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

REPLY RE: 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, four disappointed candidates for elective office, bring this action in an effort to disrupt the current governance of the Nooksack Indian Tribe. While once they disclaimed this, their latest filing removes any doubt about their intentions. No longer do plaintiffs claim to be merely seeking to "vindicate their rights" to the consistent application of government policy. No longer do plaintiffs categorically deny that they have any intention of setting aside defendants' recognition of the Council. Plaintiffs' latest memorandum openly requests precisely that form of relief.

Plaintiffs should be bound by the representations they made to this Court in their opposition to defendants' motion to dismiss and in their motion for summary judgment. However, if the dramatic shift in plaintiffs' position reflected in their most recent filing is to be countenanced, the Court should reconsider its ruling on defendants' motion to dismiss *sua sponte* in light of plaintiffs' changed position.

Regardless, if the Court concludes that it can decide this case on the merits based on the pending cross-motions for summary judgment, judgment should be in favor of defendants. Plaintiffs have simply failed to establish that defendants' decision to recognize the Council as the governing body of the Tribe was in any respect arbitrary or capricious.

STATEMENT OF FACTS

According to plaintiffs, they "have been completely consistent about the relief they seek . . ." Dkt. # 33, p. 4, n. 6. The record demonstrates the contrary.

In their original complaint, plaintiffs asserted that the Department's decision to recognize the Council as the governing body of the Tribe was "arbitrary and capricious." Dkt. # 1, ¶ 65. Curiously, plaintiffs' complaint did not specifically ask the Court to set this decision aside. Instead, they prayed for "all other appropriate injunctive or equitable relief necessary to provide complete relief to Plaintiffs." Dkt. # 1, p. 24; *and see* Dkt. # 18, ¶ 66. Naturally, defendants construed the complaint as seeking to set aside the Department's recognition of the Council, and they filed a motion to dismiss asserting the indispensable party rule because of the absence of the Tribe and the successful candidates as parties to the lawsuit.

In response to defendants' motion to dismiss, plaintiffs protested that their lawsuit did not

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

seek to overturn the Department's "recognition of anything." Dkt. # 11, p. 17, *ll.* 1-7 ("Plaintiffs are not seeking to 'terminate the United States' recognition of' anything."). Instead, according to plaintiffs, they sought only an order setting aside the Acting Regional Director's (interlocutory) endorsement of the Election Board's report on the election on the theory that her refusal to interpret a provision of the Tribe's Elections Code in endorsing the report was arbitrary and capricious. Thereafter, the Court denied the motion. Dkt. # 15.

With defendants' motion to dismiss behind them, calls to set aside the Department's recognition of the new Council started to appear in plaintiffs' pending motion for summary judgment. *See* Dkt # 28, p. 2, *ll*. 14-16. ("PDAS Tahsuda's March 9, 2017 [sic], decision [granting recognition to the Council] is arbitrary and capricious and therefore must be set aside."); p. 16, *ll.* 3-10 ("Lacking anything that resembles explanation, justification, or analysis, PDAS Tahsuda's March 9, 2018, decision [granting recognition to the Council] is arbitrary and capricious and thus without the force of law.") Yet, in their prayer for relief, plaintiffs reservedly requested only "a 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.

In their latest memorandum, filed in response to defendants' consolidated opposition and cross-motion raising standing and final agency action issues, plaintiffs' are now unambiguously asking the Court to set aside the Department's recognition of the Council. Dkt. # 33, p. 5, *ll*. 7-10 ("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* [recognizing the Council] would fully redress Plaintiffs' injury for purpose of Article III standing.") (emphasis added); *and see id.* at p. 21, *ll.* 3-5 ("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 [recognizing the Council] under 5 U.S.C. § 702).

Notwithstanding plaintiffs' contrary assertion, one is hard pressed to find *any* consistency between plaintiffs' earlier proclamation, made in the face of a motion to dismiss, that their lawsuit does not seek to terminate defendants' recognition of "anything," and their present demand that the

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

Court "set aside the March 9, 2018, decision" recognizing the Council.

ARGUMENT

I. PLAINTIFFS' PRAYER FOR DECLARATORY RELIEF FAILS TO SATISFY ARTICLE III'S REDRESSABILITY REQUIREMENT

Plaintiffs cite a variety of cases to prove a point which defendants have never disputed, *to wit,* that *in an appropriate case* declaratory relief is an available remedy in an APA case. Dkt. # 33, p. 5, *l.* 11- p. 7, *l.* 8. But the question before the Court is not whether, as a general principle of law, declaratory relief is awardable in an APA case. The question before the Court is whether plaintiffs can establish that they meet the redressability requirement for Article III standing when the relief they are seeking is merely a judicial declaration that defendants' past actions were contrary to their "policies."[1]

The law is clear that in the absence of a non-speculative showing that declaratory relief will provide them with some meaningful prospective benefit, the redressability requirement is not met. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (plaintiff was not entitled to injunctive relief barring LAPD's future use of a chokehold because of the remote possibility that he would be subjected to an LAPD chokehold in the future).[2] Plaintiffs' efforts to refute this principle of law are not persuasive.[3]

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1 Plaintiffs mischaracterize defendants' argument. Defendants have *never* asserted that "because Plaintiffs do not request injunctive relief for a future injury, their claim does not meet the redressability requirement of standing." Dkt. # 33, p. 2, *ll.* 14-16. Rather, it is defendants' position that plaintiffs do not have standing under the redressability requirement to seek prospective relief that is meaningless. The precise form of the relief, whether injunctive or declaratory, is irrelevant to the argument.

2 Only one of the cases cited by plaintiffs, *Rosales v. United States,* 477 F.Supp.2d 119 (D.D.C. 2007), (discussed, *infra*, at p. 5, n. 5), even touches upon the appropriateness of declaratory relief in relation to the redressability requirement. The others do not. *See Seminole Nation of Oklahoma v. Norton,* 223 F. Supp. 2d 122 (D.D.C. 2002) (issues concerning the propriety of declaratory relief neither raised nor discussed); *Sac & Fox Tribe of Mississippi in Iowa Election Bd. v. Bureau of Indian Affairs*, 321 F. Supp. 2d 1055 (N.D. Iowa 2004) (same); *Feezor v. Babbitt*, 953 F. Supp. 1, 2 (D.D.C. 1996) (same).

3 Plaintiffs' assertion that defendants' argument rests on only one "distinguishable" case, *Leu v. Int'l Boundary Comm'n*, 605 F.3d 693, 693 (9th Cir. 2010), is clearly wrong. Of course, because *Leu* is binding precedent in the Ninth Circuit, it is sufficient in and of itself. But many other cases could be and were cited for this same proposition of law. These include a case cited in the body of the *Leu* opinion itself, *Fieger v. Michigan 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.") Moreover, notwithstanding plaintiffs' claim that *Leu* is "entirely distinguishable," no meaningful distinction is shown. Plaintiffs assert "[n]o APA claim was made in *Leu* and that case did not involve DOI's unique relationship with Indian Tribes." Dkt. # 33, p. 2, *l.* 15 – p. 3. *l.* 3. Be that as it may, there is neither an "APA exception" nor an "Indian Tribes" exception to Article III of the U.S. Constitution.

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

Plaintiffs' memorandum asserts in purely conclusory terms that a declaration that the Acting Regional Director violated the law in declining to determine the meaning of a provision of the Nooksack Elections Code before deciding to endorse the Election Board report will prospectively redress their injuries, but they never indicate just how they will be so benefited. In truth, no tangible benefit to plaintiffs can result from declaratory relief of this nature. Plaintiffs are not unlike the plaintiff in *Lyons* who was once subjected to an illegal chokehold, or the plaintiff in *Perry v. Sheahan*, 222 F.3d 309, 314 (7th Cir. 2000), who was once subjected to an illegal seizure. The redressability requirement demands a "real and immediate threat" that the plaintiff will suffer the same harm in the future. *See Lyons*, 461 U.S. at 110.

Such a real and immediate threat is not present here. That plaintiffs will ever again suffer injury under circumstances like these such that the judicial declaration they seek will have any future applicability is, at a minimum, highly improbable. To be meaningful in the future, the Council would again have to lose recognition, and the Assistant Secretary would again have to be in the position of deciding to restore that recognition based upon a Tribal election and BIA's endorsement of an Election Board report on the results of the election. Standing is not "an ingenious academic exercise in the conceivable." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 566 (1992). Given the utter improbability that any of these events will *ever* reoccur and threaten harm to plaintiffs, plaintiffs' prayer for declaratory relief fails to meet the redressability requirement of Article III.[4]

The analysis is not changed by a request for injunctive relief ordering defendants to determine whether the special election was held in accordance with Tribal law. As set forth in *Matter of Special Mar. 1981 Grand Jury*, 753 F.2d 575 (7th Cir. 1985), "[i]t is not enough, to give

4 *Rosales v. United States,* 477 F. Supp. 2d 119 (D.D.C. 2007), *aff'd*, 275 F. App'x 1 (D.C. Cir. 2008), is not to the contrary. The plaintiffs in *Rosales* did not seek an order simply declaring that a past action was unlawful. Rather, plaintiffs' injury was the Government's refusal to recognize their election as officers of the Tribe. The basis of this refusal was a 1996 constitutional amendment that altered the Tribe's membership requirements, and decisions of the Interior Board of Indian Appeals (IBIA) affirming the validity of this 1996 amendment. The Court concluded that declaratory relief holding this constitutional amendment, and the IBIA decisions upholding the amendment, invalid would provide effective relief to plaintiffs thereby meeting the redressability requirement. *Id.* at 125-126. Henceforth, (if plaintiffs were successful on their claim), the 1996 amendment and the IBIA decisions could not serve as a basis for denying their standing. Here, however, plaintiffs have requested in their summary judgment motion a declaration holding only that "Defendants' departure from Interior's established policy was arbitrary and capricious." Dkt. # 28, p. 16, *ll.* 11-12. Such a declaration provides no meaningful present or prospective redress for plaintiffs' injuries. Even if successful, they will remain, before and after, unsuccessful candidates for Council seats in the December 2017, Special Election, and the Council will continue to be recognized by the Department as the governing body of the Tribe.

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

you standing, that you have been hurt by someone; you must have something tangible to gain from your suit—some alleviation of, or compensation for, the hurt. Otherwise the suit is as much an academic exercise as if it were brought to prevent a nonexistent harm." *Id.* at 577.

While plaintiffs may derive some psychic satisfaction out of an order requiring defendants to "determine whether the special election was held in accordance with Tribal law," such an order would amount to nothing more than an academic exercise, providing no real world benefit to them. Even if defendants were to conclude that the Election Board violated some technical requirement of the Tribe's Elections Code, *i.e.,* by not rejecting hand-delivered ballots received from otherwise eligible voters, this exercise would yield no real world benefit in terms of alleviating the injuries suffered by plaintiffs as unsuccessful candidates for Council seats. The Tribe, because it is not a party here, would be under no obligation to rerun the election so that plaintiffs could run again, and defendants lack the legal authority to force the Tribe's hand. *See Leu* 605 F.3d at 694-695 (redressability requirement not met where requested relief depends on the unfettered choices made by independent actors). Further, under such an injunction, defendants' recognition of the Council as the governing body of the Tribe could continue unabated regardless of the outcome of the process. In other words, this form of injunctive relief also fails the redressability requirement of Article III.

II. PLAINTIFFS' DEMAND THAT THE COURT SET ASIDE THE DEPARTMENT'S RECOGNITION OF THE COUNCIL NECESSITATES RECONSIDERATION OF THE MOTION TO DISMISS

While plaintiffs' ask the Court to set aside defendants' "decision," they have not always been clear or consistent about what they would have the Court set aside. As set forth above, after disclaiming any intention of asking the Court to set aside the Department's recognition of the Council when this case was before the Court for a determination as to whether the absent Tribe was an indispensable party, plaintiffs now are openly calling for the Department's recognition of the Council to be set aside. Dkt. # 33, p. 21, *ll.* 2-6. Indeed, as defendants argued in their cross-motion for summary judgment, *see* dkt. # 32, p. 15, *l.* 11 – p. 18, *l.* 12, and plaintiffs now apparently concede, dkt. # 33, p. 8, *l.* 2 – p. 10, *l.* 2, it cannot be any other way. As a jurisdictional matter, only final agency actions may be the subject of judicial review under the APA, and the Acting Regional Director's decision to endorse the Election Board report on the Special Election was not a final

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

agency action.

If, as plaintiffs argue, this change in position resolves their redressability issues, it nevertheless puts back on the table the indispensable party issues under Rule 19, F.R.Civ.P., raised by defendants' motion to dismiss. That plaintiffs are now openly asking the Court to set aside the Department's recognition of the Council after affirmatively representing to the Court that they had no intention of seeking this relief when defendants' Rule 19 motion was before the Court necessitates that the Court reconsider whether this case should be dismissed because of the absence of an indispensable party.

The Court has clear authority to reconsider its interlocutory orders at any time before it enters judgment, and this situation clearly calls for such a response. *See Matter of 949 Erie St., Racine, Wis.*, 824 F.2d 538, 541 (7th Cir. 1987) (an interlocutory order may be changed by the district court at any time prior to final judgment). The Court's order reflects that its ruling denying defendants' motion to dismiss on indispensable party grounds was greatly influenced by plaintiffs' past unequivocal representations that their lawsuit did not seek to set aside defendants' recognition of the Council. Dkt. # 15, p. 3, n. 4 ("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).") Thus, the Court characterized the relief sought by plaintiffs as follows:

> If the Court were to grant relief to plaintiffs, the effect would not be to unseat the current members of the Nooksack Tribal Council. *Rather, defendants would be required to re-evaluate whether they must interpret Nooksack tribal law in assessing the validity of the challenged election conducted in 2017.*

Id. at p. 2, n. 3 (emphasis added). Because the relief sought by plaintiffs is now shown to go far beyond what they represented to the Court in response to the motion to dismiss, the correctness of that ruling should be reexamined in light of plaintiffs' changed position.[5]

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5 Plaintiffs also asserted that *Timbisha Shoshone Tribe v. U.S. Dep't of the Interior*, 290 F.R.D. 589 (E.D. Cal. 2013), *appeal dismissed as moot*, 824 F.3d 807 (9th Cir. 2016), relied upon by defendants, was distinguishable because plaintiffs were not seeking an order setting aside the Department's recognition of the Council. See Dkt. # 11, p. 17, *ll*. 1 - 5.

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

Moreover, this Court's alternative holding that, even if the absent parties were necessary parties, they were not indispensable parties, dkt. # 15, p. 3, *ll.* 7-13, should be reexamined. While the Court concluded that the risk of prejudice to the Tribe of going forward in its absence would be "minimal," *id.*, this conclusion also was presumably influenced by plaintiffs' false representations about the nature of the relief they would be seeking in the litigation. This enabled plaintiffs to downplay substantially the prejudice that would follow from allowing the litigation to proceed in the absence of the Tribe. *See e.g.* Dkt. # 11, p. 23, *l.* 17 – p. 24, *l.* 1 ("Plaintiffs are not seeking to create "chaos." They are merely seeking to ensure that Defendants have "discharge[d] the federal government's fiduciary obligations," as the law requires."); *and see id.* at p. 11, *ll.* 2-9. Clearly, the requested setting aside of defendants' recognition of the Council will be far more disruptive to the Tribe than the far more limited form of relief that plaintiffs previously represented they were seeking.

III. AN ALLEGED VIOLATION OF AN ADMINISTRATIVE POLICY THAT LACKS THE FORCE AND EFFECT OF LAW IS NOT ENFORCEABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT

The law in the Ninth Circuit could not be more plain. In an action under the APA, in order to prevail on a claim that an agency impermissibly departed from its own policy, the claimant must establish that the policy in question had the "force and effect of law." *United States v. One 1985 Mercedes*, 917 F.2d 415, 423 (9th Cir. 1990) (alleged violation of policy regarding forfeiture enforcement for personal use quantities of illicit drugs not actionable under the APA); *and see W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 900 (9th Cir. 1996) ("[W]e will review an agency's alleged noncompliance with an agency pronouncement only if that pronouncement actually has the force and effect of law.") In other words, the law holds that when an agency fails to follow its own policy, an action will lie under the APA only if the agency in promulgating the policy intended it to be legally binding. In order for an agency policy to be legally binding for purposes of an action under the APA, the policy must both prescribe "substantive rules," *i.e.,* "legislative in nature, affecting individual rights and obligations," and be "promulgated pursuant to a specific statutory grant of authority." *United States v. Fifty–Three (53) Eclectus Parrots,* 685 F.2d 1131, 1136 (9th Cir. 1982).

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

Plaintiffs provide no basis for distinguishing this Circuit authority. Instead, relying almost entirely on cases from outside our Circuit, plaintiffs' argument essentially asks this Court to ignore Circuit precedent.[6]

The single Ninth Circuit case cited by plaintiffs, *Alcaraz v. I.N.S.*, 384 F.3d 1150 (9th Cir. 2004), is of no assistance to them. The *Alcaraz* panel did not depart from the rule established in *Eclectus Parrots,* nor did it make any holding that is helpful to plaintiffs. At issue in *Alcaraz* was a stopgap measure known as "repapering," implemented by the former Immigration and Naturalization Service ("INS") and the Executive Office of Immigration Review (EOIR) under the authority of Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") through a series of written directives as an interim measure pending the promulgation of formal regulations. *Id.* at 1156. The repapering process was intended to mitigate the harsh effects of a change in the law regarding eligibility for suspension of deportation. The Alcarazes were clearly eligible for repapering and could thereby have avoided deportation if the policy was applied to their case. However, for unknown reasons, repapering was not applied to the Alcarazes' case and they were ordered deported.

The Alcarazes argued on appeal that because the INS's repapering directives were substantive and developed pursuant to IIRIRA § 309, they created a judicially enforceable right under the APA. *Id.* at 1162. Notably, this argument closely aligns with the *Eclectus Parrots* rule.

Obviously struggling with the fact that the directives regarding repapering were not promulgated as regulations, the Court declined to rule that they created an enforceable policy under the APA. The Court acknowledged that in some cases agencies have been required to abide by "certain internal policies," and it cited *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), as the case in which this doctrine has its clearest origin. While noting that *Accardi* dealt with

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6 Moreover, none of the cases from other jurisdictions is particularly helpful to plaintiffs. The Court in *California Valley Miwok Tribe v. Jewell*, 5 F. Supp. 3d 86, 100 (D.D.C. 2013), did not, as plaintiffs represent, conclude that a series of DOI letters established a "DOI policy that is binding upon the agency and enforceable under the APA." Rather, the Court simply found that the agency's factual conclusion that the Tribe's membership was limited to five individuals was arbitrary and capricious in light of the evidence in the administrative record, *i.e.,* "the DOI letters," which reflected "that the Tribe's membership is potentially significantly larger than just these five individuals." *Id.* at 98. *Cayuga Nation v. Bernhardt*, 2019 WL 1130445, at *11 (D.D.C. Mar. 12, 2019), is also of no assistance to plaintiffs. The Court did not decide, as plaintiffs represent, that a series of BIA letters interpreting tribal election law "established binding agency policy reviewable under the APA." Nothing found in *Seminole Nation of Oklahoma v. Norton*, 223 F. Supp. 2d 122, 134 (D.D.C. 2002), addresses the relevant issue at all.

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

published regulations, it observed that in other cases the "*Accardi* doctrine," as it has come to be known, had been extended beyond formal regulations.[7] However, the Court declined to decide itself whether the written directives before it had the force and effect of law. *Id.* at 1162. ("[W]e decline to address whether the various memoranda issued by the agency are sufficient to establish a policy to which the agency was bound under the *Accardi* doctrine.")

Plaintiffs' argument would have this Court believe that there are two separate lines of authority operative in the Ninth Circuit that are diametrically opposed. The first, developed under *Accardi,* which makes any agency policy legally binding and enforceable under the APA regardless of intent and formality of promulgation. The second, represented by *Eclectus Parrots,* which sets forth unambiguously that only policies that are "legislative in nature, affecting individual rights and obligations," and "promulgated pursuant to a specific statutory authority" have the force and effect of law and are enforceable under the APA. In effect, plaintiffs' argument encourages the Court to follow this presumed first line of cases and ignore the clear rule set down in *Eclectus Parrots* and its progeny. Plaintiffs' argument provides no reason or rationale for why this Court should apply their preferred rule and ignore the rule enunciated in *Eclectus Parrots* and many other Ninth Circuit cases.

However, *Eclectus Parrots* should not be viewed as representing a different line of authority from the case law formulated under the *Accardi* doctrine. Instead, *Eclectus Parrots* is better viewed as the Ninth Circuit's formulation of the *Accardi* doctrine as it has evolved since the Court's issuance of its original opinion in 1954. *See, e.g., Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (where regulation was not designed to confer important procedural benefits upon individuals but was instead intended to allow the ICC to gather relevant information in the exercise of its discretionary authority the *Accardi* doctrine does not apply).

Moreover, even if an entirely distinct line of case authority is recognized in the Ninth Circuit under the *Accardi* doctrine that, as distinguished from *Eclectus Parrots,* makes enforceable "certain

7 The observation in *Alcazar* that "the *Accardi* doctrine had been extended beyond formal regulations" is not clearly supported by the Ninth Circuit cases cited in the opinion. In *Church of Scientology of California v. United States*, 920 F.2d 1481, 1487 (9th Cir. 1990), the Court merely considered the applicability of the Doctrine in regards to a codified IRS policy, but did not decide that the IRS was bound by the policy under the *Accardi* Doctrine. *Id.* at 1487-1488. Specifically, the Court did not hold that the IRS policy was enforceable despite not being a formally promulgated regulation. *Id. Romeiro de Silva v. Smith*, 773 F.2d 1021 (9th Cir. 1985), also contains no such holding. Indeed, the Court concluded that the 1981 policy instruction before it was merely an internal directive not having the force and effect of law. *Id.* at 1025.

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

internal policies" regardless of form, it is apparent that this alternative line of case authority does not apply to the supposed policy that forms the basis of plaintiffs' claim.

Two important characteristics are found in the cases where the *Accardi* doctrine has been found to have been properly applied. First, the doctrine's applicability is limited to cases in which the agency's failure to follow its policies was found to adversely affect an entitlement, right, or vested property interest of the plaintiff. *United States v. Eisenberg*, 149 F. Supp. 3d 71, 91 n. 15 (D.D.C. 2015) (and cases cited). That is not the case here. The supposed policy plaintiffs rely upon as the basis of their claim does not determine individual rights and obligations. The policy, if it exists, had only an internal purpose. To the extent the Department resorts to Tribal law at all under this supposed policy, it serves merely, *for the benefit of the Department,* to guide it in its internal determinations as to whether the Council should be recognized as the governing body of a Tribe.

Second, under the *Accardi* doctrine, the agency itself must have intended that the policy in question be binding upon the agency. Where an agency had gone through the process of promulgating formal regulations affecting a party's entitlements, rights, or vested property interests, an agency's intent is not usually in doubt. Where the policy is not issued as a regulation, however, "the general consensus is that an agency statement, not issued as a formal regulation, binds the agency only if the agency intended the statement to be binding." *Farrell v. Dep't of Interior,* 314 F.3d 584, 590 (Fed. Cir. 2002) (and cases cited). The importance of agency intent in adjudging the binding nature of an agency policy is well documented in the Ninth Circuit. *See United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168 (9th Cir. 2000) ("Accordingly, Gateway cannot rely on the Engineering Regulation because it was not intended to have the force of law, but was instead a policy statement to guide the practice of district engineers."); *Eclectus Parrots*, 685 F.2d at 1136 ("Clearly, this internal procedure for alerting Customs officers to possible infringements of 19 U.S.C. § 1527 was not intended as a substantive rule, and was not entitled to the force and effect of law against the government.") Agency intent was also the determinative factor in the outcome in *Alcaraz*. Recognizing that the binding nature of the directives was a question of agency intent, the Court remanded the case to the agency to determine whether it considered itself to be legally bound by its directives. 384 F.3d 1162-63.

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

In the case at bar, not only is the supposed policy that plaintiffs ask the Court not of the type that has been found enforceable under the *Accardi* doctrine, there is no indication that the Department considers this supposed policy to be legally binding on the agency. The fact that the supposed policy has not been reduced to writing, and plaintiffs can only offer their deductive reasoning as evidence of its existence, belies any such conclusion.

In summary, even accepting for purposes of argument that the Department had a policy of interpreting and following Nooksack Election Tribal law in making a decision on recognition of the Council, and defendants deviated from that policy in this case, it does not follow that plaintiffs have stated a viable claim, because "an agency's deviation from its own guidelines is not *per se* arbitrary or capricious." *Lake Mohave Boat Owners Ass'n v. Nat'l Park Serv.*, 138 F.3d 759, 763 (9th Cir. 1998). Here, plaintiffs have not established that the supposed policy they wish to have enforced against defendants is, or was ever intended by them to be legally binding and enforceable, or that it otherwise bears the indicia of a binding enforceable policy. Accordingly, their motion for summary judgment should be denied and defendants' cross-motion should be granted.

IV. PLAINTIFFS HAVE FAILED TO SHOW THAT DEFENDANTS ACTED ARBITRARILY AND CAPRICIOUSLY

The remainder of plaintiffs' memorandum constitutes a zealous attack on a strawman. As set forth above, plaintiffs are seeking to overturn defendants' recognition of the Council as the governing body of the Tribe despite the fact that the Tribe is not a party in this lawsuit. Under ideal circumstances, *i.e.,* where the Tribe is a party, cases challenging recognition decisions are delicate matters. As the Court in *Cayuga Nation v. Bernhardt*, 2019 WL 1130445 (D.D.C. Mar. 12, 2019), observed, "[t]he constraints on the Court's review are especially important in this case as courts "owe deference to the judgment of the Executive Branch as to who represents a tribe." *Id.* at *8 (internal citations omitted). Plaintiffs have provided no satisfactory reason why deference should not be accorded to defendants' decision here.

Instead, plaintiffs have created a theoretical "policy" out of thin air, namely a requirement that the Department interpret and construe the Nooksack Elections Code before recognizing the Council. Next, they imagine an unexplained and unjustified change in this theoretical policy as a

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

means of obtaining a Court order disrupting the government-to-government relationship that currently exists between the Tribe and the Department. This effort should fail. First, the supposed policy does not exist. The series of PDAS letters from which plaintiffs divine this supposed policy merely describe why the Tribe's Council would no longer be recognized as its governing body and set forth defendants' expectations, unique to the Tribe, for the Tribe to regain recognition of its Council. The letters neither establish nor evidence any Government "policy" in the conventional sense. The circumstances that prompted the letters, and the description of the Department's expectations for a resumption of normal relations, were *sui generis,* specific to the Tribe, and reflected no generally applicable Department policy.[8]

Finally, even if there was a deviation from statements made in the PDAS letters, and even if those letters are construed to reflect otherwise enforceable agency "policy," the Department's deviation from its own policy is not *per se* arbitrary or capricious. *Lake Mohave Boat Owners Ass'n*, 138 F.3d at 763 (decision to use comparable rates as a range, rather than as an arithmetic average as specified in agency guidelines, was not arbitrary and capricious); *and see City of Fremont v. F.E.R.C.,* 336 F.3d 910, 916 (9th Cir. 2003) (reciting the "general principle" that "it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.").

Moreover, plaintiffs have simply failed to show that any action taken by defendants was arbitrary and capricious. *Id.* As set forth in our prior memorandum, the Acting Regional Director concluded based on her review of the evidence that the election was conducted in a sufficiently fair manner for her to provide her endorsement, and no resort to an interpretation of the Tribe's Election Code was necessary for her to reach that conclusion. The PDAS exercised his discretionary authority to extend recognition to the Council in part based upon the Acting Regional Director's endorsement. At no time did the Department promise either to supervise the Nooksack Election or to interpret and adjudge technical questions arising under the Nooksack Elections Code in the process of reaching this decision. Under the relevant standard of review, the Department's decision to recognize the Council is entitled to deference, even if plaintiffs question its wisdom.

8 More detailed requirements were contained in the MOA but, as the Court has already recognized, the MOA by its own terms was legally unenforceable by any party. Dkt. # 15, p. 3, n. 5.

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

CONCLUSION

For the foregoing reasons, and for those reasons stated in their principal memorandum, 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 31st day of May 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

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

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 May 31, 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 31st day of May, 2019.

s/ Alexandra Melendez

ALEXANDRA MELENDEZ
Legal Assistant (Contractor)
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone: (206) 553-4371
E-mail: alexandra.m.melendez@usdoj.gov

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