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Plaintiff in Pro Per

United States District Court

for the District of Arizona

Raymond Cross	)	Case No. CV18-220TUCCKJ
Plaintiff	)	
vs.	)	**COMPLAINT FOR**
Department of the Interior	)	**DECLARATORY RELIEF**
Defendant	)	
	)	

I

Introduction

1. Plaintiff Cross is seeking declaratory relief from this Court because his tribally and federally guaranteed right to petition—guaranteed to him by Article X of the Three Affiliated Tribes' (TAT) Constitution and by the Right of Petition Clause of the First Amendment to the U.S. Constitution—the Secretary of the Interior (SOI) to amend his own Tribe's Constitution has been effectively stymied by the following actions of the Bureau of Indian Affairs (BIA):

a. by the arbitrary and capricious action that has been taken by its Great Plains Regional Director in issuing his decision of October 16, 2017, to supplant and to replace Article X's standard regarding how many tribal members' signatures that Cross must collect to validate his Secretarial Petition – that requires only 557 constitutionally "qualified tribal voters" need sign Cross' petition to render it valid---with a wholly impossible to achieved federal signature collection standard—25 C.F.R.§81.53—that requires Cross to collect 3,447 tribal members' signatures despite the fact that only 1,673 qualified tribal voters existed in the TAT at the time Cross commenced his petitioning process on May 17, 2017; See. Regional Director's Decision of October 16, 2017 ("Director's Decision), Exhibit "E", and

b. by the Interior Board of Indian Appeals' ("Board") order of January 11, 2018, that dismissed plaintiff Cross' appeal of the Regional Director's decision on the grounds that it did not constitute "final" agency action, as well as by the Board's further holding that Cross must first present his fully formulated petition-- thereby requiring him to make a good effort to substantially comply with the Regional Director's impossible to achieve signature collection requirement—before he would be deemed legally eligible by the Board to challenge any aspect of the Regional Director's decision in this matter. See, *Raymond Cross v. Great Plains Regional Director* (*Cross I*), 65 IBIA 89, 92 (January 11, 2018) (the Board held that the

governing federal regulations "do not envision [the] BIA making a final decision on whether a petition is valid before a petition is submitted.")

2. Given that tribal members' petitions to the Secretary of the Interior (SOI) are governed by a hybrid system of tribal constitutional law—as represented by Article X of his Tribe's Constitution in this matter--and by the BIA's recently formulated Final Rule that now governs both the Secretarial Petitioning and Secretarial Elections processes under the aegis of a single federal rule, plaintiff Cross seeks to provide this Court with hopefully useful, background information regarding the genesis of this Indian only, tribal-federal petitioning system.

A. The Substantive And Procedural Barriers Imposed On Tribal Members' Secretarial Petitions By The BIA's 2015 Final Rule Governing Secretarial Petitions And Secretarial Elections That Seek To Amend The Tribal Constitutions Of Those Organized Indian Tribes Who Have Chosen To Adopt Such Governing Documents Under The Authority of 25 U.S.C. § 476

3. In at least one tribal commentator's opinion, the BIA's 2015 Final Federal Rule's—that consumed 25 years of BIA's diligent efforts in its making--primary goal is to erect "unnecessary [administrative] obstacles and processes [that are] designed to thwart the efforts of [tribal] petitioners [to amend their own tribes' governing documents] See. Secretarial Election Procedures, BIA Final Rule, 25 C.F.R. Parts 81 and 82, 80 Fed. Reg. 63094-63114 (Oct. 19, 2015) ("80 Fed. Reg.") ("The Bureau of

Indian Affairs is amending its regulations governing Secretarial elections and procedures for tribal members to petition for Secretarial elections."), See, 80 Fed. Reg. at page 63104

4. His pessimistic comments regarding this rule's likely effects on the future availability of the what he regarded as the sole practical means—referring here to the Secretarial Petitioning process--whereby tribal members can possibly redress their grievances against overbearing or lawless tribal governments, should be read in light of the BIA's stated future policy that in administering this new rule it would impose signature collection requirements on tribal petitioners "that are high enough so as to avoid harassment of organized tribal governments through frivolous petitions [brought forth by] a small minority of the [tribal] membership." See, 80 Fed. Reg. at page 63103

5. But its declared policy did ironically cause it—at least in one cited instance--to reduce its signature collection requirement from 60% of all eligible tribal voters of a given Indian tribe to a slightly less onerous requirement holding that future tribal petitioners need collect the signatures of only 50% of the Tribe's eligible voters to validate their Secretarial Petitions. See, 80 Fed. Reg. at Ibid

6. Protecting tribal councils from the burden of having to consider potentially numerous petitions from ostensibly disaffected or disgruntled tribal members who sought to amend their respective tribes' governing documents justified the BIA's efforts to erect and maintain high signature collection barriers as its means of limiting

the number of successful tribal members' petitions seeking to amend their respective Tribe's governing documents. See, 80 Fed. Reg. at Ibid

7. These high signature collection requirements are steadfastly maintained by the BIA despite the its acknowledgment of the inherently innocuous nature of these petitions: "[u]ltimately, [tribal members'] signatures on a [member sponsored] petition represents only a request to bring an issue to a vote, rather than a decision on the request to be voted upon." See, 80 Fed. Reg. at page 63103

8. The BIA acknowledges these requirements have been successful in tamping down the number of successful tribal members' petitions, citing one example wherein it could not recollect one instance where a tribal member petition had successfully surmounted the BIA's 60% signature collection requirement for a given Tribe. See, 80 Fed. Reg. at page 63103 ("The lowering [of the signature collection requirement to 50%] recognizes that the current 60% requirement may never have been met.")

9. The above cited tribal commentator also pointed out that under the 2015 Rule tribal petitioners must now surmount new procedural hurdles in order to have their proposed Secretarial Petitions validated by the BIA; he cites, for example, the requirement wherein "[u]nlike when tribal governing body submits a resolution requesting an election, the [tribal] petitioners must first undergo a review to verify [their] petition." See, 80 Fed. Reg. at page 63102

10. In light of the BIA's administrative attention and concern that it devotes to tribal members' petitions, it would presumably be equally concerned about ensuring and safeguarding the democratic legitimacy of the Secretarial Election process relating to the possible adoption of any proposed amendments to the tribes' governing documents; indeed, it's not surprising that several tribal commentators wanted the 2015 Rule to address this imbalance by its "establish[ing] a threshold for participation by eligible [tribal] voters in the required election [on the proposed amendments]-either that a percentage of eligible voters [be required] to register to vote or that a certain percentage of eligible voters [be required to actually] vote [so as to validate a given Secretarial Election.]" See, 80 Fed. Reg. at page 63102

11. A tribal commentator graphically illustrated the electoral legitimacy problem that results from not requiring a minimum eligible voter participation threshold for Secretarial Elections; as paraphrased by the BIA rule makers, the commentator's problem case is as follows: "[Assume a case where] there are 6,500 eligible voters, but only a 100 [voters] register [to vote in the election], and only 40 of those [registered tribal voters] actually cast a ballot [in the hypothetical Secretarial Election], the election would [nonetheless] be valid under the proposed regulation because more than 30 percent of [the] registered voters voted, even though less than 1% of the eligible voters cast a ballot." See, 80 Fed. Reg. at Ibid

12. However, the BIA's brief response to this comment was to express its hope that it could find other ways to improve eligible tribal voter participation in Secretarial Elections, such as its promoting new tribal voter education initiatives; but the BIA's refusal to require a minimum eligible voter participation threshold to validate Secretarial Elections stands in definite contrast to the maximum eligible voter participation it requires in the validation of tribal members' Secretarial Petitions. See, 80 Fed. Reg. at Ibid

13. This constant "tug of war" and endemic interplay between the BIA's policy objective of supporting and preserving organized tribal government; ensuring that that BIA acknowledges and respects tribal constitutional law--including Article X of the TAT Constitution—as the paramount legal authority in the Secretarial Petitioning process, and last, but hopefully not least, protecting individual tribal petitioners' due process interests and rights-- including plaintiff Cross' legal rights and due process interests—requires that appropriate administrative and judicial oversight be asserted and exercised over this arcane, but important, Indian only petitioning system.

14. The foregoing analysis of the 2015 Final Rule demonstrates that the BIA functions in a regulatory environment that is rife with potentially divided loyalties and conflicting interests. Given that reality, it's questionable whether the BIA can effectively and fairly discharge its assigned role of "balancing" the competing rights and interests the "organized" tribal governments, tribal petitioners considered as a

group and the personal rights and interests of individual tribal members such as plaintiff Cross. For that reason, he has provided a brief overview regarding how the BIA has, from the perspective of his rights and interests as a tribal member of the TAT as an American citizen, has misinterpreted and misapplied the governing tribal and federal law in this matter.

B. Summary of Plaintiff Cross' Case:

15. This matter arose out of plaintiff Cross' exercise—on May 17, 2017--of his Article X right to petition the Secretary of the Interior (SOI) to call a Secretarial Election for the purpose of repealing a 1986 tribal constitutional amendment that had extinguished the pre-existing right of ALL (emphasis added) of the TAT's non-resident, but otherwise constitutionally qualified, tribal voters to vote by absentee ballot in all tribal elections.

16. After that amendment became effective in 1986, non-resident tribal voters must now return to the Fort Berthold Reservation if they wish to cast a ballot in any tribal election. See, Article IV, Section 2(b), TAT Constitution, Exhibit "I"

17. However, many, if not most, non-resident tribal voters have found returning to the Reservation to vote in each tribal election to be economically or physically impracticable and unduly burdensome for them to accomplish.

18. Today, 75% to 80% of the Tribe's approximately 15,800 members reside off the Fort Berthold Reservation.

19. However, only a quarter of its enrolled membership—approximately 4,000 members---reside on the Reservation.

20. But only those members who reside on the Reservation are entitled to vote—that is, unless an otherwise eligible, non-resident tribal voter chooses to physically return to the Reservation in order to vote in the election in question—in tribal elections.

21. Plaintiff Cross initiated--on May 17, 2017-- his Secretarial Petition to amend his Tribe's Constitution as authorized by Article X of his Tribe's Constitution and by 25 C.F.R. Part 81, subpart F, entitled Formulating Secretarial Petitions. See, Article X, Entitled "Amendment," TAT Constitution ("TAT Constitution"), Exhibit "I"

22. He also requested the Local Fort Berthold Agency Official, Superintendent Kayla Danks, to inform him as to the minimum number of tribal members' signatures he must collect, pursuant to the requirements of Article X, to validate his Secretarial Petition. See, 25 C.F.R. § 81.57(a)(2)(i) ("The spokesperson for the tribal petitioners may ask the…Local Bureau Official [in this case, Superintendent Danks] TO DETERMINE (emphasis added) the number of tribal members who MUST (emphasis added) sign [Cross'] petition as required by [Article X] of the tribe's governing document.") See also , Cross Initial Letter To Superintendent Danks ("Cross' Initial Letter"), Exhibit "A"

23. However, neither Superintendent Danks, nor the BIA's Great Plains Regional Director, EVER FULFILLED CROSS' REQUEST (emphasis added) to inform him of minimum number of constitutionally qualified tribal voters who MUST (emphasis added) sign Cross' petition, according to Article X's requirements, so as to render it constitutionally valid.

24. Therefore, given that no legally responsible BIA official--neither the Agency Superintendent nor the Regional Director--ever performed this tribal constitutionally required step to ascertain the required number of qualified tribal voters who must sign Cross' Secretarial Petition--as is required by the express terms of Article X and 25 C.F.R. § 81.57(a)(2) (i)—they have both breached their legally and administratively assigned duties they owed to plaintiff Cross.

25. Not surprisingly, both BIA officials now claim they were exempt from complying with their responsibilities and that they were legally entitled to by-pass Article X's requirement that they determine the minimum number of constitutionally "qualified tribal voters" who MUST (emphasis added) sign Cross' Secretarial Petition so as to render it valid under the terms of that Article. See, Article X, TAT Constitution, at page 9, Exhibit "I"

26. Superintendent Danks provides the most straightforward excuse for not complying with Article X's substantive requirements—particularly its requirement that only "constitutionally QUALIFIED (emphasis added) tribal voters" be allowed to sign

Cross' petition—given her claim that Tribal Enrollment Officer's mere act of CONVEYING (emphasis added) to her the number she was to use in determining how many ostensibly constitutionally qualified tribal voters (10,340) existed in the TAT as of May 18, 2017, relieved her of any regulatory duty to conduct further inquiry—whether or not it was required by 25 C.F.R. §81.57(a)(2)(i) or Article X—regarding the minimum number of tribal members' signatures Cross must collect so as to validate his Secretarial Petition, See, Superintendent Danks' Decision of June 21, 2017 ("Danks' Decision"), Exhibit "B"

27. She further asserts in her decision, the mere conveyance of this information there were 10,340 ostensibly qualified tribal members in the TAT who were, therefore, entitled to sign Cross' petition---even though this information had been "conveyed" to her from the Tribal Enrollment Officer on May 18, the DAY AFTER (emphasis added) plaintiff Cross requested that she determine the minimum number of qualified tribal voters who must sign his Secretarial Petition according to Article X—was sufficient to both obligate and entitle her to use that number in determining how many tribal members' signatures Cross must collect to validate his petition. See, Danks' Decision, at Ibid ("As we stated in our May 18, 2017 letter, we received the enrollment information (10, 340 eligible tribal voters) from the Tribal Enrollment Office, which was then divided by one-third which then equals 3,447 QUALIFIED (emphasis added) voters."), Exhibit "B"

28. By comparison, the BIA's Regional Director's rationale for disregarding Article X's substantive requirements stems from his unwarranted and conclusory assertion that Article X was "silent" regarding the qualifications of those tribal members who were constitutionally required to sign Cross' petition; he pushed that theory because he erroneously confused an alleged tribal constitutional "silence" on this issue with what was, in reality, a merely ambiguous or incomplete tribal constitutional description as to which tribal members constituted "qualified tribal voters" came within Article X's purpose and intent; but he pressed his conclusion because it served his desired goal of triggering his much preferred default federal regulation, 25 C.F.R. §81.53, that ostensibly allowed and authorized ALL (emphasis added) adult tribal member of the TAT—defined by that federal regulation as any tribal member who is 18 years of age or older--to sign Cross' petition. See, Great Plains Regional Director's Decision at page 4 ("Director's Decision") ("Where the tribal constitution is silent, it does not supplant federal regulation."), Exhibit "E"

C. Conclusion:

29. Plaintiff Cross, as the tribal petitioner in this matter, is forced to run a gauntlet of federal regulations that seem intended and designed to ensure that very few, if any, tribal member petitions are ever successful in realizing their ultimate goal of amending their own respective Tribe's governing document. However, in plaintiff Cross' case this issue is heightened because the BIA's imposed signature collection

goal of 3,447 constitutionally qualified tribal voters' signatures —pursuant ostensibly to Article X of the TAT Constitution—is impossible for Cross to achieve

II

Jurisdiction

30. This court has jurisdiction over this matter pursuant to 28 U.S.C. §1331, popularly known as the Federal Question statute, because it arises under the Right of Petition Clause of the First Amendment to the United States Constitution; the Due Process Clause of the Fifth Amendment to the United States Constitution; the Agreement Between The Three Affiliated Tribes and the United States of December 14, 1886, approved March 3, 1891, 26 Stat. 1032; section 16 of the Indian Reorganization of 1934, 25 U.S.C.§476; the Administrative Procedure Act, 5 U.S.C.§ 706(2)(A); and 25 C.F.R. Part 81, Subpart F, Formulating Petitions To Request A Secretarial Election (§§ 81.49-81.63)

III

Venue

31. Venue is proper pursuant to 28 U.S.C.§1391 because the defendant is a federal agency and Plaintiff Raymond Cross resides in this district.

IV

Parties

32. Plaintiff Raymond Cross resides at 2236 East Third Street, Tucson, AZ 85719. Defendant Department of the Interior (DOI) is a federal, cabinet level, agency that has its headquarters address at 1849 C Street, N.W., Washington DC 20240.

V

Statement of Facts

A. Facts Relevant To The Personal Status of Plaintiff Cross

33. Plaintiff Raymond Cross (Cross) is an enrolled member of the Three Affiliated Tribes (Tribe), a federally recognized Indian tribe which resides on its treaty established Fort Berthold Reservation (Reservation) that is located in northwestern North Dakota. See, Elizabeth A. Fenn, Encounters At The Heart Of The World: A History of the Mandan People (2015 Winner of the Pulitzer Prize, History)

B. Facts Relevant To The Contemporary Fort Berthold Reservation

34. The federal government's decision to build one of the world's largest earth filled dam on the Fort Berthold Reservation in the early 1950s—as part of its massive, multipurpose, water resources development program known as the Pick-Sloan Program (PSP) for the development of the Upper Missouri River Basin—inundated and took over 156, 035 acres of the Tribe's best and last remaining agricultural lands along the River, destroyed the tribal people's nine (9) historic river bottom communities, geographically fragmented the Reservation into six (6) discrete and discontinuous segments and occasioned the exodus from the Reservation of many of the Tribe's

younger, productive and job ready men and women who left to seek new life and job opportunities in America's urban job centers such as the Bay Area, Phoenix, L.A, Chicago and Denver under the BIA's so-called Indian relocation program of the early 1950s and 1960s that intentionally sought to depopulate the Fort Berthold Reservation, as well as many other Indian reservations around the country, as part of the federal government's tribal termination program. See, Paul Van Develder, Coyote Warrior: One Man, Three Tribes And The Trial That Forged A Nation (Little, Brown: 2004)

35. Today, about 75%-80% the Tribe's enrolled membership of approximately 15,800 members live and work off of the Fort Berthold Reservation. Only a relatively small minority of about 4,000 tribal members continue to reside, for their own personal reasons, on the Reservation.

36. Furthermore, many of these resident tribal members—given the recent influx of mineral royalty payments to many Indian land owners from oil and gas development on the Reservation—have chosen to move off Reservation and into the surrounding towns and cities such as Bismarck, ND, in order to access more of life's amenities as well as better health care. However, many of these tribal members also choose to maintain post office boxes or their traditional family residences on the Fort Berthold Reservation.

37. The Tribe's 1936 Constitution--authorized by Section 16 of the 1934 Indian Reorganization Act (IRA) of 1934-- has never been comprehensively amended or

revised so as to take account of those tremendous demographic and geographic changes that have been wrought on the Fort Berthold Reservation by, in large part, by the federal government's intentional breach of its 1886 Agreement with the TAT due to its enactment of the Garrison Dam Taking Act of 1949.

38. Therefore, the Tribe's largely un-revised 1936 Constitution still distributes the Tribe's overall political authority solely to that relatively small minority of tribal members who reside within the Reservation's six (6) segments or electoral districts and who possess the exclusive constitutional authority to vote for representatives to the Tribe's governing body known as the Tribal Business Council (TBC).

C. Facts Relevant To Plaintiff Cross' Initiation Of His Request-- Through The Secretarial Petitioning Process That Is Set Forth In Article X Of The Tribe's Constitution--For A Secretarial Election Seeking The Repeal Of A 1986 Amendment To The TAT Constitution

39. Plaintiff Cross is the spokesman for an ad hoc group of concerned tribal members on Fort Berthold Reservation who have decided--as authorized by Article X of the Tribe's Constitution---to request A Secretarial Election, via a Secretarial Petition, that would be scheduled and administered by the Secretary of the Interior (SOI). See, Cross' Initial Letter To Agency Superintendent Danks on May 17, 2017, at Ibid ("Cross Initial Letter"), Exhibit "A"

40. At that election, those constitutionally qualified tribal voters who have been deemed by Article X's provisions as legally entitled to sign Cross' Secretarial Petition and likewise as legally entitled to vote in this election, would decide, by the majority vote of those constitutionally qualified tribal voters, whether or not to repeal that identified 1986 tribal constitutional amendment.

41. The TAT Constitutional provision that plaintiff Cross and his fellow petitioners seek to put up for a referendum vote is the following:

> "For the purpose of voting in Tribal Business Council Elections exclusively, any eligible voter of the Three Affiliated Tribes, whose place of legal residence is located outside of the exterior boundaries of the Fort Berthold Reservation on the date of an election shall return to the Reservation in order to vote in the election and shall register to vote and cast his ballot at the appropriate segment polling place on the date of the election." Article IV, Section 2(b). See, TAT Constitution, Exhibit "I "

42. Cross and his fellow tribal petitioners are seeking to repeal this particular amendment because its adoption extinguished the pre-existing right of ALL (emphasis added) non-resident tribal voters to vote in all tribal elections by absentee ballot.

43. They are also seeking to repeal this particular amendment because its "return to the Reservation to vote" requirement imposes a substantial economic and physical burden on the affected tribal members' inherent and fundamental right to vote in any and all tribal elections.

44. On May 17, 2017, Cross sent a letter to the Agency Superintendent Kayla Danks requesting her—pursuant to the requirements of 25 C.F.R.§ 81.57(a)(2)(i)--"to

determine the number of tribal members who must sign" his Secretarial Petition "as required by [Article X of his] tribe's governing document." See, Cross' Initial Letter at Ibid, Exhibit "A"

45. Cross told Danks in his letter to be aware that the TAT Constitution distinguishes between two constitutionally established classes of tribal voters: a. those eligible tribal voters who are defined in Article IV, Section 2(a) of his Tribe's Constitution as those tribal member who are "eighteen (18) years of age and over" and who are therefore deemed eligible to vote in Tribal elections; and b. those qualified tribal voters who, under the provisions of Article X of the Constitution, have become "legally entitled" to sign Secretarial Petitions and to vote in Secretarial Elections. See, Cross' Initial Letter at Ibid, Exhibit "A"

D. Facts Relevant To Superintendent Danks' Decision Delegating Her Job Of Determining How Many Tribal Member Signatures Plaintiff Cross Must Collect In Order To Validate His Secretarial Petition To The Tribal Enrollment Officer—Sevant F. Taft—Of The TAT

46. Superintendent Danks' decision describes how she determined how many tribal members' signatures Cross must collect to validate his Secretarial Petition:

> "As stated in our May 18, 2017 letter, we received the enrollment information [that there were 10,340 living enrolled tribal members who were 18 years of age or older] from the Tribal Enrollment Office, which was then divided by one third, which then equals 3,447 signatures of qualified tribal voters." See, Danks' Decision of June 21, 2017 ("Danks' Decision"), Exhibit "B"

47. Furthermore, Danks states in her decision:

> "After conferring with higher management, we have concluded that since this information was relayed [to Danks] from the Tribe and pertains to Article X, of the Three Affiliated Tribes' Constitution, it does not present any information or decision that is appealable under 25 C.F.R. §2.7(c). "See, Danks' Decision at Ibid, Exhibit "B"

E. Facts Relevant To Plaintiff Cross' Notice Of Appeal (NOA) To The Great Plains Regional Director Regarding Superintendent Danks' Decision of June 21, 2017

48. On July 14, 2017, Plaintiff Cross gave Superintendent Danks his Notice of Appeal (NOA) pursuant to 25 C.F.R. §2.9, challenging her decision that he must collect 3,447 signatures from constitutionally qualified tribal voters in order to validate his Secretarial Petition. See, Cross' Notice of Appeal (NOA) Of Danks' Decision ("Cross' First NOA"), Exhibit "C"

49. He also gave her notice that he was appealing her conclusion that her decision on this substantive issue was non-appealable. See, Cross' First NOA at Ibid, Exhibit "C"

50. Plaintiff Cross also told Danks that he, as a tribal member not represented by legal counsel, had served by two day priority mail and as required by 25 C.F.R. §2.12, a copy of all his relevant appeal documents on that official who will decide this appeal, as well as on each interested party that was known to him. See, Cross' First NOA at Ibid, Exhibit "C"

51. Cross told Danks, as well, that he would file his Statement of Reasons (SOR) for his appeal within the thirty (30) day time limit provided for this purpose in 25 C.F.R. §2.10(c). See, Cross' First NOA at Ibid, Exhibit "C"

F. Facts Relevant To Plaintiff Cross' Statement Of Reasons (SOR) In Support Of His Appeal Of Danks' Decision Requiring Him To Collect 3,447 Qualified Tribal Voters' Signatures In Order To Validate His Secretarial Petition

52. In his Statement of Reasons (SOR) in support of his appeal from Danks' Decision, Plaintiff Cross asserted four (4) bases for error by Superintendent Danks in her decision of June 21, 2017, as follows: a. Superintendent Danks erred in claiming he decision was non-appealable under 25 C.F.R. §2.7(c); b. Superintendent Danks erred in her arbitrary and capricious decision to implicitly delegate to the Tribal Enrollment Officer, Sevant S. Taft, her exclusive and non-delegable administrative authority—granted to her by 25 C.F.R. §81.57(a)(2)(i)--to determine the number of qualified tribal voters' signatures that Cross must obtain on his Secretarial Petition, thereby violating the express requirements of Article X of the TAT Constitution, as well as Cross' due process rights that prohibit such a delegation of her exclusive decision making responsibilities to a separate and presumptively hostile and antagonistic entity; and, c. Superintendent Danks erred by abusing her administrative discretion in according undue deference to the Tribal Enrollment Officer's erroneous conclusion that--as contrary to paramount tribal constitutional law embodied in Article X--there were 10,

340 constitutionally qualified tribal voters existing in the TAT as of May 18, 2017, as well as by her independent failure to reasonably "interpret [Article X of the Tribe's Constitution] as [was] necessary to carry out the [federal] government-to--government relationship with the Tribe's [Secretarial Petitioners herein] as required by 25 C.F.R. § 81.9; and d. she erred in holding there were 10, 340 constitutionally qualified tribal voters who were "legally entitled" to sign Cross Secretarial Petition, given that her decision fundamentally conflicts with the findings of facts and conclusions of law contained in the 2015 IBIA decision—entitled *Charles K. Hudson v. Great Plains Regional Director,* 61 IBIA 253 (September 15, 2015) ("*Hudson*")—which thoroughly analyzed both Article X of the Tribe's Constitution, as well as the relevant federal regulations governing Secretarial Elections, and concluded that only those eligible tribal voters who have actually registered to vote in the 2013 Secretarial Election on Fort Berthold Reservation—1249 voters in total-- are to be deemed "constitutionally qualified tribal voters" with the meaning of Article X and relevant federal regulations governing Secretarial Elections. See, Cross' Statement of Reasons, at pages 4-13 ("Cross' SOR), Exhibit "D"

G. Facts Relevant ToThe Great Plains Regional Director's Decision Denying Plaintiff Cross' Appeal On October 16, 2017

53. The Regional Director recognized that "Article X of the [Tribe's] Constitution uses the term 'qualified voters' in relation to determining the number of

[tribal members'] signatures needed for a valid petition." See, Regional Director's Decision at page 4 ("Director's Decision") Exhibit " E"

54. He also recognized that Article requires "the Secretary of the Interior to call an election on any proposed amendment...upon the presentment of a petition signed by one-third of the QUALIFIED (emphasis added) voters." See. Director's Decision at page 4, Exhibit "E"

55. But he wrongly concluded that--given Article X had failed to specifically define the constitutional qualifications of those "qualified tribal voters"—he was thus empowered to disregard that tribal constitutional law—which he characterized as wholly "silent" on this issue--thereby authorizing him to "federalize" the determination of WHICH (emphasis added) and HOW MANY (emphasis added) tribal members—those issues now to be determined by a federal regulation--25 C.F.R. §81.53—and not tribal constitutional law--tribal members of the TAT must sign Cross' petition so as to render it valid under federal regulation. See. Director's Decision at page 4, Exhibit "E"

56. Therefore, the Regional Director chose to supplant Article X's requirements as to who is legally entitled to sign Cross' petition, in favor the BIA's default regulations that allows ANY AND ALL (emphasis added) adult members of the TAT to be legally entitled to sign his petition stating: "to be QUALIFIED (emphasis added) for purposes of signing a petition to request a Secretarial Election, one must

merely be a tribal member eighteen (18) years of age or older" See, Director's Decision at page 4, Exhibit " E"

57. The sum and substance of the Regional Director's decision in this matter is captured in his statement rejecting Cross' claimed arbitrary and capricious action by Superintendent Danks in her unquestioning embrace of the Tribal Enrollment Officer's communication to her that there were 10, 340 enrolled, adult tribal members who were thereby legally entitled to sign Cross' Secretarial Petition:

> Using the number of tribal members provided by the Trib[al] [Enrollment Officer] for calculating the number of signatories needed for a valid petition as 3,447 was not arbitrary or capricious; it followed the exact process outlined in 25 C.F.R.§81.57(a)(2)(i). The Superintendent made the proper calculation and she is not empowered by any part of the Secretarial Election regulations, to make a determination about the validity of the list provided by the Tribe" See. Director's Decision at page 5, Exhibit E"

58. However, the Regional Director pointedly ignored the relevance of a 2015 IBIA decision as binding precedent on these issues raised in the Cross' appeal, given that the Board in its decision in that earlier matter (*Charles K. Hudson v. Great Plains Regional Director*, 61 IBIA 253 (September 15, 2015)) thoroughly and comprehensively analyzed and applied that ostensibly "silent" term—qualified tribal voters—of Article X in coming to its conclusion—one that is diametrically at odds with the Director's decision—that allowing all adult tribal members of the TAT, referring to those enrolled members who are eighteen years of age or older, to vote in

Secretarial Elections would conflict impermissibly with the express language and purpose of Article X of the Tribe's Constitution which clearly intended to exclude those merely eligible tribal voters from signing Secretarial Petitions or from voting in Secretarial Elections. See, Director's Decision at page 4, Exhibit "E"

H. Facts Relevant To Plaintiff Cross' Notice of Appeal (NOA) To The Interior Board of Indian Appeals (IBIA) Regarding The Regional Director's Adverse Decision In This Matter

59. On November 15, 2017, Plaintiff Cross filed his Notice of Appeal (NOA) with the Interior Board of Indian Appeals (IBIA) requesting the Board to review the Regional Director's decision in this matter. See, Cross' Notice of Appeal (NOA) To The IBIA ("NOA-IBIA") at page 1, Exhibit "F"

60. He assigned the following four (4) bases for error in the Director's decision: a. he erred in holding that Superintendent Danks' decision requiring Cross to collect 3,447 signatures of constitutionally qualified tribal voters was rendered non-appealable by the terms of 25 C.F.R. §2.7(c); b. he erred in holding that Danks did not act arbitrarily and capriciously in implicitly delegating to a tribal representative of the TBC —Sevant F. Taft ("Taft"), the Tribal Enrollment Officer—the SOLE (emphasis added) authority to determine how many tribal members' signatures that plaintiff Cross must collect so as to validate his Secretarial Petition pursuant to Article X of the TAT Constitution thus violating the express terms of 25 C.F.R.

§81.57(a)(2)(i) that requires Danks herself TO DETERMINE (emphasis added) the minimum number of signatures that Cross must collect from constitutionally qualified tribal voters so as to validate his petition; c. he erred in holding that Danks did not abuse her official discretion by wholly deferring to Taft's clearly erroneous determination that there were 10, 340 constitutionally qualified tribal voters existing as of May 18, 2017, who, by that token, were deemed by Danks as legally entitled to sign Cross' petition; and, d. he erred in holding that Danks' decision did not fundamentally and impermissibly conflict with the findings of facts and conclusions of law contained in the governing IBIA decision entitled *Charles K. Hudson vs. Great Plains Regional Director*, 61 IBIA 253 (Sept. 15, 2015) to such a degree that the Director's decision in this matter has to be set aside as being "inconsistent with the established law" as required by the APA, 5 U.S.C. §706(2)(A).

61. The Director, rather than repudiating Danks' action implicitly delegating her regulatory duties to Taft, embraces them stating:

> "Superintendent [Danks] did not render a decision since she merely performed a simple mathematical calculation utilizing information provided by the Tribe and the procedures outlined under Article X of the Tribe's Constitution and 25 C.F.R. §§ 81.53 and 81.57." See, Director's Decision, at page 4, Exhibit "E"

62. Plaintiff Cross requested the Board to provide him with reasonable administrative relief by requesting it to order the BIA to simply re-calculate the minimum number of tribal member signatures that Cross should be required to collect-

- consistent with the terms of the governing regulation, 25 C.F.R. §81.57 (a)(2)(i) and the relevant holdings of the *Hudson* decision regarding the use of TAT's most recent Registered Voters List that was compiled for the last Secretarial Election that was held on Fort Berthold Reservation as the source document for the number of constitutionally qualified tribal voters under Article X—so as to validate Cross' pending Secretarial Petition.

I. Facts Relevant To The Interior Board Of Indian Appeals' (IBIA) Decision Dismissing Plaintiff Cross' Appeal Of The Adverse Decision By The Great Plains Regional Director

63. The IBIA held that Agency Superintendent Danks' decision requiring Plaintiff Cross to collect 3,447 qualified tribal voters' signatures did not constitute final agency action pursuant to 43 C.F.R. §4.331 or the Article X's requirement that the "Secretary must call an election on any proposed amendment to the Constitution upon the presentation of a 'petition signed by one-third of the qualified voters.' See, *Raymond Cross vs. Great Plains Regional Director* ("*Cross I*"), 65 IBIA 89 at Ibid

64. The Board's decision in this matter does note that Plaintiff Cross did ask the Local Bureau Official how many tribal signatures were required to validate his Secretarial Petition. As a result, Danks "[c]ontact[ed] the tribal governing body to obtain the current number of tribal members, 18 years of age or older, to determine the

number of tribal members who must sign a petition as required by the tribe's governing document." See, *Cross I*, 65 IBIA at 90

65. However, the Board does not analyze that portion of the relevant regulation—25 C.F.R. § 81.57(a)(2)(i)--stating that Danks will contact the Tribe regarding the present number of adult tribal members within the TAT so as to assist her "TO DETERMINE (emphasis added) the number of tribal members who MUST SIGN (emphasis added) [Cross'] petition as REQUIRED (emphasis added) by [Article X of] the [T]ribe's governing document." See, *Cross I*, 65 IBIA at 90

66. The Board agreed with the Regional Director's supplanting of Article X's requirements with the BIA's own regulation, 25 U.S. C. §81.53, that states "one must merely be a tribal member eighteen (18) years of age or older…to be qualified to sign a petition to request a Secretarial election" See, *Cross I*, 65 IBIA at 90

67. The Board, as it correctly states, is only authorized is to consider appeals from a "final administrative action or decision; however, it then goes on to state that "even if [the Regional Director's action in this matter] were characterized as 'decision' it's not final." See, *Cross* at 91

J. Facts Relevant To Plaintiff Cross' Motion For Reconsideration Before The IBIA

68. Plaintiff Cross filed his Motion For Reconsideration with the Board on January 27, 2018, requesting it to reconsider its earlier order dismissing his appeal of

the Regional Director's decision on the grounds that his decision did not constitute "final" agency action as is required before the Board can exercise its appellate jurisdiction over Cross' appeal in matter. See, Cross' Motion For Reconsideration ("Cross' Motion"), Exhibit "G"

69. His motion was based on two grounds: a. the Board's earlier order of dismissal of Cross' appeal would inflict a manifest injustice affecting not only Cross' constitutional and statutory right of appeal, but the right to petition on behalf of hundreds of other similarly situated tribal petitioners for whom he was informally nominated to speak; and b. the Board's order of dismissal of Cross' appeal was based on a clearly erroneous interpretation of governing federal administrative law principles relating to what constitutes "final" agency action.

70. Furthermore, the Regional Director's decision to replace Article X of the TAT Constitution with 25 C.F.R. §81.53—whose terms ostensibly authorize ALL (emphasis added) adult (those who are 18 years of age or older) members of the TAT, or 10,340 members as of May 18, 2017, to sign Cross' Secretarial Petition—is based on his wholly erroneous and unwarranted assumption that Article X is allegedly "silent" regarding the rights and qualifications of those tribal members it regards as being "qualified tribal voters" and whom, per that Article's provisions , are the only tribal members of the TAT who are "legally entitled" to sign Secretarial Petitions and to vote in Secretarial Elections. See, Cross' Motion at page 2, Exhibit "G"

71. Consequently, the manifest injustice that would be inflicted upon the TAT and its members, by the Director's decision, is the "demolishment of the tribal people's intentionally established constitutional distinction between eligible and qualified tribal voters, [and the Board's order] also…approves the BIA's wrongful substitution of a wholly QUANTITATIVE (emphasis added) standard as the [BIA's] administratively constructed replacement [that's accomplished by the Director's decision that substitutes 25 C.F.R. §81.53 for Article X] for the tribal people's …QUALITATIVE (emphasis added) for determining which tribal voters…were legally entitled to participate in Secretarial Elections and…to sign Secretarial Petitions[.]" See, Cross' Motion at page 3, Exhibit "G"

72. Furthermore, "the [Board's dismissal order implicitly] approves the [BIA's] establishment of a wholly impossible to achieve QUANTITATIVE (emphasis added) standard one that now expressly requires…Cross to collect 3,447 [tribal members'] signatures rather than the 557 signatures he would have been required to collect under Article X's previously existing QUALITATIVE (emphasis added) standard." Cross' Motion at Ibid

73. The Regional Director's decision, approving Danks' requirement that Cross collect 3,447 signatures from qualified tribal voters of the TAT, "thereby overrid[ing] and fundamentally alter[ing] the petitioning procedures set forth...in Article [X]…[while] undisputed law and fact reveals that in 2013 only 1,249 [registered]

constitutionally qualified voters existed in the TAT and in 2016 only 1,673 [registered] constitutionally qualified tribal voters existed in the TAT." See, Cross' Motion at page 9, Exhibit "G"

K. Facts Relevant To The IBIA's Decision Denying Plaintiff Cross' Motion For Reconsideration

74. On February 28, 2018 the Board denied plaintiff Cross' motion for reconsideration in this matter. See, *Raymond Cross v. Great Plains Regional Director*, 65 IBIA 157 (Feb. 28, 2018) ("*Cross II*")

75. The Board stated that it will grant "petitions for reconsideration only in extraordinary circumstances." *Cross II* at 157

76. Cross' motion for reconsideration was based on: a. his argument that the Board's "dismissal of his appeal was for lack of jurisdiction was based on a 'clearly erroneous legal interpretation of the federal administrative law principles governing final agency action;"" See, *Cross II* at 157, and b. Cross contends the Board should "reinstate [his] appeal, order briefing on the merits, and review the Regional Director's decision so as to prevent a 'clear and manifest injustice'" will occur if the Board's decision were to be left in place. See, *Cross II*, at 157-8

77. The "determination of the number of signatures required for a valid petition…is an interim step in the process of formulating a [tribal member's] petition, a process which culminates in in submission to the Regional Director for a written

decision regarding the petition's validity and the basis for the Regional Director's determination." See, *Cross II* at 158

78. However, that "decision from which [Cross] appeals is an interim action over which the Board lacks jurisdiction." *Cross II* at 158-9

79. While the Board has "inherent authority…to correct manifest error or injustice in a decision…[it] does not provide an independent source of jurisdiction for the Board to consider an appeal over which it lacks jurisdiction." *Cross II* at 159

VI

Plaintiff Cross' Claims For Relief

A. The IBIA ("Board") Erred In Holding That The Regional Director's Decision To Supplant Article X's Highly Restrictive Signature Collection Standard-- And To Replace It With A Wholly "Federalized" Signature Collection Standard (25 C.F.R. §81.53) That Purportedly Authorized ALL (Emphasis Added) 10.340 Adult Members Of The TAT To Sign Cross' Petition---Did Not Constitute Final Agency Action As Required By 43 C.F.R. §4.331 And 25 C.F.R. §2.7(c)

80. Plaintiff Cross hereby re-alleges and incorporates by reference the preceding paragraphs of this Complaint as though they were fully set forth herein.

81. The reviewability of the BIA's decision--which the Board has characterized as "interim" and not "final" agency action--requiring plaintiff Cross to collect 3,447 signatures from qualified tribal members of the TAT should be determined according

to "the effect of the action and not its label." See, *Oregon Natural Desert Association v. U.S. Forest Service*, 465 F.3d 1071, 1075 (9th Cir. 1987) ("*Oregon Natural Desert*") ("An agency's characterization of its action as being provisional or advisory is not necessarily dispositive, and courts consider whether the practical effects of an agency's decision make it final agency action, regardless of how it is labeled.")

82. Therefore, the Ninth Circuit Court of Appeals likewise agrees that the "'finality' element [of] agency action must be interpreted in a pragmatic and flexible manner" rather than in an overly formalistic manner such as the Board seems to do when it insists that only plaintiff Cross' fully formulated Secretarial Petition will be deemed "final agency action" that falls within its appellate jurisdiction. See, *Oregon Natural Desert,* at id

83. In its 2016 NAGPRA decision, the Ninth Circuit Court of Appeals held that the U.S. Forest Service's decision holding that NAGPRA's inventory requirements applied to discovered "[Native American] remains and objects… marked the legal consummation of the agency's decision making process as to that issue; by analogical reasoning in extending that decision's rationale to apply to the Regional Director's determination in this matter that the provisions of its default federal regulation—25 C.F.R. §81.53-- and not Article X's substantive requirements--- should apply in determining which and how many of the tribal members of the TAT may sign Cross' petition, likewise marked the final legal consummation of this issue with

respect to how many tribal member signatures Cross must collect to validate his petition. See, *Navajo Nation v. U.S. Department of the Interior*. 819 F. 3d 1084, 1085-86 (9th Cir. 2016)

84. Given the practical effects of the BIA's Regional Director's decision---requiring plaintiff Cross to collect 3,447 tribal member signatures as against Article X' standard requiring him to collect 557 signatures—arise solely as a result of the Director's wrongful application of 25 C.F.R. §81.53-- purportedly authorizing ALL (emphasis added) 10.340 adult tribal members of the TAT to sign Cross' petition, that decision clearly meets the "finality" test of governing federal administrative law.

B. Superintendent Danks' Arbitrary And Capricious Action Of Delegating The SOLE (Emphasis Added) Responsibility For Determining How Many Tribal Members MUST (Emphasis Added) Sign Cross' Petition To The Employee Of A Presumptively Antagonistic And Rival Entity Clearly Violated The Constitutional Prohibition Against A Federal Official Delegating Her Entrusted Regulatory Authority To An Inappropriate Entity

85. Plaintiff hereby re-alleges and incorporates by reference all of the preceding paragraphs of this Complaint as though they were fully set forth herein.

86. Superintendent Danks' self-described course of conduct—set forth fully in her decision of June 21, 2017—in relation to the Tribal Enrollment Officer—Sevant F. Taft—wherein she admits to her virtual de facto abdication of her regulatory role to

Mr, Taft whereby he was authorized by Danks to determine the number of tribal members who were, in his sole judgment, eligible to sign Cross' Secretarial Petition:

> "As stated in our May 18, 2017 letter, we received the enrollment information [10,340 eligible tribal voters] from the Tribal Enrollment Office, which was then divided by one-third, which then equals 3,447 signatures of QUALIFIED VOTERS (emphasis added) [as the number of signatures Cross must collect to validate his petition.] See, Danks' Decision at Ibid, Exhibit "B"

87. Superintendent Danks' de facto delegation of her regulatory role to the Tribal Enrollment Officer embodies the vice the U.S. Supreme Court was concerned about in its landmark decision in *Carter v. Carter Coal Company,* 298 U.S. 236 (1936) as a regulatory delegation to one person of the "power to regulate the business of another and especially a competitor…[that] undertakes an intolerable interference with personal liberty [such as Cross' right of petitioning the federal government]..[that] transgresses the very nature of [governmental function]. See, Id at 311

88. Indeed, it's the potential "self-interested character of the delegate," represented by the Tribal Enrollment Officer in the matter at hand, that concerns the appellate courts that have had to deal with this issue, today:

> "The power to self-interestedly regulate the business of a competitor is, according to the Court's *Carter Coal* decision, 'anathema to the very nature of things,' or rather, to the very nature of governmental function…But here, the majority of producers 'may be and often are adverse to the interests of others in the same business.' That naked self-interest compromised their neutrality and worked 'an intolerable and unconstitutional interference with personal liberty and private property.'" See, *Association of American Railroads v. U.S. Department of Transportation*, 821 F. 3d 19, 29 (D. C. Cir. 2016)

89. Cross, and his fellow tribal petitioners, are very much in the same "business" as is the Tribal Enrollment Officer who may well have an incentive to "overly regulate" the personal liberty of those tribal petitioners who are seeking to amend their Tribe's governing document in a manner that is adverse to both the tribal employees and the tribal council members who are associated with particular tribal faction or group that is presently in power on the Fort Berthold Reservation.

C. The Regional Director's Decision To Supplant Article X's Substantive Standards With 25 C.F.R. § 81.53---Purportedly Authorizing ALL (Emphasis Added) of the 10. 340 Adult Members of the TAT To Sign Plaintiff Cross' Secretarial Petition--- Constitutes Not Only A Clear Abuse of Discretion On His Part, But Also A Clear Abridgment Of Plaintiff Cross' Right To Petition The Federal Government For The Redress Of His Grievances Pursuant To Article X of His Tribe's Constitution And Right Of Petition Clause Of The First Amendment To The U.S. Constitution

90. Plaintiff hereby re-alleges and incorporates by reference all the preceding paragraphs of this Complaint as though they were fully set forth herein.

91. Through his supplanting of Article X's highly restrictive standard regarding which tribal members will be deemed "legally entitled" to sign Secretarial Petitions and to vote in Secretarial Elections with 25 C.F.R. §81.53, the Regional Director upped plaintiff Cross' signature collection burden by several degrees of magnitude

from 557 signatures required on his petition, per the requirements of Article X, to 3,447 signatures required on his petition, per the requirements of the Director's replacement standard of 25 C.F.R.§81.53. See, Director's Decision at page 4, Exhibit "G"

92. The Regional Director intentional choice to significantly increase Cross' signature collection burden by the application of a wholly federal collection standard—25 C.F.R, §81.53--also effectively abridged plaintiff Cross' right to communicate his grievances--via the exercise of his right of petition as authorized by Article X of the TAT Constitution and the Right of Petition clause of the First Amendment to the U.S. Constitution—to the Secretary of the Interior, his trustee under federal Indian law principles. See, David Bernstein, The Heritage Guide To the Constitution: Freedom Of Assembly And Petition

93. Indeed, as Professor Bernstein emphasized in his above cited essay on the right of petition, how the courts have recognized how this right—that is typically exercised in conjunction with its cognate right, the freedom of assembly—has "persuad[ed]… the Supreme Court to hold that the First Amendment implicitly contains a right to ESPRESSIVE ASSOCIATION (emphasis added), that is, a right to associate to engage in the activities protected in the First Amendment." See, Id; and See Also, *Boy Scouts v. Dale*, 530 U.S. 640 (2000) (This right also protects private groups that wish to promote traditional values and ideas.)

94. In the oft times politically charged political atmosphere of the Fort Berthold Reservation, protecting the right of expressive association on behalf of those small groups of tribal members who advocate for legal and political reform of tribal governance becomes very important and the Regional Director's decision upping the number of signatures to astronomical levels, tends to "chill" that right by rendering the prospect of reform via the Secretarial Petitioning process illusory at best.

95. The U.S. Supreme Court has recognized the right to petition "as among the most precious liberties safeguarded by the Bill of Rights" and "implicit in the very idea of government." See, *United Mine Workers v. Illinois State Bar* Association, 389 U.S. 217 (1967)

96. The right to petition is deemed a fundamental liberty protected from encroachment by federal, state and tribal governments. See, *NAACP v. Button,* 371 U.S. 415 (1963)

97. Not only is the right of petition, itself, protected by the First Amendment, but all the incidental activities of petitioning—gathering signatures, circulating flyers, rallying public support—are likewise protected and are subject to NEUTRAL (emphasis added) regulation and restriction—something that the Regional Director's decision clearly isn't-- consistent with public safety and order. See, *McDonald v. Smith*, 472 U.S. 479 (1985)

D. The Regional Director's Failure To Defer To Article X Of The TAT Constitution Not Only Violated His Duty To Do So Under 25 C.F.R, §81.9, But It Also Demonstrated His Intentional Subversion Of The Critically Important Government-To-Government Relationship Between The Federal Government And Plaintiff Cross, As Well As His Fellow Tribal Petitioners, /To Such A Degree That He Has Rendered The Secretarial Petitioning Process "Totally Inoperable"—In Contravention Not Only Of Article X's Provisions, But Of Fundamental Indian Law Principles, As Well—On The Fort Berthold Reservation

98. Plaintiff hereby re-alleges and incorporates by reference all the preceding paragraphs of this Complaint as though they were fully set forth herein.

99. The BIA should generally defer to tribal laws and ordinances, and should refrain from interpreting tribal law "unless there is a clear necessity to do so." See, Wilfahrt, The BIA Must Give Deference To Tribal Interpretation Of Tribal Governing Documents

100. However, if the "furtherance of its government-to—government relationship" with the affected tribal people requires it, then the BIA is authorized to make a reasonable interpretation of governing tribal law and it "may employ the general rules of statutory construction when it interprets tribal constitutions or ordinances." See, Wilfahrt at id

101. Indeed, BIA officials, including the Regional Director herein, are bound in certain circumstances, such as when the matter involves a government-to-government interaction such as determining which tribal members are entitled to sign Secretarial Petitions or vote in Secretarial Elections, the BIA "retains authority, however, to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe[.]" See, 25 C.F.R.§ 81.9

102. For example, given that Article X of the TAT Constitution authorizes the issuance of Secretarial Petitions but expressly limits the eligibility of those tribal members who wish to sign those petitions to just those "qualified tribal voters" who have taken the required action necessary to become "legally entitled to sign, for example, plaintiff Cross' pending Secretarial Petition, then the Regional Director would have the authority to "make an independent interpretation of tribal law concerning voter eligibility, although it should give deference to the tribe's interpretation of its own law in this regard." See, *Prairie Island Community v. Minneapolis Area Director*, 25 IBIA 187, 192 (1997)

103. But, the Regional Director herein--rather than exercising his limited authority of reasonable interpretation of tribal law, granted to him under the terms of 25 C.F.R. §81.9, to support and strengthen the mutually respectful and fundamental government-to-government relationship between the federal government and the tribal people of the TAT—acted to gut the most significant and substantive provisions of

Article X and replace it with a inapplicable federal regulation, which the BIA law expert, Wilfahrt, rightly characterized as a wrongfully rendered, ostensible tribal law interpretation which has "the absurd result of rendering [Article X of the TAT Constitution] totally inoperative." See, Wilfahrt at Id

E. The Regional Director's "Absurd" And Wrongfully Rendered Interpretation of Article X As Ostensibly "Silent" Regarding The Definition And Application of The Constitutional Phrase--"Qualified Tribal Voters"--Clearly Conflicts With The Established Law On This Issue---As Declared By The IBIA In Its 2015 Decision Entitled *Charles K. Hudson v. Great Plains Regional Director*, 61 IBIA 253 (September 15, 2015)—And Must, Therefore, Be Set Aside As Required By The Provisions Of The APA, 5 U.S.C. §706(2)(A)

104. Plaintiff hereby re-alleges and incorporates by reference all the preceding paragraphs of this Complaint as though they were fully set forth herein.

105. The APA, 5 U.S.C. §706(2)(A), requires that the reviewing court "set aside agency action…that is not in accordance with the law."

106. The Regional Director in his decision erroneously concluded that Article X of the TAT Constitution that authorized tribal petitioners, such as plaintiff Cross, to submit Secretarial Petitions to the SOI was "silent" with respect to the qualifications of those tribal members who were authorized to sign Secretarial Petitions and, therefore, he was entitled to supplant Article X's provisions regarding such tribal members'

petition with 25 C.F.R. §81.9 which states: "A member of the tribe who is 18 years of age or older may sign a petition."

107. But the second sentence of that regulation also states: "Where the tribe's governing documents imposes additional requirements (other than age requirements) on who may petition those requirements also apply."

108. Article X provides that: "It shall be the duty of the Secretary of the Interior to call an election…upon the presentation of a petition signed by one-third (1/3) of the QUALIFIED VOTERS (Emphasis Added) [of the TAT]."

109. While the Regional Director claims in his decision in this matter that Article X is wholly silent regarding the identity and qualifications of these "qualified tribal voters," there is a 2015 IBIA decision, wherein the Regional Director is the named defendant, that comprehensively and thoroughly analyzes and applies the scope and meaning of this tribal constitutional phrase, qualified tribal voters. See, *Charles K. Hudson v. Great Plains Regional Director*, 61 IBIA 253 (September 15, 2015)

110. The striking similarity between the law and facts of these two matters is not surprising given that both are governed by same, for all practical considerations, the same federal regulations—25 C.F.R. Parts 81 and 82 and the same tribal constitutional provision, Article X.

111. Likewise, the *Hudson* Court's analysis of the qualitative and quantitative meaning to be attributed to the "qualified tribal voter" standard of Article X, as well as

its interplay with the governing federal regulations governing Secretarial Petitions and Elections, establishes that "qualified tribal voter" phrase, contrary to the Director's somewhat convenient claims in the Cross matter, means the same thing in the Secretarial Election context as it means in the Secretarial Petition context,

112. The *Hudson* Court concluded that the constitutional phrase, qualified tribal voters, refers to tribal members who are both "eligible to vote and registered to vote" in Secretarial Elections on the Fort Berthold Reservations.

113. Therefore. Article X—far from being "silent" on the qualifications of those who are entitled to sign Secretarial Petitions as claimed by the Regional Director—clearly and unambiguously refer to those TAT tribal members who are, in fact, both deemed "eligible to vote and registered to vote" in Secretarial Elections.

114. Therefore, for the above cited reasons the Regional Director's decision holding that Article X is silent regarding the qualifications of qualified tribal voters as used in Article X must be set aside as contrary to established law on the subject.

VII

Request for Relief

Plaintiff Cross respectfully requests the following relief:

1. Issue a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C.§ 2201 regarding these issues of fact and law that are before this Court in this matter:

a. declare that the BIA's decision requiring plaintiff Cross to collect 3,447 signatures from qualified tribal voters of the TAT constitutes "final agency action" within the meaning of 43 C.F.R §.331 and 25 C.F.R. §2.7(c);

b. declare that the BIA's decision requiring plaintiff Cross to collect 3,447 signatures from non-existent constitutionally qualified tribal voters within the TAT, as defined by Article X of the TAT Constitution, constituted an impermissible abridgement of his Right of Petition the federal government for the redress of grievances that is guaranteed to him by Article X of the TAT Constitution and the First Amendment to the U.S. Constitution;

c. declare the Fort Berthold Agency Superintendent Danks' de facto delegation of her regulatory authority to determine the minimum number of signatures that plaintiff Cross must collect from constitutionally qualified tribal voters within the TAT—as required by Article X of the TAT Constitution and 25 C.F.R. §81.57(a)(2)(i)—to an employee of a presumptively antagonistic entity that has the strong incentive to "game the numbers" in its favor, violated the long standing constitutional principle prohibiting a federal agency from delegating its inherently regulatory function to a functionary of a presumptively antagonistic entity that has the strong incentive to determine the number of signatures to be collected in a manner that would be adverse to plaintiff Cross;

d. declare that the Regional Director's decision to supplant and replace Article X of the TAT Constitution's clear and express proviso that only "qualified tribal voters" are "legally entitled" to sign Secretarial Petitions with his preferred regulatory alternative—25 C.F.R. §81.53—that purportedly authorizes ALL (emphasis added) adult tribal members—10, 340 as of May 18, 2017-- to sign Cross' petition, violated his duty to defer to tribal constitutional law and to seek to reasonably interpret, and thereby save, any ambiguous or ostensibly "silent" tribal constitutional terms in a manner that supports and strengthens the government—to—government relationship between the federal government and the Indian peoples; and

e. declare that Regional Director's decision requiring plaintiff Cross to collect 3,447 signatures to validate his Secretarial Petition--pursuant to his wrongful substitution of 25 C.F.R. §81.53 as the appropriate standard for calculating that number rather than the rightful standard of Article X—should be, and is, set aside due to its irreconcilable with the findings of facts and conclusion of law contained in the IBIA's 2015 decision in *Charles K. Hudson v. Great Plains Regional Director*, 61 IBIA 253 (Sept. 15, 2015).

f. Therefore, under the guiding authority of the *Hudson* decision--which held that Article X's requirements regarding which tribal members are legally entitled to sign Secretarial Petitions and to vote in Secretarial Elections are "only those

eligible voters who register [to vote in Secretarial Elections] are [therefore] considered qualified or entitled to [sign Secretarial Petitions] and to vote Secretarial Elections"—declare that plaintiff Cross need collect 557 signatures from constitutionally qualified tribal voters to validate his petition, given that this amount of signatures equals one-third of the number of registered tribal voters of the TAT at the 2016 Secretarial Election that was held on the Fort Berthold Reservation.

2. This Court exercise continuing jurisdiction over this matter as plaintiff Cross' pending Secretarial Petition wends its way through the process to its presentment as a fully formulated petition to the appropriate BIA official for its approval as a valid petition and then proceeds to the Secretarial Election phase wherein the SOI schedules and administers a tribal referendum election on the issue presented to the qualified tribal votes for decision.

3. This Court award plaintiff Cross reasonable cost and compensation for his hundreds of hours of research, writing and production time and effort he invested in this matter.

4. This Court award plaintiff Cross such other relief as it deems just.

Dated: April 25, 2018

By: Raymond Cross

Raymond Cross

Plaintiff in Pro Per

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