HON. THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

v.

DAVID BERNHARDT, Acting 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.

NO. C18-0859-TSZ

REPLY ON PLAINTIFFS' RULE 62.1 MOTION FOR INDICATIVE RULING ON PLAINTIFFS' RULE 60(b) AND 15(a)(2) MOTIONS

NOTE ON MOTION CALENDAR
March 13, 2020

**ORAL ARGUMENT REQUESTED**

## I. INTRODUCTION

Interior's decision of March 9, 2018, was arbitrary and capricious, and the emails concealed by Defendants are proof. The decision rendered by U.S. Department of the Interior ("Interior") Principal Deputy Assistant Secretary ("PDAS") John Tahsuda's on March 9, 2018, to "recognize the validity of the Tribal Council" ("Recognition Decision"), Dkt. # 23-18, was made for reasons that are unacceptable under federal law. Defendants argue "[t]he Department is not



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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." Dkt. # 50-4 at 4. This is incorrect.

Defendants also maintain they owe no "duty or obligation to monitor the Nooksack Special Election [or] to determine whether the election conformed to Nooksack law." *Id*. This is beside the point. The relevant inquiry is whether Defendants owed a duty to ensure that the Recognition Decision conformed to *federal law*. It did not.

Federal law barred Defendants from issuing the Recognition Decision in order to "benefit the legal position of third parties in the *Rabang* case." Dkt. # 50 at 8. Federal law barred Defendants from taking arbitrary or capricious agency action. Federal law barred Defendants from abusing the discretion bestowed by Congress pursuant to 25 U.S.C. § 2.

Through that lens, "defendants would agree that the emails should have been included in the administrative record." Dkt. # 50 at 8, n.4. Yet without offering *any* justification for why the four emails between Interior Counselor Kyle Scherer and lobbyist Robert Porter, in particular, were not produced to Plaintiffs and this Court as required by 5 U.S.C. § 706, Defendants claim that their "failure . . . amounted to harmless error." *Id*. Defendants are wrong.

Had Defendants produced those emails in the spring of 2018 as required by the Freedom of Information Act ("FOIA"), or by January of 2019, as required by the Administrative Procedure Act ("APA") and this Court's scheduling Order (Dkt. # 20 at 1), Plaintiffs would have been able to bring a fundamentally different lawsuit.[1] Plaintiffs should now be allowed to bring an amended APA suit, given Defendants' newly discovered obstruction.[2]

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[1] Plaintiffs intend to bring such a suit should this Motion not be granted. In essence, the underlying question before the Court is whether any new APA claim should be part of this action. Given the Court's familiarity with the facts and issues, it would be a waste of resources to institute another suit involving the same agency action, because of Defendants' prolonged failure to comport with federal information or evidence disclosure laws. *See* Dkt. # 20 at 1.

[2] Defendants' FOIA argument is a red herring. Dkt. # 50-4 at 15-16. FOIA is simply relevant to show Plaintiffs' counsel's diligence in seeking the newly discovered emails for eighteen months. Fed. R. Civ. P. 60(b)(2).



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No matter how Plaintiffs might style an APA amendment pursuant to 5 U.S.C. § 702, it is plain that Defendants "relied on factors which Congress has not intended it to consider" when PDAS Tahsuda's issued the Recognition Decision. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994) ("The test is whether 'extraneous factors intruded into the calculus of consideration' of the individual decisionmaker.") (citation omitted).

Plaintiffs deserve a full and fair opportunity to present the whole case to the Court.

## II. LAW AND ARGUMENT

### A. PLAINTIFFS' POTENTIAL AMENDMENT IS SUBJECT TO JUDICIAL REVIEW.

Defendants now argue that there might be no such thing as "'*per se*' arbitrary and capricious conduct." Dkt. # 50-4 at 4. But in support of their summary judgment motion Defendants conceded there is such a thing as "'*per se* arbitrary and capricious'" conduct (but that the Recognition Decision was not one such example). Dkt. # 34 at 12. The fact remains that an agency action that was rendered to benefit third parties in civil Racketeer Influenced and Corrupt Organizations Act ("RICO") litigation is *per se* arbitrary and capricious, and Plaintiffs should have been furnished the evidence long before November 2019 that would have allowed them to plead that particular claim pursuant to the Section 702 of the APA.

Defendants also incorrectly suggest that Plaintiffs would need to show that "the intrusion of partisan politics" affected PDAS Tahsuda's recognition decision to bring a political influence claim. Dkt. # 34 at 9. Plaintiffs need not show that party politics influenced PDAS Tahsuda. Instead Plaintiffs should have been furnished the evidence that would have allowed them to plead



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that extraneous factors—specifically, a lobbyist's efforts—caused the Recognition Decision to issue.[3] *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43; *ATX, Inc.*, 41 F.3d at 1527.

Defendants argue that any new APA claim that Plaintiffs might bring in light of the omitted evidence will not be viable since "the APA itself cannot be violated" and "there 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." Dkt. # 50 at 8 (quotation omitted). Defendants are wrong.[4]

The first sentence of § 702 of the APA pronounces a cause of action to any person "**suffering legal wrong because of agency action**"—Plaintiffs here—**or** to any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute"—also Plaintiffs here, as discussed below. In other words, Section 702 itself sets out the "legally binding requirement" that Defendants seek. Dkt. # 50 at 9. Under this provision, District Courts possess "the authority to review final agency action" of **any** final federal agency action. *Safer Chemicals, Healthy Families v. U.S. Envtl. Prot. Agency*, 943 F.3d 397, 416-17 (9th Cir. 2019); *see also King Mountain Tobacco Co., Inc. v. Alcohol & Tobacco Tax & Trade Bureau*, No. 11-3038, 2012 WL 12951864, at *3 (E.D. Wash. Sept. 24, 2012) ("[T]he first sentence of § 702 . . . entitl[es] aggrieved individuals to judicial review of federal agency action under the APA.") (quotation omitted); *Fuller-Deets v. Nat'l Institutes of Health*, No. 18-3175, 2020 WL 230894, at *6 (D. Md. Jan. 14, 2020) ("The first sentence [of § 702] describes the cause of action created by the APA"); *Sevigny v. United States*, No. 13-401, 2014 WL 3573566, at *7 (D.N.H. July 21, 2014) ("Section

[3] Mr. Porter was not behaving as an "attorney"—as Defendants repeatedly mischaracterize him—during the days and hours immediately precedent to PDAS Tahsuda's Recognition Decision. *See, e.g.,* Dkt. # 50-4. During all material times, he was acting as a registered lobbyist who was hired by the Nooksack Indian Tribe to lobby Interior regarding "self-governance issues." ProPublica, *Lobbying for Nooksack Indian Tribe by Capitol Hill Policy Group LLC*, https://projects.propublica.org/represent/lobbying/r/301016824 (last accessed Mar. 5, 2020).

[4] Defendants argue that Plaintiffs' deserved amendment of their APA suit would be futile, but also argue "it is premature to discuss the amendment of pleadings now." Dkt. # 50 at 8, 2, n.1. Defendants are wrong on both fronts.



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702's first sentence supplies a right to seek review of agency action under the Administrative Procedure Act.") (quotation omitted).

That is, in addition to violations of other federal laws, the APA *itself* grants jurisdiction to determine the appropriateness of any federal agency action that "'mark[s] the consummation of the agency's decisionmaking process, . . . by which rights or obligations have been determined, or from which legal consequences will flow." *Safer Chemicals*, 943 F.3d at 417 (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)); *see also Sydnor v. Office of Pers. Mgmt.*, No. 06-0014, 2007 WL 172339, at *4 (E.D. Pa. Jan. 23, 2007), *aff'd*, 336 F. App'x 175 (3d Cir. 2009) ("In order to state a claim under the APA, Plaintiff must challenge an 'agency action,' since it is only review 'thereof' that the APA permits. Where no other statute provides a private right of action, the 'agency action' challenged must be 'final agency action.'") (quoting 5 U.S.C. § 704); *Alegre v. United States*, No. 16-2442, 2019 WL 3891036, at *4 (S.D. Cal. Aug. 16, 2019) (recognizing "actions brought under the APA").

As the Court of Federal Claims explained in *Tech Sys., Inc. v. United States*:

> Under the arbitrary and capricious standard, the Court considers whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment by the agency. Although searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency. The Court will instead look to see if an agency has examined the relevant data and articulated a satisfactory explanation for its action, and may not supply a reasoned basis for the agency's action that the agency itself has not given. The Court must determine whether the . . . decision lacked a rational basis . . . . A ***second ground*** for [an APA claim] is when the protester can show . . . a violation of regulation or procedure. . . .

98 Fed. Cl. 228, 243 (2011) (quotation omitted; emphasis added). Here, Plaintiffs' claim rests "[u]nder the first, rational basis ground." *Id.* The Recognition Decision is indisputably a final



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agency action,[5] and Defendants' omitted emails reveal its arbitrary, capricious, and abusive nature—which Plaintiffs should now be allowed to plead and prove.

In addition, as the Ninth Circuit Court of Appeals clarified in *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1171-1172 (9th Cir. 2017), Section 702—specifically its second sentence—waives the United States' sovereign immunity "broadly" for claims for non-monetary relief, such as those Plaintiffs propose to bring under 25 U.S.C. § 2.[6] A plaintiff need not allege a statutory violation to state a "viable action under the APA," as Defendants maintain. Dkt. # 50 at 8; *see Clinton v. Babbitt*, 180 F.3d 1081, 1087 (9th Cir. 1999) ("In 5 U.S.C. § 702, the United States expressly waived 'sovereign immunity **in non-statutory review actions** for nonmonetary relief brought under 28 U.S.C. § 1331.'") (citation omitted); *Trudeau v. Federal Trade Com'n*, 456 F.3d 178, 188 (D.C. Cir. 2006) ("In sum, we hold that APA § 702's waiver of sovereign immunity permits not only [plaintiff]'s APA cause of action, but **his nonstatutory . . . actions as well**."); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 775 (7th Cir. 2011) (Section 702's waiver applies "in cases involving constitutional challenges and **other claims arising under federal law**") (emphasis added).

**B. DEFENDANTS' OMITTED EVIDENCE DOES CHANGE THE DISPOSITION OF THIS CASE.**

Defendants misstate that it is Plaintiffs' "belief that every document having even a tangential relationship" to the Recognition Decision be included in the administrative record.

[5] While Section 704 "limits the right to bring suit under the waiver of sovereign immunity found in the first sentence of § 702," Defendants do not, and cannot, allege that Plaintiffs do not meet the requirements of Section 704 of the APA. *MacKenzie v. Castro*, No. 15-0752, 2017 WL 1021299, at *4 n.4 (N.D. Tex. Mar. 16, 2017).

[6] *See United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir.1986) (noting that 25 U.S.C. § 2 serves "as the source of Interior's plenary administrative authority in discharging the federal government's trust obligations to Indians"); *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008) ("[A] cornerstone of [the trust] obligation is to promote a tribe's political integrity"); *Seminole Nation of Oklahoma v. Norton,* 223 F. Supp. 2d 122, 139-140 (D.D.C. 2002) ("Congress has expressly vested in the Commissioner of Indian Affairs the authority for the management of all Indian affairs and of all matters arising out of Indian relations. . . . [T]he DOI has the authority and responsibility to ensure that the Nation's representatives, with whom it must conduct government-to-government relations, are the valid representatives of the Nation as a whole").



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Dkt. # 50 at 11. Federal law dictates what must be included in the administrative record. Plaintiffs are entitled to "all documents and materials . . . considered by agency decision-makers." *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (citations omitted). Defendants otherwise claim that Plaintiffs have "failed to make any showing that the Porter emails . . . played any role in the decision." *Id.,* at 11. Defendants' positions are belied by the chronology of events that *immediately preceded* Mr. Scherer's issuance of the Recognition Decision for PDAS Tahsuda at the exact time the Ninth Circuit deliberated in *Rabang*:

- **Wed., February 28, 2018—**Mr. Porter emailed Mr. Scherer: "there is a March 9th hearing before the 9th Circuit Court of Appeals . . . the AASIA's recognition letter is needed asap, certainly by early next week." Dkt. # 46-2.
- **Wed., March 7, 2019 at 1:34 p.m. ET**—Regional Director issued her Endorsement Memorandum to PDAS Tahsuda. Dkt. #23-12; Dkt. # 46-20.
- **Thurs., March 8, 2018, at 9:45 a.m. ET**—Mr. Porter learned that DOI was prepared to issue the Recognition Decision. Dkt. # 46-3.
- **Fri., March 9, 2018, at 11:07 a.m. ET—**Mr. Scherer had drafted and surnamed/approved the Recognition Decision, and presented it for PDAS Tahsuda's approval. Dkt. #26-5.
- **March 9, 2018, at 2:05 p.m. ET—**Mr. Scherer emailed the Recognition Decision and blind copied Mr. Porter, who replied: "Thank you, Kyle." Dkt. # 46-4.
- **March 9, 2018—**The Ninth Circuit hears argument and deliberates in *Rabang v. Kelly*, No. 17-35427 (9th Cir. Mar. 9, 2018), Dkt. # 32.

The Endorsement Memorandum was issued five business days after Mr. Porter pleaded for Defendants' intercession in *Rabang*, and PDAS Tahsuda decided to issue the Recognition Decision barely 24 hours later. Dkt. #23-12; Dkt. # 46-20; Dkt. # 46-4. The United States simply does not make or issue decisions so rapidly.[7]

[7] *See* U.S. Dep't of the Interior - Indian Affairs, Indian Affairs Correspondence Handbook, 7 IAM-H, CH. 8, https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/IA_Correspondance_Handbook_508_OIMT.pdf (last visited Mar. 6, 2020), at 44-47 (setting forth an elaborate intra-agency review process "to ensure that written information is accurate and that the organization provides consistent policy statements."). It appears Defendants also violated Handbook by not obtaining appropriate review or approval of the Recognition Decision before Mr. Scherer issued it. *Id.* ("Correspondence should be routed through offices with a direct interest in or responsibility for the



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The fact of the matter is that thanks to Mr. Porter and Mr. Scherer, Defendants considered *Rabang* when rendering the Recognition Decision. They should not have, but they did. And the four (not "two") emails exchanged by Mr. Porter and Mr. Scherer are rather "clear evidence" that the AR was incomplete, and that the Recognition Decision violated federal law. Dkt. # 59 at 13.

## III. CONCLUSION

Interior's Recognition Decision is arbitrary and capricious and an abusive of the discretion Congress entrusted to Defendants, and the emails concealed by Defendants are proof. Plaintiffs ask that their Rule 62.1 Motion for an Indicative Ruling be **GRANTED**.

DATED this 13th day of March 2020.

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functions, programs, or policies that are covered by the correspondence."); *compare* Dkt. #26-5 (Recognition Decision surnamed by Mr. Scherer and Regional Solicitor Rebekah Krispinsky), *with* Dkt. #46-21 (prior PDAS Tahsuda letter surnamed by Mr. Scherer, Ms. Kripinsky, and four other Interior officials). That lapse also establishes APA liability under Section 702. *Morton v. Ruiz,* 415 U.S. 199, 235 (1974); *Church of Scientology of Cal. v. United States,* 920 F.2d 1481, 1487 (9th Cir.1990); *Nicholas v. INS,* 590 F.2d 802, 806-08 (9th Cir. 1979).

**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 13th day of March 2020.

s/Wendy Foster
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