The Honorable Thomas S. 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

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR INDICATIVE RULING PURSUANT TO RULE 62.1, F.R.CIV.P.

Defendants David Bernhardt, Tara Katuk Mac Lean Sweeney, John Tahsuda III, and the U.S. Department of the Interior, through their attorneys, Brian T. Moran, United States Attorney, and Brian C. Kipnis, Assistant United States Attorney, for the Western District of Washington, hereby submit this memorandum of points and authorities in opposition to the motion of plaintiffs Robert Doucette, Bernadine Roberts, Saturnino Javier, and Tresea Doucette for an indicative ruling pursuant to Rule 62.1, F.R.Civ.P.

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

INTRODUCTION

On August 13, 2019, the Court entered summary judgment in this action in favor of defendants David Bernhardt, Tara Katuk Mac Lean Sweeney, John Tahsuda III, and the U.S. Department of the Interior (hereafter collectively referred to as "the Department"). Thereafter, plaintiffs Robert Doucette, Bernadine Roberts, Saturnino Javier, and Tresea Doucette, appealed the judgment. The present motion asks the Court, in light of "new evidence," to indicate to the Court of Appeals that it wishes to reconsider its judgment pursuant to Rule 60(b)(2) or 60(b)(6), F.R.Civ.P.[1] A positive indication is needed to induce the Court of Appeals to consider remanding the case for further proceedings. *See* Rule 62.1, F.R.Civ.P.

Plaintiffs' request should be denied because they have failed to show that there is any reason for this Court to reconsider its judgment.

SUMMARY OF ARGUMENT

In March 2018, the Department recognized the Nooksack Tribal Council, as constituted following a December 2017 Special Election, as the legitimate governing body of the Nooksack Tribe. Plaintiffs now present an unsupported conspiracy theory. According to plaintiffs, in "a twist befitting of only the Trump Administration," Principal Deputy Assistant Secretary-Indian Affairs (PDAS) John Tahsuda,[2] acting in cahoots with a so-called "Washington D.C. private lobbyist," "hurriedly" issued a decision recognizing the new Nooksack Tribal Council ("the Council") in order to bolster the legal position of "holdover [Nooksack] councilmembers" in an unrelated lawsuit.[3]

Even if those allegations were true, and they are not, plaintiffs have not suffered any legally cognizable detriment. This suit concerns Plaintiffs' unsuccessful candidacies in a December 2017

1 Plaintiffs' motion also discusses amendment of their pre-judgment complaint, but it is premature to discuss the amendment of pleadings now. Before plaintiffs may seek leave to amend their complaint, they must first persuade the Court to seek a remand from the Court of Appeals, obtain a remand, and convince the Court to vacate its judgment pursuant to Rule 60(b), F.R.Civ.P. *See Lindauer v. Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996), as amended (Sept. 4, 1996).

2 At the time of the events of relevance to this motion, John Tahsuda was the acting Assistant Secretary-Indian Affairs ("ASIA"). For ease of reference, he will be referred to as the PDAS or PDAS Tahsuda.

3 *Rabang v. Kelly*, No. 2:17-cv-00088-JCC (W.D. Wash.).

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

Nooksack Special Election that they believe was unlawfully conducted. The lawfulness of the election under Nooksack tribal law is strictly an intra-tribal matter over which the Department had no jurisdiction. The Department monitored the election for its own purposes, *i.e.*, to decide whether to recognize a newly elected Council as the legitimate government of the Nooksack Tribe. Based on that monitoring, the PDAS decided to recognize the Council.

In its memorandum opinion granting the Department's motion for summary judgment, the Court said "[g]iven the amount of scrutiny and involvement the BIA had in the election process, the Court is persuaded that Interior more than satisfactorily discharged its duty to ensure that the Nooksack Tribal Council recognized by PDAS Tahsuda, in his role as Acting Assistant Secretary, was 'duly constituted' and represented the Tribe 'as a whole.'" Dkt. # 41, p. 20, *ll.* 6-9. In light of this conclusion, and in sharp contrast to plaintiffs' accusations, nothing in plaintiffs' current motion undermines the Court's fundamental conclusion that the administrative record amply supported the Department's decision to recognize the new Council based on the Special Election.

The "new evidence" that plaintiffs offer in support of their accusations consists almost entirely of two apparently unanswered e-mail messages from attorney Robert Odawi Porter to two U.S. Department of the Interior officials, including one who served as Counselor to the AS-IA. These e-mail messages encouraged the Department to act quickly to recognize the Council because of a perceived benefit to third party defendants in the *Rabang* case.[5] Despite lacking any evidence other than that these messages were sent by attorney Porter and received by the Department, plaintiffs leap to the conclusion that the PDAS "hurriedly issued the decision by March 9, 2018 at 2:05 pm ET because up until that moment, a 'lack of recognition' could have 'mean[t] that the Tribe's officials [we]re acting ultra vires, and thus operating a 'racket' under RICO' . . ." Dkt. # 45, p. 2, *ll.* 3-7. Plaintiff imply that these e-mails were purposefully withheld as part of some "clever design to minimize [Mr. Porter's] on-record activity." Dkt. # 45, p. 9, n.9.

Plaintiffs', of course, lack any evidence that these e-mail messages had any influence on either the substance or timing of the decision to recognize the Council. Moreover, neither the

5 A third e-mail message from Mr. Porter to Mr. Scherer simply requests that a Nooksack Tribal attorney be sent a copy of the PDAS decision, and a later fourth e-mail message thanks him for having done so. Dkt. ## 46-3, 46-4.

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

existence of these e-mails nor their absence from the administrative record amounts to "*per se* arbitrary and capricious" conduct. Assuming that *any* action of an administrative agency could ever constitute "*per se*" arbitrary and capricious conduct, there is no authority in plaintiffs' memorandum that such a conclusion is warranted in this case. The Administrative Procedure Act (APA) did not require that the Porter e-mail messages be included in the administrative record. The same is true of a "draft Nooksack resolution" mentioned in a calendar note of a BIA employee that has drawn plaintiffs attention. And, even if these documents should have been included in the administrative record, their absence amounted to harmless error.

Finally, even if these allegations could be proven, and they cannot, plaintiffs have not, and cannot, demonstrate that they have suffered any injury as a consequence. As the Department has consistently argued throughout the litigation, the Department's decision to monitor the Special Election, and to base its decision on whether to recognize the newly elected Council based on that election, was neither legally required nor undertaken for the benefit of unsuccessful candidates for elective office. The exercise was undertaken wholly for the *Department's* benefit. *See* Dkt. # 34, p. 11, *ll*. 7-11 ("To the extent the Department resorts to Tribal law at all under the supposed policy, it serves merely, *for the benefit of the Department*, to guide it in its internal deliberations as to whether the Council should be recognized as the governing body of a Tribe.) (emphasis in original). The Department had no legal duty or obligation to monitor the Nooksack Special Election. The Department also had no legal duty to determine whether the election conformed to Nooksack law, as this Court previously held. Thus, plaintiffs have no basis to seek relief from defendants under the APA.

The Department is not liable to plaintiffs under the APA for actions that do not violate the Constitution, a statute, or a regulation having the force and effect of law. As noted before, if the plaintiffs have been injured by seeking office in an election that did not follow Nooksack law, they have been injured by members of the Nooksack Tribe and must seek their remedy, if any, under Nooksack law.

In summary, as the Court concluded in entering its judgment in this action, the plaintiffs did

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

not show that there was any basis for overturning the Department's decision to recognize the Council. Notwithstanding plaintiffs' accusations in the present motion, they have failed to show that there is any reason to disturb the judgment of the Court. The motion should be denied.

STATEMENT OF FACTS

The Court is well acquainted with the facts of this case. After the Department determined in 2016 that it could no longer recognize the Council as the legitimate governing body of the Nooksack Tribe, and after the dismissal of a lawsuit brought by a Tribal faction who sought to judicially challenge this determination,[6] the Department and the Chairman of the Tribe entered into an expressly nonbinding and unenforceable memorandum of agreement ("MOA"). The purpose of the MOA was to set forth the mutual understanding of the parties as to the path the Tribe should follow to obtain the Department's recognition of its Council and to establish a provisional means for the Department and the Tribe to interact while the Tribe lacked a recognized government.

The MOA envisioned that the Nooksack Tribe would hold a Special Election for open Council seats, including as eligible voters all members of the Nooksack Tribe. The MOA also envisioned that the Bureau of Indian Affairs' (BIA) Northwest Region would observe the Special Election. Upon a favorable recommendation from BIA's Northwest Regional Director to the Assistant Secretary-Indian Affairs, the Department would recognize the Council. Pending the Department's decision, the Chairman of the Nooksack Tribe, Robert Kelly, was "recognize[d] . . . as a person of authority within the Nooksack Tribe, through whom the ASSISTANT SECRETARY will maintain government-to-government relations with the Tribe for such time as this MOA is in effect . . ."[7] Following a Nooksack Special Election in December 2017, and after BIA's Acting Northwest Regional Director made a favorable recommendation to the Acting Assistant Secretary-Indian Affairs, PDAS issued a letter recognizing the Nooksack Tribal Council on March 9, 2018.

Plaintiffs here (four unsuccessful Council candidates) challenged the Department's recognition of the Council pursuant to Section 704 of the APA, 5 U.S.C. § 704. In seeking to

6 *Nooksack Indian Tribe v. Zinke*, No. C17-0219-JCC, 2017 WL 1957076, at *1 (W.D. Wash. May 11, 2017).

7 Administrative Record at pp. 000007-000012.

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

overturn recognition of the post- Special Election Council, plaintiffs argued that the Department violated a supposed policy of "interpreting Tribal constitutional, statutory, and common law to determine whether the Tribal Council was validly seated as the governing body of the Tribe." The Court rejected this argument, concluding that plaintiffs had failed to show that such a policy existed. *See Doucette v. Bernhardt*, No. C18-859 TSZ, 2019 WL 3804118, at *8 (W.D. Wash. Aug. 13, 2019) (citing *United States v. One 1985 Mercedes*, 917 F.2d 415, 423 (9th Cir. 1990)). The Court also expressed its satisfaction with the Department's efforts in monitoring and evaluating the election. *Id.* at *9.

Plaintiffs filed their notice of appeal on August 30, 2019. Dkt. # 43. The case has been stayed while on appeal by agreement of the parties.

ARGUMENT

I. PLAINTIFFS HAVE NOT SHOWN THAT THIS IS THE RARE AND EXTRAORDINARY CIRCUMSTANCE THAT JUSTIFIES AN INDICATIVE RULING

"'Indicative rulings" are incredibly rare, and a district court should only issue them in extraordinary circumstances." *C.Q. v. River Springs Charter Sch.*, No. CV18CV1017SJOSHKX, 2018 WL 7461689, at *2 (C.D. Cal. Nov. 27, 2018). In acting upon a motion for an indicative ruling under Rule 62.1, F.R.Civ.P., the Court must necessarily look forward to see if the moving party has shown sufficient reason to warrant interrupting the normal appellate process and upsetting the ordinary rules regarding the finality of judgments in order to entertain a motion for reconsideration. *See id.*

Plaintiffs suggest that they have made a sufficient showing, citing Rule 60(b)(2), F.R.Civ.P. ("newly discovered evidence") and Rule 60(b)(6), F.R.Civ.P. ("any other reason that justifies relief"). Defendants disagree that plaintiffs have carried their burden.

The law concerning motions for reconsideration was recently summarized in *Chinook Indian Nation v. Bernhardt*, No. 3:17-CV-05668-RBL, 2020 WL 618465 (W.D. Wash. 2020):

> Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d

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

> 877, 890 (9th Cir. 2000). "[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Marlyn Natraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009). Neither the Local Civil Rules nor the Federal Rule of Civil Procedure, which allow for a motion for reconsideration, is intended to provide litigants with a second bite at the apple. A motion for reconsideration should not be used to ask a court to rethink what the court had already thought through — rightly or wrongly. *Defenders of Wildlife v. Browner*, 909 F.Supp. 1342, 1351 (D. Ariz. 1995). Mere disagreement with a previous order is an insufficient basis for reconsideration, and reconsideration may not be based on evidence and legal arguments that could have been presented at the time of the challenged decision. *Haw. Stevedores, Inc. v. HT & T Co.*, 363 F. Supp. 2d 1253, 1269 (D. Haw. 2005). "Whether or not to grant reconsideration is committed to the sound discretion of the court." *Navajo Nation v. Confederated Tribes & Bands of the Yakima Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003).

Id. at *1. Particularly where the relief sought entails the upending of a judgment, Rule 60(b) should be confined to situations in need of an extraordinary remedy, for "[t]he framers of Rule 60(b) set a higher value on the social interest in the finality of litigation." *U.S. Care, Inc. v. Pioneer Life Insurance Co. of Ill.*, 244 F. Supp. 2d 1057, 1061 (C.D. Cal. 2002) (*quoting Merit Ins. Co. v. Leatherby Insurance Co.*, 714 F.2d 673, 683 (7th Cir. 1983)). As discussed below, Plaintiffs' motion does not satisfy these standards.

II. PLAINTIFFS HAVE NOT SHOWN THAT THEIR RIGHTS HAVE BEEN VIOLATED BY THE ALLEGED IMPROPER CONDUCT OF THE PDAS

The motion before the Court fails to identify any supposed legal right of the plaintiffs that the Department has violated because of the Department's alleged receipt and coordination with representatives of third parties in connection with the PDAS's decision to re-recognize the Council as the governing body of the Nooksack Tribe. Because this has not been shown, plaintiffs' motion for a positive indication pursuant to Rule 62.1, F.R.Civ.P., should be denied.

First, the MOA, which is expressly non-binding, and which confers no rights on anyone, including the parties to the agreement, certainly cannot be the source of such legal rights.[8] Second, plaintiffs have not identified any right belonging to them that was violated when Department employees received routine communications from attorney Porter or other third parties while in the

8 Even if the MOA were a legally binding contract, it could not serve as the basis for an APA action. *See N. Star Alaska v. United States*, 14 F.3d 36, 38 (9th Cir. 1994) (APA does not waive sovereign immunity for contractually based claims).

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5220 UNITED STATES COURTHOUSE
700 Stewart Street
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(206)-553-7970

process of deciding, pursuant to the MOA, whether and when to re-recognize the Tribal Council. Plaintiffs have certainly pointed to no authority suggesting that the APA grants third parties "veto power" over an agency decision by sending unsolicited emails that, upon mere receipt by a federal official, taint the entirety of an agency action. Lastly, plaintiffs have not identified any right that was transgressed if, as plaintiffs allege, the timing or other aspects of the decision to recognize the Council was adjusted to benefit the legal position of third parties in the *Rabang* case.[9]

Having failed to identify any violation of law by the Department, plaintiffs' promised future causes of action amount to freestanding claims of arbitrary and capricious conduct under the APA, *i.e.*, claims that are untethered to any specific violation of the law but that simply assert the Department acted "arbitrarily" and "improperly." This is apparently what plaintiffs mean when they promise to amend their complaint (if the judgment is vacated) to assert a "*per se* arbitrary and capricious" claim, and an "improper political influence" claim. Dkt. # 45, p. 15, *ll.* 3-8. But, a viable action under the APA requires more than standalone allegations of "arbitrariness" or "impropriety." An APA plaintiff must demonstrate that the defendant agency violated the law.

The APA is purely a procedural statute. Thus, the APA itself cannot be "violated." *See Or. Nat. Res. Council v. Thomas*, 92 F.3d 792, 797 (9th Cir. 1996) (there is no such thing as a "free-standing APA 'arbitrary and capricious'" claim). Section 706 of the APA, 5 U.S.C. §706, does "not declare self-actualizing substantive rights, but rather, . . . merely provide[s] a vehicle for enforcing rights which are declared elsewhere." *Perales v. Casillas*, 903 F.2d 1043, 1050 n.4 (5th Cir. 1990). Thus, "[t]here is no right to sue for a violation of the APA in the absence of a 'relevant statute' whose violation 'forms the legal basis for [the] complaint.'" *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 753 (9th Cir. 1991) (citing *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 882-883 (1990)).[10] Stated simply, in appropriate circumstances, the APA

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9 In the latter case, defendants would agree that the e-mails should have been included in the administrative record. But, as argued elsewhere in this memorandum, in that event, the failure to include them amounted to harmless error.

10 A corollary of these holdings is set forth in cases previously cited to the Court by defendants. Specifically, the Ninth Circuit holds that the APA does not support an action against an agency for a violation of a regulation or policy unless the regulation or policy was intended by the agency to have the force and effect of law. *See, e.g., United States v. One 1985 Mercedes*, 917 F.2d 415, 423 (9th Cir. 1990); *and see* dkt. # 34, pp. 8-12.

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

exists to provide a means to bring an agency to account for violations of *law* that otherwise would not be redressable. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.)

While plaintiffs allege that the PDAS was influenced by representatives of the Tribe to announce his decision in time to assist third parties in other litigation, they have not shown how that action violated any law. Communications between the Department and representatives of the Tribe regarding the 2017 Special Election, if they occurred, were neither unlawful nor violative of any right belonging to plaintiffs. And, if the PDAS decided to announce his decision in time to clarify the legal position of third parties in another lawsuit, plaintiffs have not shown that such an action would violate any law binding on the Department. Finally, if these communications were "political" in nature, and there is absolutely no evidence of the intrusion of partisan politics into the PDAS' decision-making process, plaintiffs have again failed to show that either the sending or the receipt of those communications were necessarily unlawful.

Absent a showing that the Department violated some legally binding requirement, and that they suffered injury as a consequence, plaintiffs are simply incorrect in their assertion that they may, in some future proceedings in this lawsuit, productively pursue a claim against the Department based on the standard of arbitrariness and capriciousness found in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29 (1983). *See* Dkt. 45, p. 17, *l.* 17 - p. 18, *l.* 16. As the Court of Appeals stated in *Oregon Natural Res. Council*, "where there is no law to apply for purposes of section 701(a)(2), it is legally irrelevant whether an agency has made a 'finding' that is 'contrary to the evidence before it' or that's 'so implausible that it couldn't be ascribed to a difference in view or the product of agency expertise.'" *Id.* at 92 F.3d at 798-99.[11]

Based on the foregoing, plaintiffs' motion for an indicative ruling should be rejected because

11 It is also not enough for plaintiffs to assert generically that the PDAS's alleged actions constituted a violation of trust obligations that the Government owes to them or to Indian tribes generally. *See* Dkt. # 45, p. 20, *ll.* 5-18. "[U]nless there is a specific duty that has been placed on the government with respect to Indians, [the government's general trust obligation] is discharged by [the government's] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir.1998)). Plaintiffs' motion does not identify any specific duty placed on the Government that the Department has violated, nor do they demonstrate any noncompliance with general regulations or statutes.

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

they have not demonstrated that they have any legal right to assert against the Department and, consequently, they have failed to show that they have any viable prospective claim or cause of action to assert against the Department if the judgment in this action were to be vacated.

III. PLAINTIFFS' NEW EVIDENCE IS UNLIKELY TO CHANGE THE DISPOSITION OF THE CASE

Plaintiffs' suggestion that their "new evidence" entitles them to rely on both Rule 60(b)(2) and Rule 60(b)(6) as bases for reconsideration is misinformed. The six separate subsections of Rule 60(b) provide mutually exclusive avenues of relief. *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1088-89 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002); *and see Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 n.11 (1988). Consequently, because Rule 60(b)(6) by its express terms exists only to advance "other" reasons for reconsideration, it may not be used when the claimed basis for reconsideration is encompassed by one of the other enumerated grounds. Stated simply, Rule 60(b)(6) relief is only available for reasons other than those covered by the five previous subsections of the rule. *Agusta S.P.A.*, 252 F.3d at 1088-89.[12] Because plaintiffs claim they are entitled to reconsideration based on "new evidence" they have discovered, their basis for relief if the case were to be returned to this Court must be Rule 60(b)(2).

The test applicable to a motion for reconsideration under Rule 60(b)(2) based on newly discovered evidence requires the movant to show not only that he or she could not have timely discovered the evidence through due diligence but also that the evidence "was 'of such magnitude that production of it earlier would have been likely to change the disposition of the case.'" *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990) (*quoting Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211–12 (9th Cir. 1987)). Evidence that is merely cumulative or impeaching is not sufficient. *See Gorbach v. Reno*, 181 F.R.D. 642, 649 (W.D. Wash. 1998), *aff'd*, 219 F.3d 1087 (9th Cir. 2000); *and see McCormack v. Citibank, N.A.*, 100 F.3d 532, 542 (8th Cir. 1996) (evidence must be "material and not merely cumulative or impeaching").

12 Moreover, "[u]nlike the rest of Rule 60(b), subdivision (6) is construed harshly against the movant." *United Artists Corp. v. La Cage Aux Folles, Inc.*, 771 F.2d 1265, 1275 (9th Cir. 1985) (Wallace, J., concurring); see also *Corex Corp. v. United States*, 638 F.2d 119, 121 (9th Cir. 1981).

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700 Stewart Street
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(206)-553-7970

As grounds for a possible motion for reconsideration, and the basis for plaintiffs' request for a positive indication under Rule 62.1, F.R.Civ.P., plaintiffs' motion essentially relies upon the absence from the administrative record of: (1) two e-mails sent to the Department by attorney Robert Odwai Porter, a representative of the Tribe, between February 15, 2018 and March 9, 2018, encouraging the Department to reach a decision to recognize the Council in time to assist third-party defendants in *Rabang*, and; (2) a copy of a "Nooksack Draft Resolution/Proposal" mentioned in a calendar notation of BIA employee Gregory Norton. Plaintiffs suggest that, had these items been included in the administrative record, they would have advanced different causes of action in their complaint in addition to the one that ultimately proved unsuccessful.[14]

Before discussing the quality of plaintiffs' evidence, it is necessary to consider the APA's "whole record" requirement. Plaintiffs' motion rests upon the supposition that it was improper for the Department to omit the e-mail messages and the "Nooksack Draft Resolution/Proposal" from the administrative record. Implicit in plaintiffs' argument is the belief that every document having even a tangential relationship to an administrative action must be included in an administrative record. Such a rule is not only unworkable, it is not supported by the law. *See Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 305 F.R.D. 256, 297 (D.N.M. 2015).

The statute from which the administrative record requirement emanates, 5 U.S.C. § 706, establishes, *inter alia*, that review of informal agency actions shall be under the arbitrary and capricious standard of review, and that such review is to be based on "the whole record or those parts of it cited by a party." The arbitrary and capricious standard focuses a court on the agency's process of reasoning, *NVE, Inc. v. Department of Health and Human Services*, 436 F.3d 182, 190

14 Plaintiffs' motion also refers to a purported statement by Department attorney Christina Parker during a telephone conversation with plaintiffs' counsel of record in which she reportedly said that "[w]e are just doing as we are told by DC." The statement attributed to Ms. Parker would not qualify as "new evidence" because plaintiffs' counsel allegedly heard this statement prior to filing the complaint in this action, and it would not be included in an administrative record, as oral statements are not captured in an administrative record unless reduced to writing. Moreover, the statement, even if made by Ms. Parker exactly as plaintiffs allege, is hopelessly ambiguous. It is not clear from the recounting of the event by plaintiffs' counsel what specifically Ms. Parker is referring to and, even construing the alleged statement against defendants (which is contrary to the applicable presumption of regularity), the statement does not undermine the Court's judgment that the Department had a sound basis for recognizing the Council in the administrative record. *See United States v. Litton Indus., Inc.*, 462 F.2d 14, 18 (9th Cir. 1972) (absent *prima facie* evidence of fraud, prejudice or other administrative wrongdoing, administrative regularity will be presumed).

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700 Stewart Street
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(206)-553-7970

(3rd Cir. 2006), and the focal point for judicial review of agency reasoning is the contemporaneous administrative record.

As established by the Supreme Court, judicial review under the APA will generally be confined to the administrative record that was before the agency when the agency rendered its decision. *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *and see Fla. Power and Light Co. v. Lorion*, 470 U.S. 729, 743 (1985). The task of the reviewing court is to apply the appropriate APA standard of review to an agency decision based on the record the agency presents to the reviewing court. *Florida Power and Light Co.*, 470 U.S. at 743-44.

An administrative record must be neither over inclusive or under inclusive. *Walter O. Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). It must contain only what the federal agency had before it "*at the time of [its] decision*." *Id*. at 793 (emphasis in original). All else must be excluded. *Id*. The "critical inquiry" in determining whether a particular document belongs in an administrative record is whether the document was "before the [agency] at the time of the decision." *Thompson v. Dep't of Labor*, 885 F.2d 551, 556 (9th Cir. 1989).

As the cases cited above indicate, an administrative record is not supposed to be a catalogic collection of every document having some tangential connection to the subject matter of an agency action. Rather, the administrative record serves as an evidentiary basis for a Court's review of the lawfulness of a final agency action under the arbitrary and capricious standard of review. The focus must be on the evidence considered by the agency in reaching the decision, together with the agency's statement of the reasons for its decision if one was created at the time the decision was made. *See National Association of Chain Drug Stores v. U.S. Department of Health & Human Services*, 631 F.Supp.2d 23, 27 (D.D.C. 2009) (and cases cited) (deliberative pre-decisional documents are not part of the administrative record because the reasonableness of the agency's action is judged in accordance with its stated reasons.)

The dilemma in assembling an administrative record for an APA challenge to an informal decision, *i.e.*, a decision that is not legally required to be made on the basis of a record, is that a record for the decision, by definition, is not required to be contemporaneously maintained. And, the

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

more informal the decision challenged, the less likely that a contemporaneous record will have been created by the agency. Given the difficulty of this task, it is assumed that an agency "properly designated the Administrative Record absent clear evidence to the contrary." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir.1993); *and see Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F.Supp.2d 1, 5 (D.D.C. 2006) ("an agency is entitled to a strong presumption of regularity, that it properly designated the administrative record."). This presumption is not lightly overcome. *See Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 33 (D.D.C. 2013), *aff'd sub nom. Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46 (D.C. Cir. 2015) ("Absent a rebuttal of the presumption of regularity, the Secretary's determination of which documents are privileged, and thus excluded from the administrative record, is conclusive.").

Turning to the case at bar, plaintiffs have failed to make any showing that the Porter e-mails in question were "before the agency" when it made its decision, *i.e.*, that they played any role in the decision that was made. Plaintiffs' suspicions that the decision was expedited at Mr. Porter's insistence rest upon the timing of the decision in relation to the date of a Ninth Circuit oral argument. However, far from being expedited, the administrative record reflects that the Department took in excess of three months following the December Special Election to reach a decision.

Likewise, the "Nooksack Draft Resolution/Proposal" mentioned in an entry for February 2, 2018, in the calendar of BIA employee Gregory Norton, turns out to be nothing more than a reference to a January 30, 2018, resolution of the Nooksack Tribal Council suspending a March 2018 regular election because of questions concerning the newly elected Council's ability to validly certify the results of an election while BIA was still in the process of deciding whether or not to recognize the Council following the December 2017 Special Election. Decl. of Norton, ¶¶ 2-3, Exh. A. This resolution also had no bearing on the Department's decision to recognize the Nooksack Tribal Council on the basis of the December 2017 Special Election and, hence, it was not something that should have been included in an administrative record created to support that decision. *Id*. at ¶ 4.

None of the documents identified by plaintiffs have been shown to have played any part in

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

the Department's decision to recognize the Nooksack Tribal Council on March 9, 2018, and consequently, their absence from the administrative record did not violate the "whole record" requirement of the APA as plaintiffs allege.

However, even if the Court were to decide that the Department should have included any or all of these records in the administrative record, the failure to include them amounts to harmless error. Congress has admonished that in reviewing agency action, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706; *and see Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007) ("In administrative law, as in federal civil and criminal litigation, there is a harmless error rule.") (internal quotation marks and citation omitted); *Rybachek v. U.S. E.P.A.*, 904 F.2d 1276, 1295 (9th Cir. 1990) (prejudicial-error rule, mandated by the APA, means that court may not strike down agency action on basis of error unless petitioners have been harmed by error).

Here, the substance of the decision reached by the PDAS, based upon the Acting Northwest Regional Director's endorsement was that the December 2017 Nooksack Special Election was procedurally sufficient to reflect the will of the Nooksack electorate as a whole. This Court, upon its review of the administrative record, concluded that BIA's efforts to monitor the election were a more than sufficient basis for the PDAS to draw that conclusion.

The "new evidence" amassed by plaintiffs does not undermine the basis for the Court's judgment. In the case of the two e-mail messages that are the basis of plaintiffs' motion, they at most reflect a desire on the part of Mr. Porter's clients to have a decision by the time of a Ninth Circuit oral argument so that their circumstances would be clarified for purposes of the *Rabang* lawsuit. However, even assuming that Mr. Porter's messages influenced the timing of the Department's decision (although, as noted, more than three months passed between the date of the Special Election and the PDAS' decision) there is nothing in them that either changes the state of the existing administrative record already reviewed by the Court or that gives any substance to the contention that the ultimate decision would have been any different had it not been for attorney Porter's communications with Mr. Scherer and then-Assistant Solicitor Rebekah Krispinsky.[16] In

16 Moreover, it is not clear how plaintiffs' could benefit from having this information, if the case were to be returned to the District Court for further proceedings. Because this is an APA case, discovery is not generally permitted. *See*

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

other words, if it was error to omit these e-mail messages from the administrative record, the error was harmless.

IV. PLAINTIFFS CANNOT JUSTIFY A MOTION FOR RECONSIDERATION IN THIS ACTION BASED ON THE DEPARTMENT'S ALLEGED FAILINGS IN RESPONDING TO A FOIA REQUEST OF A THIRD PARTY

Plaintiffs justify their motion in part on the basis of the Department's supposed bad faith in failing to disclose the Porter e-mail messages in response to a FOIA request. Plaintiffs essentially ask the Court to assume that this non-disclosure resulted from intentional misconduct by the Department. This is not proven by plaintiffs' motion.

The FOIA request at issue was sent on behalf of "Nooksack Tribal Member Michelle Roberts." Dkt. # 46-9, p. 2. Notably, Ms. Roberts is not a party to this lawsuit. Although plaintiffs' motion fails to quote the FOIA request fully, the request was limited to:

> Any e-mail or written communication transmitted to or received by *the U.S. Department of Interior's Office of the Assistant Secretary for Indian Affairs or Bureau of Indian Affairs Central Office* regarding the Nooksack Special Election . . ."

Id. (emphasis added).

As set forth above, the e-mail messages in question were unilaterally transmitted by Mr. Porter to Mr. Scherer and, in one case, Ms. Krispinsky. At the time of the Special Election and continuing through the PDAS decision to recognize the Nooksack Tribal Counsel, Mr. Scherer worked as Counselor to the Assistant Secretary-Indian Affairs. Immediately thereafter, he left AS-IA to join the Office of the Solicitor. Dkt. # 46-6, pp. 2-3. Ms. Krispinsky was an Assistant Solicitor in the Office of the Solicitor. *See* Dkt. # 45, p. 7, n.7. That these two employees were employed in the Office of the Solicitor at the time the FOIA request was received by the Department could explain why these records were not found by the responsible employees in regards to a FOIA

Evans v. Salazar, No. C08-0372-JCC, 2010 WL 11565108, at *2 (W.D. Wash. July 7, 2010) (*citing Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988)). Further, under the law, plaintiffs are not entitled to probe the mental processes of the PDAS, through a deposition or otherwise, in order to discern the reasoning by which he or she arrived at the decision in question. *See United States v. Morgan*, 313 U.S. 409, 421-422 (1941) (improper for district court to authorize deposition of Secretary of Agriculture and to have him questioned at length at trial regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates); *and see Warren v. Washington*, No. C11-5686 BHS/KLS, 2012 WL 2190788, at *2 (W.D. Wash. June 14, 2012) ("Courts cannot, and should not, undertake a probe of the mental processes utilized by an administrative officer in performing his function of decision.") (internal quotation omitted).

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

request directed at the "Office of the Assistant Secretary for Indian Affairs."[17]

Regardless, the fact that these e-mail messages were not produced in response to a FOIA request submitted by a third party is not a valid basis for a motion for reconsideration in this action.

The Freedom of Information Act confers a statutory right, extended to the public at large, to obtain records from federal agencies subject to enumerated exemptions. The basic purpose of FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Robbins Tire & Rubber Co.*, 437 U.S. at 242. The only relevant interest in disclosure under FOIA is the public's interest in understanding government operations or activities, and not the particular private interest in the requested information of either plaintiffs or Ms. Roberts. *See United States Department of Defense v. F.L.R.A.*, 510 U.S. 487, 495 (1994).

As the Supreme Court stated in unequivocal terms, FOIA was "not intended to function as a private discovery tool." *Robbins Tire & Rubber Co.*, 437 U.S. at 242; *and see The Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974) ("Discovery for litigation purposes is not an expressly indicated purpose of the Act."). Thus, as the Supreme Court has held, a party's rights under FOIA are not "in any way diminished by its being a private litigant, but neither are they enhanced by [the party]'s particular, litigation-generated need . . ." *Robbins Tire & Rubber Co.*, 437 U.S. at 242, n.23. It stands to reason, therefore, that any complaint plaintiffs might have had about the Department's response to their FOIA request, *had they made a FOIA request,* would have to be redressed within FOIA, not here. *See, e.g.*, 43 C.F.R. Part 2, Subpart H (Freedom of Information Act; Records and Testimony; Administrative Appeals).

Plaintiffs' "particular, litigation-generated need" is simply irrelevant in adjudging the Department's good faith or bad faith in responding to a FOIA request. That is even more true here. The FOIA request that is the subject of plaintiffs' complaint was made not by plaintiffs, but by a non-party. Plaintiffs can hardly complain here about the Department's response to a FOIA request

17 In agencies as large as the Department of the Interior, the responsibility for receiving FOIA requests, collecting documents and responding to FOIA requests is overseen by specific FOIA Units. The Department of the Interior has decentralized its FOIA operations among 13 bureaus and offices, each of which has a Bureau/Office FOIA Officer leading its separately managed and resourced FOIA Program. https://www.doi.gov/foia/About-Us

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

that they themselves did not even make.

CONCLUSION

For the foregoing reasons, defendants respectfully request that plaintiffs' motion for an indicative ruling be denied.

DATED this 2nd day of March 2020.

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
Email: brian.kipnis@usdoj.gov

Attorneys for Defendants