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 official capacity as Acting Assistant Secretary - Indian Affairs; BRUCE MAYTUBBY, in his official capacity as Eastern Regional Director, Bureau of Indian Affairs; DARRYL LACOUNTE, in his official capacity as Acting 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

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO DEFENDANT-INTEVENOR'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT-INTERVENOR'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

In response to Plaintiffs' Motion for Summary Judgment ("Pls. Mem."), ECF No. 47, Defendant-Intervenor has filed an Opposition and Cross Motion for Summary Judgment ("Def.-Int. Mem."). ECF No. 50. Plaintiffs herein incorporate by reference arguments made in Plaintiffs' Motion, ECF No. 47, and respond below to Defendant-Intervenor's claims.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIM THAT DEFENDANTS VIOLATED FEDERAL AND CAYUGA NATION LAW BY PROMOTING AND SUPPORTING THE STATEMENT OF SUPPORT CAMPAIGN

A. DOI Failed to Review Legal Conclusions *De Novo*

Defendant-Intervenor asserts that the Acting Assistant Secretary - Indian Affairs ("ASIA") need not review legal determinations *de novo*. Def.-Int. Mem. at 16-17; 22-23. Federal Defendants "incorporate by reference Intervenors' discussion that applicable law did not require AS-IA to apply a de novo review standard." Memorandum of Points and Authorities in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 6 ("Fed. Defs. Mem."). ECF Nos. 51, 52.

In the agency proceedings below, however, Defendant Maytubby conceded that the ASIA reviews questions of law *de novo*. *See* AR 003815 ("[q]uestions of law, and the sufficiency of the evidence are reviewed *de novo*"). On behalf of the Department, Defendant Black likewise held that "issues of law and challenges to the sufficiency of the evidence are reviewed *de novo*" by the ASIA. AR 003883 (relying on *O'Bryan v. Great Plains Regional Director*, 48 IBIA 109, 116 (2008) ("[w]e review *de novo* any legal determinations made by BIA")).

There can be no question that the applicable standard of review for legal determinations adopted by the ASIA from the IBIA requires *de novo* review of legal questions, and the same standard applies to federal court review of legal determinations made by federal agencies.

Picayune Rancheria of the Chukchansi Indians v. Pacific Regional Director, 62 IBIA 103, 114 (2016) ("[t]he Board reviews legal issues, and the sufficiency of evidence to support a decision, *de novo*"); *Maniilaq Assn. v. Burwell*, 72 F. Supp. 3d 227, 234 (D.D.C. 2014) ("[q]uestions of law are reviewed *de novo* under the APA as in ordinary cases") (citing *Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d. 103, 114 (D.D.C. 2009)); *Alturas Indian Rancheria v. Pacific Regional Director*, 64 IBIA 236, 241 (2017) ("[T]he Board reviews questions of law and the sufficiency of evidence *de novo*.").

Defendant-Intervenor supports its contrary argument by cherry-picking excerpts from IBIA precedent to suggest that the law of Indian Nations does not qualify as law. *See* Def.-Int. Mem. at 22-23. Because IBIA case law on this standard is unambiguous, Defendant-Intervenor's argument fails. By his own admission, Defendant Black was required to review *de novo* questions of law, including Cayuga law. Plaintiffs have shown that he failed to do so. Pls. Mem. at 6-8.

Further, given their position below, Federal Defendants should be judicially estopped from arguing for a different standard here. Judicial estoppel "'prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding,'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2000) (internal quotation marks omitted); *see also Marshall v. Honeywell Tech. Sys. Inc.*, 828 F.3d 923, 932 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 830 (2017). A district court should apply the doctrine where a party takes a (1) clearly inconsistent position; (2) suggesting either the first or second court or administrative agency was misled; and (3) conferring an unfair advantage. *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 798 (D.C. Cir. 2010).

Federal Defendants conceded below that *de novo* review was the proper standard, AR 003883; take a clearly inconsistent position here, Def.-Int. Mem. at 6; and would gain an unfair advantage in this Court if allowed to now claim a more deferential standard applied to Defendant Black's review of Defendant Maytubby's decision. Defendant-Intervenor's argument that a deferential standard applies should be rejected.

B. The Agency Determinations Contradict the Plain Language of Cayuga Law

Plaintiffs have demonstrated that Defendant Black's failure to review Cayuga law *de novo*, as required, formed the basis for his erroneous conclusion that the SOS campaign complied with that law. Pls. Mem. at 8-20. Federal Defendants and Defendant-Intervenor concede the agency decisions below were based largely on a single textual provision from the Great Law of Peace. *See, e.g.,* AR 003888 (finding that "[t]he Regional Director premised the Decision on a provision from the Haudenosaunee Great Law of Peace"). Notwithstanding their reliance on this provision, Defendant-Intervenor seeks to avoid its plain meaning by deriding analysis of its words as employing an improper "Western textualist lens." Def.-Int. Mem. at 20. Defendant-Intervenor would have it both ways: it persuaded Federal Defendants to rely on a written version of Cayuga law in support of its argument that that law allows mail-in surveys to override Clan Mother appointments, but also contends Cayuga law cannot be interpreted according to its plain language. *Id*.[1] Federal Defendants considered this written passage as the principal evidence supporting their determination that the survey complied with Cayuga law. Federal Defendants'

[1] None of the "myriad scholarly sources" referenced by Defendant-Intervenor addresses the question whether Cayuga law permits use of a *sui generis* mail-in survey process to choose and remove leaders. Def-Int. Mem. at 20-21. As Plaintiffs have shown, Pls. Mem. at 17-20, it is undisputed that the Cayuga Nation has never before used such a process to override the acknowledged authority of the clans and Clan Mothers, nor has the United States ever approved one for Cayuga or any other Indian nation. Pls. Mem. at 27.

reliance on the passage was error because its plain language does not support their decision. Pls. Mem. at 17-20. Plaintiffs are entitled to Summary Judgment on Count I.

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNTS II AND III BECAUSE DEFENDANTS' CHANGE IN POSITION ON THE STATEMENT OF SUPPORT CAMPAIGN WAS NOT SUPPORTED BY REASONED EXPLANATION

The agencies' explanations for changing their longstanding policy regarding the verification and confirmation of the Halftown Group's 2016 SOS campaign were based on false premises. Further, the agencies failed to reasonably assess the evidence in the record as a whole regarding the reliability of the SOS campaign. The agencies' decisions were therefore arbitrary and capricious and should be vacated. Plaintiffs hereby incorporate by reference the arguments made in their principal brief. Pls. Mem. at 21-25.

A. Reliance on False Premises Violates the APA

When an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy…[i]t would be arbitrary or capricious to ignore [the underlying contradiction]." *F.C.C. v. Fox*, 556 U.S. 502, 515 (2009). Further, "an agency cannot…offer an explanation for its decision that runs counter to the evidence before it." *Code v. Esper*, 285 F. Supp. 3d 58, 65 (D.D.C. 2017) (quotation marks omitted). "Reliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decision-making." *Missouri Pub. Serv. Comm'n v. F.E.R.C.*, 337 F.3d 1066, 1075 (D.C. Cir. 2003); *see also Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army*, 398 F.3d 105, 113 (1st Cir. 2005) ("agency decisions based on false factual information run afoul of the Administrative Procedures Act.").

Because the agency misstated the facts in attempting to justify its abrupt change in policy, Plaintiffs' Motion for Summary Judgment on Count II should be granted, and

Defendants' and Defendant-Intervenor's cross motions should be denied. *Nat. Res. Def. Council, Inc. v. Rauch*, 244 F. Supp. 3d 66, 96 (D.D.C. 2017) ("[I]t is arbitrary and capricious for an agency to base its decision on a factual premise that the record plainly showed to be wrong.").

B. Federal Defendants' Change in Policy Regarding the Statement of Support Campaign was Arbitrary Because It Reversed Without Explanation a Decades-Long Policy to Respect the Role of the Cayuga Clan Mothers

The agencies' decision to support and approve the results of the Halftown Group's 2016 SOS campaign represented a profound departure from prior agency policy and practice. As a basis for their new policy, the agencies relied upon factual premises that contradict those which underlay its prior uniform policy of rejecting similar mail-in survey campaigns.

Defendant-Intervenor relies exclusively on the fact that Defendant Maytubby and Defendant Black "devoted entire sections" of their decisions to the 2015 Poitra Decision rejecting a similar campaign. Def.-Int. Mem. at 27-28. They claim the Poitra Decision comprised the whole of the agencies' policy and Federal Defendants' explanation for reversal sufficed. *Id*. at 28. But Federal Defendants' explanation for departing from the 2015 Poitra Decision (1) ignored centuries of consistent policy leading up to the Poitra Decision and the decisions challenged here; and (2) depended on false factual premises.

The agencies have for decades rejected mail-in surveys, referenda, and electoral processes as inconsistent with Cayuga law, and have for centuries consistently recognized the authority of the Clan Mothers to choose and remove members of the Nation's Council of Chiefs pursuant to the will of the people of each clan. Throughout the United States' two centuries of relations with the Cayuga Nation, the federal government had never before questioned the Clan Mothers' authority to appoint and remove Council members, much less supported a process to eviscerate that authority.

In 1997, the BIA rejected a proposed election campaign at Cayuga. AR 003276-77. Again in 2005, the BIA declined to recognize the results of a purported electoral process and instead reaffirmed that Cayuga Nation "leaders are not elected but are appointed by their respective clanmothers (sic) in accordance with the customs of the Cayuga Nation." AR 000053-54. Again in 2012, the BIA declined to recognize an SOS campaign proposed by the Halftown Group, having affirmed yet again in 2011 that "the Clan Mothers are the persons tasked with the responsibility of appointing representatives of their respective clans to serve on the Nation Council." AR 000426-27; AR 003411. In 2015, after the Halftown Group requested that the BIA confirm the results of a 2014 SOS campaign, the BIA once more declined to credit it. AR 003075; AR-003216-24. Given two hundred years of uniform policy, the agency decisions improperly focused solely on distinguishing the 2015 Poitra Decision. AR-003575; AR-003877 ("the current iteration of the dispute stems from the February 20, 2015 decision of then-Acting Eastern Regional Director Tammie Poitra"), AR 003896-97.

Further, both agencies misapprehended the facts in distinguishing their decisions from the 2015 Poitra Decision. *See* Pls. Mem. at 23-24. Defendant-Intervenor aims to elide the agencies' error by suggesting that Mr. Halftown's 2015 ISDEAA contract proposal came from the 2006 Council because he submitted it and was its federal representative. Def.-Int. Mem. at 28-29. But the very basis for the 2015 Decision was the split among members of the 2006 Council, each faction of which separately sought to access ISDEAA funds. Pls. Mem. at 23. It is this key fact the agencies both relied on and got wrong. *Id*.; AR 003897 (basing decision on purported fact that 2006 Council submitted ISDEAA application in 2015 but not in 2016).

Because the agencies' decision to reverse longstanding policy was based on inaccurate factual distinctions from the 2015 Poitra Decision and a misapprehension of agency policy, the

decision to support and verify the Halftown Group's 2016 SOS campaign was arbitrary. *Nat. Res. Def. Council, Inc.*, 244 F. Supp. 3d at 96. Plaintiffs are entitled to Summary Judgment on Count II.

C. Federal Defendants Failed to Explain Reversal of Their Policy Requiring Plaintiffs and Defendant-Intervenor to Reach Consensus on the Meaning of a Statement of Support Campaign in Cayuga Law

In rejecting the Halftown Group's 2014 SOS campaign, the 2015 Poitra Decision characterized the campaign as "purely a matter of Nation law and policy, *upon which it would not be appropriate for BIA to intrude*." AR 003223 (emphasis added). The 2015 Poitra Decision expressly required that Plaintiffs and Defendant-Intervenor "come to a common understanding of what role, if any, a campaign of support should play in the selection or retention if its leadership" before the BIA could verify and confirm the results of a campaign of support. *Id.* No such common understanding between the Plaintiffs and Defendant-Intervenor has been reached, and the BIA never responded to Plaintiffs' proposal for working toward such an understanding. AR 003335-36 (suggesting a meeting with Defendant-Intervenor consistent with the 2015 Poitra Decision mandating a consensus decision). Federal Defendants failed to provide a "reasoned explanation" for their departure from the 2015 policy requiring a consensus on the SOS. *F.C.C. v. Fox*, 556 US at 515.

Defendant-Intervenor falsely contends that by 2016, "there was *no* possibility of a [consensus] resolution from the 2006 National Council" because it had not met for a decade. Def.-Int. Mem. at 8 (emphasis in original). In fact, the members of the 2006 Council met for two full days of federally supervised mediation in the summer of 2015, yielding a Mediation Peace Agreement that resolved the Halftown Group's ongoing state court eviction action against Plaintiffs and pledged both factions to promoting and protecting the peace in Cayuga territory.

AR 003273-74 (signed by all six members of the 2006 Council). Included in the Mediation Peace Agreement was a stipulation that "[a]t present, the Jacobs Group and the Halftown Group are engaged in efforts to resolve the Nation's internal dispute with the assistance of a federal mediator." AR 003273. A consensus resolution by the parties regarding the SOS campaign was certainly within the realm of possibility in late 2015 or early 2016, contrary to Defendant-Intervenor's assertion that when no application was submitted in 2016 by the 2006 Council, "the Department *had to* change course." Def.-Int. Mem. at 29-30 (emphasis in original). Because the BIA and ASIA decisions failed to discuss, much less explain, why the BIA no longer required the Parties to come to a common understanding of the place of an SOS campaign in Cayuga law and governance, the agencies failed to provide the reasoned explanation required for reversing the BIA's longstanding policy supporting Cayuga law and rejecting similar campaigns. Plaintiffs are entitled to Summary Judgment on Count II.

D. The Agencies' Proffered Explanation was not Based on Substantial Evidence in the Record as a Whole

1. The SOS Campaign Offered Only One Choice

Defendant-Intervenor falsely claims that "the Cayuga people accept[ed] the Halftown Council's interpretation of Cayuga law and reject[ed] that of Plaintiffs." Def-Int. Mem. at 15. The Administrative Record shows nothing of the sort. Plaintiffs' interpretation of Cayuga law was not even included in the SOS materials for consideration by the Cayuga people, much less rejected by them. AR 003261 (SOS document providing no option to support Plaintiffs or Plaintiffs' explication of Cayuga law, and falsely characterizing Plaintiffs as having "inappropriately adopted the name of the Nation's Council" and "attempt[ing] to take over our government"); Pls. Mem. at 26. And several key undisputed tenets of Cayuga law, including the tenet that new members may join the Council only after being nominated and introduced by their

Clan Mother, were both embraced by the SOS, AR 003261, 003256, and flagrantly violated by it. AR 003796 (undisputed facts that Bear and Turtle Clan Mothers opposed new Clan members ostensibly added to Council by SOS and that there is no Wolf Clan Mother and therefore no Wolf Clan representative may lawfully be added to Council).

Plaintiffs highlighted these fatal flaws in the SOS in evidence presented to Defendants Maytubby and Black. The agencies failed to fully consider and address this evidence despite their obligation to explain their change in policy based on substantial evidence in the record as a whole. Pl. Mem. at 25-30. Plaintiffs are entitled to Summary Judgment on Count III.

2. The SOS Campaign Did Not Produce Reliable Results

Defendants and Defendant-Intervenor falsely characterize Plaintiffs' expert evidence on the accuracy of the SOS as submitted in a "reply brief." *See* Fed. Defs. Mem. at 5; Def.-Int. Mem. at 30 ("the expert report was included in a *reply brief*") (emphasis in original). Likewise, Defendant Black erroneously characterized the filing as a "reply brief" as a basis for his ruling "declin[ing] to afford independent weight to the Report in light of its unrebutted status." AR 003900. In fact, the evidence was submitted in a response brief. AR 003553-59. Defendant-Intervenor simply chose not to seek leave to provide rebuttal evidence. The agencies' decisions hinged on a determination that the untested mail-in survey used for the SOS accurately gauged Cayuga citizens' will. Indeed, though the Cayuga Nation had never before used such a mail-in survey to choose leaders, Defendants improperly placed the burden on Plaintiffs to "disprove" its accuracy and validity. AR-003575; Pls. Mem. at 25-30. Because the agencies failed to properly consider and weigh the evidence on the survey mechanism's accuracy, based at least in part on the erroneous premise it was submitted in reply, AR 003900, their decisions were arbitrary and capricious and should be vacated.

By arguing against the applicability of any and all known standards that might apply to the *sui generis* SOS process, Defendant-Intervenor inadvertently highlights the agencies' failure to reasonably explain their decision to embrace a standardless survey process as the central electoral mechanism for the Cayuga Nation. In Defendant-Intervenor's view, the statement of support campaign was "not *supposed to* parrot Western electoral practices" such as neutral, unbiased ballots; anonymous voting; public voter rolls; and provision of more than one choice in a process intended to resolve disputes between competing slates. Def.-Int. Mem. at 33 (emphasis in original). Nor was the SOS bound by federal rules specific to tribal elections, by longstanding United States policy on Cayuga Nation sovereignty, or even the rules prescribed by the SOS itself. *See* discussion, *supra* at 8 (SOS violated its own condition that new members of Council be nominated and introduced by Clan Mothers). This standardless process - planned, funded and approved by the BIA together with one faction of recognized leaders to the exclusion of other recognized leaders - has fundamentally disrupted the governing structure of the Cayuga Nation, which had served the Nation well for over two centuries. Had Federal Defendants complied with federal law in their review of the process, the issue would remain solely within the purview of the Cayuga Nation and its citizens. But because the United States, in placing a heavy finger on the scales, violated the APA and federal due process guarantees, this Court should vacate and remand for decision in conformance with Federal law. Plaintiffs are entitled to summary judgment on Counts II and III.

IV. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIM THAT FEDERAL DEFENDANTS UNCONSTITUTIONALLY DEPRIVED THEM OF A NEUTRAL DECISION-MAKER

Defendant-Intervenor argues that Plaintiffs waived their due process claim by failing to request that the Regional Director be disqualified for bias; that the Due Process Clause does not

apply to the Department of the Interior's decision to provide technical assistance to the Halftown Group; and that the Department's statutory authority to manage Indian affairs insulates such decisions from constitutional scrutiny. Def.-Int. Memo. at 33-35. Defendant-Intervenor's arguments miss the mark: Plaintiffs did not waive their due process claim, and no federal statute or other source of law excuses the Department of Interior from upholding its Constitutional due process obligations.

A. Plaintiffs Did Not Waive Their Due Process Claim

Defendant-Intervenor cites no case in support of the proposition that a plaintiff waives due process claims of bias in federal court if she fails to request disqualification of the administrative adjudicator. Applicable authority holds no such request is necessary to preserve due process claims. Federal courts may vacate decisions that violate due process based on the bias of the decision-maker "if the objection is timely brought," including after an administrative proceeding has concluded. *Jonal Corp. v. D.C.*, 533 F. 2d 1192, 1197 (D.C. Cir. 1976) ("Obviously, if personal bias or prejudice is apparent in the conduct of the administrative proceedings, there may well be grounds for the reversal of the administrative determination if the objection is timely brought."); *Power v. Federal Labor Relations Authority,* 146 F. 3d 995, 1002 (D.C. Cir. 1998).

In any event, the factual premise of Defendant-Intervenor's argument is wrong: Plaintiffs requested that Regional Director Maytubby recuse himself once they learned that the Halftown Group had proposed the SOS campaign and that the Regional Director, prior to consulting with Plaintiffs, had accepted it as viable. AR 003300. As stated in counsel for Plaintiffs' letter, the Plaintiffs "request[ed] that the BIA first review and rule on the request to reject a majority vote campaign, and rule on the *request that the Director recuse himself* due to past illegal and ex parte

meetings over the past six months with the [Halftown Group]." *Id.* (emphasis added). Even if there were a requirement to seek disqualification, which there is not, Plaintiffs preserved their due process claims for review here.

B. Defendant Maytubby's Failure to Act as a Neutral Decision-Maker Violated Plaintiffs' Due Process Rights

Defendant-Intervenor's other arguments are neither sound nor responsive to Plaintiffs' Motion for Summary Judgment on their due process claims. Plaintiffs do not argue that due process required a "paper hearing" before the Department could provide technical support and money to Halftown to carry out his SOS. Def.-Int. Mem at 35. Rather, the Administrative Record demonstrates that Defendant Maytubby's failure to act as a neutral decision-maker violated Plaintiffs' due process rights: for months, he worked closely with the Halftown Group to design and plan the SOS to the exclusion of Plaintiffs, who were federal recognized leaders of the Nation at the time, AR 003264-65; he pronounced the SOS a viable method to resolve the Cayuga government dispute within 72 hours of receiving the Halftown proposal, over the strenuous objections of the Plaintiffs, AR 003262; he declined even to respond to Plaintiffs' objections and proposal for an alternative process to resolve the governmental dispute, AR 003267-337 (Letter of Plaintiffs' counsel, Joseph Heath, to which neither Defendant Maytubby nor the BIA ever responded); and he refused to afford Plaintiffs adequate opportunity to contest the campaign's validity under Cayuga law before supporting its implementation, AR 003266 (providing just ten days for Plaintiffs to weigh in on the SOS, because "the [SOS campaign] is going to be getting underway").[2]

[2] Defendant-Intervenor violated this Court's Intervention Order prohibiting duplication of arguments made by Federal Defendants by arguing that Plaintiff's lack a liberty or property interest protected by the Due Process Clause, Def.-Int. Mem. at 35-36, the same argument made

Defendant-Intervenor's argument under 25 U.S.C. § 2 also badly mischaracterizes Plaintiffs' claims. Plaintiffs do not argue that the absence of legal authority for the Department's provision of federal support to one side in an intragovernmental tribal dispute constitutes a stand-alone violation of due process. Rather, the flimsy legal basis for the BIA's actions is evidence of Defendant Maytubby's bias in favor of the Halftown Group. The Regional Director was determined enough to support this change in Cayuga government that he was willing to skirt the boundaries of his lawful authority in implementing federal programs. No case cited by Defendant-Intervenor supports the use of federal money and technical support designed to interfere in the internal affairs of sovereign Indian nations. *See, e.g., Worcester v. Georgia*, 32 U.S. 554 (1832) (holding that to construe the phrase "managing all their affairs" in Cherokee Nation Treaty to surrender the Nation's right to self-government would be a "perversion of their meaning."). Plaintiffs are entitled to summary judgment on Counts IV and V.

V. DEFENDANT-INTERVENOR IS NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' COUNT VI CLAIM THAT THE ASIA'S PARTICIPATION IN THE REGIONAL DIRECTOR'S DECISION VIOLATED DUE PROCESS

Defendant-Intervenor argues that Plaintiffs waived the claim that their due process rights were violated by Defendant Black's role as both a participant in agency decision-making at the BIA Regional Office and as appellate reviewer of the Regional Director's Decision. Defendant-Intervenor further argues that Plaintiffs have no due process rights to an independent appellate review, and that, regardless, the facts suggest Defendant Black did not participate in the proceeding before Defendant Maytubby at the regional level. Def.-Int. Mem. at 36-40.

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by Federal Defendants. Fed. Defs. Mem. at 12-14. Plaintiffs incorporate by reference responsive arguments in Plaintiffs' Opposition/Reply to Federal Defendants at 7-8.

Defendant-Intervenor's Motion for Summary Judgment on this claim should be denied because it misapprehends applicable law and mischaracterizes the Administrative Record.

A. Plaintiffs Have Not Waived Their Due Process Claim

Defendant-Intervenor contends that this Court need not review Plaintiffs' Count VI claim because Defendant Black's conclusion that Plaintiffs had not preserved "this argument" for the administrative appeal was reasonable and consistent with applicable D.C. Circuit law on argument waivers. This contention is incorrect. Notably, Defendant-Intervenor does not argue, nor could it, that Plaintiffs did not raise this issue in the administrative proceeding below. Rather, Defendant-Intervenor argues that because the issue was raised in a footnote in Plaintiffs' appellate brief before Defendant Black, the claim was waived. That is not the law. Defendant-Intervenor cites no case that obligates administrative appellate officers to comply with the appellate briefing rules of the circuit courts. The only case cited for this proposition, *Healthbridge Mgmt. LLC v. N.L.R.B.*, 672 Fed. Appx. 1 (D.C. Cir. 2016), is unpublished, and the panel that issued the decision believed it "had no precedential value." D.C. Cir. R. 36(c)(2). Defendant Black was on notice that Plaintiffs objected to his hearing their appeal. His misgivings about addressing it were based on decisional authority outside the D.C. Circuit. In any event, he addressed the objection on the merits. AR 003876, n. 64. Under these circumstances, Plaintiffs' claim was preserved for decision by this Court.

B. Defendant Black Violated Plaintiffs' Due Process Rights by Both Participating in the Proceeding Before the Regional Director and Reviewing That Decision

Defendant-Intervenor also argues that Plaintiffs had no due process right to an administrative appeal, so a conflicted appellate decision-maker is not unconstitutional. Def.-Int. Mem. at 38. Again, Defendant-Intervenor misconstrues Plaintiffs' claim. This Court does not

need to decide whether due process requires administrative appellate review, because Plaintiffs' claim is that, when such appeal rights are provided, due process requires an independent appellate reviewer. Administrative agencies may have discretion about whether to provide appellate review of their decisions, but when such review is offered, the procedures must comport with due process. *See Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985) ("In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution and, in particular, in accord with the Due Process Clause.").

Finally, Defendant-Intervenor argues that the facts do not show that Defendant Black participated in the decision of the Regional Director. This argument conflates the evidentiary standard for a preliminary injunction with the standard for summary judgment. On a motion for summary judgment, even those involving agency action under an administrative record, the record evidence of the nonmoving party "is to be believed," and all justifiable inferences drawn in its favor. *See Alford v. Def. Intelligence Agency*, 908 F. Supp. 2d 164, 169 (D.D.C. 2012) (internal citation and quotation marks omitted). Because under the record evidence here, Defendant-Intervenor cannot show that Defendant Black did not participate in the Maytubby Decision, its motion should be denied. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970) (reversing grant of summary judgment when the evidence had not foreclosed the possibility of the existence of certain facts from which "it would be open to [the factfinder] . . . to infer from the circumstances" that a material fact was established).

The administrative record shows a strong likelihood that Defendant Black participated in the process that led to the Regional Director's Decision. Defendant Black submitted a declaration in opposition to Plaintiffs' preliminary injunction motion which states that he was

"generally aware" of the leadership dispute at Cayuga but was not "actively involved in the decision making process preceding" the Regional Director's recognition decision. ECF No. 32-1 at ¶ 4. Defendant Black's disclaimer by its terms does not preclude his involvement, only his "active[]" involvement "preceding" the decision. Active involvement at the time of the decision and passive involvement preceding it such as receiving and reviewing briefs, sharing ideas, and/or indicating Department leadership's general preferences to subordinates like Defendant Maytubby could constitute a violation of due process and are not precluded by Defendant Black's declaration.

In addition, the record contains evidence to support a reasonable inference of participation. Before the Regional Director made his decision, Defendant Black received copies of the briefs filed by the Plaintiffs and the Halftown Group. AR 003456; AR 003427; AR 003528; AR 003552. Moreover, at the time Defendant Black served as Acting Assistant Secretary for Indian Affairs at the Department of the Interior, the Halftown Group had an application pending for the United States to accept certain parcels of Cayuga land in trust, an ongoing matter that raised government recognition issues.

This issue cannot be conclusively resolved on this administrative record because the record is incomplete. The documents the Department of the Interior released pursuant to Plaintiffs' request under the Freedom of Information Act ("FOIA") inexplicably omitted all documents for the period between late June 2015 and June 7, 2016. ECF No. 23-2 at ¶ 42. Defendant Maytubby concedes that the collaboration between the BIA regional office and the Halftown Group to devise the SOS campaign was in full swing during this period, and the documents that have not yet been released by Federal Defendants pursuant to FOIA may elucidate Defendant Black's role. To fill the known gaps in the administrative record in the face

of the Department's intransigence, Plaintiffs moved for discovery, a motion which this Court at the February 12, 2018 teleconference held in abeyance. ECF. 40 at 10, n.5. Defendant-Intervenor's Motion for Summary Judgment on Plaintiffs' Count VI should be denied. In the alternative, Plaintiffs respectfully request that Defendant-Intervenor's Motion be held in abeyance until this Court decides Plaintiffs' Motion for Expedited Discovery.

VI. CONCLUSION

For all the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted, and Defendant-Intervenor's Cross-Motion for Summary Judgment should be denied.

Date: August 3, 2018

Respectfully submitted,

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