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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PATRICK HAMMOND III,

Plaintiff

v.

SALLY JEWELL, Secretary of the U.S.
Department of the Interior; INTERIOR BOARD
OF INDIAN APPEALS, U.S. Department of the
Interior; U.S. DEPARTMENT OF THE
INTERIOR; AMY DUTSCHKE, Regional
Director, Pacific Regional Office, Bureau of
Indian Affairs; TROY BURDICK,
Superintendent, Central California Agency,
Bureau of Indian Affairs,

Defendants.

Case No.: 1:15-cv-00391-SKO

**PLAINTIFF'S OPPOSITION TO
FEDERAL DEFENDANTS' MOTION
TO DISMISS**

TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES	3
I. INTRODUCTION	4
II. PLAINTIFF HAS SUFFERED A LEGAL WRONG BECAUSE OF THE FEDERAL DEFENDANTS' ACTIONS AND IS ENTITLED TO JUDICIAL REVIEW.....	5
III. PLAINTIFF HEREIN HAS STANDING BECAUSE HE HAS BEEN DAMAGED BY THE ACTIONS OF FEDERAL DEFENDANTS	6
IV. DUE PROCESS CALLS FOR SUCH PROTECTIONS AS THIS STITUTION DEMANDS	8
V. THE ADMINISTRATIVE PROCEDURES ACT SETS FORTH THE PROVISION BY WHICH TO MEASURE DEFENDANTS' ACTIONS	10
VI. CONCLUSION	11

TABLE OF AUTHORITIES

Statutes

5 USCS § 702	5
5 USCS § 704	6
5 USCS § 706	6, 10

Regulations

54 FR 6478, §2.6	6
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Cases

Bernard v. United States DOI 674 F.3d 904, 907 (8th Cir. S.D. 2012).....	7
Bd. of Regents v. Roth, 408 U.S. 564, 577 (U.S. 1972)	9
Cal. Valley Miwok Tribe v. Salazar 967 F. Supp. 2d 84, 86 (D.D.C. 2013).....	7, 8
Doe v. United States DOJ, 753 F.2d 1092, 1105 (D.C. Cir. 1985).....	9
Joint Bd. of Control of Flathead v United States (1986, DC Mont) 646 F Supp 410, cert den (1988) 486 US 1007	7
Lower Ark. Valley Water. v United States (2008, DC Colo) 578 F Supp 2d 1315	7
Mathews v. Eldridge, 424 U.S. 319, 334 (U.S. 976).....	9
Mecca v. United States 389 Fed. Appx. 775, 781 (10th Cir. Colo. 2010).....	9
Payton v. USDA, 337 F.3d 1163, 1165 (10th Cir. N.M. 2003)	8
Valley Forge Christian Coll. v. Ams. United for Separation 454 U.S. 464, 472 (1982)	7

I. INTRODUCTION

Plaintiff is seeking review of Federal Defendants' decisions in this matter. This lawsuit has not been brought against the Picayune Rancheria of Chukchansi Indians. The Tribal Council is not a defendant herein. This action has been filed against SALLY JEWELL, Secretary of the U.S. Department of the Interior (hereinafter "Secretary"); AMY DUTSCHKE, Regional Director, Pacific Regional Office, Bureau of Indian Affairs (hereinafter "Regional Director"); TROY BURDICK, Superintendent, Central California Agency, Bureau of Indian Affairs (hereinafter "Superintendent"); INTERIOR BOARD OF INDIAN APPEALS, U.S. Department of the Interior (hereinafter "IBIA"); U.S. DEPARTMENT OF THE INTERIOR (hereinafter "Department"); (collectively hereinafter "Federal Defendants")

While a part of the facts of this lawsuit is indeed that Plaintiff was removed from the Tribal Council for improper reasons, that is not what this lawsuit is about. The lawsuit is about the Federal Defendants having 1) violated Plaintiff's due process rights under the Fourteenth Amendment, 2) violated the Indian Civil Rights Act, 3) violated the Administrative Procedures Act, and 4) taken actions that are an abuse of discretion and are arbitrary and capricious and contrary to law.

Plaintiff is amazed at Federal Defendants' characterization of the matter.

Federal Defendants' state that "The fundamental issue with Plaintiff's position is that the BIA does not have a role in deciding who is on Tribal Council..." (Motion to Dismiss, page 1, lines 9-10.) Then they proceed to explain that they decided the last uncontested Tribal Council would be recognized and that the last uncontested Tribal Council was "Dora Jones, Chance Alberta, Jennifer Stanly, Nancy Ayala, Morris Reid, Reggie Lewis and Nokomis Hernandez. Id. at ¶ 26, 30. In a footnote, the Regional Director's decision refers to the replacement of Patrick Hammond by Nokomis Hernandez." (Motion to Dismiss, page 4, lines 2-6.) Then Federal Defendants continued with a process of rendering decisions about which Tribal Council was valid and who were members of that Tribal Council. (Motion to Dismiss, page 4, lines 8-25.)

The subject decision by Federal Defendants, is directly interrelated with the specific subject of Plaintiff's removal from the Tribal Council. When the Regional Director gave authority to the last uncontested Tribal Council elected December 2010, and then listed the members of said

1 council, she omitted plaintiff from the list. The matter was appealed to the IBIA, and plaintiff filed
2 his brief with the IBIA. On February 9, 2015, the IBIA issued its decision making the Regional
3 Director's decision effective immediately. This February 9 decision effectively included a decision
4 against Plaintiff in response to the Appeal he had filed.

5 The IBIA final decision determined that the Tribal Council to be recognized was the Tribal
6 Council elected in 2010; that included Plaintiff; but then, the final decision decided to exclude
7 Plaintiff from the Council that would be recognized. That final decision did not state any findings
8 of fact to support the exclusion of Plaintiff. That final decision did not state any conclusions of law
9 to support the exclusion of Plaintiff. It didn't discuss at all why Plaintiff is justifiably excluded,
10 since he was validly elected in 2010. The final decision effectively made two decisions, and it is
11 that second decision, to exclude Plaintiff from the Tribal Council, that is defective.

12 In taking these actions Federal Defendants have indeed taken a role in deciding who is on
13 Tribal Council.

14
15 **II. PLAINTIFF HAS SUFFERED A LEGAL WRONG BECAUSE OF THE**
16 **FEDERAL DEFENDANTS' ACTIONS AND IS ENTITLED TO JUDICIAL REVIEW**

17 Plaintiff is seeking review of Federal Defendants' decisions in this matter. "A person
18 suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action
19 within the meaning of a relevant statute, is entitled to judicial review thereof. ..." (5 USCS § 702)

20 Certainly, the Department of the Interior, including the BIA, is an agency. Federal
21 Defendants, in their capacity as an agency have made decisions in this matter. Plaintiff herein has
22 alleged that Federal Defendants have wrongfully taken actions that have adversely affected or
23 aggrieved Plaintiff and Plaintiff is therefore entitled to judicial review of those decisions.

24 To the extent necessary to decision and when presented, the reviewing court
25 shall decide all relevant questions of law, interpret constitutional and statutory
26 provisions, and determine the meaning or applicability of the terms of an agency
27 action. The reviewing court shall—

28 ... (2) hold unlawful and set aside agency action, findings, and conclusions
found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
with law;

1 (B) contrary to constitutional right, power, privilege, or immunity;
2 ... (D) without observance of procedure required by law;
3 (E) unsupported by substantial evidence in a case subject to sections 556 and
4 557 of this title or otherwise reviewed on the record of an agency hearing provided
5 by statute; or
6 (F) unwarranted by the facts to the extent that the facts are subject to trial de
7 novo by the reviewing court.”
8 (5 *U.S. Code* § 706)

9 The decision of the Interior Board of Indian Appeals is subject to judicial review under 5
10 *U.S.C.* 704, when a decision has been made effective immediately. “...Departmental action subject
11 to judicial review ... when ... the official to whom the appeal is made ... determines ... the decision
12 be made effective immediately.” (54 *FR* 6478, §2.6)

13 The IBIA final decision determined that the Tribal Council to be recognized was the Tribal
14 Council elected in 2010; that included Plaintiff; but then, the final decision decided to exclude
15 Plaintiff from the Council that would be recognized. That final decision did not state any findings
16 of fact to support the exclusion of Plaintiff. That final decision did not state any conclusions of law
17 to support the exclusion of Plaintiff. It didn’t discuss at all why Plaintiff is justifiably excluded,
18 since he was validly elected in 2010. The final decision effectively made two decisions, and it is
19 that second decision, to exclude Plaintiff from the Tribal Council, that is defective.

20 **III. PLAINTIFF HEREIN HAS STANDING BECAUSE HE HAS BEEN DAMAGED**
21 **BY THE ACTIONS OF FEDERAL DEFENDANTS**

22 “A plaintiff seeking to invoke a federal court's jurisdiction must establish: (1) that it has
23 suffered an "injury in fact—an invasion of a legally protected interest which is (a) concrete and
24 particularized, and (b) actual or imminent, not conjectural or hypothetical," 504 U.S. at 560; (2) that
25 its injury is fairly traceable to the challenged action of the defendant and not the result of the
26 "independent action of some third party not before the court," [Citations.]; and (3) that it is "likely,
27 as opposed to merely speculative, that the injury will be redressed by a favorable decision," *id.* at
28 561 [Citation.]. These three elements constitute an "irreducible minimum" required by Article III of

//

1 the Constitution.” (*Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*,
2 454 U.S. 464, 472 (1982).)

3 Plaintiff herein has correctly alleged Federal Defendants’ invasion of his legally protected
4 interest. The action is not about “Plaintiff’s grievance concerns his removal from the Tribal
5 Council” as asserted by defendants. This action is about defendants having violated Plaintiff’s due
6 process rights and violation of the Indian Civil Rights Act and violation of the Administrative
7 Procedures Act, and defendants having taken actions that are an abuse of discretion, arbitrary and
8 capricious and contrary to law.

9 Defendants here have asserted that “Federal courts should not make pronouncements about
10 tribal law.” But surely defendants would not attempt to assert that Federal courts should not make
11 pronouncements about actions taken by Federal agencies. The Courts have reviewed actions taken
12 by Federal agencies and they seem to use phrases such as “regulations provide sufficient standards
13 by which to judge BIA’s actions” (*Joint Bd. of Control of Flathead v United States* (1986, DC
14 Mont) 646 F Supp 410, cert den (1988) 486 US 1007) and “standard against which to judge
15 Secretary’s exercise of discretion.” (*Lower Ark. Valley Water. v United States* (2008, DC Colo) 578
16 F Supp 2d 1315.) and “The district court affirmed the IBIA decision ... concluding that it was not
17 arbitrary, capricious, an abuse of discretion, or otherwise contrary to the law.” (*Bernard v. United*
18 *States DOI*, 674 F.3d 904, 907 (8th Cir. S.D. 2012).)

19 “It is no intrusion upon tribal sovereignty to set aside a decision of a federal agency if that
20 decision violates federal law. “ (*Cal. Valley Miwok Tribe v. Salazar*, 967 F. Supp. 2d 84, 86 (D.D.C.
21 2013).)

22 Pursuant to settled law, an agency action will be set aside or held unlawful if they are
23 arbitrary, unreliable; an abuse of discretion, or contrary to law, constitutional rights, its power and
24 privilege, or immunity.

25 The IBIA stated in its decision that the “BIA would recognize the last undisputed Tribal
26 Council, which the Regional Director identified as the Council as constituted following a tribal
27 election in 2010, with one change ("2010 Council").” The IBIA then notes: “Hammond, who was
28 elected to the Council in 2010, appeals from the Regional Director’s acceptance of his subsequent

1 removal from the Council and replacement with Nokomis Hernandez. As identified in the Decision,
2 the 2010 Council consists of Dora Jones, Chance Alberta, Jennifer Stanley, Nancy Ayala, Morris
3 Reid, Reggie Lewis, and Nokomis Hernandez.” (See page 2 of the IBIA Order, dated February 9,
4 2015, a copy of which is attached to Defendants’ Motion to Dismiss as Exhibit C.) Defendants do
5 not provide any reasoning or legal basis to support the decision regarding plaintiff’s exclusion from
6 the 2010 Council, nor is there basis given for why Hernandez and not plaintiff was named.

7 In a case that is substantially similar to the present matter, a District Court did possess
8 jurisdiction over a matter in which a farmer sought review of Department of Agriculture's decision
9 to terminate the farmer's participation in a conservation program because whether the participant
10 was in compliance with terms and conditions of the program contract had to be decided on basis of
11 facts and law, and was not left to the unfettered discretion of the agency. (See *Payton v. USDA*, 337
12 F.3d 1163, 1165 (10th Cir. N.M. 2003).)

13 A member of an Indian tribe has standing to challenge his exclusion from participation. (See
14 *Cal. Valley Miwok Tribe v. Salazar*, 967 F. Supp. 2d 84, 87 (D.D.C. 2013).)

15 Federal Defendants have rendered a decision which terminated Plaintiff’s participation in
16 the tribe’s relationship with the BIA. Whether defendants’ decision that approved of Plaintiff’s
17 exclusion from the Tribal Council is correct must be decided on basis of facts and law, and should
18 not be left to unfettered discretion of defendants.

19 Clearly, plaintiff may seek redress and the Federal Court has jurisdiction as to the decision
20 of Federal Defendants in the instant matter.

21
22 **IV. DUE PROCESS CALLS FOR SUCH PROTECTIONS AS THIS SITUATION**
23 **DEMANDS**

24 A position as a member of a Tribal Council ought to be and is protected by a right to due
25 process. This particular situation calls into question the liberty interest of Plaintiff.

26 “[D]ue process is flexible and calls for such procedural protections as the particular
27 situation demands.” [Citation.] Accordingly, resolution of the issue whether the administrative
28 procedures provided here are constitutionally sufficient requires analysis of the governmental and

1 private interests that are affected [Citations.]” (*Mathews v. Eldridge*, 424 U.S. 319, 334 (U.S.
2 1976).)

3 “Protected property interests require "a legitimate claim of entitlement," created not by the
4 Constitution but by independent sources such as statute, municipal ordinance, or contract.
5 [Citation]” (*Mecca v. United States*, 389 Fed. Appx. 775, 781 (10th Cir. Colo. 2010).)

6 An individual's liberty interest, under the due process clause, is impaired when the
7 government acts to injure his or her good name, reputation, honor or integrity, or imposes a stigma.
8 (See *Doe v. United States DOJ*, 753 F.2d 1092, 1105 (D.C. Cir. 1985).)

9 “To have a property interest ... a person ... must have more than a unilateral expectation of
10 it. He must, instead, have a legitimate claim of entitlement to it. ... It is a purpose of the
11 constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. “
12 (*Bd. of Regents v. Roth*, 408 U.S. 564, 577 (U.S. 1972).)

13 Plaintiff had and has expectation that he may retain his position as a member of the Tribal
14 Council. Federal Defendants have made a decision that took that position away from Plaintiff and
15 have thus imposed a stigma upon him. Plaintiff has a right to vindicate his claim.

16 The subject decision by Federal Defendants, is directly interrelated with the specific subject
17 of Plaintiff’s removal from the Tribal Council. When the Regional Director gave authority to the
18 last uncontested Tribal Council elected December 2010, and then listed the members of said
19 council, she omitted plaintiff from the list. The matter was appealed to the IBIA, and plaintiff filed
20 his brief with the IBIA. On February 9, 2015, the IBIA issued its decision making the Regional
21 Director’s decision effective immediately. This February 9 decision effectively included a decision
22 against Plaintiff in response to the Appeal he had filed. (See Motion to Dismiss, page 11, lines 3-4;
23 see also Complaint, paragraphs 26-29.)

24 The IBIA final decision determined that the Tribal Council to be recognized was the Tribal
25 Council elected in 2010; that included Plaintiff; but then, the final decision decided to exclude
26 Plaintiff from the Council that would be recognized. That final decision did not state any findings
27 of fact to support the exclusion of Plaintiff. That final decision did not state any conclusions of law
28 to support the exclusion of Plaintiff. It didn’t discuss at all why Plaintiff is justifiably excluded,

1 since he was validly elected in 2010. The final decision effectively made two decisions, and it is
2 that second decision, to exclude Plaintiff from the Tribal Council, that is defective.

3
4 **V. THE ADMINISTRATIVE PROCEDURES ACT SETS FORTH THE PROVISION**
5 **BY WHICH TO MEASURE DEFENDANTS' ACTIONS**

6 The entire Complaint is about the “wrongness” of Federal Defendants’ actions in this matter.
7 The Third and Fourth Claims for Relief incorporate the entire prior allegations of the Complaint
8 (Paragraphs 48 and 50) The statutes by which to measure defendants’ actions have clearly been set
9 out. The allegations state that Federal Defendants have 1) violated Plaintiff’s due process rights, 2)
10 violated the Indian Civil Rights Act, 3) violated the Administrative Procedures Act, and 4) taken
11 actions that are an abuse of discretion and are arbitrary and capricious and contrary to law.

12 The allegations of the Complaint set out the basis for the claims as provided by the APA:

13 To the extent necessary to decision and when presented, the reviewing court shall
14 decide all relevant questions of law, interpret constitutional and statutory provisions,
15 and determine the meaning or applicability of the terms of an agency action. The
16 reviewing court shall— ...

(2) hold unlawful and set aside agency action, findings, and conclusions found to
be--(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
with law;

17 (B) contrary to constitutional right, power, privilege, or immunity; ...

18 (D) without observance of procedure required by law;

(E) unsupported by substantial evidence ...

19 (F) unwarranted by the facts ...

(5 USCS § 706)

20
21 It is not “difficult to tell what Plaintiff claims are in counts three and four.” The entire
22 complaint asserts that Federal Defendants’ decision is an abuse of discretion, is contrary to
23 constitutional right and power, is without observance of procedure required by the Constitution and
24 the APA, is unsupported by substantial evidence and is unwarranted by the facts. There is no
25 difficulty in understanding what laws and statutes apply here.

26 The IBIA final decision determined that the Tribal Council to be recognized was the Tribal
27 Council elected in 2010; that included Plaintiff; but then, the final decision decided to exclude
28 Plaintiff from the Council that would be recognized. That final decision did not state any findings

1 of fact to support the exclusion of Plaintiff. That final decision did not state any conclusions of law
2 to support the exclusion of Plaintiff. It didn't discuss at all why Plaintiff is justifiably excluded,
3 since he was validly elected in 2010. The final decision effectively made two decisions, and it is
4 that second decision, to exclude Plaintiff from the Tribal Council, that is defective.

5
6 **VI. CONCLUSION**

7 Plaintiff is seeking review of Federal Defendants' decisions in this matter. The Complaint
8 has set forth the elements necessary to seek such review. The decision is reviewable by statute and
9 final agency action has occurred. The decision is subject to judicial review. The Motion to Dismiss
10 should not be granted.

11
12 Dated: September 17, 2015

Respectfully submitted,

13 THE REICH LAW FIRM

14
15 By: /s/ Jeff Reich
16 Jeff Reich,
Attorneys for Plaintiff