UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAYUGA NATION, *et al.*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 17-1923 (CKK)
RYAN ZINKE, *et al*.	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF
THEIR MOTION TO DISMISS

I. INTRODUCTION

Defendants Ryan Zinke, in his official capacity as Secretary of the Interior; Michael Black, in his official capacity as Acting Assistant Secretary – Indian Affairs and in his individual capacity; Bruce Maytubby, in his official capacity as Eastern Regional Director, Bureau of Indian Affairs, United States Department of the Interior; Weldon "Bruce" Loudermilk, in his official capacity of Director, Bureau of Indian Affairs, United States Department of the Interior; United States Department of the Interior; and the Bureau of Indian Affairs, ("Defendants" or "Federal Defendants"), by and through undersigned counsel, respectfully submit this Reply in support of their Motion to Dismiss this case.

Plaintiffs in this case are an entity calling itself the Cayuga Nation, which claims to be the rightful leadership of the Cayuga Nation of New York, and its purported tribal officials. Plaintiffs have brought various Administrative Procedure Act and constitutional challenges to the Department of the Interior's July 13, 2017 final agency decision to recognize Plaintiffs' rival faction as the proper leadership of the Nation. The July decision was issued by Michael Black,

who Plaintiffs have named in both his official and individual capacity. Complaint ¶ 17. At the time of the July decision, Mr. Black was the Department of the Interior official exercising the delegable authority of the Office of the Assistant Secretary – Indian Affairs pursuant to the Vacancies Reform Act, 5 U.S.C. § 3341 *et seq*. At no point during the pendency of Plaintiffs' administrative appeals process was Mr. Black involved in the case in anything other than his official capacity. Mr. Black has since been reassigned to the Department of the Interior's Bureau of Reclamation. Black Declaration ¶ 1.

II. ARGUMENT

A. Plaintiffs fail to support their claim against Mr. Black in his individual capacity.

In a case cited by Plaintiffs, the Supreme Court has clearly stated the test for whether a suit is against an individual or the government: "a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,'" *Dugan v. Rank*, 372 US 609, 620 (1963); quoting *Land v. Dollar*, 330 US 731, 738 (1947). Plaintiffs are asking the court to issue an injunction that would "interfere with the public administration." The fact that plaintiffs say they seek "a declaratory judgment against Defendant Black in his individual capacity that he violated Plaintiffs' constitutional rights to a neutral and unbiased decision-maker . . ., Response in Opposition ("Pl. Opp") at 4, does not alter the fact that all the components of relief sought by Plaintiffs in their complaint would be obtained from the BIA, not from Mr. Black.

In support of their "individual capacity claim," Plaintiffs point to several ways that Black harmed them: by -- participating in the proceeding before the BIA Regional Director that resulted in the December 2016 BIA Decision, and subsequently reviewing and affirming that Decision on appeal as the Acting Assistant Secretary for Indian Affairs within the Department of

the Interior. Complaint ¶ ¶ 151-165. Specifically, the Complaint alleges that Defendant Black received the briefs of the Halftown Group and the Plaintiffs that addressed the validity of the mail-in campaign engineered by the Halftown Group and the BIA seeking to replace the Cayuga Nation government; that he advised the BIA Director as "Special Advisor" about the delegation of authority to make the Regional Director's decision final agency action; that he participated as a "Special Advisor" in the deliberations that led to the Regional Director's decision; that he withdrew the delegation and assumed jurisdiction over the appeal of the Regional Director's decision; and that he affirmed that decision on July 13, 2017. Complaint ¶¶ 155-164. *See also* Pl. Opp. at 3-4. Plainly, all the actions identified by plaintiffs were taken by Black in exercise of his official duties.

The cases cited by Plaintiffs do not support their arguments. *See* Pl. Opp. at 5. In *Pollack v. Hogan*, the plaintiff sued defendants in their official capacity. The point of the ruling is that, because the actions of the government officer were ultra vires, they were not actions of the sovereign, so sovereign immunity did not bar the suit. The case says nothing about suits against officials in their individual capacity. In *Dugan v. Rank,* the plaintiff brought suit against the federal government and against BOR individuals in their individual capacities. The Court directed the dismissal of the individual capacity claims, as being in fact claims against the U.S. *Larson* has language particularly harmful to plaintiffs' theory: "If [an officer] is exercising [delegated power] the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented." 337 U.S. 682, 693 (1949 - not, as stated by plaintiffs, 1921.) Plaintiffs cite to *Abou-Hussein v. Mabus*, claiming that the case is distinguishable from Plaintiffs' individual capacity claim against Defendant Black. Pl. Opp. at 6. However, it is undisputed that, in this matter, Plaintiff requests this Court to provide "a declaratory judgment

against Defendant Black in his individual capacity" because of an alleged violation of Plaintiffs' constitutional rights," Pl. Opp. at 4. Such equitable relief cannot be obtained from a defendant sued in his individual capacity. *See Hatfill v. Gonzales*, 519 F.Supp.2d 13, 25-27 (D.D.C. 2007); *Brancaccio v. Reno*, 964 F. Supp. 1, 2 n.4 (D.D.C. 1997) (plaintiff failed to state a claim against federal officials in their individual capacities where allegations made against them referred to actions that could only be performed by the defendants in their official capacities and where plaintiff requested injunctive relief which could only be performed by defendants in their official capacities); *see also Simpkins v.District of Columbia Government*, 108 F.3d 366, 368 (D.C. Cir.1997) (A Bivens suit is an action against a federal officer in an individual capacity, seeking damages for violations of the plaintiff's constitutional rights.).

B. Plaintiffs did not allege, and have not shown, a property interest entitling them to constitutional guarantees of due process.

Plaintiffs state that they have an alleged "property interest protected by the Due Process Clause of the Fifth Amendment." Pl. Opp. at 7. Plaintiffs provide no cite to support that statement, and it is not true. At no point in their complaint do the plaintiffs identify any property interest. The word 'property' appears once, where Plaintiffs quote the Constitution. In their Complaint, the Plaintiffs elaborate on their theory of the denial of due process, but never do they explain their property interest. In Plaintiffs' opposition, the sole alleged "property interest" is the right of a tribal government to receive ISDEAA funding: "by recognizing the Halftown Group as the government of the Cayuga Nation for purposes of such a federal contract . . . the Defendants have deprived Plaintiffs of this property interest appurtenant to the Government-to-Government relationship. Plaintiffs are entitled to due process protections against that deprivation." Pl. Opp. at 8. However, individuals who serve as any tribe's governing body have no "constitutionally cognizable property interest" in the ISDEAA funding. The benefits of that

money flow to the tribe as a whole; plaintiffs, as members of the Tribe, have exactly the same interest in those funds as they would have if they were the recognized government.

C. Plaintiffs failed to identify a cognizable property interest

"As an *initial step* for both substantive and procedural due process claims, however, plaintiffs must allege that the defendant deprived them of a constitutionally cognizable liberty or property interest. *See Washington v. Glucksberg*, 521 U.S. 702, 720–22, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (explaining that the Supreme Court's "established method of substantive-due-process analysis" creates a "*threshold requirement* ... that a challenged state action implicate a fundamental right");" *Doe v. District of Columbia*, 206 F. Supp. 3d 583 (D.D.C. 2016)(Porter's emphasis).

"In order to make out a violation of due process, the plaintiff must show the Government deprived her of a "liberty or property interest" to which she had a "legitimate claim of entitlement," and that "the procedures attendant upon that deprivation were constitutionally [in]sufficient." *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). A "cognizable liberty or property interest," *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012) (per curiam), is essential because "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement," *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983); *Roberts v. U.S.*, 741 F.3d 152, 161 (D.C. Cir. 2014).

"Before reaching the question of whether the various state actors violated plaintiff's Fourteenth Amendment due process rights, the court must resolve the threshold question of whether plaintiff had a protected property interest in continued employment with the DOC." *See New Castle–Gunning Bedford Educ. Ass'n v. Board of Educ.*, 421 F.Supp. 960, 963 (D. Del. 1976). *Doherty v. Del*. 2005 WL 735557 (D. Del. 2005)(unreported).

1. Assuming arguendo a property interest, Plaintiffs have failed to establish a denial of due process.

Plaintiffs point to the undisputed fact that Mike Black served in three positions during the timeframe of the Department's decision process leading to the recognition of the Halftown council at Cayuga. Mr. Black was Director of the BIA, then special counselor to the Director of the BIA, then Acting Assistant Secretary of the Interior. *See* Black Decl. ¶ 1. These changes in assignment had nothing to do with the Cayuga matter; they were based on the needs of the organizational agency and permissible actions by the Department, carried out in the ordinary course of its federal functions. Each of the position held by Mr. Black carried responsibilities for oversight of activities in the BIA. An un-related departmental staffing change placed Mr. Black in a supervisory position over Regional Director Maytubby (in Black's role as Director), and then in a position to decide an appeal of the RD's decision as Acting AS-IA. Mr. Black's involvement alone provides no support for the proposition with there is was anything improper about the decisions at issue in this matter. *States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

The plaintiffs do not allege that they were not accorded all the process rights provided to them by 25 CFR part 2. It is undisputed that the Regional director, in making his initial decision, invited and received briefs and answering briefs from the parties; likewise, when considering Plaintiffs' appeal, the AS-IA invited, and the parties submitted, briefs and answering briefs. Accordingly, the plaintiffs were not denied procedural due process.

As the Supreme Court held in *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983), "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to

which the individual has a legitimate claim of entitlement." *See also Brandon v. District of Columbia Board of Parole*, 823 F.2d 644, 648 (D.C. Cir. 1987) ("As other circuits have found, the mere fact that the government has established certain procedures does not mean that the procedures thereby become substantive . . . interests entitled to federal constitutional protection under the Due Process Clause.")(citations omitted).

Lastly, Plaintiffs argue that by recognizing the Halftown Group as the government of the Cayuga Nation for purposes of such a federal contract, over the strenuous objections of the Plaintiffs, the Defendants have deprived Plaintiffs of the property interest appurtenant to the Government-to-Government relationship, and that they are entitled to due process protections against that deprivation. Pl. Opp. at 8. However, Plaintiffs still have not alleged how Defendant Black has violated any constitutional rights of Plaintiffs. Plaintiffs allege that a decision-maker who participates both in deciding a matter and in appellate review of that decision violates the constitutional principle of due process. Pl. Opp. at 9. Mr. Black played no role in the analysis of this dispute. Black Decl. ¶ 6. The Regional Director worked closely with his staff and two attorneys in the office of the Solicitor in crafting his decision. *Id*. A different attorney within the Office of the Solicitor conducted the analysis of the plaintiffs' appeal to the AS-IA, and drafted the decision document approved and signed by AS-IA. Plaintiffs fail to state a Due Process claim, having failed to identify either a constitutionally cognizable liberty or property interest of which they have been deprived, or a process or procedure which was due them and denied. Even if some violation could be cobbled together from Plaintiffs' allegations to establish Defendant Black denied them of some Constitutional right, the Plaintiffs clearly have neither alleged nor established that that right was so clearly established that Plaintiffs' claims could withstand the defense of qualified immunity.

CONCLUSION

Wherefore, for the reasons set forth herein, Plaintiffs' claims as to Defendant Michael Black in his individual capacity should be dismissed.

Respectfully submitted,

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