UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARING AND APPEALS

INTERIOR BOARD OF INDIAN APPEALS

THE CAYUGA NATION by its COUNCIL OF CHIEFS and CLAN MOTHERS, Appellants, v. EASTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	DOCKET NO. IBIA – not yet assigned

NOTICE OF APPEAL FROM DECISION OF BIA OFFICIAL

Appeal is hereby taken from a December 15, 2016, decision of the Eastern Regional Director, Bruce Maytubby, as delegated by Principal Deputy Assistant Secretary Lawrence Roberts through Deputy Bureau of Indian Affairs Field Director for Field Operations Michael R. Smith, acting on behalf of Bureau of Indian Affairs Director Bruce Loudermilk, regarding recognition of the lawful government of the Cayuga Nation and denial of the Nation's ISDEAA contract application. *See Maytubby Decision of December 15, 2016, attached as Exhibit "A".* While the decision purports to be a "Final Agency Decision," *see Attempted Delegation of December 15, 2016, attached as Exhibit "B,"* this Board has jurisdiction pursuant to 25 C.F.R. § 2.4(e); 25 C.F.R. § 2.6; 43 C.F.R. § 4.332; 25 U.S.C. §450f(b) and 25 C.F.R. Part 900.

BACKGROUND

On February 20, 2015, then-Acting Bureau of Indian Affairs Regional Director Tammie Poitra issued a decision recognizing, as the Cayuga Nation's "last undisputed government," a Council of Chiefs comprised of six individuals, including Appellants here.

On June 17, 2016, Eastern Regional Director Bruce Maytubby wrote to three of these six recognized leaders – Appellants here, referred to by Mr. Maytubby as the "Jacobs Council" – that the faction comprising the other half of the federally recognized Council ("Halftown Group") intended to conduct a mail-in survey in order to determine a new form of government and slate of leaders for the Cayuga Nation. Mr. Maytubby revealed that he had conducted secret meetings with the Halftown Group for at least six months and stated that, in his view, their mail-in survey "would be a viable way of involving the Cayuga people in a determination of the form and membership of their government." *Letter of Bruce Maytubby, Regional Director, to Anita Thompson, Secretary, Cayuga Nation Council, June 17, 2016, attached as Exhibit "C."*

Appellants, including the Cayuga Nation's Council of Chiefs and Clan Mothers, immediately objected to the Halftown Group's effort and to Mr. Maytubby's support for it, pointing out that Cayuga law precludes mail-in survey campaigns from being used to choose governmental representatives and instead entrusts that solemn responsibility to the Clan Mothers, working with citizens directly through their respective clans. Denying the Clan Mothers' role in governance violates Nation law and sovereignty and the right of Cayuga citizens to choose their own means of determining leadership. In addition, the Nation expressed outrage at Mr. Maytubby's admission that he had conducted secret meetings and communications with one faction of the Nation's then-recognized Council of Chiefs without consulting or even informing the other half or the Nation's Clan Mothers. Undaunted, Mr. Maytubby continued to secretly

consult with the Halftown Group, who utilized BIA funds to proceed with their mail-in survey campaign. Mr. Maytubby also sent BIA officials to Cayuga territory – again without consultation or even notification to federally-recognized Nation leaders – to secretly review the results of the controversial survey campaign.

On November 1, 2016, Mr. Maytubby contacted both factions within the Nation's federally recognized government and requested briefing on several questions: "the validity of the [Halftown Group's] statement of support process as a matter of law;" "the process by which the statement of support process was actually conducted," and whether "tribal traditions support the Jacobs Council." *Letter of Bruce Maytubby to Clint Halftown and William Jacobs, November 1, 2016, attached as Exhibit "D."* Claiming that his recognition decision was governed by the 90 day limitation applicable to ISDEAA contract applications, Mr. Maytubby provided just 27 days for the development of the record and completion of briefing.

The parties submitted briefs laying out their positions. The Nation's submissions included testimony from experts in Cayuga law whose analyses unequivocally demonstrate that the mail-in survey campaign violates Cayuga law. In particular, the campaign violates the well-established requirement that the Nation's Council make decisions by consensus; strips the Clan Mothers of their ancient role in choosing and overseeing members of Council; and supplants the process under the Great Law of Peace by which the Nation's Chiefs are appointed or "condoled." In addition, the Nation produced uncontroverted academic expert testimony that found that the mail-in survey campaign as conducted was "a deeply flawed process from which no information may confidently be gathered." *Analysis of the 2016 "Statement of Support Campaign," James N. Druckman and Jacob Rothschild, November 25, 2016, attached as Exhibit "E."*

Nonetheless, on December 15, 2016, Mr. Maytubby concluded that the mail-in survey campaign was "valid" as the new means by which the citizens of the Cayuga Nation will choose their leaders, despite his finding that the campaign process would have violated federal tribal election law in several ways. *See, generally, Exh. A* (Maytubby affirming that voter list was kept secret from Nation leaders and citizens; biased language favored one side; no option was given to support the Jacobs Council; and "ballots" were non-anonymous). On the sole basis of the mail-in campaign, Mr. Maytubby recognized the Halftown Group as the lawful government of the Nation for nation to nation purposes. Mr. Maytubby's letter further denied Appellants' application on behalf of the Nation for contract assistance pursuant to the ISDEAA.

Mr. Maytubby invoked a legal principle that neither faction had argued: the astonishing notion that for the Nation to use any means of choosing leaders other than a "plebiscite" would violate the human rights of Cayuga citizens. *Exh. A* at 7-8. Disturbingly, through a standardless, same-day delegation, his decision also purported to deprive the Nation of the right to administrative review. If allowed to stand, this decision would eviscerate centuries of law and custom within the Cayuga Nation. It would summarily overturn without analysis years of BIA and IBIA precedent on the sovereign right of Indian nations to choose their own government and on the central role of the principal of consensus and of the Clan Mothers and the Chiefs in the government of the Cayuga Nation.

JURISDICTIONAL STATEMENT

Because of the unique circumstances surrounding this matter, there are multiple alternative grounds for Board review of Mr. Maytubby's decision.

A. The Board has jurisdiction to review Mr. Maytubby's decision pursuant to 25 C.F.R. 2.4(e). That regulation confers jurisdiction on the Interior Board of Indian Appeals to

review decisions of the Principal Deputy Secretary – Indian Affairs: "The following officials may decide appeals:…(e) The Interior Board of Indian Appeals, pursuant to the provisions of 43 C.F.R. part 4, subpart D, if the appeal is from a decision made by an Area Director or a Deputy to the Assistant Secretary - Indian Affairs." At the time he purported to delegate authority to Mr. Maytubby, the Principal Deputy Assistant Secretary was acting in his own capacity, not in the capacity of Assistant Secretary. That is because he was barred from assuming "acting" status by 5 U.S.C. § 3346(a) (1), which limits to 210 days the time that any federal official may serve as "Acting Official." Mr. Roberts served as Acting Assistant Secretary for 209 days, from January 1 to July 1, 2016. *See* https://www.bia.gov/cs/groups/xopa/documents/text/idc1-033489.pdf . At the time of Mr. Maytubby's December 15, 2016, decision, he was no longer eligible to serve as Acting Official and took action in his capacity as Principal Deputy Secretary – Indian Affairs. While the Board has held that in limited circumstances officials may be considered to be acting as Assistant Secretary on a "de facto" basis, it has never before held that an official may circumvent 5 U.S.C. § 3346(a)(1) by continuing to serve in an "acting" capacity de facto after the statutory time limit has run.

B. The Board has jurisdiction and a responsibility to review Mr. Maytubby's decision pursuant to 25 C.F.R. § 2.6. The attempted delegation by the Deputy Assistant Secretary failed on procedural grounds and therefore is not legally effective. Indian Affairs Manual Part 3, Chapter 4, "Delegation of Authority: Delegations to the Deputy Bureau Director, Field Operations, and to the Regional Organizations" requires that delegations to the Regional Directors and the Deputy Director for Field operations go through the BIA Director prior to redelegation. *See* https://www.indianaffairs.gov/cs/groups/xraca/documents/text/idc1-

032031.pdf; *see also* 230 DM 1 (Department of the Interior Departmental Manual, Delegation Series, Director, Bureau of Indian Affairs).

Pursuant to this requirement, the Department of the Interior ("Department") cannot simply bypass the BIA Director or substitute the signature of the Deputy Director for Field Operations or a Regional Director for that of the BIA Director. That is exactly what was attempted here, however. Though the delegation was styled as passing "through" BIA Director Bruce Loudermilk, in fact the Director did not take part in the redelegation and did not sign the delegation document. *See Exh. B.* Instead, Deputy Director for Field Operations Michael R. Smith purported to redelegate on the Director's behalf, something he is prohibited by the Manual from doing.

C. Because Mr. Maytubby's decision constituted a denial of the Nation's ISDEAA contract application, the Board has reviewing authority pursuant to 25 U.S.C. §450f(b) and 25 C.F.R. Part 900. An attempt by federal officials to characterize the decision as a "final agency [action]" cannot deprive the Board of the reviewing authority granted to it by federal statute and regulation. Mr. Maytubby's November 1 scheduling order clarified that his decision was bound "by the statutory deadline for [] decision to accept or reject a 638 proposal." *Exh. D* at 2. The federal courts lack jurisdiction over appeals from such 638 decisions absent the exhaustion of administrative remedies provided by Board review and guaranteed by Congress through 25 U.S.C. § 450f(b). *See Cloverdale Rancheria of Pomo Indians of Cal. v. Jewell*, 593 Fed. Appx. 606, 609 (9th Cir. 2014) (dismissing for failure to exhaust administrative remedies a federal court action contesting declination of 638 contract).

D. Principal Deputy Assistant Secretary Roberts' attempted delegation of authority to make the Halftown group recognition decision final for the Department should not be given

legal effect because it violates Congress's intent to provide an administrative appeal. Congress has expressed its intent in two statutes. First, in 1946, Congress authorized Department of the Interior officials to delegate administrative authority under certain circumstances "for the purpose of facilitating and simplifying the administration of laws governing Indian affairs," and in the same statute, mandated that "such delegated powers shall be exercised subject to appeal to the Secretary . . . to the Deputy Secretary or to an Assistant Secretary of the Department . . . or to the Commissioner of Indian Affairs." Act of August 8, 1946, 60 Stat. 939, 25 U.S.C. § 1a.

Second, as discussed above, Congress requires that "an opportunity to appeal" must be provided to Indian nations whose proposed ISDEAA contracts have been declined. 25 U.S.C. § 450f(b). Regional Director Maytubby considered applications for self-determination contracts and established a briefing schedule based on the timelines applicable to consideration of such applications. As a result, for delegations of authority generally, and for consideration of ISDEAA contract applications specifically, Congress intended that Indian nations have a right to an administrative appeal before seeking review in federal court. Allowing administrative officials to deprive the Cayuga Nation of the right to an administrative appeal would violate Congress' intent.

E. Roberts' attempted delegation should not be given effect because it would contravene congressional intent by circumventing BIA regulations designed to bring agency expertise to bear and to protect Indian nations' due process rights. Federal regulations provide two mechanisms for administrative review of Regional Director decisions: appeal to the Board and adjudication by the Board; or appeal to the Board and adjudication by the Assistant Secretary – Indian Affairs. 25 C.F.R. Part 2. Appeal procedures for denials of self-determination contracts are more elaborate and include the right to an administrative hearing to resolve

disputed factual questions; intermediate efforts to resolve the appeal; and a recommended decision by an administrative law judge before review by the Board. 25 C.F.R. Part 900, subpart L. These regulations not only implement Congress's intent, but also fulfill the BIA's obligation to provide due process to Indian nations adversely affected by agency decisions.

Further, administrative appeals allow the Department of the Interior and its boards and agencies to apply their expertise in formulating and implementing federal policy on Indian affairs and in clarifying the law governing the United States' relations with Indian nations. Principal Deputy Assistant Secretary Roberts' attempted delegation would contravene Congress's intent by bypassing federal regulations designed to afford due process and by depriving the Department and this Board of the opportunity to bring to bear their expertise. For these reasons, the delegation should not be given legal effect and the IBIA should exercise jurisdiction over this appeal.

F. Roberts' attempted delegation should not be given effect because his exercise of authority is not subject to any "intelligible principle" that defines and constrains such power. Requiring administrative officers to conform the exercise of their delegation authority to standards and principles is necessary to afford due process to the Cayuga Nation and other Nations, tribes and individuals whose rights are impacted by administrative decision-making. Delegation of administrative power must be limited by discernable standards. *See Cudahy Packing Co. of Louisiana v. Holland,* 315 U.S. 357 (1942). The "intelligible principle" requirement applies not only to congressional delegations of legislative power to federal agencies but also subdelegations within an agency. *See United States v. Touby,* 710 F. Supp. 551, 559 (D. New Jersey 1989), *aff'd* 909 F. 2d 759, *aff'd* 500 U.S. 160 (1991) ("Further, if the delegation does not comply with the 'intelligible principles' test, then the subdelegation must fail as well.");

see also United States v. Gordon, 580 F. 2d 827, 840, n. 6 (5th Cir. 1978), *cert. denied,* 439 U.S. 1051 (1978) (upholding delegation of authority from the Attorney General to the Drug Enforcement Administration to permanently list controlled substances because the DEA "must act pursuant to the same standards" as Congress required of the Attorney General.)

The intelligible principle requirement has particular force in Indian affairs, where the Supreme Court has imposed a special duty on federal agencies "to deal fairly with Indians." *Morton v. Ruiz,* 415 U.S. 199, 236 (1974). In *Morton v. Ruiz,* the Supreme Court affirmed that the legitimate expectations of Indians to be treated fairly by the BIA cannot be contravened by "ad hoc determination[s]." *Id.* Inherent in that notion is the principle that intelligible standards must govern agency decisions, and that Indian nations must have adequate notice of the standards.

The attempted delegation here was made with no notice whatsoever to petitioners and was based on no discernible standards. *See Exh. B.* It is exceedingly rare for the Principal Deputy Assistant Secretary to make initial determinations about federal recognition or ISDEAA contracts. Neither the delegation itself, nor any published policy or rule of the BIA, provides a discernable standard that would establish why such a role was warranted here or that would distinguish justified delegations from unjustified delegations. The only rationales for delegation provided here were (1) the existence of a dispute within the Cayuga Nation about its form of government and (2) the fact that an "extensive" administrative record had been compiled. *Id.* Neither suffices to constitute an "intelligible principle." If the first rationale justified making recognition decisions final without appeal to the IBIA, virtually every Indian nation with a leadership dispute would be deprived of the right of administrative review. As to the second rationale, every administrative decision is based on written documents in an administrative

record, and here the parties were given only 27 days (spanning two federal holidays) to submit briefs and supporting material for the record. No hearing was held, though one side in the dispute – the Halftown Council – had availed itself of multiple ex parte meetings with the Regional Director prior to the decision. There is no evidence whatsoever that the record here was "extensive," much less so extensive as to justify the exceedingly rare delegation of authority attempted.

STATEMENT OF REASONS FOR APPEAL

I. The Eastern Regional Director's Decision Was Arbitrary and Capricious

A. Mr. Maytubby acknowledged that the electoral process he approved for the Cayuga Nation would violate federal law on tribal elections in at least several ways. *See Exh. A* at 8 (Maytubby pointing out the "sharp contrast" between the secret list he approved and the requirements of 25 C.F.R. part 81 regarding transparency of "eligible voter lists"); *id.* at 11 (Maytubby acknowledging that "the language used in the statement of support documents is not neutral, clearly favoring the Halftown Council"); *id.* at 5 (Maytubby noting that the process precluded anonymous "voting" and required participants to identify themselves in connection with the views they expressed).

B. Mr. Maytubby acknowledged that the process he approved had multiple deficiencies identified by two independent experts in voting and public opinion polling. These experts deemed the process approved by Mr. Maytubby "a deeply flawed method of assessment [of Cayuga citizens' views] from which no information may be confidently gathered." *Exh. E* at ¶ 10. No countervailing expert evidence was provided; Mr. Maytubby simply discounted the experts' views.

C. Mr. Maytubby found that the faction pushing the process he approved sent cash payments to tribal citizens just prior to asking for their signed statements of support. *See Exh. A* at 12 ("[c]hecks were sent out on June 15… prior to distribution of the statements of support on July 6.").

D. Mr. Maytubby acknowledged that both of the Nation's Clan Mothers, who have since time immemorial been charged with appointing, overseeing and removing Council members, opposed the process and the changes it purported to make relative to Clan leadership. Approval of the statement of support process cannot be squared with the Clan Mothers' well-established role: either they retain the authority to represent the views of their clan members in choosing leaders for Council, or that authority is stripped away in favor of using a mail-in survey to choose leaders for Council.

E. Mr. Maytubby reversed existing federal policy on supporting mail-in surveys as a means of Cayuga governance without providing any evidence whatsoever – much less substantial evidence – to justify such a reversal.

F. Mr. Maytubby's interpretation of the applicable Cayuga Nation law was counter to the evidence before him regarding the meaning and content of such law.

II. The Eastern Regional Director's Decision was Contrary to Law and Violated the Due Process Rights of the Citizens of the Cayuga Nation

A. While federal law guarantees that each Indian Nation may choose its own form of government, Mr. Maytubby's decision stated that the Cayuga Nation's failure to accept a "plebiscite" as a means of choosing leaders would violate individual Cayuga citizens' "fundamental human right[s]." *See Exh. A* at 7 and 8 (defining a plebiscite as a "vote" and stating that "a plebiscite must be a valid mechanism by which a body politic may decide matters of governance"). Cayuga law provides for citizens to choose their governmental representatives

through their clans, not through a vote or "plebiscite," and the federal government may not intrude upon this time-honored sovereign process.

B. Mr. Maytubby's bias violated the Nation's right to due process. Far from being a neutral decision-maker, Maytubby prejudged the viability of the campaign of support process and secretly colluded with the Halftown faction while excluding Nation leaders then recognized by the United States. Four months before requesting briefing from both sides on the appropriateness of the campaign of support process under Cayuga law, Mr. Maytubby stated in writing that he "believe[d] the process to be viable" as a means of choosing Cayuga Nation leaders. *See Exh. C* at 1.

Prior to his decision, and for a period of at least six months, Mr. Maytubby conducted ex parte meetings and communications with the Halftown faction and neither notified nor consulted with other Cayuga leaders, including Clan Mothers and Chiefs then recognized by the United States. Mr. Maytubby never responded to Appellants' written request of July 1, 2016, for more information about his ex parte meetings and his stated support for the mail-in survey process.

Following completion of the campaign of support, Mr. Maytubby authorized BIA personnel to conduct a clandestine trip to Cayuga territory at the invitation of the Halftown Group to observe documents related to the process, again neither notifying then-recognized Cayuga leaders, including Clan Mothers and Chiefs, nor inviting them to participate. And upon information and belief, BIA funds from existing ISDEAA contracts were expended on salary for Halftown faction employees who promoted the faction's efforts and oversaw the controversial "statement of support" process.

RELIEF SOUGHT

For the foregoing reasons, Appellants request that the Board:

1. Vacate Regional Director Maytubby's decision recognizing the Halftown Group as the lawful government of the Cayuga Nation for purposes of its relationship with the United States.

2. Vacate Regional Director Maytubby's decision declining to award an ISDEAA contract to Appellants on behalf of the Cayuga Nation.

3. Direct that Regional Director Maytubby recuse himself from any further decision-making regarding the Cayuga Nation

4. All other relief the Board deems proper.

Dated: January 13, 2017

By: _____

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