UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

The Cayuga Nation, by its Council of Chiefs and Clan Mothers; Clan Mother PAMELA TALLCHIEF; Clan Mother BRENDA BENNETT; Sachem Chief SAMUEL GEORGE; Sachem Chief WILLIAM JACOBS; Representative AL GEORGE; Representative KARL HILL; Representative MARTIN LAY; Representative TYLER SENECA, Plaintiffs, vs. The Honorable RYAN ZINKE, in his official capacity as Secretary of the Interior, United States Department of the Interior; JOHN TAHSUDA III, in his official capacity as Acting Assistant Secretary – Indian Affairs; MICHAEL BLACK, in his individual capacity; BRUCE MAYTUBBY, in his official capacity as Eastern Regional Director, Bureau of Indian Affairs; BRYAN RICE, in his official capacity as Director, Bureau of Indian Affairs; UNITED STATES DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS, Defendants, THE CAYUGA NATION COUNCIL, Defendant-Intervenor.	Civil Action No.: 17-cv-01923-CKK

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Federal Defendants and Defendant-Intervenors Cayuga Nation Council (together, "Defendants") seek to recast this action as a frivolous challenge to a sensible resolution to years of governmental turmoil and gridlock at the Cayuga Nation, embraced by Cayuga citizens to end a campaign of violence and intimidation carried out by the Plaintiffs. That is patently false.[1] Rather, this case is about whether federal law allows the Bureau of Indian Affairs ("BIA") to secretly collude with one faction of Cayuga citizens to eviscerate traditional governmental structures of the Cayuga Nation and to anoint themselves as leaders based on a flawed and unreliable mail in survey. Because the decision of Federal Defendants to recognize the Halftown Group is causing ongoing and severe harm to the Plaintiffs, because such harm outweighs any injury to the Federal Defendants and Defendant-Intervenor; and because Plaintiffs have shown meritorious claims of violations of the Administrative Procedures Act and the Constitution, the motion should be granted.

ARGUMENT

I. Plaintiffs Have Shown a Likelihood of Success on the Merits

A. Federal Defendants' Imposition of a Plebiscite Requirement (Count I)

Plaintiffs have shown they are likely to succeed on the merits of their claim that Defendant Maytubby violated federal law by concluding that a plebiscite must be a valid means for the Cayuga Nation to choose its leaders. ECF No. 22 at 4-9. Defendants' opposition to this claim relies on a

[1] Defendant-Intervenors' allegations of violence against Plaintiffs are, as ever, wholly unsubstantiated. *See, e.g., Cayuga Nation v. Jacobs*, 986 N.Y.S. 2d 791, 794 (N.Y. Sup. Ct 2014) ("Notably, there is a dearth of allegations regarding any direct involvement by any of the [Plaintiffs here] at any of the [alleged] incidents [of violence at Nation properties].") This Court should disregard the Declaration of Clint Halftown, filed by Defendant-Intervenors in support of their opposition to this motion, because Defendant-Intervenors have made no motion to supplement the administrative record. Further, Mr. Halftown's averments about violence and forcible seizures of property fail to tie any of the Plaintiffs here to any act of violence. *See, e.g.* Halftown Declaration, ECF No. 31-1 at ¶ 7 (alleging unnamed "Jacobs faction supporters" committed acts of violence).

straw man argument, i.e. that Plaintiffs purportedly claim "the Clan Mothers alone may choose tribal leadership, irrespective of the wishes of Cayuga citizens." ECF No. 32 at 15; *see also* ECF No. 31 at 8.[2] The Court need not consider an argument Plaintiffs do not make. Plaintiffs argue that federal law preserves the right of Indian nations to determine their own forms of government, and that the consent of the governed may be expressed through processes other than a plebiscite. ECF No. 22 at 4-8 (providing examples of tribal and non-tribal contexts in which plebiscites are not valid mechanisms for governmental decision-making). Defendant Maytubby's Decision unlawfully held that "a plebiscite must be a valid mechanism by which a body politic [like the Cayuga Nation] may decide matters of governance." AR 001145,[3] Decision at 8. This holding conflicts with well-established federal Indian law, which confirms that plebiscites may be valid mechanisms in some tribal contexts while not valid in others. *See, e.g.*, *Hammond v. Jewell*, 139 F. Supp. 3d 1134, 1137–38 (E.D. Cal. 2015) ("determination of tribal leadership is quintessentially an intra-tribal matter"); *see also Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316, 327 (2008);

[2] Defendant-Intervenors, not joined by the BIA, further opine that "[t]he BIA used the term 'plebiscite'… only as shorthand." ECF No. 31 at 8, fn. 1. The relevance of this suggestion is unclear; in any event it is belied by the plain language of Defendant Maytubby's Decision, which includes a dictionary definition of plebiscite, AR 001590, Decision at 7, n. 2, and echoes his June 17 prejudgment: "A Cayuga Nation plebiscite via a statement of support process is valid in principle." AR 001591.

[3] Plaintiffs filed the subject motion and the Motion to Supplement the Administrative Record and Expedite Discovery prior to the Federal Defendants' filing of the AR. Upon review of Defendants' AR and AR Index, ECF Nos. 26 & 27, Plaintiffs have discovered certain errors and omissions separate and distinct from the omissions addressed in Plaintiffs' Motion to Supplement. Plaintiffs request the opportunity to confer with Defendants on a collaborative resolution of these deficiencies. In the event these deficiencies cannot be remedied collaboratively among the parties, Plaintiffs respectfully request the opportunity to bring such deficiencies to the attention of the Court.

ECF 22 at 15 (In "[t]he Nation's clan-based, deliberative process for choosing leaders…the voices of the people inform the Clan Mothers' determinations about leadership.")[4]

Defendant-Intervenors' reliance on *Ransom v. Babbitt*, 69 F. Supp. 2d 141 (D.D.C. 1999) is puzzling, as *Ransom* supports, rather than undermines, Plaintiffs' claims here. ECF No. 31 at 4, 5, 10. The tribal government in that case had well-established processes for holding elections and referenda. The governmental reform at issue in *Ransom* was a proposed constitution, and dispute arose over the precise circumstances under which the constitution could be deemed adopted. No tribal faction challenged the referendum process itself, which had been used by the Tribe for decades as a means of determining the will of the Mohawk people. *See, e.g., Ransom* at 147 ("[B]oth the Constitutional government and the Three Chiefs Government, despite their fundamental political disagreements, ha[ve] endorsed a joint resolution… assert[ing] that 'the governing bodies reaffirm that public referendums have historically been the voice of the people and their results are final and legally binding.'")

Citing *Ransom* for the principle that "the people of the tribe" have the ultimate right to choose their form of government, ECF No. 31 at 4, sheds no light on whether the BIA may, as a matter of law, hold that "a plebiscite must be a valid mechanism" for all tribes to choose their leaders; whether the BIA provided a reasoned basis for abruptly reversing its longstanding position that plebiscites are not used in Cayuga law; or whether the mail-in survey process – like the well-established public referenda used by the Mohawks – could accurately gauge the will of the Cayuga people. Indeed, in *Ransom* this Court found the BIA's provision of federal funding to support constitutional reform within the Mohawk government ultimately undermined the Tribe's right of

[4] Defendant Black's Decision conceded the irreconcilability of a plebiscite with the Nation's traditional governing structures but upheld the plebiscite requirement as "limited" and temporary. AR 001559.

self-determination. *Ransom* at 154, 155 (citing BIA acknowledgement that "'[w]e do have a collateral interest [in this dispute] as the Constitution and tribal court were developed under Bureau funding," and holding that "[f]or [the BIA and other federal defendants]… to actively seek to institute the form of government that they prefer, turns th[e] notion [of tribal self-determination] on its head."). Plaintiffs are likely to prevail on this claim.

B. Arbitrary Reversal of Longstanding Policy (Count II)

Plaintiffs have shown that the longstanding policy of the BIA, Department of the Interior ("DOI") and the Interior Board of Indian Appeals ("IBIA") recognized the authority of the Cayuga Nation Clan Mothers to appoint members of the Council of Chiefs, and that the agencies failed to provide a reasoned basis for their abrupt reversal of that policy and embrace of the mail-in survey campaign. ECF No. 22 at 9-13. Defendants' contention that no such federal policy existed is meritless and should be rejected. Likewise, this Court should reject Defendants' vague assurances that the decisionmakers provided reasoned bases for their reversal.

At least by 1997, the BIA had accepted the Nation's position that "Cayuga Chiefs and Representatives are… accountable to the Cayuga people… according to traditional Cayuga law and the clan system, rather than Anglo concepts of pure majority rule." AR 000895. Under the traditional Haudenosaunee system of government employed by the Cayuga Nation, "each clan appoints a Clan Mother, who in turn appoints an individual to serve as Chief." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F. 3d 874, 877 (1993), AR 000862. In 2005, BIA Regional Director Franklin Keel articulated this federal policy in response to an effort by members of the Halftown Group to secure BIA support to conduct an election in violation of Cayuga law:

> "[L]eadership is comprised of a Nation council representing the clans of the Cayuga Nation. These leaders are not elected, but are appointed by their respective clanmothers in accordance with the customs of the Cayuga Nation. It would not be appropriate for the Bureau of Indian Affairs to encourage or assist members of the

> Cayuga Nation in changing the form of government that the Cayuga Nation operates under and we will not engage in such activity."

AR 000859.

The federal policy supporting the Cayuga Nation's traditional governmental structure and rejecting individual Cayugas' efforts to eviscerate this structure through BIA-supported electoral or survey processes has been consistently reaffirmed by the BIA, DOI, and the IBIA. *See, e.g., George v. Eastern Regional Director,* 49 IBIA 164, 165 (affirming the traditional clan-based methods of determining leadership and reaching consensus); AR 001018 (BIA holding "neither party has ever denied the authority of the Clan Mothers, under ancient Haudenosaunee custom, to choose clan representatives who sit on the Nation's council"); AR 000797 (BIA rejecting request for support of mail-in survey campaign and stating that "we are aware of no applicable authority that provides for [BIA] verification of election results [at Cayuga] or allows BIA to provide an independent confirmation of the results of a [mail-in survey process]").[5]

The APA's "reasoned basis" requirement means more than simply "a basis." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014). In arguing that the decisionmakers did provide "reasoning," Defendants offer only the circular argument that if the mail-in survey showed majority support for the Halftown Group, that means the Cayuga people support the Halftown Group, which requires the BIA to accept the survey as valid. *See* ECF No. 22 at 21-22. Under this purported "reasoning," any pseudo-electoral process would be valid and binding on the BIA, no matter how legally or procedurally flawed. "An agency may not provide conclusory statements in place of genuine reasoning." *Hensley v. United States*, No. CV 16-1389, 2018 WL 1036361, at *8

[5] Defendants incorrectly state that Defendant Maytubby "explained that he only authorized the use of the Initiative in order to ascertain Cayuga leadership after recognizing that the 2006 Council had dissolved." Defendant Maytubby did not say this. *See* AR 0001141 (Maytubby giving two reasons for the Decision: that "the 2006 Council… did not submit a proposal" and that "one year and ten months [have passed] since the [2015] Interim Decision" recognizing the 2006 Council).

(D.D.C. Feb. 22, 2018) (citing *AT & T Wireless Servs., Inc. v. FCC*, 270 F.3d 959, 968 (D.C. Cir. 2001)).

Likewise, Defendants vainly argue that Defendant Maytubby only "authorized" the mail-in survey campaign after "accepting briefing from Plaintiffs" and "affording Plaintiffs several months to make their case to Cayuga citizens." ECF No. 32 at 20. It is unclear what Defendants mean by "authorize": Defendant Maytubby "agreed[] [the survey] would be viable" on the same day he first informed Plaintiffs of it. AR 000844. Just three days later, he urged haste "because the [mail-in] process described in my letter… is going to be getting underway." ECF No. 22-1, Ex. Z. He never responded to Plaintiffs' request to suspend the survey campaign so that alternatives could be explored and full briefing could be provided. AR 000846-000884. And months before his December 15, 2016 Decision, Defendant Maytubby provided the Halftown Group with federal resources and federal "verification" of the survey results. AR 000953. Because Defendants provide no reasoned basis for this dramatic reversal in federal policy, Plaintiffs are likely to succeed on the merits of their claim.

C. No Rational Basis for Conclusion Mail-in Survey was Valid (Count III)

Federal Defendants have not rebutted Plaintiffs' argument they are likely to succeed on their claim there was no rational basis for Federal Defendants' conclusion that the mail-in survey accurately reflected the will of the Cayuga citizens. Defendants reached that determination in the face of uncontradicted expert testimony concluding the survey was a "deeply flawed method of assessment from which no information may be confidently gathered." AR 001120. Defendant Maytubby rejected the expert report wholesale based on his belief that the Cayuga citizens were capable of forming opinions, and that they could be trusted to understand the choice, despite undisputed biases and inaccuracies in the survey. AR 001149-001150. Defendant Black affirmed

this finding by simply summarizing Defendant Maytubby's conclusions. AR 001569. These are conclusions, not reasons, and do not pass muster under the APA.

Federal Defendants defend these conclusions by analogizing the decisionmakers' role here to that of a jury. ECF No. 32 at 21 (citing cases from the Eighth and Sixth Circuits on the right of juries to accept or reject expert testimony). That is not the law. Rather, the agency must "respond meaningfully to objections raised by a party," and the failure to do so renders the resulting decision arbitrary and capricious. *Hensley v. United States,* No.16-1389, 2018 WL 1036361 at *5 (D.D.C. February 22, 2018). "[C]onclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standard of judicial review." *AT & T Wireless Servs., Inc. v. FCC,* 270 F. 3d 959, 968 (D.C. Cir. 2001).

Further, Federal Defendants possess no special competence entitling them to deference on the accuracy of the sui generis mail-in survey process. By Defendants' own admission, the survey process incorporated none of the procedural safeguards required by 25 C.F.R. Part 81 for tribal elections overseen by the BIA. *See* ECF 22 at 14. Nor do Defendants cite any instance in which such a process has been used by an Indian tribe or overseen by the BIA.[6]

Defendants failed to undertake any reasoned analysis of the problems identified by Plaintiffs' experts, who found that "[i]n sum, based on both our own work in survey research and on rigorous, peer-reviewed scholarship in this field, our professional opinion is that no valid conclusions may be drawn from the support statement survey." AR 001120. A meaningful response

[6] Defendants' claim that a "similar" process was once used by the Oneida Indian Nation should not be credited. ECF No. 31 at 8. *See* AR 001110 (Oneida process was conducted pursuant to prior agreement of both tribal governmental factions; was overseen by a neutral third party, the League of Women Voters; and provided for prior review of an agreement on voting rolls by both sides, among other procedural safeguards). If relevant at all, Oneida illustrates the limits of the BIA's expertise in this area. *See* AR 001110 at n. 12 (DOI denying Oneida request that BIA cure balloting discrepancies because "[t]he BIA has no special expertise in issues of ballot integrity that would justify it in second-guessing the League [of Women Voters] determination on those issues.")

to the experts' report would have acknowledged that, cumulatively, the deficiencies and flaws in the survey rendered it completely unreliable as a measure of opinion about governance at the Cayuga Nation. Plaintiffs are likely to prevail on the merits of this claim.

D. Violation of Due Process (Count IV)

Plaintiffs have also shown they are likely to succeed on the merits of their due process claims, including prejudgment of the mail-in survey process as "viable;" collusion between the BIA and one faction of the Nation's federally recognized government to the exclusion of other federally-recognized leaders; and administrative appeal review by an official who also participated in the decision. ECF No. 22 at 17-24. Defendants fail to show Plaintiffs are unlikely to succeed on these claims.

Plaintiffs first learned of Defendant-Intervenors' proposed mail-in survey process and of Defendant Maytubby's "agree[ment]" with the Halftown Group that "it would be… viable" on the same day: June 17, 2016. The record establishes that within days of receiving this notice, Plaintiffs:

> Objected to Defendant Maytubby's prejudgment of the process as "viable" for the Cayuga Nation, ECF 22-1, Ex. U;
>
> Requested complete information from Defendant Maytubby about the consultations with the Halftown Group he referenced in his June 17 letter, pursuant to which he had made his viability determination, *Id*.;
>
> Provided detailed feedback to Defendant Maytubby and Defendant-Intervenors regarding flaws in the mail-in survey process, AR 000846-000884;
>
> Called for Defendant Maytubby to recuse himself from further consideration of the campaign, given his months-long ex parte communications with the Halftown Group and prejudgment of the survey campaign, AR 000847, AR 000884;
>
> Asked Defendant Maytubby and the BIA to hold off on the mail in survey process until the agency could consider Plaintiffs' arguments regarding the need for recusal and the conflicts between the proposed process on one hand and Cayuga law and longstanding BIA and DOI policy, on the other, AR 000884;

> Proposed three (3) alternatives to the mail-in survey process: (1) convening of the Grand Council of the Haudenosaunee, of which the Cayuga Nation is a member, to "provid[e] support for all factions in this leadership dispute to resolve their differences"; (2) convening of a meeting in the Nation's schoolhouse, open to all Cayuga citizens, for the Halftown faction and Plaintiffs to discuss resolution of their differences; (3) convening of a separate meeting of the then-recognized 2006 Council "for the limited purpose of working to secure [a unified] ISDA grant," AR 000848, 000882, 000883.

Documents in the AR establish these facts. This Court should reject Defendants' repeated and unsupported statements contradicting this record evidence. *See, e.g.,* ECF No. 32 at 4 ("the Record does not demonstrate that Plaintiffs either collaborated with the Halftown Council on the Initiative or otherwise proposed any other means of resolving the dispute"); ECF No. 31 at 11 (Plaintiffs "never sought Acting Director Maytubby's recusal or disqualification and never lodged an accusation of bias or prejudgment"); ECF No. 32 at 4 ("the Regional Director clarified [in his June 17 letter] that the BIA had not definitively decided to recognize the results of an Initiative process").[7] *See also* ECF No. 32 at 24, n. 5 (arguing the fact that Defendant Maytubby "explicitly sought alternatives" to the mail in survey process demonstrates his "open mind" about that process; failing to note that Defendant Maytubby never acknowledged Plaintiffs' proposed alternatives, much less pursued or provided a response to them).

As the record demonstrates, Plaintiffs received no response whatsoever from the BIA or Defendant Maytubby as to any objection or proposal Plaintiffs made. That is because Defendant Maytubby had already made up his mind about the mail-in survey process: it was "viable" and the federal government would support it irrespective of Plaintiffs' detailed concerns about the process

[7] The Court should likewise disregard Defendant-Intervenor's bald statement that "[i]t is not true that 'the Cayuga Nation has never used' processes akin to the campaign of support." ECF No. 31 at 8. Defendant-Intervenors do not provide this court – nor have they ever provided – an example of any such a process being used by the Nation. *Cf. Samuel George v. Eastern Regional Director*, 49 IBIA 164, 167 (2009); AR 001560 (Defendant Black acknowledging "it is true" that the Cayuga Nation has not previously used plebiscites to select leaders).

as proposed to be implemented and as a matter of Cayuga law. Plaintiffs are likely to succeed on their claims of collusion and prejudgment in violation of due process.

Likewise, Defendants fail to refute Plaintiffs' showing they are likely to prevail on the merits of their claim that Defendant Black lacked the requisite neutrality to adjudicate Plaintiffs' administrative appeal consistent with due process. As a threshold matter, the Declaration submitted by Defendant Black should be stricken to the extent it provides extra-record information and post-hoc argument regarding his involvement below.[8] ECF No. 32-1.

Plaintiffs argued in the IBIA and before Defendant Black that his review of Defendant Maytubby's Decision presented, at the least, the appearance of a conflict of interest, and that jurisdiction over Plaintiffs' appeal more properly lay with the IBIA. AR 001347-001362; AR 00145; compare ECF No. 32 at 25 (falsely stating "at no point have Plaintiffs challenged he Federal regulations under which the Assistant Secretary assumed jurisdiction over the appeal"); *see also* AR 0001356 (Defendant Black "participated in meetings, received written correspondence, and supervised BIA involvement in mediation between Mr. Halftown's group and" Plaintiffs prior to the challenged decisions); AR 001357-001358 (detailing Defendant Black's supervisory authority over Defendant Maytubby leading up to Defendant Maytubby's decision and Defendant Black's role in withdrawing the challenged delegation of authority purportedly rendering Maytubby's decision final agency action). For these reasons, Plaintiffs are likely to prevail on their due process claims.

[8] During this Court's February 12, 2018 telephone conference, Plaintiffs' counsel understood the Court to request that Defendant Black submit an affidavit on the contents of the Administrative Record. Defendant Black's Declaration goes far beyond that subject. ECF No. 32-1 at 1-2.

II. Plaintiffs Have Shown Irreparable Harm in the Absence of a Preliminary Injunction.

Federal Defendants argue that the timing of Plaintiffs' filing of the motion shows harm is not imminent and irreparable; that the higher standard for mandatory injunctions applies to Plaintiffs' motion; and that harm to the Plaintiffs is speculative because it depends on the actions of third parties over which Federal Defendants have no control. ECF No. 32 at 9-13. Defendant-Intervenors repeat the arguments that Plaintiffs should be subjected to the mandatory injunction standard and that there can be no harm because Federal Defendants have no control over third parties that rely on the recognition decision. ECF No. 31 at 6-7 and 14-15. Defendant-Intervenors' only new argument on irreparable harm is that Plaintiffs cannot claim harm to the Cayuga Nation because they are not its government. ECF No. 31 at 12-13. None of these arguments withstands scrutiny.

Federal Defendants argue that the modest lapse of time between the July 2017 decision of Defendant Black affirming the Defendant Maytubby's Decision and the filing of the Complaint and this Motion bars the issuance of preliminary relief. That argument should be rejected because delay in filing a motion for preliminary injunction is not dispositive of the question of imminent and irreparable harm, and in any event, Plaintiffs' delay is excusable. The length of delay is not the deciding factor, but rather the factual context in which the delay occurred. *Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 388, n. 15 (D. D.C. 2017). So, for example, when the plaintiff waits until the issue is moot before filing suit, delay weighs against preliminary injunctive relief. *Fund for Animals v. Frizzell*, 530 F. 2d 982 (D.C. Cir. 1975). Conversely, if the plaintiff seeks to resolve the dispute through the administrative process, delay alone cannot be the basis for denying preliminary injunctive relief. *Gordon v. Holder*, 632 F. 3d 722, 724-25 (D.C. Cir. 2011) (Denying relief based on delay alone would unfairly punish the plaintiff for "its persistent attempts to use the

administrative process to resolve its dispute. . . ."). Federal Defendants' argument would elevate delay to a dispositive criterion divorced from the factual context, contrary to the law of this Circuit.

The Plaintiffs had good reasons for the timing of the motion for preliminary injunction. The administrative record omitted key documents related to consultations between Halftown and BIA officials for eight months during the time the Halftown campaign was devised and planned. Plaintiffs sought to obtain such relevant evidence first by direct request to the BIA Regional Director and then through a Freedom of Information Act request. ECF 22-1, Ex. U. The Department of the Interior provided no responsive documents for nearly five months, and its dilatory disclosures in December 2017 and January 2018 provided an incomplete set of documents requiring extensive follow-up communications.

In addition, Plaintiffs justifiably postponed legal action while they pursued administrative remedies. As was their right, Plaintiffs sought review of Defendant Maytubby's Decision at the Interior Board of Indian Appeals. Federal Defendants strenuously resisted review by the IBIA, and the question of that agency's authority to review Defendant Maytubby's Decision was not resolved until Defendant Black retroactively withdrew delegation to Defendant Maytubby to render a final decision and assumed jurisdiction over Plaintiffs' appeal.[9] Following Defendant Black's affirmance of Defendant Maytubby's Decision, Plaintiffs sought review of that in the IBIA as well. The IBIA denied jurisdiction over that appeal in early August 2017. *Cayuga Nation v. Eastern Regional Director,* IBIA No. 17-025 (Aug. 2, 2017), ECF No. 22-1, Ex. CC. This Court has ruled that plaintiffs who avail themselves of administrative processes should not be punished by a finding that

[9] Defendant Black did not withdraw the delegation to the Regional Director and assume jurisdiction over the appeal because he was concerned about the lengthy duration of IBIA appeals, as Federal Defendants now claim. ECF No. 32 at 5. Rather, according to his assumption of jurisdiction, Black withdrew the purported delegation because "it was not necessary." ECF No. 22, Ex. Y. Post-hoc rationalizations should be disregarded.

delay arising from that process bars preliminary injunctive relief. *Gordon v. Holder*, 632 F. 3d at 724.

In addition, Defendant-Intervenors' action in New York State court to evict the Plaintiffs from Cayuga Nation properties and to permanently enjoin their access to them required Plaintiffs to devote scarce resources to defend against that retaliatory action. Contrary to Federal Defendants' suggestion, this motion was not filed in response to any "urging" by the State court (ECF No. 32 at 11), but rather to restore the status quo at Cayuga pending resolution of the merits of Plaintiffs' claims.

Both the Federal Defendants and the Defendant-Intervenors, in duplicative arguments, contend that the stricter standard for mandatory injunctions governs this motion. This argument ignores that this Circuit has abolished the distinction between mandatory and prohibitory injunctions in the APA context, because "the mandatory injunction has not yet been devised that could not be stated in prohibitory terms." *League of Women Voters of United States v. Newby*, 838 F. 3d 1, 7 (D.C. Cir. 2016) (internal citation and quotation marks omitted). Moreover, that argument mischaracterizes the preliminary relief Plaintiffs seek. Plaintiffs' motion seeks to restore and preserve the status quo regarding federal recognition of a government for the Cayuga Nation, and the Federal Defendants, in cooperation with Defendant-Intervenors, can comply with a preliminary injunction without taking affirmative steps. Federal Defendants would simply be restrained from recognizing the Halftown Group during the pendency of this action. Restoring the status quo ante would not sever or disrupt the government to government relationship between the Cayuga Nation and the United States, which is established by the Treaty of Canandaigua of 1794.

By contrast, the harm to Plaintiffs from the Federal Defendants' recognition decision is certain and substantial. That third parties, such as the EPA, state courts and federal courts, are

taking actions based on the recognition decision that impairs the governmental functions and responsibilities of the Plaintiffs do not render such harms speculative. It is irrelevant that Federal Defendants do not control the actions of third parties when the consequences of the challenged decisions directly harm the Plaintiffs. For example, on February 27, 2018, the U.S. District Court for the District of New Mexico granted the Halftown Group's Motion for Summary Judgment in the interpleader action in *Ramah Navajo Chapter v. Zinke*, No. 90 CV 957 JAP/KBM, and ordered that $113,004.15 in ISDEAA contract support costs settlement funds be disbursed to Halftown because "the BIA has definitively recognized [the Halftown Group] is the current governing body of the Nation and that Mr. Halftown is the recognized federal representative of the Nation." *Amended Final Summary Judgment*, Doc. 1603, February 28, 2018, attached as Ex. A.

Federal Defendants' argument that the Plaintiffs have not made out a case of constitutional violations that are per se irreparable also misses the mark. Plaintiffs do not make that argument, but rather argue that the due process violations led to impairment of other rights of Plaintiff, such as the right to self-government. Thus, the constitutional violation is but one among a suite of violations that cause harm that cannot be remedied absent an injunction.

Defendant-Intervenors' argument that Plaintiffs suffer no harm from the recognition of Halftown because Plaintiffs have no right to carry out governmental functions of the Cayuga Nation is similarly unavailing. That argument ignores two critical facts: the two Plaintiff Clan Mothers, who are the core of Cayuga governmental authority, continue to be recognized by the United States as Cayuga leaders; and two of the Plaintiffs were part of the last Cayuga government recognized the BIA from 2006 to 2016. Unlike the Halftown Group, these Plaintiffs are not self-appointed leaders acting outside the dictates of Cayuga law. Moreover, Defendant-Intervenors are estopped from arguing that the Plaintiff Clan Mothers lack governmental authority at Cayuga, because Halftown

has acknowledged the governmental authority of the Clan Mothers throughout this dispute. AR 001018 (referencing Decision of Eastern Regional Director Recognizing Cayuga Nation Council, August 9, 2011: "[N]either party has ever denied the authority of the Clan Mothers, under ancient Haudenosaunee custom, to choose clan representatives who sit on the Nation's Council.").

III. The Balancing of the Harms and Public Interest Favor Plaintiffs

Federal Defendants allege the following harm to be balanced against the demonstrated harm to the Plaintiffs: Federal Defendants will have to evaluate the effect of a preliminary injunction on the Cayuga ISDEAA contract and to re-evaluate unspecified "financial or other relationships the Nation has established over the past seven months." Federal Defendants also argue an injunction would "withhold significant Federal funding from the Nation's government and its citizens," although they do not identify any such funding source or amount.[10] And Federal Defendants claim they would have to suspend consideration of a "pending liquor ordinance" and application to transfer Nation land held in fee to the United States to hold in trust, both submitted by the Halftown Group. ECF No. 32 at 28-29.[11]

Federal Defendants' argument shows that they will in fact suffer no cognizable harm if a preliminary injunction is granted. Suspending applications for grant funds and requests for

[10] Federal Defendants claim they would be harmed by the fact that granting Plaintiffs' motion would require the Federal government to "either terminat[e] or suspen[d] the Nation's current ISDA contract." ECF No. 32 at 28. This harm is speculative and unsupported by the record or the extra-record evidence they provide. ECF No. 32-2.

[11] Federal Defendants also allege that a preliminary injunction would throw the Cayuga Nation back into "a state of perpetual uncertainty." ECF No. 32 at 29. In fact, it is the challenged decisions that have created intolerable uncertainty for the Nation. The Decisions' legal and practical effect is ambiguous and fraught with internal inconsistencies. *See* ECF No. 22, Ex. A at 10 ("Given the important role of the Clan Mothers, it is of concern to BIA that the Cayuga Nation Clan Mothers do not agree with [Halftown's] statement of support process and do not agree that the Council members that were named in the statement of support process are on the Council"). Plaintiffs have addressed this issue in their Memorandum of Points and Authorities in Support of the Motion for Preliminary Injunction and will not repeat that argument here. ECF No. 22 at 37.

approval of ordinances or fee-to-trust applications requires little effort or time. The modest administrative inconvenience of having to consider the effect of an injunction on the routine administration of federal programs does not impair or undermine any cognizable federal interest, and does not therefore, tip the balance in favor of denying a preliminary injunction. *See, e.g.*, *Hudson v. Am. Fed'n of Gov't Employees*, 281 F. Supp. 3d 11 (D.C.C. 2017) (any administrative inconvenience to defendant is outweighed by the hardship to plaintiff when the preliminary injunction would add only slightly to defendant's workload).

Defendant-Intervenors argue that, because it makes the same claim to governmental authority as the Plaintiffs, its harm from a preliminary injunction would outweigh harm to the Plaintiffs if a preliminary injunction is not granted. ECF No. 31 at 15-16. Defendant-Intervenors have it backwards. Precisely because this case involves contending factions for governmental power at Cayuga, restoration and maintenance of the status quo ante is necessary while this Court determines the legality of the BIA's decision to recognize one of those factions for contracting purposes. If this Court finds the BIA violated the APA and the Constitution, the harm to Plaintiffs during the interim period cannot be remedied. Preliminary relief is designed to prevent such harm.

Defendant-Intervenors repeat the argument of Federal Defendants that the Halftown Group would suffer substantial harm because an injunction would "impede many projects" of importance to the Cayuga citizenry that Mr. Halftown claims to control. ECF No. 31 at 16. Other than Halftown's application to convey land to the United States to hold in trust, Defendant-Intervenors identify no such projects, and do not explain how an injunction in effect during the consideration of the merits would impede them. A brief interruption in the BIA's consideration of the fee-to-trust application, which has been pending for 13 years, is not the kind of harm that outweighs harm to the

Plaintiffs, especially because the Halftown Group intervened primarily to expedite resolution of this case on the merits. ECF No. 17 at 10.

CONCLUSION

All parties likely share the goal of finding an enduring resolution to the governance dispute at the Cayuga Nation. Federal Defendants' rush to judgment in an arbitrary and fundamentally unfair process that violated Cayuga law is not the solution. Plaintiffs raise substantial and meritorious claims about the legality of the federal government's support for and approval of the Halftown Group's mail-in survey process. Restoring the status quo ante while those claims are considered will ensure that Plaintiffs' interest in a preserving a Cayuga government that functions under Cayuga law will no longer be impaired, and that further damage to the traditional Cayuga government will be avoided.

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Respectfully submitted,

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