty to "notify the tribe, in writing, whether and in what manner [he or she] has found the proposed . . . amendments to be contrary to applicable laws." 25 U.S.C. § 476(c)(3). Even if the Secretary "finds" the proposed amendment to be contrary to applicable laws, nothing in the statute gives her the authority to refuse to hold an election on that basis. To the contrary, the Secretary has *a mandatory duty* to hold an election within a statutorily specified time following a request from an eligible tribe, regardless of his or her views on the legality of the proposed amendment. *Coyote Valley Band of Pomo Indians v. U.S.*, 639 F.Supp. 165, 175 (E.D. Cal. 1986). The Secretary may exercise the power to disapprove an amendment only *after* a proposed amendment has been voted upon and been ratified by the relevant electorate, but only for a limited period of time and only for limited reasons.[6]

A disapproval is permissible *only* if the Secretary determines that the proposed constitutional amendment violates "applicable laws," and for no other reason. 25 U.S.C. § 476(d)(1).[7] If the

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5 If the Tribe wishes to challenge a post-election disapproval by the Secretary of a ratified constitutional amendment, the statute provides it with a judicial mechanism for doing so. *See* 25 U.S.C. § 476(d)(2).

6 The IRA was amended after, and as a consequence of the decision in *Coyote Valley Band*, and the obligation of the Secretary to hold an election upon a tribal request was only strengthened by the statutory amendment. 25 U.S.C. § 476(c)(1)(B) requires that "[t]he Secretary *shall call and hold an election* as required by subsection (a) of this section… . . . within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws." The intent of this statutory language is made plain by the House and Senate Reports that accompanied the passage of the bill:

> H.R. 2677 allows the Secretary to review the draft tribal document before the election is called. However, the Secretary has to call a tribally requested election and can only refuse to approve the document if he finds that the draft document is in violation of federal law.

H,Rep.No. 100-453, 100 Cong., 1st Sess. (Nov. 20, 1987), p. 3. Similarly, the accompanying Senate Report states as follows:

> Title I of H.R. 2677 authorizes the Secretary to review the draft tribal document before the election is called. However, the Secretary is required to call a tribally requested election within a time certain after receipt of a tribal request and can only refuse to approve the document if he finds that the draft document is in violation of applicable law.

S.Rep.No. 100-577, 100th Cong., 2d Sess. (Sept. 30 (legislative day, Sept. 26), 1988), p. 2.

7 25 U.S.C. § 476(d) provides, in pertinent part:

> (d) Approval or disapproval by Secretary; enforcement

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Secretary does not disapprove the proposed amendment within a statutorily prescribed amount of time, the proposed constitutional amendment is deemed approved by operation of law. 25 U.S.C. § 476(d)(2). The proposing tribe is afforded a right to "enforce the provision of this section in an appropriate Federal Court" under the statute. *Id.; and see Kickapoo Tribe of Oklahoma v. Lujan*, 728 F.Supp. 791, 794 (D.D.C. 1990).[8]

ii. Plaintiffs lack standing to raise this claim

a. Constitutional Standing

The Supreme Court has "repeatedly held that an asserted right to have the Government act in accordance with [the] law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984). As an "irreducible minimum," a plaintiff must demonstrate injury in fact that is actual or imminent and not conjectural. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury must also be fairly traceable to the challenged agency action and it must be likely, rather than merely speculative, that the Plaintiff's injury will be redressed by a favorable decision. *Id*. at 560-561. Plaintiffs bear the burden of proof on the issue of standing. *See Warth v. Seldin*, 422 U.S. 490 (1975).

Plaintiffs avoid making a direct claim that their rights under the ICRA have been violated. This is necessary because such a claim is plainly foreclosed by *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (25 U.S.C. § 1302 does not waive tribal sovereign immunity and does not provide a civil cause of action in federal court against tribal officials . . . tribal members have only one avenue to seek relief in federal court for violations of § 1302 - a petition for writ of habeas

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> (1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.
>
> (2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

8 The conclusion that the authority to invoke the jurisdiction of a federal district court under this provision resides exclusively with the proposing tribe was, as noted by the Court in *Kickapoo Tribe*, reinforced by the legislative history. The Court accurately observed that "[b]oth the Senate and House Reports state that '[t]he tribe also has the right to challenge any finding made by the Secretary as to the legality of a proposed tribal document in the appropriate Federal court.'" *Id*. at 794 (citing S.Rep. No. 577, 100th Cong., 2d Sess. 2 (1988); H.R.Rep. No. 453, 100th Cong., 1st Sess. 3 (1987)). *Id.* at 794. The Court concluded that "[t]aken in the context in which it was written, it is clear to this Court that Congress was referring to the tribe requesting the election." *Id.*

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corpus). Consequently, because they are barred from asserting a direct claim here based on 25 U.S.C. § 1302, plaintiffs seek to accomplish indirectly what they cannot achieve directly, basing their claim upon rights conferred *only* upon the Tribe by 25 U.S.C. § 476(c)(2). In other words, under plaintiffs' theory of liability, the Secretary violated the *Tribe's rights* under 25 U.S.C. § 476(c)(2) by failing to notify *the Tribe* before the election that its proposed constitutional amendment was (in plaintiffs' view) contrary to 25 U.S.C. § 1302.

As noted previously, to assert this claim in federal court, plaintiffs are required to establish that they have standing to bring a claim for an alleged violation of *the Tribe's right* to pre-election notification pursuant to 25 U.S.C. §476(c)(2). *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."). Specifically, under plaintiffs' theory of liability, they must establish as an irreducible minimum that they have "suffered or [are] imminently threatened with a concrete and particularized 'injury in fact'" that is "fairly traceable" to the Secretary's alleged unlawful failure to provide pre-election notification to the Tribe of the presumed illegality of the proposed (now-enacted) amendment, and that their injury "is likely to be redressed by a favorable judicial decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

1. *Injury*

A plaintiff must show a "threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009). Where, as here, plaintiffs are not the object of government action or inaction, "standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, *supra*, 504 U.S. at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)).

Although it is plaintiffs' burden to allege and prove that they have standing to bring a claim under 25 U.S.C. § 476(c)(2), their operative complaint is of little assistance in that regard. *Nothing* in the complaint alleges any grounds for concluding that plaintiffs have met this irreducible

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minimum for standing to assert a claim based on an alleged violation of 25 U.S.C. § 476(c)(2).[9] The *closest* that plaintiffs come is found in paragraph 8 of their operative complaint which alleges as follows:

> By authorizing and conducting this election motivated by racial animus against an identifiable class, Defendants have placed Plaintiffs and those similarly situated in danger of immediate and irreparable harm. In addition to being stripped of cultural and political rights Plaintiffs exercise as members of the Nooksack Indian Tribe, should Plaintiffs' basis for enrollment be removed in the Secretarial election, Plaintiffs will suffer immediate noneconomic harm.

Dkt. # 3, ¶ 12.[10] The difficulty with this allegation of injury is first, in regards to proceeding with, or not proceeding with, an election process (*i.e.*, "authorizing and conducting") the Secretary has no discretion. By law, she is required to "conduct" an election upon a request from a tribal authority. Thus, plaintiffs' oblique, yet inflammatory statement that the election was "motivated by racial animus against an identifiable class" does not change the calculus. Plaintiffs do not specifically allege the source of the supposed "racial animus," but it matters not at all for purposes of the standing analysis. Insofar as the Secretary is concerned, her motivations are simply irrelevant because she has no discretion in the matter. Under 25 U.S.C. § 476(c)(2), upon the request of a tribal authority, she must conduct an election by virtue of a statutory command.

Second, none of plaintiffs' claimed injuries have anything to do with the purported violation of 25 U.S.C. § 476(c)(2). The failure of the Secretary to provide notification *to the Tribe* of the presumed illegality of its proposed constitutional amendment has nothing at all to do with "stripping [plaintiffs] of cultural and political rights." Indeed, even the amendment itself would not result in any such harm to plaintiffs because the amendment only changes the basis for enrollment in the Nooksack Tribe for future applicants. If plaintiffs are at risk of being "stripped" of their rights as

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9 Because the operative complaint was filed *before* the election, and plaintiffs have never sought leave to file an amended or supplemental complaint, their operative complaint is devoid of any claim that the Secretary violated a distinct provision of the Indian Reorganization Act, 25 U.S.C. § 476(d), by ultimately approving the amendment following its ratification by the electorate. Accordingly, such a claim could not properly be brought before the Court in this lawsuit, and it is therefore not addressed in this motion.

10 This action was not filed as a class action, and plaintiffs do not have standing to assert the rights of "similarly situated" third parties who are not before the Court as parties to this lawsuit. *Hong Kong Supermarket v. Kizer*, 830 F.2d 1078, 1081 (9th Cir 1987) (Prudential limitations on standing "require that parties assert their own rights rather than rely on the rights or interests of third parties."). Consequently, the only relevant "injury" is that suffered by plaintiffs St. Germain and Roberts alone.

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members of the Nooksack Tribe, it is by some other means entirely. But, in any event, the Secretary's obligation is only to notify the Tribe if she concludes that a proposed amendment potentially violates "applicable laws." Plaintiffs are not injured by the "wrongful" failure to provide the notification because it does not affect *them* in any way. Even with such notification, the Secretary must proceed with the election so long as the tribal authority does not withdraw its request, and nothing requires that a tribal authority withdraw its request upon receiving such notification. Thus, only a proposing Tribe could conceivably be "injured" by not receiving pre-election notice of the Secretary's findings.

2. "Fairly Traceable"

Plaintiffs do not precisely allege how *they* will be harmed by the failure of defendants to provide proper notification to the Tribe of the presumed "illegality" of the amendment. Left to surmise, it is possibly plaintiffs' theory that if the Tribe (who is not before the Court) disenrolled them through separate tribal proceedings, their ability to reenroll as new tribal members could be jeopardized by the narrowing of the possible grounds of eligibility for tribal enrollment. Even if that is the case, plaintiffs' amended complaint does not connect up this alleged harm to any failure by defendants to notify the Tribe about the presumed illegality of the proposed amendment. It is not enough for standing purposes that a plaintiff suffer some harm, no matter how remote and attenuated. According to the Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), "there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Id*. at 560-561 (internal quotations omitted). If plaintiffs' are to be stripped of their status as members of the Nooksack Tribe, that harm will come about by the actions of a third party not before the Court, *i.e*., the Nooksack Tribe itself. The failure of the Secretary to notify the Tribe of the presumed illegality of the proposed constitutional amendment prior to the Secretarial Election has no causal connection to the harm plaintiffs say will befall them. In other words, that harm is not "fairly traceable" to the challenged action (or, in this case, inaction) of the Secretary.

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The injury is also not actual and imminent. Plaintiffs must be disenrolled by the tribe before their opportunities for reenrollment become a ripe concern. And, as of the date the operative complaint was filed, the proposed amendment had not even been ratified by the tribal electorate, let alone had it been approved by the Secretary.[11]

3. Redressibility

Lastly, to establish that they have standing to raise this claim, plaintiffs must establish that it is "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan*, *supra*, 504 U.S. at 38. Plaintiffs' alleged injury is not likely to be redressed by a favorable judicial decision. The election has occurred according to law and the Secretary has approved the ratified constitutional amendment pursuant to 25 U.S.C. § 476(d)(1). These events supersede any defect in the Secretary's pre-election notification to the Tribe. There is no remedy appropriate under the circumstances which can provide plaintiffs redress for their alleged injuries. If the Court concludes that the Secretary should have provided pre-election notification to the Tribe of the presumed illegality of the amendment, an order requiring the Secretary to now provide such notice to the Tribe, after the ratification of the amendment, and after the Secretary has determined post-election that the amendment should be approved would be an entirely futile and meaningless gesture which would resolve nothing, let alone provide plaintiffs any redress for any injury.

Moreover, to the extent plaintiffs claim as their injury that they may lose their status as members of the Nooksack Tribe, that deprivation will result only from disenrollment proceedings conducted by the Nooksack Tribe. The Nooksack Tribe is not a party to these proceedings, and

11 Plaintiffs cannot be heard to say that there would have been a different outcome had the Secretary notified the Tribe of the presumed illegality of the proposed amendment. The Tribe would perhaps be deprived of information to which it is legally entitled concerning the Secretary's views on the legality of the proposed amendment, but the Tribe is not here complaining. It is wholly conjecture as to what path the Tribe would follow if the Tribe was informed of the Secretary's opinion, pre-election, that the proposed amendment was contrary to applicable laws. This is because no path would be foreclosed to the Tribe, regardless of the Secretary's views on the subject. Any assertion by plaintiffs that the Tribe, possessed of this information, *might* have decided not to go forward with the election as opposed to choosing some other course of action, would rest entirely upon idle speculation. The Tribe would still have the full panoply of options available to it, including the option to move forward with the election and to legally challenge any subsequent disapproval of the amendment by the Secretary. Plaintiffs cannot say that it is more likely that the Tribe would choose one course over the other without engaging in idle speculation. Thus, they cannot show the real and immediate harm which is necessary to establish standing. *See Lujan*, *supra*, 504 U.S. at 583 ("The injury or threat of injury must be both 'real and immediate,' not 'conjectural,' or 'hypothetical.'").

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reversing the election (if that is an available remedy) will provide plaintiffs no redress for that particular injury.

b. Statutory Standing

For purposes of standing analysis, plaintiffs' injury (if any), is purely statutory in nature in that it exists (if at all) by virtue of the violation of a particular statute, *i.e*., 25 U.S.C. § 476(d)(1). *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) ("[t]he . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.") (internal quotations omitted); see also *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."). Standing analysis with respect to such a claim proceeds at two separate levels. First, each of plaintiffs' claims must pass muster under Article III. (As set forth above, they do not.) Second, plaintiffs must also establish that they have "statutory standing" for their claims. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, ___ U.S. ____, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014),

At the statutory level of standing analysis, the Court in substance must determine "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id*. at 1387. As opposed to whether the plaintiff may invoke the court's jurisdiction, the question is whether the plaintiff "has a cause of action under the statute." *Id.* The determination whether a statute grants a plaintiff a cause of action is "a straightforward question of statutory interpretation," operating under the presumptions that the plaintiff must allege interests that "fall within the zone of interests protected by the law invoked," *id*. at 1388 (internal quotation marks omitted), and injuries that were "proximately caused by [the alleged] violations of the statute," *id*. at 1390. As the Supreme Court has explained, "[e]ssentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500. For this reason, "the violation of a statutory right is usually a sufficient injury in fact to confer standing." *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014).[12]

12 At the same time, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Institute*., 555 U.S. 488, 497 (2009). Thus, there are limits on Congress's ability to

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Unquestionably, there has been no violation of a right conferred upon plaintiffs. The right allegedly violated, *i.e.*, a right to pre-election notification of a finding that a constitutional amendment is contrary to applicable laws, is a right which the statute confers by its express language *only* upon "the tribe." 25 U.S.C. § 476(c)(3) ("the Secretary shall notify the tribe . . .") The question, therefore is whether the statute can be understood as *also* granting persons in plaintiffs' position a right to judicial relief." This is a "straightforward question of statutory interpretation: Does the cause of action in [25 U.S.C. § 476(d)(2)] extend to plaintiffs like [St Germain and Roberts]?" *Lexmark, supra,* 134 S.Ct. at 1388. The text of 25 U.S.C. § 476(d)(2) is perfectly opaque on this point. The statute authorizes actions in federal court to "enforce the provisions of this section," but it does not say by who or by whom. To similar effect was the statute under judicial examination in *Lexmark* , 15 U.S.C. § 1125(a)(1), which authorizes suit by "any person who believes that he or she is likely to be damaged" by false advertising. The Court noted that, read literally, that broad language might suggest that an action is available to anyone who can satisfy the minimum requirements of Article III. But the application of "zone of interests" and "proximate causality" principles, and also recognizing "the unlikelihood that Congress meant to allow all factually injured plaintiffs to recover," led the Court to reject "such an expansive reading." *Id.*

1. Zone of Interests

Under zone of interest analysis, it is presumed that a statutory cause of action extends only to plaintiffs whose interests "fall within the zone of interests protected by the law invoked." *Lexmark*, 134 S.Ct. 1388 (*citing Allen v. Wright*, 468 U.S. 737, 751 (1984). Applying that analysis here, it simply cannot be said that plaintiffs' interests fall within the zone of interests of 25 U.S.C. § 476. While it is abundantly clear from the operative complaint that plaintiffs have an interest in retaining their status as members of the Nooksack Indian Tribe, that is simply not within the zone of interests protected by the Indian Reorganization Act in general, or 25 U.S.C. § 476(c) specifically.

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elevate to the status of legally cognizable injuries particular types of harm that were previously not recognized in law. *Lujan*, 504 U.S. at 578. As our Court of Appeals has observed, there are "two constitutional limitations on congressional power to confer standing." *Robins, supra*, 742 F.3d at 413. "First, a plaintiff 'must be among the injured, in the sense that she alleges the defendants violated her statutory rights." ' *Id*. (*quoting Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 707 (6th Cir.2009)) (internal quotation marks omitted). "Second, the statutory right at issue must protect against 'individual, rather than collective, harm." ' *Id. (quoting Beaudry*, 579 F.3d at 707).

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The Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461 *et seq*., represented the first comprehensive attempt to incorporate Indian tribes as political entities within the legal and political systems of the United States, embodying the endorsement of a policy to promote tribal self-government and a government-to-government relationship between Indian tribes and the United States. The IRA fundamentally restructured the relationship between Indian tribes and the federal government, reversing the Nineteenth Century goal of assimilation and embodying "principles of tribal self-determination and self-governance." *Connecticut ex rel. Blumenthal v. U.S. Department of Interior*, 228 F.3d 82, (2nd Cir. 2000) (quoting, *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992)). In one sense, 25 U.S.C. § 476 cuts against that overriding purpose by requiring Tribes to submit to a federally-run election process and by conferring upon the Secretary the authority to disapprove a ratified tribal constitution or amendment as violative of "applicable laws." But the 1988 amendments, including the requirement in 25 U.S.C. § 476(c) that the Secretary provide pre-election review and notification of any "found" violation of "applicable laws," ushered in a series of checks on that power, in favor of the tribes. These provisions serve purely the interest of strengthening tribal self-determination by enshrining into statutory law limits on the Secretary's authority to delay and disapprove tribal constitutions and amendments in the wake of *Coyote Valley Band of Pomo Indians v. U.S.*, 639 F.Supp. 165, 175 (E.D. Cal. 1986), and to strengthen those limitations by making them more specific and less discretionary.

It runs counter to the very purpose of these provisions to construe them as a means for individual tribal members to delay or thwart a Tribe's efforts at self-governance through a federal lawsuit attacking tribal constitutions and amendments which they individually dislike. As applied to this case, the purpose of the pre-election notification requirement is not to protect plaintiffs' interest in stopping a constitutional amendment which they view as potentially injurious to their status as tribal members. Rather, the clear and evident purpose is to serve the Tribe's interest in having advance knowledge that the Secretary might not approve an amendment as contrary to applicable laws even if it is subsequently ratified by the electorate so they may more efficiently react to a

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threatened disapproval. Thus, plaintiffs' interest in remaining members of the Tribe is not within the zone of interests protected by the IRA generally, or 5 U.S.C. § 476(c) specifically.

2. Proximate Cause

The second aspect of statutory standing in proximate causation. According to the Court:

> [W]e generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute. For centuries, it has been a well established principle of [the common] law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause. That venerable principle reflects the reality that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. Congress, we assume, is familiar with the common-law rule and does not mean to displace it *sub silentio*. We have thus construed federal causes of action in a variety of contexts to incorporate a requirement of proximate causation.

Lexmark, supra, 134 S.Ct. at 1390 (internal quotations omitted). Thus, the Court determined that it was proper to read 15 U.S.C. § 1125 as containing such a requirement, "its broad language notwithstanding." *Id.* According to the Court, the question presented was "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Id.* Conversely, the proximate cause requirement bars suit for alleged harms that are "too remote" from the defendant's unlawful conduct. *Id.*

Plaintiffs here cannot claim that any harm they might suffer is proximately caused by the Secretary's alleged failure to provide pre-election notification to the Tribe that its proposed constitutional amendment was violative of applicable laws. As alleged, plaintiffs' prospective injuries will presumably occur as a result of having been disenrolled by tribal authorities through tribal processes and then being unable to subsequently reenroll under the remaining grounds for eligibility following tribal ratification of the proposed amendment and Secretarial approval (or a failure to timely act) after the completion of the election. That alleged injury will not be in anyway proximately caused by the absence of pre-election notification to the Tribe pursuant to 25 U.S.C. § 476(c). Thus plaintiffs' claim fails both tests of statutory standing: their alleged injury is neither within the zone of interests protected by the statute nor will it be proximately caused by any alleged violation of the Secretary of her obligation to provide pre-election notification to the Tribe.

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iii. The Arbitrary and Capricious Standard Applies

Assuming that plaintiffs can establish standing it is necessary to identify precisely the issue that requires resolution and the standard of review by which such issue is resolved. Under plaintiffs' apparent theory of the case, the Court must first decide *de novo*, whether the constitutional amendment in question violates applicable laws, *i.e.*, 25 U.S.C. § 1302(a)(8).[13] According to plaintiffs' theory, if the Court concludes that the amendment does indeed violate the statute, then it must hold that the Secretary violated the law by failing to notify the Tribe of that violation prior to the election, even though the Secretary never herself reached such a conclusion nor made such a finding. We do not agree that this is a correct analysis of the law. It is incongruous to think that the Secretary could "violate" the law simply by reaching a different conclusion on the legality of the amendment prior to a definitive determination in a court of law. Rather, in federal defendants' view, the Secretary could only possibly violate 25 U.S.C. §476(c) by having made a "finding" that a proposed amendment is contrary to applicable law and then failing to notify the Tribe of that finding within the time prescribed by the statute. However, if the Court is called upon to review the *bona fides* of the Secretary's decision that the amendment does not violate applicable laws, such review must be for arbitrariness and capriciousness based on the administrative record, *i.e.*, did the Secretary have a reasonable basis for arriving at a different conclusion based on the information available to her at the time? 25 U.S.C. § 476(d) prescribes no particular standard for judicial review. In such circumstances, the Courts import the arbitrary and capricious standard of review for adjudicating such challenges. *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 685 (D.C. Cir. 1982).[14]

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13 As discussed below, this premise is highly doubtful. *See, e.g, McCurdy v. Steele*, 506 F.2d 653, 655 (10th Cir. 1974) ("We have noted in earlier cases that the Indian Civil Rights Act was directed primarily to the administration of justice by tribal authority, rather than to the governmental structure, office holding, or elections.")

14 As explained by the Court:

> The applicability of *de novo* review to administrative actions is limited and is generally not presumed in the absence of statutory language or legislative intent to the contrary. In *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963), the Supreme Court stated, "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held." *Id.* at 715. *See also Consolo v. FMC*, 383 U.S. 607, 619 n.17 (1966). Referring to this rule this court has said:

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Here, for example, if the Secretary's finding was arrived at on the basis of the advice of competent counsel, even if the finding ultimately proved incorrect as a predictor of the law as determined by subsequent judicial rulings, the Secretary's finding based on such advice would nevertheless not be arbitrary and capricious. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.")

iv. Even if the Secretary violated the law in failing to provide the Tribe with pre-election notification that the proposed constitutional amendment violated applicable laws, that violation was rendered moot by the Secretary's subsequent approval of the proposed constitutional amendment as consistent with applicable laws.

The constitutional "cases and controversies" limitation prevents federal courts from deciding moot questions. *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983). The mootness doctrine is a constitutional or prudential limitation on the competence of federal courts to decide particular cases and is properly examined by the court regardless of whether the parties choose to address the issue. *Kennedy v. Block*, 784 F.2d 1220, 1222 n.1 (4th Cir. 1986). An actual controversy must exist at the time the question is reviewed, and not simply at the date when the action was commenced. No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights. *Already, LLC v. Nike, Inc.*, ___ U.S. ___, 133 S. Ct. 721, 727 (2013). Here any failure by the Secretary to provide pre-election notice of the Tribe of a finding of the amendment's inconsistency with applicable law has effectively been superceded by the Secretary's post-election approval of the ratified amendment as consistent with applicable laws. Dkt. # 34 at USA-B-000066. Thus, plaintiffs' claim that the Secretary should

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> This circumscription ... stems from well ingrained characteristics of the administrative process. The administrative function is statutorily committed to the agency, not the judiciary. A reviewing court is not to supplant the agency on the administrative aspects of the litigation. Rather, the judicial function is fundamentally-and exclusively-an inquiry into the legality and reasonableness of the agency's action, matters to be determined solely on the basis upon which the action was administratively projected.
>
> *Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 839-40 (D.C. Cir. 1976). (footnotes omitted)

Id. at 685.

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have notified the Tribe before the election of a finding of inconsistency was rendered moot by the Secretary's subsequent post-election approval of the amendment.

v. Even if the Court is to determine the legality of the lack of pre-election notice based on a de novo review of the consistency of the amendment with applicable laws, the amendment should be determined to be consistent with applicable laws.

Lastly, plaintiffs' cause of action is ultimately based on the contention that the amendment violates the Indian Civil Rights Act (ICRA) relying specifically on the ICRA provision prohibiting a tribe from denying anyone the equal protection of its laws. 25 U.S.C. § 1302(a)(8). Plaintiffs assert that this amendment was motivated by racial animus against individuals who are of Filipino ancestry and thus that the amendment is the product of unlawful discrimination. Even if the allegations concerning the Tribe's motivations are accurate, and that, of course, is unproven, the amendment does not facially discriminate against anyone. The amendment is not directed to any current members; it is prospective in nature only. As this Court has already observed, "nothing in the proposed amendment would disenroll anyone retroactively." Dkt. # 25, p. 12, *ll*. 1-5.

Once the amendment goes into effect (something which had not occurred at the time the operative complaint was filed) the Tribe will be "discriminating" only between potential members - those who will qualify for membership under other eligibility criteria in the Nooksack Constitution and those who will not, even if they may possess 1/4 degree Indian blood and can prove Nooksack ancestry to any degree. But this type of discrimination is not unlawful. A key concept in Indian law is that "[a] tribe's right to define its own membership for tribal purposes has long been recognized· as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez* , 436 U.S. 49, 72 n. 32 (1978). As this Court has already noted:

> Plaintiffs are members of the Nooksack Tribe by virtue of the membership requirements currently stated in the Tribe's Constitution, all of which define membership by ancestry. The proposed constitutional amendment, which alters those ancestry-based requirements, is no more unlawful than the original requirements. Put simply, neither ICRA nor any other law prohibits a tribe from using race or ancestry in defining its membership.

Dkt. # 5, p. 10, *ll*. 15-25.

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II. PLAINTIFFS HAVE NOT SUFFICIENTLY ALLEGED A VIOLATION OF THE 5TH OR 15TH AMENDMENTS BY ANY FEDERAL ACTOR

The Indian nations or tribes are dependent political nations and wards of the United States. They possess the attributes of sovereignty, insofar as they have not been taken away by Congress. They are quasi-sovereign nations. As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. *Santa Clara Pueblo v. Martinez*, *supra*, 436 U.S. at 55-56. Thus, it is held that "[a]n Indian tribe or nation is not a federal instrumentality and is not within the reach of the Fifth Amendment, and due process restraint places restrictions on the Indian tribes only when it is so provided by Congressional enactment." *Groundhog v. Keeler*, 442 F.2d 674, 678 (10th Cir. 1971). It seems clear also, that the 15th Amendment has not been made applicable to Tribes directly or through the ICRA. *See, id.* at 681-683.

Plaintiffs attempt to circumvent this barrier by alleging, correctly, that a Secretarial election is nevertheless a federal election. Plaintiffs argue that federal defendants are therefore constrained in conducting a Secretarial election directly by both the 15th Amendment and the equal protection aspect of the Fifth Amendment. Just so perhaps, but the difficulty is that plaintiffs have alleged a violation of neither constitutional protection. "The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. The National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race. Color and previous condition of servitude, too, are forbidden criteria or classifications . . ." *Rice v. Cayetano*, 528 U.S. 495, 511-512 (2000). However, plaintiffs' complaint is devoid of any allegation that identifies any federal actor as having taken any step to unlawfully discriminate on grounds of race or other unlawful criteria against any otherwise eligible voter who is attempting to exercise his or her right to vote. To the contrary, the administrative record establishes definitively that *every* member of the Nooksack Tribe, regardless of all other criteria, was afforded an opportunity to register to vote, and the subsequent election was conducted of all registered voters.

In an effort to overcome these facts, plaintiffs' complaint alleges only that:

> The Election Board also includes the Enrollment Officer who initiated race-based disenrollment proceedings and the Tribal Chairman who is engaging in discriminatory

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> election practices. By conducting an election involving discriminatory election practices, such as Chairman Kelly's provision of election information only to non-Filipino voters, the Defendants are violating the Plaintiffs' equal protection and voting rights.

Dkt. # 3, ¶ 92. However, despite the fact that Rob Kelly may have been a member of the Election Board, he is the Chairman of the Nooksack Indian Tribe, and not a federal officer or employee whose actions are imputable to the federal government. Moreover, while Rob Kelly may have taken certain actions in his capacity as Chairman of the Nooksack Tribe which plaintiffs allege were discriminatory, such as engaging in a race-based distribution of election information, there is no allegation that these practices were either adopted or ratified by any federal actor, or that they affected the conduct of the election in any way. As the administrative record reflects, the only materials related to the election which were distributed under the auspices of the Secretarial election were distributed to all eligible voters without distinction. Plaintiffs cannot establish a violation of the U.S. Constitution through the mere propinquity of Chairman Kelly to the election process. Rather, to state a substantial constitutional claim, plaintiff must allege a meaningful deprivation or infringement on the right to vote in the Secretarial election on the basis of unlawful criteria by persons whose actions are imputable to the federal government.

III. PLAINTIFFS DO NOT HAVE A COGNIZABLE COMMON LAW CLAIM FOR BREACH OF TRUST

Plaintiffs' fifth cause of action has two aspects. Plaintiffs' complaint alleges that defendants "have violated their trust responsibility to the Plaintiffs by authorizing a federal election clearly based on racial animus, to vote on an amendment to a tribal constitution that violates federal law, and in which racially discriminatory election practices are allowed to occur." Dkt. # 3, ¶ 106. The complaint also alleges that "Defendants have also breached their trust responsibility to Plaintiffs by refusing to comply with the Plaintiffs' FOIA request." Id. at ¶ 107.

Defendants believe that neither of the two aspects of this cause of action states a viable claim for relief. An action for breach of trust must involve a trust "resource" which is "pervasively regulated" by the federal government. *Gros Ventre Tribe v. United States*, 469 F.3d 801, 813 (9th Cir. 2006) (citing *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974 (9th Cir. 2006)). Insofar as nothing about this lawsuit involves mismanagement of a pervasively regulated trust

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resource, such as land or timber, plaintiffs' cause of action for breach of trust based on alleged illegality in conducted a Secretarial election and responding to a FOIA request is unavailing.

CONCLUSION

For the foregoing reasons, federal defendants respectfully requests that their motion be granted and that plaintiffs' first, second and fourth causes of action be dismissed.

DATED this 29th day of October, 2014.

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 October 29, 2014, I electronically filed the foregoing document 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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I further certify that on October 29, 2014, I mailed by United States Postal Service the foregoing document to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

-0-

Dated this 29th day of October 2014.

/s/ H. Hana Yiu

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