Judge Zilly

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT DOUCETTE; BERNADINE ROBERTS; SATURNINO JAVIER; TRESEA DOUCETTE,

Plaintiffs,

v.

DAVID BERNHARDT, Secretary for the United States Department of Interior, in his official capacity; TARA SWEENEY, Assistant Secretary-Indian Affairs, in her official capacity; JOHN TAHSUDA III, Principal Deputy Assistant Secretary-Indian Affairs, in his official capacity; UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

CASE NO. C18-0859-TSZ

CONSOLIDATED MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

INTRODUCTION

Plaintiffs' lawsuit seeks to hold defendants liable for failing to follow a supposed policy whose existence can only be shown through a process of deduction and whose precise terms and contours are unknown. Specifically, plaintiffs claim that defendants were *required* by this supposed policy to resolve a legal question arising under Tribal law before making a decision to recognize the Nooksack Tribal Council ("Council") as the governing body of the Nooksack Tribe ("Tribe"). Defendants' refusal to interpret Tribal law in order to resolve this question is alleged by plaintiffs to be arbitrary and capricious conduct for which they are entitled to a remedy under the Administrative Procedure Act ("APA"). Notably, it has not been shown by plaintiffs that this supposed policy has ever been promulgated as such, or published, or otherwise disseminated to the public. Indeed, plaintiffs cannot even demonstrate that the policy they seek to enforce exists anywhere in writing.

Federal agencies such as the Department of the Interior ("Department") are subject to innumerable policies. These policies are fundamental to the operation of every organization, not just federal agencies. However, not all policies are created equal. The policies under which federal agencies typically operate range from the mundane to the critically important. They may bind parties outside the agency or may affect only internal operations. They may be specific or purely aspirational. They may contain loose guidelines, subject to discretion in their application to unique circumstances, or they may contain specific, unyielding requirements.

A healthy respect for the separation of powers, much less a concern for the overwhelming docket of federal courts, requires that lines be drawn when it comes to the ability of third parties to mount federal lawsuits based on an alleged violation of the many policies under which federal agencies operate. Thus, the rule has evolved that only substantive policies that are intended to have the force and effect of law, and are imbued with that character because they have been promulgated and published according to legislative standards, are judicially enforceable. Consequently, it has been held that a policy whose existence can be unearthed only by utilizing civil discovery tools is not a policy the violation of which can support an action under the Administrative Procedure Act.

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

United States v. One 1985 Mercedes, 917 F.2d 415, 423 (9th Cir. 1989). Similarly, a policy whose existence is only discernable through a deductive process is also unenforceable under the APA.

For the jurisdictional reasons set forth below, and because the supposed policy upon which plaintiffs' case rests cannot be the basis for a cause of action under the APA, and, finally, because plaintiffs have failed to show any arbitrary and capricious conduct by defendants, defendants' cross-motion for summary judgment should be granted and the action dismissed.

SUMMARY OF THE ARGUMENT

After the Principal Deputy Assistant Secretary-Indian Affairs ("PDAS") determined that the Council could no longer be recognized as the governing body of the Tribe[1], a non-binding memorandum of agreement ("MOA") was reached between the Acting Assistant Secretary-Indian Affairs ("Assistant Secretary") and the Tribal Chairman. The purpose of the MOA was to outline a procedure whereby the Assistant Secretary's recognition of the Council as the Tribe's governing body could be regained. Among other things, the MOA provided that the Tribe would conduct a Special Election for four expired Council seats. If, following his review of a report on the Special Election to be provided by the Tribal Election Board, and the disposition of all challenges to the election process, the Regional Director of the Bureau of Indian Affairs ("BIA") Northwest Region ("Regional Director") provided his endorsement, the Assistant Secretary could, based upon that endorsement, recognize the Council as the governing body of the Tribe and reestablish government-to-government relations with the Tribe through the Council. In other words, the Regional Director's endorsement was a prerequisite to Council recognition by the Assistant Secretary.

In December 2017, the Tribe conducted a Special Election as contemplated by the MOA. Plaintiffs were unsuccessful candidates in the election as reported by the Election Board to the Acting Regional Director. Subsequently, the Acting Regional Director endorsed the Election Board's report and, based on that endorsement, the PDAS recognized the Council as the governing body of the Tribe.

1 The PDAS exercised the authority of the Assistant Secretary-Indian Affairs in making this decision.

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

Plaintiffs allege that the Tribe's Election Board ran an election that was unlawful under the Tribe's election code. The Tribe, however, is not a party to this lawsuit and is not present to defend the legality of its election process. Instead, plaintiffs have sued only the Department of the Interior ("Department") and certain officers thereof. According to plaintiffs' summary judgment motion, defendants have acted arbitrarily and capriciously in failing to follow a supposedly preexisting policy of interpreting tribal law in recognizing the leadership of the Tribe. According to plaintiffs, the Acting Regional Director's refusal to interpret tribal law to resolve a question arising under the Tribe's election code represented a break from preexisting policy, therefore rendering the Acting Regional Director's endorsement "arbitrary and capricious."

Plaintiffs, as the parties invoking the subject matter jurisdiction of this Court, have the burden of pleading and proving the existence of such jurisdiction and, to that end, are required to identify a cognizable injury and a meaningful remedy for that injury that the Court has the power to grant. Notably, notwithstanding their failed candidacies, plaintiffs do not ask the Court to set aside the Tribe's Special Election, nor do they ask the Court to overturn the PDAS's recognition of the Council as the Tribe's governing body.[2] Plaintiffs presumably understand that those remedies are

---

2 Or so plaintiffs have previously represented to the Court in opposition to defendants' motion to dismiss. However, plaintiffs' summary judgment motion contains statements inconsistent with representations they made to the Court in opposing defendants' motion to dismiss. As the Court may recall, defendants in moving to dismiss argued that the object of plaintiffs' lawsuit was to overturn the PDAS's recognition of the Council as the governing body of the Tribe, and that the Court was precluded from hearing such a case in the absence of indispensable parties, including the Tribe. In response, plaintiffs represented that they were not seeking to overturn the PDAS's decision to recognize the Council as a remedy in this lawsuit:

> To the extent that *Timbisha*'s Rule 19 orders can be considered operative precedent—which is questionable; they are certainly not binding—they are easily distinguishable. Here, Plaintiffs are not seeking to "terminate the United States' recognition of" anything. *Timbisha*, 290 F.R.D. at 597. Plaintiffs are seeking a declaration that Defendants' "departure from Interior's established policy was arbitrary and capricious" and that the Court "[h]old unlawful, and set aside, Interior's change in policy."

Dkt. # 11, p. 17, *ll*. 2-7 [footnote omitted]. Thereafter, in its December 21, 2019, Minute Order denying defendants' motion to dismiss, the Court noted that:

> Contrary to defendants' assertion, plaintiffs do not seek "an order setting aside the Department [of the Interior]'s recognition of the existing Council," see Reply at 2 (docket no. 13), but rather request a declaratory judgment that defendants' departure from "established policy" was *inter alia* "arbitrary and capricious," see Compl. at § VII(A) (docket no. 1).

Dkt. # 15, p. 3, n. 4. Now, with the motion to dismiss behind them, plaintiffs appear to have reversed course in asserting in the present motion that "PDAS Tahsuda's March 9, 2017, decision [to recognize the Council] is arbitrary and capricious and therefore must be *set aside*." Dkt. # 28, p. 2, *ll.* 9-15 (emphasis added); *and see id.,* p. 16, *ll*. 2-10

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

not within the jurisdiction of the Court to award so long as the Tribe is an absent party. Instead, plaintiffs ask for declaratory relief "holding that Defendants' departure from Interior's established policy was arbitrary and capricious." Dkt. # 28, *ll*. 11-12. Even this remedy is jurisdictionally unavailable to plaintiffs.

First, and fundamentally, plaintiffs' action fails for lack of standing. The requirements of Article III standing demand that the injury asserted by a plaintiffs be one that is likely to be redressed by a favorable judicial decision. The injury plaintiffs claim to have suffered is a violation of their "right" to have defendants' policies applied in a consistent manner, and the remedy requested for that injury is a judicial declaration that the Acting Regional Director's endorsement of the Tribal Election Board's report while declining to interpret Tribal law violated that right. However, a judicial declaration that defendants committed a past violation of the law is not within the power of the Court to award under Article III.

Second, plaintiffs may not avoid jurisdictional hurdles, such as the indispensable party rule, by trying to bypass defendants' final agency action, *i.e.,* recognition of the Council as the Tribe's governing body, in order to isolate and challenge an interlocutory step in the process of arriving at that final agency action, *i.e.*, the Acting Regional Director's endorsement of the Tribal Election Board's report. The Acting Regional Director's endorsement was only an interlocutory step in arriving at a final agency action and, hence, was a non-final agency action. Subject matter jurisdiction under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, *et seq*., only exists to challenge final agency actions. For purposes of subject matter jurisdiction, plaintiffs may not atomize a final agency action into its non-final components and only attack the non-final

---

("Lacking anything that resembles explanation, justification, or analysis, PDAS Tahsuda's March 9, 2018, decision [to recognize the Council] is arbitrary and capricious and thus without the force of law.") Notwithstanding these statements, plaintiffs' prayer for relief seems to be more limited. They request only a declaratory judgment that "Defendants' departure from Interior's established policy was arbitrary and capricious." Dkt. # 28, p. 16, *ll*. 11-12.

This inconsistency creates a conundrum for defendants. Defendants have written this summary judgment motion with the understanding that plaintiffs are bound by their previous representations to the Court that they are not asking the Court to disturb the PDAS's decision to recognize the Council as the governing body of the Tribe and are seeking only the limited form of relief requested at the conclusion of their summary judgment motion. However, if plaintiffs intend to seek an order overturning the PDAS's March 9, 2018, decision to recognize the Council as the Tribe's governing body notwithstanding their prior representations to the contrary, this Court should reconsider *sua sponte* its March 7, 2019, order denying defendants' motion to dismiss, and dismiss this action pursuant to Rule 19, F.R.Civ.P.

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

components of the final agency action without attacking the final agency action. Here, the lawfulness of the Acting Regional Director's endorsement cannot be adjudicated separately from the PDAS's recognition of the Council as the Tribe's governing body, for which the endorsement was merely a prerequisite. Because, plaintiffs' case seeks to impose liability on defendants based upon a challenge to only a non-final agency action, there is no jurisdiction to hear their claim under the APA.

Third, even if plaintiffs are somehow able to overcome these obstacles, their claim runs headlong into yet another, equally formidable impediment. Plaintiffs deduce from three letters written by the PDAS that the Department had "a policy of interpreting Nooksack election law for the singular purpose of determining whether the Nooksack Tribal Council was validly seated as the governing body of the Tribe." Plaintiffs do not contend that this supposed policy has ever been promulgated as legally binding under the APA or other statutory authority. Federal agencies have a seemingly infinite number of policies. Not all of them are enforceable in a federal court action brought under the APA. An unwavering line of Circuit precedent holds that only violations of agency policies that have the force and effect of law are enforceable through an action under the APA, and, consequently, only violations of policies that are promulgated as regulations through formal notice and comment rulemaking or other statutory authority are enforceable in an action brought under the APA.

Here, the supposedly violated "policy" which forms the basis for plaintiffs' APA action fails this criterion. It has never been published in the Federal Register, never codified in the Code of Federal Regulations and never promulgated according to notice and comment rulemaking standards. Because this supposed policy lacks the force and effect of law, its violation cannot support an action under the APA.

Finally, nothing about the Acting Regional Director's interlocutory endorsement was arbitrary and capricious.

For all of these reasons, defendants are entitled to judgment as a matter of law. Accordingly, plaintiffs' motion for summary judgment should be denied and defendants' cross-motion for

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

summary judgment should be granted.

STATEMENT OF FACTS

1. Background

In January 2016, former Nooksack Tribal Chairman Robert Kelly announced the cancellation of a primary election and a March 19, 2016, general election for Council seats in which the incumbents' terms of office were to expire on March 24, 2016. As a consequence of this decision, after March 24, 2016, only three of four seats on the eight-person Council were occupied by duly elected members. Nevertheless, despite the fact that the Nooksack Constitution requires a quorum of at least five members in order for the Council to conduct the business of the Tribe, former Chairman Kelly, with the apparent support of the three remaining elected councilmembers, and councilmembers holding over in expired council seats (collectively, "the Kelly faction"), purported to transact business on behalf of the Tribe after March 24, 2016.

Following this development, and other provocative undertakings by the Kelly Faction, the PDAS, in a series of three letters to former Chairman Kelly issued between October 2016 and December 2016, informed the Chairman that the Kelly Faction, purporting to act as the Council, was not recognized by the Department as the governing body of the Tribe after March 24, 2016. AR 000001-000002, 000003-000004, 000005-000006.

2. Nooksack Indian Tribe v. Zinke

A cascading set of consequences flowing from this loss of recognition, including a threatened loss of federal funding, induced the Kelly Faction to initiate a lawsuit against the Department in the name of the Tribe, and to seek a preliminary injunction compelling the Department to recognize the Kelly Faction as the governing body of the Tribe. *The Nooksack Indian Tribe v. Zinke,* Case No. C17-0219JCC, U.S. Dist. Court, W.D. Wash. The Court instead granted the Department's cross-motion to dismiss for lack of subject matter jurisdiction. *Nooksack Indian Tribe v. Zinke*, 2017 WL 1957076 (W.D. Wash. May 11, 2017). The Court concluded that, because the Department did not recognize the Kelly Faction as the governing body of the Tribe, it had no authority to sue the

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

Department in the name of the Tribe:

> Based on this line of cases, the Court concludes deference is owed to the DOI decisions and the holdover Council does not have authority to bring this case against the federal government in the interim period where the tribal leadership is considered inadequate by the DOI. There is a sufficient basis in the record to conclude this Plaintiff, the holdover Council, may not bring a lawsuit on behalf of the Tribe. The DOI refused to recognize the actions taken by the holdover Council since March 24, 2016. (Dkt. No. 15 at 8, 11, 15.) Moreover, the DOI has not recognized the Nooksack Indian Tribal Council allegedly elected in January 2017. (*Id.* at 11, 16.) Therefore, the decisions taken and the leadership in place after March 24, 2016, are not valid at this time and on an interim basis because the DOI or BIA have not recognized any Nooksack tribal leadership.

Id. at 6. The Court noted that its holding was "consistent with an Eighth Circuit decision where the court determined that a BIA recognition and decision is made only on 'an interim basis' and once 'the dispute is resolved through internal tribal mechanisms, the BIA must recognize the tribal leadership embraced by the tribe itself.'" *Id.* (*citing Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa,* 609 F.3d 927, 943 (8th Cir. 2010)).

Before judgment was entered, the Kelly Faction moved for reconsideration pursuant to Rule 59(e), F.R.Civ.P.[3] Following briefing of the motion, the Court stayed the proceedings at the parties' request in favor of settlement discussions.

3. The MOA

Prior to the entry of judgment, the Nooksack Chairman and the Acting Assistant Secretary signed an MOA, dated August 25, 2017. AR 000007-000012. The purpose of the MOA was to "provide and outline a procedure" whereby the Assistant Secretary could grant recognition to the Council as the governing body of the Tribe. *Id.* at 000007.

Pursuant to the MOA, former Chairman Kelly agreed to hold a Special Election within 120 days to replace the cancelled regular March 2016 regular election. *Id.* The MOA provided that the Assistant Secretary could have an observer present when ballots were being handled, processed or counted. *Id.* at 000007-000008. For his part, the Acting Assistant Secretary agreed, in the interim, to recognize Chairman Kelly as "a person of authority within the Nooksack Tribe" through

3 The Kelly Faction later requested that the stay be lifted so that it could have a ruling on its motion for reconsideration. After lifting the stay, the Court denied the Kelly Faction's motion for reconsideration. *Nooksack Indian Tribe v. Zinke*, 2017 WL 5455519 (W.D. Wash. Nov. 14, 2017). The Kelly Faction did not appeal the judgment of the District Court.

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

whom the Acting Assistant Secretary would maintain government-to-government relations with the Tribe. *Id.* at 000008.

The MOA also provided that when the counting of ballots was completed, the Tribal Election Board would certify and submit the election results and a report to the BIA Northwest Regional Director. *Id.* at 000007. Thereafter, the Regional Director was to forward the Tribe's report to the Assistant Secretary with the Regional Director's endorsement of the report or an explanation for withholding such endorsement. AR 000008. Upon receipt of the Regional Director's endorsement of the report, the Acting Assistant Secretary agreed to issue a letter granting full recognition of the Council as the governing body of the Tribe. *Id.*

The MOA expresses the clear intent of the parties that the document constituted a statement of agreed principles rather than a binding and enforceable agreement:

> J. Enforceability. This MEMORANDUM is not intended by the parties to be either binding or enforceable upon either party, nor enforceable through an administrative process or in a court of law.

AR 000010.

4. The Special Election

The Tribe held a primary Special election on November 4, 2017 and a general Special Election on December 2, 2017. AR000086. On December 8, 2017, the Nooksack Election Board certified the election results. *Id.* On December 11, 2017, the Board mailed a copy of the certified election results to the BIA and sent a copy of the election report the following day.

5. BIA Acting Regional Director Endorsement

In a letter dated March 7, 2018, the Acting Regional Director issued the endorsement of the Special Election called for in the MOA. See AR000086-AR000667. The Acting Regional Director noted that one of the conditions of the MOA required the Tribe to conduct its Special Election in accordance with the Nooksack Constitution, Bylaws, and Tribal Law and Ordinances. AR000086, 000087. In assessing the Election Board's report on its compliance with its own laws, the Acting Regional Director reviewed four sworn declarations submitted by the Tribe's Election Superintendent setting forth the process followed by the Tribe at each phase of the primary and

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

general Special Election. AR000087. After review of these sworn declarations, the Acting Regional Director found that "the Board conducted the election according to the requirements set forth in Title 62 and the Nooksack Constitution." *Id.* Additionally, The Acting Regional Director reviewed and found unmeritorious a complaint alleging that the Tribe wrongfully failed to provide election ballots to certain 18-year-olds. *Id.*

The Acting Regional Director also reviewed the Elections Board's response to a challenge lodged by plaintiff Bernadine Roberts on behalf of herself and the other unsuccessful candidates. AR000087-000088. The challenge made four allegations of wrongdoing. First, the challengers alleged that the Election Board hand-received ballots in violation of the Tribe's election code. Second, the challengers alleged that numerous eligible voters did not receive ballots. Third, the challengers alleged that the incumbents procured votes through bribery. Fourth, the challengers alleged an improper family relationship between the Election Superintendent and the Tribe's General Manager and impropriety in the manner in which votes were counted. AR000088.

The Acting Regional Director found the Election Board report's explanation of the disposition of the challengers' allegations to be satisfactory. Specifically, the Election Board found that there was no evidence that votes were illegally cast and, even if misconduct occurred, the number of challenged votes was too small to affect the outcome of the election. *Id.* The Election Board also reviewed the voter list and enrollment list and found that ballots were mailed to all eligible voters. *Id.* The Election Board also found no substance to the bribery allegations. *Id.* Lastly, the Election Board concluded that the Tribal election code did not constrain the selection of an Election Supervisor because of a family relationship and did not require that ballots be counted in public. *Id.* Upon review, the Acting Regional Director, found "nothing to indicate that the Board's decision should be disturbed." *Id.*

Nevertheless, the Acting Regional Director believed that one of the allegations made by the challengers merited further discussion. AR000088. Specifically, the challengers alleged that the ballot box was "stuffed" with illegal ballots cast in-person. *Id.* In substance, the challengers alleged

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

that the Election Board improperly counted ballots that were walked into election officials instead of just those that were received through the U.S. Mail system.

In substance, the Acting Regional Director found that if this occurred, and it constituted a violation of the Tribe's elections code (a question which BIA declined to answer in this instance), the violation was technical in nature and did not amount to a fraudulent augmentation of votes through ballot stuffing, as the challengers alleged:

> The BIA was involved throughout the entire special election and closely inspected the election process. As will be discussed in the following section, the BIA has reconciled the voters list and accounted for all ballots printed for the election. The BIA inspected the ballot identification numbers of received ballots and determined they match up to the list of returned ballots. There is neither evidence that ballots were cast by deceased individuals or people voting more than once, nor evidence that vote totals were altered. Ultimately, the question of whether ballots could be received by hand or whether all ballots had to be postmarked is one of tribal law and the BIA declines to insert itself and interpret tribal law in this instance. The evidence before the BIA indicates that the election was conducted in a proper manner and the BIA finds nothing to disturb the Board's conclusions.

Id at AR000089.[4]

Based upon a review of the Election Board's report and observations of BIA personnel, the Acting Regional Director concluded that "the special election was conducted according to the Nooksack Constitution, Bylaws, and Tribal Law and Ordinances," and she forwarded the report to the Assistant Secretary with her endorsement. AR000090.

6. PDAS Recognition

In a letter to the Tribe's Chairman, dated March 9, 2018, the PDAS acknowledged receipt of the March 7, 2018 letter from the Acting Regional Director advising that the Acting Regional Director had not "identified any reason to reject the validity of the Special Election." Accordingly, pursuant to the MOA, the PDAS recognized the Council constituted after the Special Election as the Tribal governing body. AR000668.

---

4 The Acting Regional Director's endorsement memorandum describes BIA's efforts to observe the election process and noted specifically that, "[f]rom the outset, the Tribe was transparent with the election process and invited the BIA to observe the process." AR000089-000090. While it is evident from plaintiffs' memorandum that they would have preferred to see a higher level of BIA oversight, the effort expended by defendants represented a significant commitment of scarce BIA resources. Deming, Washington, where the Tribe is located, is approximately 275 miles from Portland, where BIA's Northwest Regional office is located, and approximately 75 miles from Everett where its Puget Sound Agency is located. BIA took on this observer role voluntarily without guaranteeing that it would either supervise the election or provide on-site monitoring of the election to any particular level or standard.

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

PROCEDURAL HISTORY

Plaintiffs filed their complaint on June 13, 2018. Dkt. # 1.[5] Defendants moved to dismiss for failure to join an indispensable party on September 7, 2018. Dkt. # 9. Defendants' motion argued in substance that plaintiffs' lawsuit sought to overturn defendants' recognition of the Council as the Tribe's governing body and, consequently, the Tribe and the four councilmembers who were elected in the Special Election were indispensable parties to the lawsuit. Dkt. # 9, pp. 8-9.

In opposing defendants' motion, plaintiffs specifically disclaimed that the purpose of their action was to overturn defendants' recognition of the Council as the governing body of the Tribe. Dkt. # 11, p. 17, *ll.* 2-3 ("Here, Plaintiffs are not seeking to terminate the United States' recognition of anything.") (internal quotations omitted). Instead, plaintiffs argued that they were seeking a declaration that Defendants' departure from Interior's established policy was arbitrary and capricious. *Id.* at p. 17, *ll.* 3-4.

On December 21, 2018, the Court entered an order denying defendants' motion to dismiss, concluding that the absent councilmembers and Tribe were not necessary parties to the lawsuit and, even if they were, they were not indispensable. Dkt. # 15.

ARGUMENT

I. PLAINTIFFS DO NOT HAVE STANDING TO ASSERT THEIR CLAIM

Article III standing is an antecedent jurisdictional question. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). Plaintiffs may not proceed with their action unless they have Article III standing. *See Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997). Because plaintiffs do not have standing to assert their claim, this action should be dismissed for lack of subject matter jurisdiction.

The Supreme Court has "repeatedly held that an asserted right to have the Government act in accordance with [the] law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984). A party must also have standing to bring the claim, and

5 Plaintiffs filed a "First Amended Complaint for Equitable Relief" on January 3, 2019. Dkt. # 18.

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

is obligated "to demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

To demonstrate Article III standing, a plaintiff must show a "concrete and particularized" injury that is "fairly traceable" to the defendant's conduct and "that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, __ U.S. ____, 136 S. Ct. 1540, 1547–48 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

The starting point in standing analysis is to identify the injury which the Plaintiffs contend has been sustained by the allegedly illegal action for which they seek redress. *Crutchfield v. U.S. Army Corps. of Engineers*, 230 F. Supp. 2d 687, 695 (E.D. Va. 2002). Notably, in an effort to avoid the indispensable party rule, plaintiffs have purposely narrowed the scope of possible injuries for which they are seeking redress. Although plaintiffs are failed candidates in the Special Election, they have disclaimed any interest in seeking any form of redress for injury associated with their failed candidacies. Specifically, plaintiffs are not requesting that the election results be overturned, that the election be rerun or, as previously noted, that defendants' recognition of the Council as the Tribe's governing body be set aside.[6] Rather, the injury for which plaintiffs seek redress is the violation of their "right" to have defendants consistently apply their "policy" of interpreting tribal law. Dkt. # 11, p. 14, *ll*. 8-9. Plaintiffs' summary judgment motion does not request prospective relief to vindicate that right. Specifically, they are not asking the Court to award them injunctive relief directing defendants to abide by this policy in the future.[7] Instead, plaintiffs seek only "a

6 This is understandable. Because the Tribe is not a party here, plaintiffs have no standing to obtain an order requiring that the Special Election results be set aside. "Where requested relief depends on the unfettered choices made by independent actors not before the courts . . . the claim is not redressable and this court lacks jurisdiction over it." *Leu v. Int'l Boundary Comm'n*, 605 F.3d 693, 695 (9th Cir. 2010) (internal quotations omitted).

7 Nor could they. Plaintiffs would have no standing to obtain a prospective order requiring defendants to "follow the law" in the future. Plaintiffs' standing to seek such an injunction depends on whether they are likely to suffer future injury from defendants' failure to follow a policy of interpreting tribal law in making a recognition decision in the future. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (plaintiff had no standing to obtain an injunction precluding the LAPD from using a choke hold maneuver in the future when he was unlikely to suffer future injury from the use of the chokeholds by police officers). Plaintiffs' allegation that they have suffered an injury in the past does nothing to establish a real and immediate threat that they will suffer the same injury in the future and are therefore entitled to a prospective injunction. *See*, *id*. at 105. Plaintiffs could only suffer their claimed injury again if: (1) defendants made the extraordinary determination that extreme circumstances required them to again withdraw recognition from the Council; (2) a new MOA was entered into between the Council and defendants to establish a path for restoring the Council's recognition through the mechanism of a special election in which defendants reserved a role in monitoring the election;

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

declaratory judgment or other order holding that Defendants' departure from Interior's established policy was arbitrary and capricious." Dkt. # 28, p. 16, *ll.* 11-12.

This intentional narrowing of their injury in an effort to avoid dismissal and the limited relief requested implicates the redressability aspect of standing analysis. Redressability requires the plaintiff to show it is "'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (*quoting Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). Thus, the question posed here is whether the relief requested by plaintiffs, *i.e.,* "a declaratory judgment or other order holding that Defendants' departure from Interior's established policy was arbitrary and capricious," meets the redressability factor of the Article III standing requirement. In other words, is the redressability component of the Article III standing requirement met if the only relief available to plaintiffs is an order that merely declares that defendants have committed a past violation of the law?

This case law answers this question in the negative. As the Supreme Court has recognized, "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998). Because the declaratory judgment sought by plaintiffs will be completely ineffectual in providing them redress for any future injury given that it is virtually impossible that plaintiffs will ever suffer the same injury in the future, *see* footnote 7, *supra*, plaintiffs lack the personal stake in the outcome that provides standing. *See Perry v. Sheahan*, 222 F.3d 309, 314 (7th Cir. 2000) (plaintiff lacked standing to seek declaration that defendant violated his constitutional rights in seizing firearms and other items from his apartment); *and see, Nat. Res. Def. Council v. Peña*, 147 F.3d 1012, 1021-22 (D.C. Cir. 1998) (plaintiff not entitled to injunction based on violation of rights under the [FACA] where committee was dissolved).

The law is no different in our Circuit. In *Leu v. Int'l Boundary Comm'n*, 605 F.3d 693, 694 (9th Cir. 2010), a treaty commissioner, fired by the President, sought relief in the nature of a

(3) plaintiffs again ran unsuccessfully for open seats in the special election; (4) questions of the legality of the election process under tribal law were raised and the election results were protested; and (5) defendants again declined to interpret tribal law to resolve some legal issue regarding the election process.

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

declaratory judgment that his termination was unlawful. The Court of Appeal held that the commissioner lacked Article III standing:

> To the extent that Schornack merely seeks to have President Bush's action in removing him declared unlawful, that is "not an acceptable Article III remedy." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998) (holding that "psychic satisfaction," seeing "that a wrongdoer gets his just deserts," or ensuring that another is "punished for [his] infractions," are not cognizable Article III remedies); *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 962 (6th Cir. 2009) ("In the context of a declaratory judgment action, allegations of past injury alone are not sufficient to confer standing.").

Id. at 694. Because plaintiffs seek only a declaration that defendants' past actions were arbitrary and capricious under circumstances in which there is virtually no likelihood that they will ever be injured in the same way by defendants in the future, they fail the redressability requirement for Article III standing, and there is no subject matter jurisdiction to hear their claim.

II. THERE IS NO JURISDICTION UNDER THE APA TO REVIEW AND ADJUDICATE INTERLOCUTORY, NON-FINAL AGENCY ACTIONS

In an effort to structure their claim in such a way as to avoid the indispensable party rule, plaintiffs disclaim any challenge to the PDAS's decision to recognize the Council, and instead focus their claim on the Acting Regional Director's interlocutory endorsement that served as a prerequisite to the PDAS's decision. In substance, plaintiffs apparently believe they can circumvent the indispensable party rule by eschewing an attack on the PDAS's final decision to recognize the Council in favor of an isolated attack on the interlocutory decision upon which it was based. This artifice is fundamentally inconsistent with the APA's final agency action requirement. There is no jurisdiction to review the interlocutory decision of the Acting Regional Director in isolation from the final agency action of which it is a part.

It is well-established that the APA authorizes judicial review only of "final agency action." 5 U.S.C. § 704; *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 882 (1990). Absent a final agency action, there is no jurisdiction for judicial review. *Rattlesnake Coal. v. U.S. E.P.A.*, 509 F.3d 1095, 1104 (9th Cir. 2007). Stated conversely, non-final agency action is not subject to judicial review under the APA. *Hall v. Sebelius*, 689 F. Supp. 2d 10, 19 (D.D.C. 2009); *and see Americopters, LLC v. F.A.A.,* 441 F.3d 726, 735 (9th Cir. 2006)*, aff'd sub nom. Jan's Helicopter Serv., Inc. v. F.A.A.,*

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

525 F.3d 1299 (Fed. Cir. 2008) ("Thus, if an FAA order is not final, neither we nor the district court have jurisdiction over the case.")

As a general matter, two conditions must be satisfied for an agency action to be "final." First, the action must mark the "consummation" of the agency's decisionmaking process[ ]—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

Conversely, a non-final agency action is one that "does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action." *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939). Under the APA, agency action that is merely "preliminary, procedural, or intermediate . . ." is subject to review on the review of the final agency action." 5 U.S.C. § 704; *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 247 (1980).

Under the MOA, it is evident that the final agency action was the PDAS's decision to recognize the Council as the governing body of the Tribe, and the Acting Regional Director's endorsement served as nothing more than an interlocutory prerequisite to the PDAS's final decision. In relevant part, the MOA provides:

> D. Final Tribal Council Recognition. Upon certification of the special election results as set forth in NOOKSACK TRIBAL LAWS AND ORDINANCES, the final resolution of any challenges to those results, and the submission of the Election Board's report to the Regional Director, the Regional Director shall forward to the ASSISTANT SECRETARY the Tribe's report along with the Regional Director's endorsement thereof, or an explanation for withholding such endorsement. *Upon receipt of the Regional Director's endorsement, the ASSISTANT SECRETARY shall issue a letter granting full recognition* of the NOOKSACK INDIAN TRIBAL COUNCIL as the valid governing body of the NOOKSACK INDIAN TRIBE in a form substantially similar to EXHIBIT A to this MEMORANDUM.

AR000008 (emphasis added). Under the MOA, the Acting Regional Director's endorsement, or lack thereof, served no purpose other than to form a substantive basis for the PDAS's decision to recognize the Council as the governing body of the Tribe. Analyzed under the *Bennett* factors set forth above, the endorsement had no independent utility aside from providing a substantive basis for

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

the PDAS's subsequent decision. The Acting Regional Director's endorsement was not the "consummation" of the agency's decisionmaking process as envisioned by the MOA. The Acting Regional Director's review and endorsement of the Election Board's report was a necessary step in the process of reaching a final decision on recognition of the Council as the governing body of the Tribe. It served no other purpose. AR000007. Thus, the PDAS's decision on recognition, not the Acting Regional Director's endorsement, marked the consummation of the process set forth in the MOA.

Moreover, no legal rights or obligations were determined by the Acting Regional Director's endorsement. The Acting Regional Director's endorsement of the Election Board's report served only to inform the PDAS's ultimate decision on whether or not to recognize the Council as the Tribe's governing body. The PDAS's decision to grant or deny recognition to the Council had legal consequences. *See, Nooksack*, *supra,* 2017 WL 1957076 at *7 ("[W]here the BIA refuses to recognize tribal leadership, federal courts must do the same.") The Acting Regional Director's decision to endorse the Election Board's report did not. Specifically, the Acting Regional Director was not authorized by law, or otherwise, to make a legally binding determination as to the ultimate lawfulness of the Special Election. Nor was the Acting Regional Director empowered to decide the question of recognition of the Council as the governing body of the Tribe. Notably, the Assistant Secretary had the discretion within the constraints of his lawful authority to grant or deny recognition to the Council regardless of the Acting Regional Director's endorsement, or lack thereof. In other words, even if the Acting Regional Director had refused to endorse the Election Board's report, that determination would have had no legally binding effect on anyone. As far as the Tribe was concerned, the results of the Special Election would have been unaffected by the Acting Regional Director's refusal to endorse the Election Board's report. The decision to stand by the election results, or not, in the face of a negative endorsement by the Acting Regional Director wholly belonged to the Tribe. It is true, of course, that a negative endorsement could have had an adverse effect on the PDAS's recognition decision. But that is a normal state of affairs in agency decision-making and does not convert an otherwise non-final agency action into a final agency action for

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

purposes of the APA. *See Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 288 (5th Cir. 1999) (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939)) ("[A] non-final agency action is one that 'does not itself adversely affect [the] complainant but only affects his rights adversely on the contingency of future administrative action.'").

Here it is clear that the final agency action envisioned by the MOA was the PDAS's decision on whether to recognize the Council as the governing body of the Tribe. It is the only agency action that can support federal subject matter jurisdiction here. The Acting Regional Director's endorsement was but an interlocutory step in the process at arriving at the recognition decision which cannot, in isolation, support this Court's subject matter jurisdiction. There is no subject matter jurisdiction under the APA to separately adjudicate plaintiffs' claim that the Acting Regional Director's interlocutory endorsement of the Tribal Election Board's report was wrongful. Accordingly, their claim should be dismissed.

III. A VIOLATION OF AN AGENCY POLICY THAT DOES NOT HAVE THE FORCE AND EFFECT OF LAW IS NOT ENFORCEABLE UNDER THE APA

Turning to the merits, plaintiffs' claim hinges on the belief that jurisdiction exists under the APA to enforce a purported violation of an unwritten and unpublished policy of defendants that can only be discerned from parsing a series of letters send to the Tribe by the PDAS between October and December 2016, AR 000001-000002, 000003-000004, 000005-000006 ("PDAS Letters"). From their reading of these letters, plaintiffs deduce that defendants have a "policy" of "interpreting Nooksack election law for the singular purpose of determining whether the Nooksack Tribal Council was validly seated as the governing body of the Tribe." Dkt. # 28, p. 1, *ll.* 16-19.

Plaintiffs' summary judgment motion tacitly concedes that this policy does not appear in the Code of Federal Regulations. Indeed, plaintiffs do not even claim that the policy they seek to enforce is expressed as such in the PDAS Letters. According to plaintiffs, evidence of the existence of this policy may be deduced from the references in the PDAS Letters to Tribal law in asserting that the Kelly Faction was not recognized as the governing body of the Tribe, *id* at p. 3, *ll.* 1–15, and in the MOA's indication that the Assistant Secretary's decision to recognize the Council after the

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

proposed Special Election would be based on the Regional Director's endorsement, which in turn would be based on the Regional Director's assessment of the extent to which the Special Election was conducted in accordance with Tribal law, *id.* at p. 3, *l.* 16 – p. 4, *l.* 8.

It has long been the law in the Ninth Circuit that "not all agency policy pronouncements which find their way to the public can be considered regulations enforceable in federal court." *Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir. 1982), *cert. denied*, 459 U.S. 907 (1982). Thus, the question posed by plaintiffs' claim is whether the violation of a policy that has neither been promulgated according to the notice and comment rulemaking provisions of the APA, 5 U.S.C § 553, or any other statutory authority, nor codified in the Code of Federal Regulations, and that can only be unearthed by intuiting its existence from a series of agency letters, can form the basis for a claim under the APA.

In *United States v. Fifty–Three (53) Eclectus Parrots*, 685 F.2d 1131 (9th Cir. 1982), the Circuit held that only agency pronouncements having the force and effect of law are enforceable against federal agencies under the APA, and it established a two-part test for determining which agency pronouncement are accorded such enforceability:

> To have the force and effect of law, enforceable against an agency in federal court, the agency pronouncement must (1) prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice—and (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.

Id. at 1136 (internal quotes and citations omitted).

This decision was followed by *Western Radio Services Company, Inc., v. Espy*, 79 F.3d 896 (9th Cir. 1996). In that case, the plaintiff argued that the Forest Service had improperly denied its application for a special use permit because the Forest Service allegedly followed procedures in processing the application that violated sections of the Forest Service's Manual and Handbook. *Id.* at 900-901. The Court rejected this argument. The fundamental question posed by the Court was whether the Manual and Handbook had "the force and effect of law." According to the Court, "[i]f we hold that the provisions in the Manual and the Handbook do not have the force and effect of law

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

either independently or by reference, we will not need to review Western's contention that the Service failed to comply with the guidelines contained in either." *Id.* at 901.

Addressing this question, the Court concluded that neither the Manual nor the Handbook had the force and effect of law because neither satisfied either of the two requirements set forth in *United States v. Fifty-Three (53) Eclectus Parrots*. *Id.* Specifically, the Court determined that neither the Manual nor the Handbook were "substantive in nature." *Id.* Rather, the Manual and Handbook contained only a set of procedures for the conduct of Forest Service activities and did not serve as binding limitations on the Service's authority. *Id.* Also, the Court concluded that neither the Manual nor the Handbook were promulgated in accordance with the formal rulemaking requirements of the APA or pursuant to any independent congressional authority. *Id.*

The Circuit applied this rule again in *River Runners for Wilderness v. Martin*, 593 F.3d 1064 (9th Cir. 2010), holding that environmental organizations could not mount a challenge under the APA to a National Park Service management plan that allowed continued use of motorized rafts in the Grand Canyon National Park which was alleged to be violative of policies that were deemed not to have the force and effect of law under the test established in *Fifty-Three (53) Eclectus Parrots*. *Id.* at 1070-1073; *and see Earth Island v. Carlton,* 626 F.3d 462, 473-474 (9th Cir. 2010) (tree marking guidelines did not have the force and effect of law and their violation could not form the basis of an APA claim).[8]

The supposed policy which forms the basis of the plaintiffs' claim here meets neither of the *Fifty-Three (53) Eclectus Parrots* tests for enforceability. To the extent the policy exists, it is strictly non-substantive in character. In determining, *for its own purposes,* whether a particular Tribal group should be recognized as the governing body of a Tribe, how the group came to power with reference

8 In the face of this authority, plaintiffs cite an unpublished opinion in *Confederated Tribes & Bands of Yakama Nation v. Holder*, No. 11-3028, 2011 WL 5835137 (E.D. Wash. Nov. 21, 2011). This decision is of no assistance to plaintiffs. The matter before the Court was reconsideration of an order in a discovery dispute. The District Court opinion asserts that "[t]he internal policies that can bind an agency and give rise to a cause of action under the APA are not limited to only those rules promulgated pursuant to notice and comment rule making." *Id.* at *3. The opinion neither cites nor attempts to reconcile its holding with the Ninth Circuit authority discussed above. Instead, the Court relies principally on *dictum* found in *Alcaraz v. Immigration and Naturalization Serv.*, 384 F.3d 1150, 1162 (9th Cir. 2004), which was decided before *Fifty-Three (53) Eclectus Parrots* established the law in the Ninth Circuit on this question. Plaintiffs also cite *Wilkinson v. Legal Servs. Corp.*, 27 F. Supp. 2d 32, 64 (D.D.C. 1998), in support of their argument, but they make no effort to reconcile the holding in that case with the authorities cited above.

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

to Tribal law is no doubt an important consideration for the Department. However, consideration of Tribal law is used only internally as a reference point in a determination as to whether a particular Tribal group should be recognized by the Department as a Tribe's governing body. That the Department may look to Tribal law as guidance in making an internal determination about whether a Tribal group should be recognized as the governing body of a Tribe does not serve as a binding limitation on the Department's authority.

Plaintiffs' contention that they may use the APA to enforce an unwritten, unpublished agency policy also runs afoul of the second test found in *Fifty-Three (53) Eclectus Parrots*. Plaintiffs must demonstrate that the policy has been "promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." *Id.* at 1136. Plaintiffs' memorandum makes *no* showing in this regard. Thus, plaintiffs' effort to enforce a policy that it gleans from the PDAS Letters must fail. A policy that was neither published in the Federal Register nor disseminated to the public for scrutiny and comment does not have the force and effect of law and is therefore not enforceable under the APA. *See United States v. One 1985 Mercedes*, 917 F.2d 415, 423 (9th Cir. 1989) ("An agency policy that can only be unearthed by discovery of the agency's internal workings cannot be a policy that was disseminated to the public.")

Plaintiffs have failed to show that the Department's supposed policy of "interpreting Nooksack election law for the singular purpose of determining whether the Nooksack Tribal Council was validly seated as the governing body of the Tribe" has the force and effect of law. It therefore is not a policy which is enforceable in this Court under the APA.[9]

9 Likewise, the MOA by its own terms is not an enforceable agreement under the APA or by other means. First, the MOA contains a term expressing the intent of the parties that it be nonbinding and unenforceable. Second, it fails the test of *Fifty-Three (53) Eclectus Parrots* because it was not promulgated pursuant to a specific statutory grant of authority and in conformance with procedural requirements imposed by Congress. Third, even if the MOA was somehow construed to be a binding enforceable agreement, despite the parties' expression of a contrary intent, it would be unenforceable under the APA anyway, because the APA does not waive sovereign immunity for the enforcement of claims based on contractual obligations. *N. Side Lumber Co. v. Block*, 753 F.2d 1482, 1485 (9th Cir. 1985).

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

IV. EVEN IF REVIEWABLE UNDER THE APA THE ENDORSEMENT OF THE BIA REGIONAL DIRECTOR WAS NOT ARBITRARY AND CAPRICIOUS

Assuming for purposes of argument that plaintiffs have identified an enforceable policy for purposes of the APA, they have failed to establish any arbitrary and capricious conduct by defendants. Plaintiffs' argument denigrates the integrity of every Nooksack member who had a role in the Special Election and strongly intimates that the decision to recognize the Council was made in bad faith due to the influence of "Beltway Lobbyists" on the leadership of the Department. Regardless, plaintiffs' lengthy diatribe, and their irresponsible and unfounded allegations about "stuffed ballot boxes" and the influence of "Beltway Lobbyists," do not make out a claim of arbitrary and capricious conduct by defendants.

The applicable standards are well known to this Court. Under the APA, an agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dept. of Agriculture*, 499 F.3d 1108, 1114-1115 (9th Cir. 2007). The Court must determine whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9th Cir.2004) (citation omitted). This standard of review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Independent Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (citations omitted). An agency violates the APA only if it has "relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (internal quotations omitted).

Plaintiffs heatedly charge both misconduct by the Tribe in running the election process and agency negligence or malfeasance in monitoring the election. However, those allegations do not involve actionable conduct. The Tribe is not before the Court in any capacity and so plaintiffs'

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

allegations concerning misdeeds by Tribal members are nothing more than background noise. Similarly, while plaintiffs accuse BIA employees of inadequately monitoring the election, plaintiffs point to nowhere where defendants represented to plaintiffs that they would monitor the election to any particular standard. This too is nothing more than background noise.[10]

With respect to the non-final interlocutory endorsement of the Election Board report by the Acting Regional Director, plaintiffs ignore the conscientious efforts made by BIA to assess plaintiffs' allegations of misconduct in order to determine whether they provided a sufficient reason to withhold endorsement of the Election Board report. The Acting Regional Director carefully evaluated each of plaintiffs' four allegations and found them to be insubstantial and not a reason to withhold endorsement. AR000088-000090. Except in one respect, which will be discussed in more detail below, plaintiffs do not challenge the correctness of these conclusions. Under the applicable standard of review, the conclusions are therefore presumed valid and must be upheld by the Court. *See Independent Acceptance Co.,* 204 F.3d at 1251.[11]

The single issue raised by plaintiffs that goes to the question of arbitrariness is plaintiffs' claim that defendants changed policy in midstream without adequate justification and that a decision based on this supposedly unjustified policy change amounts to arbitrary and capricious conduct. At the risk of belaboring the point, it is worth mentioning that plaintiffs' argument depends on them convincing the Court that they have identified a preexisting policy that is enforceable in an APA action in the first place.

---

10 Nor are plaintiffs' insinuations about meetings with "Beltway Lobbyists" meaningful. The Nooksack Indian Tribe is a recognized Tribe and a normal state of relations between the United States and the Tribe requires government-to-government lines of communication so that the Tribe may interact with the United States for the benefit of its members. While there is nothing in the record concerning the substance of conversations between the Department and the "lobbyists," that such meetings would occur, and even that there might be advocacy in favor of recognition of the new Council, is not sinister, but rather something that is normal and to be expected in these circumstances.

11 Similarly, plaintiffs' complaint about the speed of the PDAS decision to recognize the Council after receiving the Acting Regional Director's endorsement does not demonstrate arbitrary and capricious conduct. No standard cited by plaintiffs required the PDAS to second-guess the Acting Regional Director or to look behind the Acting Regional Director's stated reasons for her endorsement of the Election Board report. Rather, the PDAS was entitled to rely on the experience and recommendations of his subordinates in making his decision. *See, National Small Shipments Traffic Conference, Inc. v. ICC,* 725 F.2d 1442, 1450-1451 (D.C. Cir. 1984); *and see Neighbors for Rational Dev., Inc. v. Norton*, 2001 WL 37124664, at *2 (D.N.M. Dec. 18, 2001).

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

Second, in the absence of any writing to document the existence of this supposed policy and its precise parameters, the Court is asked to accept plaintiffs' self-serving identification of the contours of this supposedly preexisting policy at face value. Plaintiffs describe the supposedly preexisting unwritten policy as follows:

> Defendants carried out a policy of interpreting Nooksack election law for the singular purpose of determining whether the Nooksack Tribal Council was validly seated as the governing body of the Tribe.

Dkt. # 28, p. 1, *ll*. 16-18. In plaintiffs' view, this supposed policy operates rigidly and without room for the exercise of any administrative judgment and discretion. Thus, according to plaintiffs, the Acting Regional Director was required to interpret and resolve a question as to the requirements of the Tribe's election law should such a question be raised, no matter how insubstantial or unimportant the alleged deviation from Tribal law might be in regards to the ultimate outcome of the election.

The PDAS Letters, from which plaintiffs glean the existence of this exacting policy, lend themselves to no such interpretation. As stated in the PDAS letter of December 23, 2016, AR000005-000006, what the Department was insisting upon was "a *valid* election, *consistent* with the Tribe's constitution and the decisions of the Tribe's Court of Appeals, the Northwest Intertribal Court System." AR000005 (emphasis added). This description of the Department's objective did not necessarily exclude the exercise of administrative judgment and discretion in determining whether a Tribal election was a valid election.

The Acting Regional Director's report describes the efforts made to determine whether the Special Election was in fact a valid election. In the Acting Regional Director's view, the task did not require that a technical issue arising under the Tribe's elections code be definitively resolved in order to determine whether such an election had occurred. Summing up her conclusions on the matter of alleged ballot stuffing raised by plaintiffs, the Acting Regional Director said:

> In regards to the appeal and decision, we think one issue merits further discussion. A complaint was raised to the BIA alleging the ballot box was "stuffed" with illegal ballots cast in-person. This allegation is similar to the first claim made in the appeal to the Board. An allegation of this nature is serious and calls into question the integrity of the special election. The BIA believes that addressing this allegation is necessary so that all Nooksack citizens can be confident *that an open and fair election took place*.

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

> The BIA was involved throughout the entire special election and closely inspected the election process. As will be discussed in the following section, the BIA has reconciled the voters list and accounted for all ballots printed for the election. The BIA inspected the ballot identification numbers of received ballots and determined they match up to the list of returned ballots. There is neither evidence that ballots were cast by deceased individuals or people voting more than once, nor evidence that vote totals were altered. Ultimately, the question of whether ballots could be received by hand or whether all ballots had to be postmarked is one of tribal law and the BIA declines to insert itself and interpret tribal law in this instance. *The evidence before the BIA indicates that the election was conducted in a proper manner and the BIA finds nothing to disturb the Board's conclusions*.

AR000088-000089 (emphasis added).

The Acting Regional Director exercised her judgment in endorsing the report of the Tribal Election Board based on her conclusion that, despite the technical arguments raised by plaintiffs, the Election Board had run *an open and fair election* that substantially conformed to Tribal law and produced a verifiable result. For the purpose of providing information to the PDAS for his ultimate decision on whether to recognize a post-Special Election Council as the governing body of the Tribe, that was sufficient. The manner in which the Acting Regional Director made this determination did not reflect any change in preexisting Department policy even under plaintiffs' theory of the case, and plaintiffs have brought nothing before the Court except speculation to support a contrary argument.

The determination by the Acting Regional Director to endorse the report of the Tribal Election Board under these circumstances has not been shown by defendants to be arbitrary and capricious and defendants' cross-motion for summary judgment should be granted.

UNITED STATES ATTORNEY
5220 UNITED STATES COURTHOUSE
700 Stewart Street
Seattle, Washington 98101-1271
(206)-553-7970

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment should be denied, defendants' cross-motion for summary judgment should be granted, and the action should be dismissed.

DATED this 18th day of April, 2019.

Respectfully submitted,

BRIAN T. MORAN
United States Attorney

s/ Brian C. Kipnis

BRIAN C. KIPNIS
Assistant United States Attorney
Office of the United States Attorney
5220 United States Courthouse
700 Stewart Street
Seattle, Washington 98101-1271
Phone: 206-553-7970
E-mail: brian.kipnis@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on April 18, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

Bree R. Black Horse	bree@galandabroadman.com
Anthony S. Broadman	anthony@galandabroadman.com
Ryan David Dreveskracht	ryan@galandabroadman.com
Gabriel S Galanda	gabe@galandabroadman.com

DATED this 18th day of April, 2019.

s/ Crissy Leininger
CRISSY LEININGER
Paralegal Specialist
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone: 206-553-7970
E-mail: christine.leininger@usdoj.gov