UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAYUGA NATION, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 17-01923 (CKK)
	)	
RYAN ZINKE, *et al*.	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Federal Defendants, ("the Department"), by their undersigned attorneys, respectfully move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment in favor of Defendants on the grounds that no genuine issue as to any material fact exists and Defendants are entitled to judgment as a matter of law.

Respectfully Submitted,

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Plaintiffs,	)	
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Defendants.[1]	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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[1] Despite the Court's Order of March 27, 2018, dismissing claims against Mike Black in his individual capacity, Plaintiffs' Motion for Summary Judgment, filed May 24, 2018, identified "Mike Black in his individual capacity" as a defendant in this case.

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I. INTRODUCTION

This suit is an Administrative Procedure Act (APA) challenge to a decision by the Assistant Secretary – Indian Affairs (AS-IA Decision) recognizing one of two competing leadership factions as the governing council of the Cayuga Nation (Nation). Plaintiffs have moved for summary judgment, asking the court to vacate and remand the AS-IA's decision as arbitrary and capricious under the APA.

Plaintiffs have made no such showing. The AS-IA Decision, and the Bureau of Indian Affairs (BIA) Eastern Regional Director's (RD) decision which it affirmed, are carefully reasoned, weighing the evidence in the record and considering the applicable law. The court's APA review of agency decisions is deferential and the AS-IA Decision readily withstands APA scrutiny. The court should deny Plaintiffs' Motion for Summary Judgment (MSJ) and grant Defendant's Cross-Motion for Summary Judgment.

At the outset, Defendants Ryan Zinke and other Department of the Interior (Department) officials (collectively Federal Defendants) hereby incorporate by reference the factual background and legal arguments set out in Defendant-Intervenor Cayuga Nation Council's (Intervenor's) Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment. In compliance with this Court's Order Granting the Cayuga Nation Council's Motion to Intervene, Dkt. 28, Federal Defendants' shall accordingly not repeat arguments set forth in Intervenor's brief. Rather, Federal Defendants' Opposition and Cross Motion shall be limited to those factual and legal issues for which the United States has a unique perspective and interest.

II. FACTUAL BACKGROUND

The history of this dispute is discussed extensively in two Interior Board of Indian Appeals (IBIA) decisions: *Samuel George et al. v. Eastern Regional Director*, 49 IBIA 164 (2009), and *Cayuga Indian Nation v. Eastern Regional Director*. 58 IBIA 171 (2014). In short, the Nation's leadership split into factions in 2004, sparking over a decade of litigation and general uncertainty concerning the proper Cayuga leadership group with whom the United States could interact on a government-to-government basis.

In February 2015, then-Acting Eastern Regional BIA Director Tammie Poitra (Acting RD) temporarily recognized the Nation's most recent undisputed governmental body (2006 Council) for the purposes of implementing modifications to the Nation's existing Indian Self-Determination and Education Assistance Act (ISDA) contract. *See generally* AR-003216-24. The Acting RD accordingly declined a request from one of the Cayuga leadership factions that the Nation's citizenship determine its government through a "Campaign of Support" Initiative (Initiative). *Id.* at 003223. The Acting RD reasoned that it would be inappropriate for the BIA to render a decision that went beyond continuing to recognize the last constituted governing body – the 2006 Council – at that point in time. *Id.* However, the Acting RD emphasized the interim nature of the BIA's recognition of the 2006 Council, urged the Nation to resolve its dispute internally, and warned that in the event of changed circumstances as to what the Nation requested of the United States, the BIA might be required by law to make a determination of Cayuga leadership in the future. *Id.* at 003222-24.

Despite the Acting RD's concerns, the Nation did not establish a consensus governing body. On June 14, 2016, a Nation leadership faction headed by Clint Halftown (Halftown Council) requested BIA assistance in resolving the dispute pursuant to a "Statement of Support"

process (Initiative). *Id.* at 003246-61. The Halftown Council proposed to ask each adult Cayuga citizen (1) whether they agreed with a governance document describing the operation of the Cayuga government and the selection and removal process for its leaders; and (2) whether the Halftown Council was the Nation's governing body. *See generally id.* The request for technical assistance included legal analysis as to why the Initiative was viable under Cayuga law, listed detailed procedural safeguards for the Initiative, and requested BIA recognition of the Halftown Council as the Nation's leadership should a majority of the adult Cayuga citizens affirm both of the proposed questions. *Id.*

On June 17, 2016, three days after receiving the Initiative proposal, the RD contacted Plaintiffs in this case, a leadership faction led by William Jacobs (Jacobs Council). *Id.* at 003262-63. The RD informed the Jacobs Council of the Halftown Council's proposal, stating that "under the circumstances," the Initiative would be "a viable way" of resolving the dispute. *Id.* at 003262. However, the RD clarified that the BIA had not definitively decided to authorize the Initiative as the outlet for resolving the leadership dispute, and specifically asked that the Jacobs Council propose alternative methods for doing so. *Id.* The RD urged Plaintiffs to either work with the Halftown Council to properly administer the Initiative or else propose an alternative means of determining Cayuga leadership. *Id.* at 003262-63.

Three days after the RD sent his letter to the Jacobs Council, they responded in writing, through counsel, strenuously objecting to the proposed Initiative. *Id.* at 003264-65. Plaintiffs' counsel acknowledged that the RD had returned counsel's telephone call and that RD and Plaintiffs' counsel had discussed the RD's June 17th letter. *Id.* at 003264. Plaintiffs' counsel also requested an extension of the RD's ten day deadline for responding to the June 17th letter.

Id. The RD responded in writing three days later granting Plaintiffs an extension until July 1, 2016. *Id.* at 003266.

On July 1, 2016, Plaintiffs sent the RD a lengthy legal memorandum and voluminous exhibits objecting to the Initiative as a matter of traditional Cayuga law, previous BIA practice, and actual application. *Id.* at 003267-337. On July 5, 2016, the Halftown Council, through counsel, sent a letter to the Jacobs Council's attorney responding to the July 1st letter. *Id.* at 003338-39. Halftown counsel explained the Halftown Council's position and invited the Jacobs Council to collaborate with the Halftown Council on the Initiative. *Id.* The Record does not indicate that the Jacobs Council responded to the July 5th letter. Rather, on July 8, 2016, the Jacobs Council, through counsel, wrote a letter to the RD again objecting to the use of an Initiative process and urging the BIA to reject the Initiative. *Id.* at 003350-51.

In July 2016, the Halftown Council moved forward with the Initiative. *Id.* at 003340-49. During this process, the BIA continued to meet with and accept correspondence from Plaintiffs concerning the Initiative's legitimacy. *Id.* at 003350-51; 003380, n.38 (noting disagreement between parties as to date of Plaintiffs' meeting with the Department).[2] Both Plaintiffs and the Halftown Council also directly appealed to the Cayuga citizens on behalf of their respective positions. *Id.* at 003340-49, 003352. In September 2016, staff from the BIA's Eastern Regional Office evaluated the Initiative results and concluded that of 392 adult Cayuga citizens identified on the Nation's membership roll, 237 voted in favor of the Halftown Council on both of the proposed questions. *Id.* at 003373-74. The Halftown Council presented the results of the

[2] On September 28, 2016, the BIA met with Jacobs Council representatives in Washington, D.C. to discuss their concerns with and objections to the Initiative. AR-003880, n.38. Plaintiffs initially disputed this statement but now appears to admit the meeting with BIA. Pl. Mot. at 45.

Initiative to the Nation's citizens and the Department on October 6, 2016. *Id.* at 003383 – 003406.

In the meantime, however, both Plaintiffs and the Halftown Council had submitted ISDA proposals to the BIA. *Id.* at 003367-72; 003376-82. In order to determine the Nation's proper governing body for the purposes of executing the ISDA contract, the Regional Director requested formal briefing from both groups on November 1, 2016, concerning (1) the validity of the Initiative as a matter of Cayuga law; (2) how the Initiative had been actually conducted; and (3) Plaintiffs' claim that they constituted the proper Cayuga government under traditional Cayuga law. *Id.* at 003407-08. Both Plaintiffs and the Halftown Council submitted opening briefs (twenty five pages from the Jacobs Council, plus sixty one pages of exhibits) and reply briefs (thirteen pages from the Jacobs Council, plus eight pages of exhibits) on these questions. *Id.* at 003409-3559. On December 15, 2016, the RD issued a decision (RD Decision) recognizing the Halftown Council as the Nation's government. *Id.* at 003563-3577.

After Plaintiffs appealed to the IBIA, the AS-IA assumed jurisdiction over the appeal pursuant to 25 C.F.R. § 2.20(c) and 43 C.F.R. § 4.332(b) on January 31, 2017. *Id.* at 003666-69. At the AS-IA's invitation, the Jacobs Council submitted an opening brief (twenty five pages) and a reply brief (ten pages), with both the Halftown Council and the RD submitting opposition briefs. *Id.* at 003772-875. The AS-IA issued his Decision on July 13, 2017, affirming the RD's decision, thereby recognizing the RD Decision as the Nation's government. *Id.* at 003876-906. This appeal followed.

III. ARGUMENT

A. STANDARD OF REVIEW

When a "party seeks review of agency action under the APA [before a district court], the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *Bimini Superfast Operations LLC v. Winkowski*, 994 F. Supp. 2d 106, 119 (D.D.C. 2014) (alterations in original) (quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)). Hence, the normal Rule 56 standard "does not apply because of the limited role of a court in reviewing the administrative record"; rather, summary judgment is "the mechanism for deciding whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Id.* (quoting *Se. Conference v. Vilsack*, 684 F.Supp.2d 135, 142 (D.D.C. 2010)). The plaintiff "as the party challenging the agency action, bears the burden of proof." *Id.* at 120. "In assessing the merits…, the Court begins with the presumption that the agency's actions were valid." *Id.* "So long as the agency decision has some rational basis, the Court is bound to uphold it." *Id.*

B. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' APA CLAIMS

1) The AS-IA Decision did not arbitrarily fail to apply *de novo* review.

At the outset, Plaintiffs claim that the AS-IA Decision inherently violates the APA because the AS-IA failed to review the RD Decision *de novo*. Federal Defendants incorporate by reference Intervenors' discussion that applicable law did not require the AS-IA to have applied a *de novo* review standard.

But even if *de novo* review was required here, the AS-IA complied with that requirement. While the AS-IA Decision discusses the reasonability of the RD Decision, the AS-IA Decision included independent analysis of the arguments put forth in post-RD Decision briefing by both

Councils. AR at 003886-891. While the AS-IA Decision was obviously informed by the findings and legal conclusions of the RD below, with which the AS-IA agreed as a matter of law, the length and depth of the AS-IA Decision belies Plaintiffs' insinuation that the AS-IA merely rubber-stamped the RD Decision without consulting the record or conducting any independent review.[3]

Plaintiffs further miss the mark by arguing that the AS-IA failed to consider relevant primary source material concerning Cayuga law in his Decision. Pls. Mot. at 7-8. Plaintiffs are correct that Federal Defendants stipulated to supplement the Administrative Record in this case. But in briefing before the AS-IA, Plaintiffs did not cite a single source of Cayuga law that was included in the expanded Administrative Record materials that they now accuse AS-IA of having ignored. AR-003776-875. Plaintiffs themselves were clearly unconcerned about putting the AS-IA on notice of this allegedly critical information.

Moreover, as discussed by both Intervenors and Federal Defendants, the Administrative Record in this case supports the Decisions of both the RD and the AS-IA. *See, e.g.*, *Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1139–40 (10th Cir. 1991) (holding an agency is not required to "review every document arguably related to" the dispute, and noting both that plaintiff "had numerous opportunities to present its views and that those views were considered by [the decision maker]" and that "the record provides ample support for [the decision maker's] . . . decision"); *accord NLRB v. Beverly Enterprises–Massachusetts, Inc.*, 174 F.3d 13, 26 (1st Cir. 1999) (agency decision maker "can consider all the evidence without directly addressing in his written decision every piece of evidence submitted by a

[3] As with Plaintiffs' claims about a violation of due process, accepting their theory that the AS-IA failed to conduct independent analysis would require a finding that the AS-IA allowed multiple rounds of independent legal briefing about the validity or invalidity of the RD Decision merely as pretext, and that the AS-IA intended all along to summarily uphold the RD Decision.

party"). In light of the AS-IA Decision's demonstrable reliance on relevant documents from the Record, Plaintiffs cannot predicate an APA claim on the fact that the AS-IA allegedly failed to review and cite documents that Plaintiffs themselves failed to raise in briefing before the AS-IA.

2) Defendants Are Entitled to Summary Judgment on Count III's Claim That The Department Arbitrarily and Capriciously Applied Cayuga Law.

During the administrative proceedings before both the RD and the AS-IA, Plaintiffs repeatedly argued that the Initiative violated Cayuga law. The Department carefully considered these competing arguments concerning the Initiative. The AS-IA Decision accordingly went in-depth as to why both the AS-IA and the RD accepted the Halftown Council's interpretation of Cayuga law. AR-003886-91. While Plaintiffs may disagree with the AS-IA's conclusions, they have not demonstrated that the AS-IA Decision was arbitrary and capricious for APA purposes. Defendants are therefore entitled to summary judgment on Count III's claim that the AS-IA Decision violated the APA by concluding that the Initiative was consistent with Cayuga law.

For example, the AS-IA Decision was predicated the Haudenosaunee Great Law of Peace – which all parties has acknowledged as the basis of traditional Cayuga law. It states that:

> Whenever a specially important matter or a great emergency is presented before the Confederate Council and the nature of the matter affects the entire body of the Five Nations, threatening their utter ruin, then the Lords of the Confederacy must submit the matter to the decision of their people and the decision of the people shall affect the decision of the Confederate Council. This decision shall be a confirmation of the voice of the people.

Id. at 003568 (quoting ARTHUR C. PARKER, THE CONSTITUTION OF THE FIVE NATIONS 55 (1916)).[4] The RD interpreted this to mean that governance among the Haudenosaunee tribes (including the Nation) "comports with the principle [that] governments derive their just powers from the consent of the governed." *Id.* The AS-IA concluded the same. *Id.* at 003888-89.

[4] As the RD noted, both parties accept the Parker transcript of the Great Law. AR-003568 n.15.

Plaintiffs argue that the Department's reliance on this interpretation was misplaced, and present their own interpretation of Cayuga law that they allege demonstrates the inherent impermissibility of the Initiative within the Nation's traditional, Clan-based framework. Pl. Mot at 8-20. However, Plaintiffs once again misunderstand the legal standard. The Court's role here is not to determine whether or not the AS-IA's application of Cayuga Law was correct on the merits. Rather, the APA tasks this Court with determining whether the AS-IA Decision provided a reasonable rationale for the chosen interpretation of Cayuga law. This is particularly true here in light of Federal courts' longstanding deference to the Department in matters concerning the proper representation of Indian tribal governments. *See, e.g.*, *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 938 (D.C. Cir. 2012) (noting that "we owe deference to the judgment of the Executive Branch as to who represents a tribe").

The AS-IA Decision satisfies this standard by relying on the most reasonable rationale available: precedent-mandated deference to the plainly stated will of the Cayuga Nation's citizens. *See Ransom v. Babbitt*, 69 F. Supp. 2d 141, 150 (D.D.C. 1999) ("In situations of federal-tribal government interaction where the federal government must decide what tribal entity to recognize as the government, it must do so in harmony with the principles of tribal self-determination."); *Tarbellv. E. Reg'l Dir.*, 50 IBIA 219, 234 (2009) (when "in a series of referenda, the tribal voters overwhelmingly denied the validity of the Constitution and expressed their desire to be governed by the Three Chiefs, not by the Constitution . . . the Regional Director was not free to ignore the expressed will of the Tribe's membership"). During the Initiative process, the Nation's citizens were presented with competing interpretations of the Great Law of Peace: one which would result in leadership by the Halftown Council, and one by the Jacobs Council. AR-003340-49, 003352. The Nation determined internally that it agreed with the

Halftown Council, and that the Halftown Council was the Nation's proper leadership. It was entirely reasonable, and in fact required, that the AS-IA defer to the Nation's citizens' interpretation of Cayuga law in making his own decision.

Further, both the RD and AS-IA Decisions provided detailed analysis of the Record evidence on the Initiative's legitimacy under Cayuga law. *See generally id.* at 003568-70; 003886-91. The AS-IA rejected Plaintiffs' argument that the Clan Mothers alone may choose handpicked tribal leadership, irrespective of the wishes of Cayuga citizens – an argument that, in effect, could result in illiberal government by executive fiat. Rather, both the RD and the AS-IA cited legal analysis as to why under these specific circumstances, the Initiative complied with the principle that governance among the Haudenosaunee tribes (including the Nation) "derive their just powers from the consent of the governed." *Id.* at 003614. The RD reasoned that in light of the Great Law's guiding principle of invoking the will of the people, he could not "conclude that the citizens of each Haudenosaunee Nation have less authority with respect to their own Nation than they have within the overall Confederacy." *Id.* at 003615. The AS-IA similarly made a rational determination that the Great Law meant that the power of the government of the Cayuga Nation derives from the consent of the governed, and that therefore Cayuga citizens' indication that the Initiative was consistent with Cayuga represented the will of the Nation. *Id.* at 003887-91. It was therefore reasonable for the AS-IA to conclude that the Initiative process was a "resolution of a tribal dispute by a tribal mechanism." *Id.* at 003890-91; *see also Timbisha*, 678 F.3d at 938 (acknowledging the legitimacy of the tribe "resolv[ing] their *own* leadership dispute through a valid *internal* tribal process") (emphasis in original).

Again, Plaintiffs argue that the AS-IA and the RD misinterpreted and misapplied this and other provisions of the Great Law. Pl. Mot. at 17-20. But the APA does not task a reviewing

court with analyzing the AS-IA's interpretation of Cayuga law on the merits. Rather, the sole question is whether the Record demonstrates that the AS-IA had a rational basis for interpreting the Great Law as he did. Between the demonstrated will of the Nation's citizens and the agency's own application of legal and historical sources, the AS-IA Decision satisfies that standard.

3) Defendants Are Entitled To Judgment On Count III's Claim That The Department Arbitrarily and Capriciously Mandated the Form of Cayuga Government

Plaintiffs next argue that the AS-IA Decision arbitrarily and capriciously "forced" the Nation to adopt a mechanism of choosing leaders that was fundamentally inconsistent with Cayuga law. Pl. Mot. at 15. Once again, Plaintiffs fail to establish an APA violation.

First, the AS-IA Decision was a narrow one: the agency did not "impose" any specific form of governance, or particular leaders, on the Cayuga Nation. *See* AR-003889 ("The Regional Director did not 'Mandate' Cayuga government by plebiscite"). After seeking potential options for resolving the leadership dispute from both the Halftown and Jacobs Councils, BIA provided technical assistance on the only substantive response it received: the Initiative. And as the AS-IA stated, the Initiative process was solely designed for establishing a government with which the United States could interact in that moment. Moving forward, the AS-IA noted that it was incumbent upon the Nation to determine how it would determine tribal leadership – whether via Initiative, Clan Mother determination, or otherwise. *Id.* at 003890.

Second, making this necessary determination was not the equivalent of "imposing" anything on the Cayuga Nation. Although Plaintiffs disagree with the Department's ultimate decision to recognize the results of the Initiative, that decision did not violate Cayauga law or the Department's bedrock principle of promoting self-governance for Indian nations. To the

contrary, as discussed above, the AS-IA Decision exemplified that the AS-IA deferred to the Cayuga citizens' determination as to their law and government.

The Administrative Record reflects the AS-IA's consideration and weighing of not only Plaintiffs' arguments, but also of other relevant factors and a thorough, well-reasoned explanation for the agency's choices. That is all that the APA requires. *Kisser v. Cisneros*, 14 F.3d 615, 619 (D.C. Cir. 1994).

4) The Department Did Not Violate Plaintiffs' Due Process Rights

Plaintiffs raise a host of procedural due process claims alleging that the Department deprived them of a neutral decision maker throughout the adjudicatory process. Pl. Mot. at 30-37. Specifically, Plaintiffs summarize their due process argument as being that the Department illegally "provid[ed] funding, support and technical assistance to the Halftown Group," and therefore "supported one side in this internal Indian Nation governmental dispute to the disadvantage of the other. . . ." *Id.* at 37.

Federal Defendants incorporate by reference Intervenors' opposition and cross-motion arguments concerning due process (including that Plaintiffs have waived their due process claims). Federal Defendants raise several additional points.

(a) Plaintiffs lack the necessary protectable liberty or property interest that must predicate a due process claim.

Before reaching the merits of Plaintiffs' due process arguments, Federal Defendants note that the "process of providing an unbiased and impartial tribunal does not exist in a vacuum, it exists to afford due process when due process is required to protect a liberty interest. Providing an unbiased and impartial tribunal *itself* is not a liberty interest protected by due process." *Jenner v. Nikolas*, 828 F.3d 713, 717 (8th Cir. 2016) (emphasis in original). That is, prior to making a due process argument concerning an allegedly biased decision maker, Plaintiffs must

first identify a protectable liberty or property interest to which due process would attach in a subsequent administrative proceeding. *See, e.g.*, *Hettinga v. United States*, 677 F.3d 471, 479-80 (D.C. Cir. 2012) (per curium) (a "threshold requirement of a due process claim" is "that the government has interfered with a cognizable liberty or property interest").

Plaintiffs have not done so. As the D.C. Circuit has held, a purported tribal entity has no inherent due process interest in "recognition" in the abstract unless the United States' failure to recognize has deprived that entity of an ongoing benefit. *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 219 (D.C. Cir. 2013). Similarly, although Plaintiffs here claim to be the Nation's lawful leadership, the United States does not recognize them as such and has not for the duration of the underlying administrative proceedings. Plaintiffs' general allegations that they were deprived of tribal leadership positions cannot undergird a procedural due process claim.

Nor have Plaintiffs alleged any other protectable liberty or property interest. Plaintiffs have failed to demonstrate that they as a class, rather than the Cayuga Nation itself, are the recipients of any federal benefits allegedly withheld as a result of the RD or AS-IA Decisions (or any other federal benefits at all). And while Plaintiffs predicate their due process claims on the Department's alleged funding of and support for the Initiative, Plaintiffs cite no cases suggesting that a tribal leadership faction has a protectable liberty or property interest in the United States withholding support for its opponent during a leadership dispute. Federal Defendants have accordingly not "deprived" Plaintiffs of any ongoing benefits that would potentially have inured to a federally-recognized tribal government and would thus give rise to a procedural due process claim.[5] *See, e.g.*, *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981) (noting that while a "right can, in some circumstances, beget yet other rights to procedures essential to the

[5] In making this argument, Federal Defendants in no way suggest the presence of an inherent due process right in the recognition status of a tribal entity or governing body.

realization of the parent right . . . the underlying right must have come into existence before it can trigger due process protection") (citations and internal quotations omitted). Federal Defendants are entitled to summary judgment on Count V of Plaintiffs' allegations.

(b) Plaintiffs' due process claims fail on the merits.

Even assuming *arguendo* that Plaintiffs have properly alleged a due process claim, Federal Defendants are nevertheless entitled to summary judgment. A party claiming unconstitutional bias on the part of a federal agency "must overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Accordingly, in "the absence of clear evidence to the contrary, courts should presume that public officers have discharged their official duties properly." *South Dakota v. U.S. Dep't of the Interior*, 401 F. Supp. 2d 1000, 1011 (D.S.D. 2005) (citation omitted).

To overcome this presumption, Plaintiffs must demonstrate that the RD and AS-IA were "not capable of judging a particular controversy fairly on the basis of its own circumstances." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (quotations and internal citation omitted). "This standard is met when the challenger demonstrates, for example, that the decision maker's mind is 'irrevocably closed' on a disputed issue." *Nec Corp. v. United States*, 151 F.3d 1361, 1373 (Fed. Cir. 1998) (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948)). Examples of such a "closed mind" include a decision maker definitively and publicly supporting one side of a dispute, *see, e.g.*, *McClure v. Ind. Sch. Dist. No. 16*, 228 F.3d 1205, 1215-16 (10th Cir. 2000); *Rio Arriba, N.M., Bd. of County Comm'rs v. Acting Sw. Reg'l Dir.*, 38 IBIA 18, 28-29 (2002), publicly disparaging a party to a dispute, *see, e.g.*, *Guo-Le Huang v. Gonzales*, 453 F.3d 142 (2d Cir. 2006); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 589-90 (D.C. Cir. 1970), or having a pecuniary

interest in ruling in favor of a particular party. *See, e.g.*, *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

Plaintiffs do not satisfy these standards. Per the Administrative Record, the facts are these. The RD urged Plaintiffs to consult with the Halftown Council concerning the Initiative; invited Plaintiffs to offer alternative methods for resolving the dispute; received, considered, and included in the Administrative Record multiple legal memoranda and other submissions from Plaintiffs objecting to the Initiative as a matter of law, fact, and policy; and, prior to issuing the Decision, accepted opening and response briefs on the merits of Plaintiffs' claims. *See generally* AR-003877-3883 (explaining administrative history and citing relevant documents from the Record). The AS-IA similarly accepted opening and response briefs during Plaintiffs' appeal and upheld the RD Decision after reviewing both these briefs and the Administrative Record. *Id.* at 003772-875. Rather than indicating predisposition towards the Halftown Council, both the RD and AS-IA's actions reflect a good faith effort to develop a factual record and fully understand both parties' interpretation of Cayuga law prior to rendering a decision.

Faced with such a clear Administrative Record, Plaintiffs do not deny that the agency sought to work with both Councils to adjudicate this dispute. Rather, and without evidence, Plaintiffs seek to imbue every run-of-the-mill agency decision or interaction with nefarious intent. For example, Plaintiffs admit that they were offered full briefing before the RD, but claim that what Plaintiffs believe was an unfair briefing schedule proves that the agency was nevertheless biased towards the Halftown Council. Pl. Mot. at 31. Plaintiffs next allege a due process violation stemming from the Department's alleged failure to comply with Cayuga law – but, Cayuga law as interpreted only by Plaintiffs, an interpretation that was actively before the agency for consideration during the relevant timeframe. *Id.* at 32. Plaintiffs claim further due

process violations based on the timing of every possible agency action, speculating as to what the agency "appeared determined" to do, as opposed to what the agency actually did. *Id.* at 34. Put simply, Plaintiffs' due process case is predicated on this Court accepting Plaintiffs' invitation to "connect the dots" of Plaintiffs' circumstantial "evidence," and hold that as a matter of law, both the RD and the AS-IA spent over a year conducting sham outreach and briefing in order to mask the Department's overarching conspiracy against Plaintiffs. Agency action cannot be overturned based on this manner of unfounded conjecture.

Plaintiffs' most persistent due process argument centers on the letter that the RD sent to Plaintiffs at the outset of administrative proceedings stating that the Initiative would "be a viable way of involving the Cayuga people in a determination of the form and membership of their tribal government." Pl. Mot. at 33. Plaintiffs repeatedly claim that the RD's use of the word "viable" demonstrates that the Department had irrevocably determined to authorize the Initiative, regardless of Plaintiffs' objections or subsequent briefing. *Id.* at 32-34.

As this Court has noted, ECF No. 42 at 12, the RD's letter does not lend itself to such an interpretation. The mere fact that the RD considered the Initiative to be one potential way of ending the dispute is not the equivalent of the RD unilaterally authorizing the Initiative without agency outreach or any regard to Cayuga law, as Plaintiffs suggest. Indeed, in the same letter that Plaintiffs cite, the RD specifically invited Plaintiffs to propose "an alternative method for obtaining accurate information as to the will of the Cayuga Nation's citizens" and to contact both Halftown and the Department with questions, comments, and alternatives. AR-003262. Plaintiffs cannot predicate a due process claim, against all Record evidence, on a mischaracterization of a single word in a single letter. *See, e.g.*, *Jeremiah v. Kemna*, 370 F.3d 806, 809 (8th Cir. 2004) (examining an alleged due process violation based on "the record as a

whole); *accord Hoque v. Attorney Gen. of U.S.*, 574 F. App'x 133, 135 (3d Cir. 2014) (rejecting due process claim based on agency's use of a single phrase within the record when plaintiff's argument was not otherwise supported).

Finally, as a matter of policy, Congress has "charged" the Secretary of the Interior "with the supervision of public business relating to . . . Indians." 43 U.S.C. § 1457. "In charging the Secretary with broad responsibility for the welfare of Indian tribes, Congress must be assumed to have given him reasonable powers to discharge it effectively." *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008) (quoting *Udall v. Littell*, 366 F.3d 668, 672 (D.C. Cir. 1966)). Taken to their logical conclusion, Plaintiffs' due process arguments would prohibit the Department from interacting with any tribe, or tribal leadership group, in the event that there was any dispute whatsoever (no matter how meritless) as to the legitimacy of that tribe or leadership. That is, under Plaintiffs' theory, an individual or entity dissatisfied with the actions of a tribal government could frivolously claim that they were the real tribal government. The Department would then be prohibited as a matter of due process from entreating with either the Tribe or the challenger(s) to assess the situation and ensure proper application of the United States' trust responsibility towards Indian tribes. Federal law does not countenance such an absurd result.

Plaintiffs lack a liberty or property interest that would entitle them to make a procedural due process claim. Nor have they alleged anything on the merits that would support their allegations that the RD or the AS-IA violated their right of due process. Federal Defendants are therefore entitled to summary judgment on Plaintiff Due Process claims.

VI. CONCLUSION

For all the foregoing reasons, Defendants' Motion for Summary Judgment should be granted, Plaintiffs' Motion for Summary Judgment should be denied, and the AS-IA Decision should be affirmed.

Respectfully Submitted,

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