

Great Plains Regional Office, Bureau of Indian Affairs (“BIA”) to affirm the results of a Secretarial Election (“Election”) conducted on July 30, 2013 by Defendants. *See* Doc. No. 30-1. Specifically, the Deputy Regional Director affirmed the Election despite (1) the provision of misleading ballot information to tribal members discouraging off-reservation voter participation, which tainted the Election and likely led to voter disenfranchisement, and (2) Defendants’ failure to conduct the Election in accordance with the express requirement in the Indian Reorganization Act of 1934 and the Tribe’s Constitution that 30 percent of eligible voters must participate in any election to amend the same Tribal Constitution.

PARTIES

2. Plaintiff Charles K. Hudson is an enrolled adult member of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota (hereinafter, “the Tribe”) and resides in Portland, Oregon, and not on the Fort Berthold Reservation.

3. Sued in his official capacity, Ryan Zinke is Secretary of the United States Department of the Interior.

4. Sued in his official capacity, Michael S. Black is Acting Assistant Secretary for Indian Affairs, United States Department of the Interior.

5. The United States Department of the Interior is an executive department of the government of the United States of America.

JURISDICTION

6. This Court has jurisdiction under 28 U.S.C. §§ 1331, 2201 and 2202 because this action presents questions arising under federal law. The United States has waived immunity to this action in the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

VENUE

7. Venue is proper in this district under 28 U.S.C. § 1391(e)(1) because the United States Defendants reside and may be found here.

RELATED CASES

8. This case is factually and legally similar to a case pending before this Court brought by the same plaintiff against the same defendants for a similar decision. That case is *Hudson v. Jewell et al.*, No. 1:15-cv-01747 (D.D.C. filed Aug. 29, 2015) (TSC) and is stayed pending the outcome of this case.

FACTUAL BACKGROUND

9. On April 16, 2013, the Great Plains Regional Director, an officer of the BIA, authorized the Superintendent of the Fort Berthold Agency, a subdivision of the BIA, to conduct a Secretarial Election for the Tribe in accordance with the agency's regulations at 25 CFR Part 81.

10. The subjects of the Secretarial Election were two Proposed Amendments to the Tribe's Constitution and Bylaws.

11. Proposed Amendment 1 would amend the Constitution to modify the composition of the Tribal Business Council (the Tribe's governing body) by increasing the number of representatives from each voting district from a single representative to at least two representatives, based on the population of qualified voters in each voting district, and change the legal quorum for Council action to two-thirds of the Tribal Business Council.

12. Proposed Amendment 2 would amend the Constitution to prohibit felons from serving on the Tribal Business Council and to provide for recall of Tribal Business Council representatives.

13. Prior to the Election, Fort Berthold Agency Superintendent Timothy LaPointe mailed a cover letter entitled “NOTICE OF SECRETARIAL ELECTION AND NEED TO REGISTER” (“Cover Letter”) along with various materials (“Election Packet”), to members of the Tribe.

14. The Election Packet included the Cover Letter, the text of the Proposed Amendments, a tri-fold document entitled “Notice and Rules of Secretarial Election” (Docket No. 1-3) (“Election Brochure”), a Voter Registration Form, and an Absentee Ballot Request Form.

15. The Election Brochure stated that any challenge to the Election must be received by the Superintendent within three days following the posting of the results of the Election.

CONFLICTING INFORMATION REGARDING VOTER ELIGIBILITY

16. Article IV of the Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation (“Tribal Constitution”) (Docket No. 1-2) defines those eligible to vote as follows: “Any member of the Three Affiliated Tribes of the Fort Berthold Reservation, who is eighteen (18) years of age and over, shall be eligible to vote at any tribal election.”

17. The Cover Letter stated that tribal members wishing to vote by Absentee Ballot must return the Absentee Ballot Request Form for one of the reasons specified on that Form to receive an Absentee Ballot.

18. The Absentee Ballot Request Form required tribal members to choose one of three reasons for being unable to vote in person on July 30, 2013: (1) “I am physically unable to attend the polls because of [Serious Illness, Physical Disability, or Other],” (2) “I am temporarily absent from the Fort Berthold Reservation because of [Military Service, College, or Other],” or (3) “I am a non-resident voter. I do not live on the Fort Berthold Reservation.”

19. The Absentee Ballot Request Form required absentee voters to certify by signature: “I hereby certify that I am a member of the Three Affiliated Tribes Indians [sic] and that I am at least 18 years of age or will be at least 18 years of age on the date of the Secretarial Election (July 30, 2013). I have registered to vote in the upcoming Secretarial Election. Further, I acknowledge that I have received a copy of the proposed amendments and I am qualified to vote in the Secretarial Election.”

20. The Election Brochure included by the Superintendent in the Election Packet was not included in the IBIA Administrative Record delivered to Plaintiff but was referenced in the IBIA Decision, 61 IBIA at 254 n.2.

21. The Election Brochure set forth only two of the three eligibility criteria from the Absentee Ballot Request Form described *supra*, stating “8. Absentee Voting: A registered voter may vote by absentee ballot if they are unable to vote at the polling place because of temporary absence from the reservation, illness, or physical disability.”

22. In contrast to the Absentee Ballot Request Form, the Election Brochure made no mention of the eligibility of qualified tribal members to vote by absentee ballot by reason of living off-reservation.

23. The Tribe’s Constitution provides that all members eighteen years and over are eligible to vote in any Secretarial election, regardless of their residence on the Reservation.

24. The Election Brochure and the Absentee Ballot Request Form set forth conflicting information regarding the criteria for absentee voting.

25. According to the Cover Letter, the blue Election Brochure appeared in the Election Packet before the Absentee Ballot Request Form.

26. An otherwise qualified voter permanently living off the reservation, having read that absentee voting is available only in cases of “temporary absence from the reservation, illness, or physical disability,” would likely believe themselves ineligible to vote in the Election.

27. It is likely that qualified voters permanently living off the reservation who would have voted did not, believing themselves ineligible to do so as a direct result of the conflicting information. Defendants’ procedural error in providing conflicting information tainted the Election and cast doubt on the integrity of the Election results.

FAILURE TO MEET VOTING QUORUM REQUIREMENT

28. The Indian Reorganization Act of 1934, 25 U.S.C. § 5127 states, “In any election heretofore or hereafter held under the Act of June 18, 1934 (48 Stat. 984) [25 U.S.C. 5101 *et seq.*], on the question of excluding a reservation from the application of the said Act or on the question of adopting a constitution and bylaws or amendments thereto or on the question of ratifying a charter, the vote of a majority of those actually voting shall be necessary and sufficient to effectuate such exclusion, adoption, or ratification, as the case may be: Provided, however, That in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote.” (Emphasis supplied).¹

29. Similarly, Article X of the Tribal Constitution states, “This Constitution and Bylaws may be amended by a majority vote of the qualified voters of the tribes voting at an election called for that purpose by the Secretary of the Interior, provided that at least thirty (30) percent of those entitled to vote shall vote in such election; but no amendment shall become effective until it shall have been approved by the Secretary of the Interior.”

30. On July 13, 2013 there were 9,270 members of the Tribe over the age of 18 years.

¹ On March 16, 2017, 25 U.S.C. Section 478a was editorially reclassified as Section 5127 of that title.

31. Pursuant to the Indian Reorganization Act and Tribal Constitution Articles IV and X, any amendment to the Tribe's Constitution at the July 30, 2013 election would require a majority vote with a quorum of 2,781 voters.

32. In contrast to federal statute and the express Constitutional requirement of Article X, the Election Brochure stated, "The proposed amendments of the constitution shall be considered adopted if the majority of voters vote in favor of the adoption; provided at least 30 percent of those registered voters have cast ballots in the election."

33. Defendants' own records indicate that only 1,249 members registered to vote in the July 30, 2013 Election.

34. Because the registration did not reach the quorum of 2,781 voters pursuant to the requirements of the IRA or Tribal Constitution, the Superintendent should not have proceeded with the Election.

35. Notwithstanding the constitutional deficiency, the Election was held on July 30, 2015. Defendants' records indicate that of the 1,249 members registered, only 510 ballots were cast.

36. Instead of the 30 percent quorum of qualifying votes necessary to amend the Tribe's Constitution, only 5.5 percent of qualifying voters cast a ballot in the July 30, 2015 Election.

37. On July 31, 2013, Election Board Chairman Timothy LaPointe certified the election "in accordance with 25 CFR Part 81." Proposed Amendment 1 passed with 303 votes in favor (only 3.2 percent of eligible voters). Proposed Amendment 2 passed with 443 votes in favor (only 4.7 percent of eligible voters).

38. On August 13, 2013, the Fort Berthold Tribal Council passed Resolution 13-122-VJB (Docket No. 1-4), which formally requested on behalf of the Tribe that the BIA decertify the July 30, 2013 Election on the basis that the actual number of voters was disproportionate relative to the number of qualified voters, and transmitted the Resolution to Defendants on August 19, 2013.

39. On September 13, 2013, Regional Director Weldon Loudermilk denied the Tribe's request by letter to the Tribe's Chairman Tex Hall, approved both Proposed Amendments and formally designated them as Amendments to the Tribe's Constitution.

REQUIREMENTS OF 25 CFR PART 81

40. The Indian Reorganization Act of 1934, 25 U.S.C. § 5127, the Tribal Constitution Article X, and BIA regulations at 25 CFR Part 81 define Defendants' process for the conduct of Secretarial Elections.

41. 25 CFR § 81.5(d) provides that the Tribe's Constitution controls where there is a conflict between the Tribal Constitution's amendment article and BIA Regulations.

PLAINTIFF'S CHALLENGE

42. On August 5, 2013, Plaintiff contacted Timothy LaPointe, Secretarial Election Board Chairman, and reached an understanding that an appeal filed that day would be timely and that such appeal could be accepted via email.

43. Plaintiff filed his challenge by email August 5, 2015 at 2:55pm, challenging the Secretarial Election on the basis that, *inter alia*, the number of votes cast fell short of the Article X requirement in the Constitution that 30 percent of qualified voters participate, and that the conflicting information regarding eligibility to vote by absentee ballot likely dissuaded otherwise qualified off-reservation voters from participating.

44. On September 13, 2013, Regional Director Weldon Loudermilk sent Plaintiff a letter rejecting his challenge as untimely and failing to provide substantiating evidence.

45. On January 22, 2014, Plaintiff appealed the Regional Director's decision to the Interior Board of Indian Appeals ("IBIA").

46. In their February 13, 2014 Answer Brief before the Interior Board of Indian Appeals, Defendants admitted that Plaintiff's challenge was in fact timely and properly filed but asserted that Plaintiff had failed to include substantiating evidence supporting his claims.

47. On September 15, 2015, the IBIA entered an order ("IBIA Order") dismissing Plaintiff's claims.

48. As outlined above, Plaintiff exhausted his administrative remedies and all conditions precedent to bringing this action have occurred or been met.

49. On November 12, 2015, Plaintiff filed a Complaint challenging the IBIA Order. Docket No. 1. Accordingly, Defendants' Answer was set for 60 days later, on January 18, 2016.

50. On January 14, 2016, Defendants moved for an enlargement, Docket No. 9, which the Court granted by minute order on January 15, 2016.

51. On March 16, 2016, the Parties jointly proposed a briefing schedule which would have concluded all briefing in this matter by July 15, 2016. Docket No. 12. The court approved the schedule by minute order on March 17, 2016.

52. On April 29, 2016, pursuant to the briefing schedule, Plaintiff filed a Motion for Summary Judgment. Docket No. 14.

53. After Defendants requested two more motions for enlargement (Docket Nos. 16, 17), rather than filing their Cross-Motion for Summary Judgment, Defendants moved for voluntary remand.

REMAND

54. On December 26, 2016, after full briefing on the issue and despite the objection of Plaintiff, this Court entered an Order granting the Defendants' motion for voluntary remand without vacatur. Docket No. 28. This Court retained jurisdiction on remand and ordered Defendants to provide a revised decision to the Court within 60 days. *Id.*

55. On January 20, 2017, BIA Acting Regional Director Danelle Daugherty sent a letter, attached as Exhibit 1, to Plaintiff requesting evidence related to the decision on remand.

56. On February 1, 2017, Plaintiff, through counsel, provided Defendants with a letter, attached as Exhibit 2, and documents demonstrating that the BIA's conduct of the Three Affiliated Tribes Secretarial Election of July 30, 2013 violated the Indian Reorganization Act, the Tribe's Constitution and the BIA's own binding authority on the matter.

57. On February 24, 2017, Defendants issued a new decision on remand ("Decision on Remand") rejecting Plaintiff's challenge and refusing to reverse their decision to certify the 2013 Election. Docket No. 30-1.

58. Defendants' Decision on Remand did not support Defendants' assertions made to this Court that they harbored "substantial and legitimate concerns" regarding their 2013 Decision. Remarkably, Defendants admit that much of their Decision on Remand repeated their legal analysis supporting the decisions prior to remand.

59. Because the analysis simply replicated the Defendants' earlier legal analysis, Defendants' motion for remand was frivolous, did not reflect any intention to conduct a good-faith 'do over' with respect to its prior determination, and tests the limits of good faith.

60. On March 14, 2017, Defendants proposed a briefing schedule that would result in more than a year's delay related to the voluntary remand of its decision regarding an election that occurred on July 30, 2013.

COUNT I

(DECLARATORY JUDGMENT – LANGUAGE DISENFRANCHISED VOTERS)

61. The allegations set forth in paragraphs 1 through 60 are hereby incorporated herein as a part hereof.

62. Defendants' conduct of the Secretarial Election diminished the rights of Plaintiff and all other off-reservation voters that otherwise qualify to vote pursuant to the Tribe's Constitution, in violation of BIA regulations at 25 CFR Part 81.

63. Defendant's conduct intruded on the Tribe's sovereign power to adopt its own governing documents and be ruled by them in violation of Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 5127, and was therefore arbitrary, capricious and unlawful in violation of the Administrative Procedure Act.

64. Plaintiff is entitled to an Order declaring that the Defendants' conduct diminished the rights of Plaintiff and other off-reservation voters in violation of the Tribe's Constitution, the Indian Reorganization Act of 1934, BIA regulations and the Administrative Procedure Act.

COUNT II

(DECLARATORY JUDGMENT – FAILURE TO REACH QUORUM FOR ELECTION)

65. The allegations set forth in paragraphs 1 through 60 and 62 through 64 are hereby incorporated herein as a part hereof.

66. Defendants' certification of the Secretarial Election with less than a 30 percent quorum violated the Indian Reorganization Act of 1934, 25 U.S.C. § 5127, the Tribe's

Constitution, and Defendants' own regulations at 25 CFR 81.5(d), and was therefore arbitrary, capricious, and unlawful in violation of the Administrative Procedure Act.

67. Plaintiff is entitled to an Order declaring that the Defendants' conduct diminished the rights of Plaintiff and other off-reservation voters in violation of the Tribe's Constitution, the Indian Reorganization Act of 1934, BIA regulations and the Administrative Procedure Act.

COUNT III

(MANDATORY INJUNCTION – VACATE SECRETARIAL ELECTION)

68. The allegations set forth in paragraphs 1 through 60, 62 through 64 and 66 through 67 are hereby incorporated herein as a part hereof.

69. Plaintiff is entitled to an Order that the Defendants set aside their certification of the July 30, 2013 Secretarial Election and the February 24, 2017 Decision on Remand.

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REQUESTED RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter an order:

A. DECLARING that Defendants' conduct diminished the rights of Plaintiff and all other off-reservation voters in violation of the Tribe's Constitution, the Indian Reorganization Act of 1934, BIA regulations and the Administrative Procedure Act; and

B. DECLARING that the BIA must conduct future Elections in conformance with the Indian Reorganization Act of 1934 and the Tribe's Constitution, including its Article X requirement that at least 30 percent of the Tribe's adult membership participate in any amendment to the Tribal Constitution; and

C. VACATING the July 30, 2013 Secretarial Election; and

D. VACATING the February 24, 2017 Decision on Remand; and

E. GRANTING such further relief as this Court deems just and proper.

DATED this 17th day of March 2017.

WASHINGTON, DISTRICT OF COLUMBIA

BY COUNSEL

/s/ Patrick Sullivan

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all listed counsel of record.

/s/ Patrick M. Sullivan
Patrick M. Sullivan