HON. THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

v.

DAVID BERNHARDT, *et al.*,

Defendants.

NO. C18-0859-TSZ

PLAINTIFFS' CONSOLIDATED REPLY IN SUPPORT OF SUMMARY JUDGMENT MOTION AND RESPONSE IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The record is clear in this case. Beginning in October of 2016, the Department of the Interior ("DOI") established a policy of interpreting and applying Nooksack election law to determine whether the Nooksack Tribal Council ("Tribal Council") was validly seated as the governing body of the Nooksack Tribe ("Tribe") for the purposes of carrying out the government-to-government relationship between the United States and the Tribe.[1] Following a change in presidential administration and influence by a Washington, D.C., lobbying firm, the Principal Deputy Assistant Secretary of Indian Affairs ("PDAS") departed from DOI's established policy

[1] Dkt. ## 23-2, 23-3, 23-4, 23-5.

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when he issued a decision on March 9, 2018 ("Recognition Decision") that accepted the Bureau of Indian Affairs' Acting Northwest Regional Director's ("Regional Director") March 7, 2018, endorsement of the Nooksack Special Election ("Endorsement Memorandum") and thus recognized the Tribal Council.[2] This change in policy violates the APA.

Plaintiffs have standing to bring their claim because the APA fully vests this Court with the authority to adequately redress their injuries. Plaintiffs have properly challenged an agency action reviewable under the APA and an agency policy enforceable under the APA. Plaintiffs also have demonstrated that Defendants' change in policy violates the APA because Defendants failed to demonstrate awareness that they had departed from prior policy, the new policy fails to comply with Defendants' trust obligations to the Tribe and its members, and Defendants failed to articulate good reasons or provide a reasoned explanation for their change in policy. This Court should therefore grant summary judgment in Plaintiffs' favor.

II. ARGUMENT

A. PLAINTIFFS HAVE STANDING.

Defendants argue that Plaintiffs lack standing because this Court cannot redress their claim.[3] Specifically, Defendants contend that because Plaintiffs do not request injunctive relief for a future injury, their claim does not meet the redressability requirement of standing and, as such, this Court lacks jurisdiction.[4] In support of their argument, Defendants discuss one case: *Leu v. International Boundary Commission*, 605 F.3d 693 (9th Cir. 2010), which is entirely distinguishable. No APA claim was made in *Leu* and that case did not involve DOI's unique

[2] Dkt. ##23-18, 23-12.
[3] Dkt. #32 at 14-15.
[4] *Id.* at 13, 15.

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relationship with Indian tribes. 605 F.3d at 693-94. Rather, *Leu* involved a property dispute arising out of an International Boundary Commission order after President George W. Bush terminated the Commissioner's appointment. *Id.* at 694. *Leu* is inapposite.

Defendants fail to cite any of the cases that address standing under these circumstances. That body of case law makes clear that where a plaintiff brings an APA challenge to DOI's decision-making process regarding the approval of an allegedly unlawful tribal election and subsequent recognition of tribal leadership, and the remedy sought is a declaration that the DOI's process violated the APA and a set aside of the unlawful agency action, that plaintiff has satisfied the redressability requirement of standing.

Standing has three elements: the plaintiff must have (1) suffered an injury in fact (2) that is fairly traceable to the challenged conduct of the defendant and (3) that is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). When analyzing the standing issue, the Court must be "careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *In re Navy Chaplaincy*, 534 F.3d 756, 760 (D.C. Cir. 2008). Under the redressability prong of the standing analysis, this "Court's injury is whether the injury is likely to be redressed by a favorable judicial decision." *Chinook Indian Nation v. Zinke*, 326 F.Supp.3d 1128, 1143 (W.D. Wash. 2018) (citing *Lujan*, 504 U.S. at 561).

1. This Court Has Already Determined That It Can Redress Plaintiffs' Claim.

Here, Plaintiffs request that this Court "[i]ssue a declaratory judgment . . . that Defendants' departure from [DOI]'s established policy was arbitrary and capricious, an abuse of discretion, and a failure to act in accordance with [DOI]'s internal policies and procedures;"

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"[h]old unlawful, and set aside, Interior's change in policy as arbitrary and capricious."[5] In other words, Plaintiffs properly ask this Court to declare that Defendants' departure from established DOI policy was arbitrary and capricious and to set aside the challenged decision.[6] 5 U.S.C. § 706(2)(A).

This Court already has determined that it could adequately redress Plaintiffs' claim and grant Plaintiffs this "complete relief":

> In asking that the United States Department of the Interior ("Interior") and the Bureau of Indian Affairs be required (on the requested remand) to abide by applicable regulations and policies and to exercise their discretion properly when re-asserting the validity of the 2017 election, plaintiffs seek relief that would affect only the future conduct of Interior's and/or the BIA's administrative process, and as to the particular procedures prospectively used by a federal agency, nether the Tribe nor the absent council members have a legally protected interest.[7]

As this Court explained, issuance of a declaratory judgment necessarily affects DOI's future conduct.[8] Such prospective relief vindicates the injuries Defendants inflicted upon Plaintiffs as a result of Defendants' unlawful departure from DOI policy.

In concluding that it could adequately redress Plaintiffs' claim, the Court relied on the Ninth Circuit Court of Appeals' decision in *Alto v. Black*, 738 F.3d 1111 (9th Cir. 2013). There, tribal members sued the BIA for declaratory and injunctive relief under the APA seeking to invalidate and reverse the Assistant Secretary's disenrollment order. *Id.* at 1115. The claims in *Alto* likewise concerned "the manner in which the [Assistant Secretary's] exercised his authority

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[5] Dkt. #18 at 24-25.
[6] *Id.* Attempting to put words in Plaintiffs' mouth, Defendants are flat wrong that Plaintiffs have "reversed course." Dkt. #32 at 4 n. 2. Plaintiffs have been completely consistent about the relief they seek, which is any or all of that for which they prayed in their original Complaint and Amended Complaint. Dkt. ##1 at 24-25; 11 at 17; 18 at 24-25.
[7] Dkt. #15 at 3 (citing *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256 (9th Cir. 2000)).
[8] *Id.*

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to review the Band's enrollment determination." *Id.* at 1125. The court determined that it could afford the plaintiffs the relief they sought because "the injury complained of in the first three causes of action is the BIA's violation of the APA[,]" which resulted from the Assistant Secretary's actions; thus a declaration that the Assistant Secretary acted arbitrarily and capriciously and a set aside of the Assistant Secretary's decision would afford the plaintiffs complete relief. *Id.* at 1127. Similarly, Plaintiffs' claim is limited to review of the manner in which Defendants ostensibly evaluated the Special Election and in turn approved the results.[9] And because Plaintiffs' claim is that Defendants violated the APA by departing from DOI policy, a declaration that the DOI acted arbitrarily and capriciously and a set aside of the unlawful, March 9, 2018, agency action would fully redress Plaintiffs' injury for purpose of Article III standing. *See Alto*, 738 F.3d at 1127.

2. Other Courts Have Found Plaintiffs' Claim For Declaratory Relief Redressable.

Other courts also have concluded that a plaintiff who makes a claim like that advanced by Plaintiffs in this case—APA claims seeking a declaration that the DOI violated the APA as a result of agency processes involved in approving or disapproving an allegedly unlawful election by challenging recognition of the newly-elected tribal leadership—has standing because the claim is redressable. The U.S. District Court for the District of Columbia's decision in *Seminole Nation of Oklahoma v. Norton*, 223 F.Supp.2d 122 (D.D.C. 2002), together with the many cases cited below, illustrate this point. In *Seminole Nation*, a tribe sought a declaratory judgment that the DOI violated the APA by refusing to recognize tribal leadership following an election that the

[9] Dkt. #18 at 22-25.

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BIA found was inconsistent with the tribal law. *Id.* at 125-26, 147-48. The court found that the tribe had satisfied the redressability component of standing because "a favorable decision by this Court in plaintiff's favor"—a declaration that the DOI violated the APA—"would redress [plaintiff's] injury." *Id.* at 132 n. 13 (citing *MD Pharm., Inc. v. DEA*, 133 F.3d 8, 11-12 (D.C. Cir. 1998)).

Several other courts have similarly held that a plaintiff establishes redressability where the relief sought is a declaration that the agency violated the APA and an order setting aside the action. For example, in *Sac & Fox Tribe of Mississippi in Iowa Election Board v. Bureau of Indian Affairs*, 321 F.Supp.2d 1055 (N.D. Iowa 2004), a tribal election board sought declaratory relief under the APA of the BIA's recognition of a separate election held by a dissident group of tribal members that allegedly violated the tribe's constitution. *Id.* at 1058. The court found that the "Election Board's allegations satisfy the redressability element of Article III standing because it is likely that the Election Board's alleged injury will be redressed by a favorable decision in this action"—that the BIA violated the APA. *Id.* at 1061.[10]

Similarly, in *Feezor v. Babbitt*, 953 F.Supp. 1 (D.D.C. 1996), tribal members challenged an Interior Board of Indian Appeals' ("IBIA") decision that overruled a BIA Area Director's approval of an ordinance that affected tribal membership. *Id.* The court determined that the tribal members had met the requirements of standing, finding that "redressability is shown by IBIA's

[10] The Court ultimately determined that it lacked jurisdiction over the Election Board's request for declaration that "the BIA's conduct violated the Tribe's Constitution and, therefore, is invalid" because that request would require the court to interpret the Tribe's constitution. *Id.*; *see also Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) (affirming holding that "resolution of . . . disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court."). In contrast, Plaintiffs' claim here does not require the Court to interpret the Nooksack Constitution; rather, Plaintiffs ask this Court to determine whether Defendants' unlawfully departed from DOI policy in issuing the Recognition Decision. *See* Dkt. # 18 at 24-25.

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power to disapprove the ordinance." *Id.* at *4. The court ultimately remanded the case back to DOI for further consideration and explanation. *Id.* at *6.

Also, in *Rosales v. United States*, 477 F.Supp.2d 119 (D.D.C. 2007), tribal members brought an APA suit against the DOI seeking declaratory judgment that the agency's decisions violated the APA and thus be set aside. *Id.* at 121. The tribal members sought no injunctive or other form of relief under the APA beyond a declaratory judgment and set aside of the decision. *Id.* at 121, 129. The court affirmed the tribal members' standing: their injuries could be redressed by a "[c]ourt order declaring that the Board's decisions and the Secretarial election are invalid" under the APA and must be set aside. *Id.* at 126 (citing *Feezor*, 953 F.Supp. at 4).

As these cases demonstrate, Plaintiffs have standing as they narrowly seek declaratory relief and a set aside of agency action under the APA based on Defendants' unlawful departure from DOI's established policy of interpreting Nooksack election law.[11] *See Seminole Nation*, 223 F.Supp.2d at 132 n. 13; *Sac & Fox Tribe of Miss.*, 321 F.Supp.2d at 1061; *Rosales*, 477 F.Supp.2d at 126. Redressability is anchored by this Court's authority under 5 U.S.C. § 706(2)(A) to determine that Defendants unlawfully departed from DOI's policy of applying Nooksack law, which empowers the Court to "[h]old unlawful, and set aside, Interior's change in policy as arbitrary and capricious" and thus to "[i]ssue equitable relief . . . ordering Defendants to determine whether the special election was held in accordance with Tribal law."[12] This Court therefore possesses the authority to redress Plaintiffs' injuries by granting them the relief they seek, assuming, as the Court must at this point, that Plaintiffs would prevail on the merits of their

[11] *See generally* Dkt. #18 at 1-3, 5-25.
[12] *Id.* at 24-25.

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APA claim. *See Lujan*, 504 U.S. at 561. Plaintiffs have established redressability; they have standing.

B. PLAINTIFFS CHALLENGE A FINAL AGENCY ACTION.

Plaintiffs allege that the Recognition Decision issued by the PDAS, which was wholly predicated on the Regional Director's Endorsement Memorandum, was an unlawful departure from established DOI policy.[13] In response, Defendants argue this Court lacks jurisdiction "to separately adjudicate" the Regional Director's Endorsement Memorandum because it is an interlocutory, non-final agency action.[14] Defendants agree, however, that the PDAS's Recognition Decision specifically relies upon, incorporates, and approves the process underlying the Regional Director's Endorsement Memorandum.[15] *See Ciba-Geigy Corp.*, 801 F.2d 430 n. 7 (D.C. Cir. 1986) (final agency action may "result from a series of agency pronouncements rather than a single edict."). It was the PDAS's rubber-stamping of the Endorsement Memorandum that crystalized the Recognition Decision and constituted DOI's final agency action. *See Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 49 (D.C. Cir. 2000). Plaintiffs have therefore properly sought judicial review of Defendants' unlawful change in policy by challenging the PDAS's agency action to approve DOI's process, accept the Endorsement Memorandum and thus the election results. *See, e.g., Vann v. Kempthorne*, 467 F.Supp.2d 56, 71 (D.D.C. 2006), *judgment rev'd in part on other grounds*, 534 F.3d 741 (D.C. Cir. 2008); *Seminole Nation of Okla.*, 223 F.Supp.2d 122; *see also Ciba-Geigy Corp. v. E.P.A.*, 801 F.2d at 436 (an agency letter represents a reviewable final agency action where the letter "unequivocally stated that [agency's]

[13] Dkt. #28 at 13-16; Dkt. #18 ¶¶ 76-84.
[14] Dkt. #32 at 15, 18.
[15] Dkt. #23-18.

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position . . . [and] it gave no indication that it was subject to further agency consideration or possible modification.").

More importantly, judicial precedent illustrates that a plaintiff properly seeks APA review of the DOI process involved in tribal election approval by challenging the DOI decision that formally recognizes or refuses to recognize the results of that election, i.e., new tribal leadership. For example, in *Vann v. Kempthorne*, 467 F.Supp.2d 56 (D.D.C. 2006),[16] tribal members sought APA review of the DOI's process in approving allegedly unconstitutional election results and recognizing the tribe's newly-elected leadership. *Id.* at 63-65. The *Vann* plaintiffs claimed that tribal election procedure was inconsistent with applicable tribal and federal law; thus the process the agency employed in its approval of the election results and recognition of tribal leadership was arbitrary and capricious. *Id.* at 62-65, 71. The court found that the final agency action at issue in the plaintiffs' APA claims was the Assistant Secretary's recognition of tribal leadership stemming from the allegedly unlawful election. *Id.* at 71.

Vann makes clear that a plaintiff properly seeks judicial APA review of an agency's process in evaluating and approving results of a purportedly unconstitutional election by challenging the Assistant Secretary's final recognition of tribal leadership. *Id.* Other courts also have held that seeking APA review of the Assistant Secretary's ultimate approval or disapproval of a tribal election and recognition or refusal to recognize election results, is the appropriate means by which to challenge the agency's process in reaching that decision. *See Seminole*

[16] On appeal, the District of Columbia Court of Appeals reversed in part and remanded the district court's denial of the tribe's motion to dismiss. *Vann v. Kempthorne*, 534 F.3d 741 (D.C. Cir. 2008). The appellate court held that the tribe itself was protected by sovereign immunity, but that the suit against tribal officials was not foreclosed under *Ex Parte Young* and special sovereignty interests. *Id.* The appellate court, however, did not disturb the district court's finding regarding final agency action and conclusion that the agency did not act in an arbitrary and capricious manner in violation of the APA. *Id.*

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Nation, 223 F.Supp.2d 122; *see also Cal. Valley Miwok Tribe v. Jewell*, 5 F.Supp.3d 86, 88, 91, 97-101 (D.D.C. 2013).

C. THIS COURT MAY REVIEW DEFENDANTS' CHANGE IN POLICY UNDER THE APA.

1. Agency Policy Does Not Have To Be Subject To Rules Promulgated Pursuant To Notice And Comment Rule Making To Be Reviewable Under The APA.

Defendants argue that the DOI policy at issue here is not reviewable under the APA because it was not published in the Federal Register or otherwise subject to a formal rule-making process.[17] Defendants are wrong. Plaintiffs' APA claim is supported by the "well-established" proposition that "agencies may be required to abide by certain internal policies." *Alcaraz v. Immigration and Naturalization Serv.*, 384 F.3d 1150, 1162 (9th Cir. 2004). Consistent with *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), and its progeny, federal courts have repeatedly held that an administrative rule published in the Federal Register is not required to bind a federal agency—an administrative agency can be sued for failing to abide by its less formal rules and procedures. *See also Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Wilkinson v. Legal Services Corp.*, 27 F.Supp.2d 32, 56 (D.D.C. 1998).

As recognized by the U.S. District Court for the Eastern District of Washington in *Confederated Tribes & Bands of Yakama Nation v. Holder*, No. 11-3028, 2011 WL 5835137 (E.D. Wash. Nov. 21, 2011), "[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 (citing *Alcaraz,* 384 F.3d at 1162). There, the court

[17] Dkt. #32 at 18-19, 21. Defendants also argue that agency guidelines, manuals, and handbooks do not constitute agency policies reviewable under the APA. *Id.* at 19-20. Plaintiffs do not, however, challenge any DOI guidelines, handbooks, or manuals as the basis for Defendants' departure from DOI policy. *See* Dkt. #18.

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reviewed Ninth Circuit precedent on this issue, ultimately "reject[ing] the Federal Defendants' interpretation that unpublished policies can never bind an agency." *Id.* This Court should likewise reject that same argument advanced by Defendants in this case.

The determination of the "law" that binds agencies goes beyond form and looks to substance. *Wilkinson*, 27 F.Supp.2d at 60. Internal, unpublished rules may bind an agency. *See Ruiz*, 415 U.S. 235; *Mass. Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985). "[R]ules implicit in an agency's course of conduct where that conduct gives rise to a 'common law' administrative rule" can bind an agency and are enforced under the APA. *Wilkinson*, 27 F.Supp.2d at 60 (citing *Doe v. Hampton*, 566 F.2d 265, 281-82 (D.C. Cir. 1977)).

2. DOI Letters Establish Agency Policy Reviewable Under The APA.

In the context of Plaintiffs' APA claim, other federal courts have determined that a series of DOI letters regarding conditions applicable to the recognition of tribal government may established a DOI policy that is binding upon the agency and enforceable under the APA. In *California Miwok Tribe v. Jewell*, 5 F.Supp.3d 86 (D.D.C. 2013), for instance, the U.S. District Court for the District of Columbia reviewed the BIA's recognition of tribal leadership following a disputed election facilitated by the agency under the APA standards applicable to an agency's change in policy. *Id.* at 98, 100 (citing *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *Anna Jaques Hosp. v. Sebelius*, 583 F.3d 1 (D.C. Cir. 2009); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009)). The court determined that a series of BIA letters regarding the composition of tribal leadership or purpose of government-to-government relations established BIA policy that bound the agency. *Id.* at 98-100.

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Cayuga v. Bernhardt, — F.Supp.3d —, No. 17-1923, 2019 WL 1130445 (D.C.C. Mar. 12, 2019), also informs this Court's analysis. There, tribal members sought APA review of the BIA's and DOI's recognition of tribal leadership following a tribal vote. *Id.* Those plaintiffs challenged the BIA's interpretation of tribal law and subsequent recognition of tribal leadership as an APA violation because the BIA and DOI had failed "to provide a reasoned explanation for departing from prior policy and approving the [tribal vote] as a lawful method of selecting members for the Cayuga Council." *Id.* at *6. The court recognized that a series of BIA letters interpreting tribal election law to tribal leadership over the course of nearly two years established binding agency policy reviewable under the APA. *Id.* at *10-12.

Likewise in this case, the "law" that binds Defendants was enshrined in the series of prior PDAS letters as well as the Memorandum of Agreement, all of which established a policy of interpreting Nooksack election law to determine whether the Tribal Council was validly seated as the governing body of the Tribe.[18] *See Cayuga*, 2019 WL 1130445, at *10-12; *California Miwok Tribe*, 5 F.Supp.3d at 98-100; *see also Seminole Nation*, 223 F.Supp.2d at 134 (finding BIA a letter sent to tribal leadership "clearly expresse[d] the DOI's position that it will not recognize future actions of the [tribe]" until it conducted a lawful election and seated a government consistent with the tribe's constitution.). In all, a federal regulation or other product of agency rulemaking is not necessary to establish a policy enforceable under the APA. This Court may therefore adjudicate Plaintiffs' APA claim.

[18] Dkt. ##23-2, 23-3, 23-4, 23-5, 23-10.

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D. DEFENDANTS' ACTED ARBITRARILY AND CAPRICIOUSLY.

Finally, Defendants broadly argue their change in policy did not violate the APA.[19] In support of their contentions, Defendants cite a single case: *Independent Acceptance Co. v. California*, 204 F.3d 1247 (9th Cir. 2000),[20] which involved an APA action by long-term health care providers against the U.S. Department of Health and Human Services that challenged the Secretary's acceptance of state plan amendments to the method of reimbursement under the Medicaid Act. *Id.* Critically, *Independent Acceptance Co.* did not involve an APA claim predicated on any change in agency policy, and therefore cannot support Defendants' claim that their change in policy was permissible under the APA. *Id.*

In contending that their actions do not represent a policy change that violates the APA, Defendants broadly argue the Regional Director's evaluation of the election was sufficient, but fail to cite to any of the well-settled factors employed by courts when making an APA determination in the context of DOI's trust relationship with Indians.[21] Plaintiffs address the agency policy change standards applicable to this kind of judicial review in turn below, which establish that the PDAS's acceptance of the BIA's Endorsement Memorandum constituted an arbitrary and capricious departure from DOI policy.

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[19] Dkt. #32 at 22-25.

[20] *Id.* at 23; *see id.* at 23-25.

[21] Dkt. #32 at 22-25. Because Defendants do not respond to Plaintiffs' legal authority supporting their claim that Defendants' policy change violates the APA, Defendants appear to concede this crucial point. *See* LCR 7(2); *see also In re Benham*, 2014 WL 4543268, at *5 (C.D. Cal. 2014), *aff'd*, 678 Fed. Appx. 474 (9th Cir. 2017) (party conceding by failing to respond to it in summary judgment briefing); *Bancoult v. McNamara*, 227 F.Supp.2d 144, 149 (D.D.C. 2002) ("[I]f the opposing party files a responsive memorandum, but fails to address certain arguments made by the moving party, the court may treat those arguments as conceded[.]").

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1. Standards of Review

Again, an agency's change in policy violates the APA where the agency fails to display awareness that it is changing its position, fails to show that the new policy is permissible under the statute, does not believe the new policy is better, or fails to provide good reasons for the new policy. *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (citing *Fox Television Stations, Inc.*, 556 U.S. at 515-16). An agency fails to provide "good reasons" for a new policy if there is no "reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.*

Because Plaintiffs' claim involved DOI's unique relationship with Indians, several principles guide the Court's determination of whether Defendants' actions are arbitrary, capricious, or otherwise not in accordance with the law. For nearly two centuries, Congress and the U.S. Supreme Court have acknowledged and continually reaffirmed the existence of a trust relationship between the United States and Indian tribes. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Seminole Nation v. United States*, 316 U.S. 287, 296 (1942). As a result, Congress has delegated to the DOI—specifically its Secretary—broad authority to carry out the federal government's unique trust obligations to Indians. 25 U.S.C. § 2 (Secretary has the power to manage "all Indian affairs, and all matters arising out of Indian relations."); *see also United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986). A cornerstone of this trust responsibility is DOI's duty to ensure a tribe's political integrity. *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008) (citing *Seminole Nation*, 316 U.S. at 296). This includes the duty "to ensure that [a tribe's] representatives, with whom [she] must conduct government-to-government relations, are valid representatives of the [tribe] as a whole." *See Seminole Nation*,

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223 F.Supp.2d at 140 (D.C. Cir. 2002); *Morris v. Watt*, 640 F.2d 404, 415 (D.C. Cir. 1981) (noting that tribal governments must "fully and fairly involve the tribal members"); *Cal. Valley Miwok Tribe v. United States*, 424 F.Supp.2d 197, 201 (D.D.C. 2006) (the Secretary must "ensure that he deals only with a tribal government that actually represents members of the tribe"); *Milam v. U.S. Dep't of the Interior*, 10 ILR 3013, 3017 (D.C. Cir. Dec. 23, 1982) ("The Secretary of the Interior is charged not only with the duty to protect the rights of the tribe, but also the rights of individual members."). That trust duty expressly underpinned each of the PDAS's determinations issued between October 17, 2016 and January 16, 2018.[22]

In specific, the DOI Secretary "has the authority to interpret the tribal constitution in order to determine who will be recognized as the tribal representatives for the purpose of carrying out federal relations with the tribe." *Milam*, 10 ILR at 2015. The Secretary must interpret tribal law in a reasonable manner when carrying out this duty, *Ransom v. Babbitt*, 69 F.Supp.2d 141, 153 (D.D.C. 1999), which is precisely what DOI's PDAS did in each of the determinations he issued between October 17, 2016, and January 16, 2018.[23]

Federal courts apply these principles when evaluating whether the DOI arbitrarily and capriciously departed from an established policy in violation of the APA. *See, e.g., Cal. Valley Miwok Tribe*, 5 F.Supp.3d at 96-100; *Seminole Nation*, 223 F.Supp.2d at 134-144. When determining whether a tribal election and leadership are valid, DOI's decision must be consistent with a tribe's constitution and laws. *Seminole Nation*, 223 F.Supp.2d at 134, 140. A court may find that an agency acted in an arbitrary and capricious manner if it acted in disregard of the plain

[22] Dkt. ## 23-2, 23-3, 23-4, 23-5, 23-11.
[23] *Id.*

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language of tribal law. *See Ransom*, 69 F.Supp.2d at 153. Significantly, the DOI acts arbitrarily and capriciously when it recognizes tribal leadership following an election in which the tribe disregarded its own law in order "to disenfranchise members of the tribe and preclude them from participating in the governance of the [tribe]." *See id.* at 137.

California Valley Miwok Tribe v. Jewell, 5 F.Supp.3d 86 (D.D.C. 2013), illustrates application of these guiding principles to an APA claim based on a DOI policy change. There, the court found that the BIA's decision to recognize a limited number of individuals as tribal members and tribal leadership based following a disputed tribal election, represented an unreasonable change in agency policy that violated the APA. *Id.* at 98-100. The court first evaluated whether the Assistant Secretary's decision to recognize the tribal membership was a departure from prior DOI policy. *Id.* at 97-98. Although the Assistant Secretary acknowledged that the decision "mark[ed] a 180-degree change of course from positions" DOI previously held, DOI argued that the court "must uphold the revised policy so long as the agency has provided a 'reasoned explanation' for the change." *Id.* at 98 (citing *Brand X Internet Servs.*, 545 U.S. at 981). Rejecting DOI's position, the court observed that the Assistant Secretary's conclusion "ignore[d]—entirely—that the record [wa]s replete with evidence that the Tribe's membership is potentially significantly larger than just five individuals," citing evidence that the BIA had received prior to the Assistant Secretary's decision. *Id.* at 98. The court found that because the Assistant Secretary's action "ma[de] no effort to address any of this evidence in the record [and] instead . . . simply declare[d] that there are only five citizens of the tribe," he failed to adequately discharge his trust responsibilities and failed to explain his decision-making criteria. *Id.*

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The court also evaluated whether the Assistant Secretary's decision to recognize the tribe's general council was an unlawful departure from prior DOI policy in violation of the APA. *Id.* The court likewise found that the Assistant Secretary "simply assume[d], without addressing, the validity of the General Council." *Id.* The court explained that it was "incumbent on [Assistant Secretary] to first determine whether a duly constituted government actually exists." *Id.* at 100 (citing *Seminole Nation*, 223 F.Supp.2d at 140; *Cal. Valley Miwok Tribe*, 424 F.Supp.2d a 201). Finding that the Assistant Secretary's decision "fail[ed] to address *whatsoever* the numerous factual allegations in the administrative record that raise significant doubts about the legitimacy of the General Council," the court observed evidence in the administrative record that the BIA had ignored—including evidence of "fraud and misconduct." *Id.* (emphasis in original). In all, the court held that the Assistant Secretary's decision "[was] not consistent with the 'distinctive obligation of trust' the federal government must employ when dealing with Indian tribes . . . nor is it supported by the administrative record." *Id.* (citing *Seminole Nation*, 316 U.S. at 296; *Petroleum Comm., Inc. v. F.C.C.*, 22 F.3d 1164, 1172 (D.C. Cir. 1994); *CVMT II*, 515 F.3d at 1267). The court found that the Assistant Secretary's actions constituted an unlawful departure from agency policy that violated the APA. *Id.* at 101.

In contrast, the court in *Cayuga*, 2019 WL 1130445, found that DOI did not act in violation of the APA when it changed its policy regarding its procedure for evaluating tribal election procedures and recognition of tribal leadership. The plaintiffs specifically argued that the DOI had failed to provide a reasoned explanation or adequately explain their change in policy applicable to tribal election procedures. *Id.* at *10. First, the court found that the DOI displayed the requisite awareness of its change in the policy when the Assistant Secretary "devoted an entire

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section [in the challenged decision] to why 'the Regional Director did not arbitrarily reverse a longstanding agency position,'" acknowledging that the "BIA was now changing its position by allowing the [tribal vote] to resolve the leadership dispute." *Id.* The court further concluded that the DOI's proffered reasons for the change in policy were reasonable because DOI needed an entity to enter into ISDEAA contacts with and the leadership dispute had not resolved itself over time, thus justifying DOI intervention. *Id.* at *11-12. The court concluded that the DOI "did not violate the APA by failing to adequately explain their change in policy relating to the use of a [tribal vote] to select members for the Nation Council" because DOI "acknowledge that they were making a change in policy and provided a reasonable explanation for that change." *Id.* at *12.

2. Defendants' Change In Policy Violated The APA.

a. Defendants Failed To Display Awareness Of A Policy Change.

Here, Defendants' policy change violated the APA because they failed to display awareness that they were changing their position regarding interpretation and application of Nooksack law. *See Organized Village of Kake*, 795 F.3d at 966. Each of the decisions issued by the PDAS cited to and interpreted Nooksack election law to determine whether the Nooksack Tribal Council was validly seated.[24] The PDAS's Recognition Decision failed, however, to cite to or interpret Nooksack law.[25] Unlike the change in policy that was upheld in *Cayuga*—where the court deemed that the Assistant Secretary displayed awareness of a change in policy by "devoting an entire section [in the challenged decision] to why 'the Regional Director did not arbitrarily reverse a longstanding agency position'" because the BIA had in interpreted interpreting the

[24] Dkt. ## 23-2, 23-3, 23-4, 23-5.
[25] Dkt. #23-18.

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tribe's laws differently than before—the PDAS's Recognition Decision included no such display of awareness, let alone an entire section devoted to why the Regional Director "decline[d] to insert itself and interpret tribal law in this instance."[26] *See id.* at *10.

b. Defendants' Policy Change Does Not Comply With 25 U.S.C. § 2.

Defendants' change in policy violated the APA because it does not comply with the applicable statute, 25 U.S.C. § 2, and the duties that flow from that statute. *Organized Village of Kake*, 795 F.3d at 966. Like the arbitrary and capricious agency action in *California Valley Miwok Tribe*, the Assistant Secretary's Recognition Decision also "fails to address *whatsoever* the numerous factual allegations in the administrative record that raise significant doubts about the legitimacy of the" Special Election, including evidence of "fraud and misconduct."[27] 5 F.Supp.3d at 98-100 (emphasis in original). The Assistant Secretary's failure in this regard is inconsistent with his duty to promote the Tribe's political integrity, ensure leadership recognized by the DOI is valid, and to protect tribal members, all of which stem from 25 U.S.C. § 2. *Cal. Valley Miwok Tribe*, 515 F.3d at 1267; *Seminole Nation*, 223 F.Supp.2d at 140; *Morris*, 640 F.2d at 415.

Defendants' policy change further violates the APA because it fails to interpret tribal law, which also is a duty that stems from 25 U.S.C. § 2. The PDAS's Recognition Decision does not interpret Nooksack election law or address the Regional Director's affirmative choice to decline to interpret Nooksack election law.[28] The law is clear that among the trust obligations imposed on Defendants by 25 U.S.C. § 2 is Defendants' duty to interpret and apply tribal law and apply the tribe's constitution in the process involved in determining who the DOI will recognize for the

[26] Dkt. #23-12 at 4.
[27] *See* Dkt. #23-12.
[28] Dkt. #23-18.

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purposes of carrying out government-to-government relations. *Milam*, 10 ILR at 2015; *Ransom*, 69 F.Supp. 2d at 153; *Seminole Nation*, 223 F.Supp. at 134, 140. Defendants failed to carry out that duty in this instance. Thus, the policy change does not comply with the applicable statute and violates the APA.

c. Defendants' Policy Change Fails To Provide Good Reason.

Defendants' policy change violates the APA because they failed to provide good reason as well as a "reasoned explanation" for the change. *Fox Television Stations, Inc*., 556 U.S. at 515-16. The PDAS's Recognition Decision provides no good reason or explanation as to why Defendants suddenly ceased their policy of interpreting and applying Nooksack law.[29] This "unexplained inconsistency" is in and of itself is grounds for finding the challenged agency action to be arbitrary and capricious in violation of the APA. *Organized Village of Kake*, 795 F.3d at 966. Recall in *Cayuga*, the Assistant Secretary went to great lengths to explain why the agency decided to employ a different interpretation of tribal law, citing the need to contract with the tribe and resolve the leadership dispute, which the court upheld as sufficient. 2019 WL 1130445, at *11-12. Defendants failed to provide any such good reasons or explanation for the change in this instance. Rather, Defendants' actions mirror those that the court in *California Valley Miwok Tribe* deemed violative of the APA because the Assistant Secretary had provided no good reasons for the sudden and unexplained change in policy. 5 F.Supp.3d at 98-100. The absence of any good reason or reasoned explanation for suddenly declining to interpret and apply Nooksack law in the PDAS's Recognition Decision, particularly in light of their trust responsibility to do so,

[29] Dkt. #23-18.

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shows that Defendants' policy change violates the APA. *Id.*; *Cayuga* 2019 WL 1130445, at *11-12; *see also Organized Village of Kake*, 795 F.3d at 966.

III. CONCLUSION

Plaintiffs respectfully request this Court to declare that Defendants violated the APA, deem Defendant's agency action arbitrary and capricious, and set aside the March 9, 2018, decision under 5 U.S.C. § 702.

DATED this 10th day of May 2019.

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CERTIFICATE OF SERVICE

I, Wendy Foster, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Ste. L1, Seattle, WA 98115.

3. Today, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF System, which will send electronic notification of such filing to the following parties:

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The foregoing statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 10th day of May 2019.

s/Wendy Foster
Wendy Foster

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