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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES K. HUDSON	)	
	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:15-cv-01988 (TSC)
	)	
RYAN ZINKE, *et al.*,	)	
	)	**ORAL ARGUMENT REQUESTED**
Defendants.	)	
	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON REMAND

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INTRODUCTION

Defendants' Cross-Motion for Summary Judgment fails to support their ongoing misinterpretation of the Indian Reorganization Act and the Tribal Constitution or provide this Court any reason to depart from the D.C. Circuit's admonition that Defendants must conduct elections on Indian reservations in accordance with majoritarian values.

Defendants' belief that they are at liberty to modify the statutory tribal quorum that Congress reserved to itself is outrageous. Even more remarkable is their belief that the statute accommodates their consecutive, diametrically opposite interpretations.

ARGUMENT

I. Congress Unambiguously Intended a Tribal Quorum in Secretarial Elections.

Because Congress has twice spoken directly to the quorum mechanism and expressly withheld that mechanism from its delegation of regulatory authority to the Secretary, there is no justification for Defendants' competing interpretation. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984). "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent… If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id*. at. 843 n.9.

Congress' intent that the Tribe hold democratic, majoritarian elections to adopt and amend tribal constitutions in the 1934 Act and 1935 Amendment is "the law," and any purported ambiguity is of the Defendants' own invention.

A. In 1934, Congress Withheld the Tribal Quorum from its Delegation of Authority to the Secretary to Conduct Elections under the IRA.

While the Supreme Court has held that courts must defer to reasonable agency interpretations of federal statutes if Congress has delegated interpretational authority, there has been no implied or express delegation to Defendants with regard to the tribal quorum. Congress authorized the adoption and amendment of Tribal constitutions in Section 16 of the Indian Reorganization Act of 1934 ("IRA") as follows:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized by the Secretary of the Interior under such rules and regulations as he may prescribe.

25 U.S.C. § 476 (1934) (emphasis added).

The current statute maintains almost the same language: constitutional adoptions and amendments are effective when "ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe." 25 U.S.C. § 5123. The statute does delegate implementing authority to the Secretary, except for one key provision – the voting threshold at issue here. This is the only provision related to the election process that Congress reserved to itself and removed from the Secretary's scope of delegated authority. The plain and unambiguous phrase in the 1934 IRA simultaneously set up a quorum of fifty percent of adult members, and a threshold of a simple majority of that quorum voting in favor, to adopt or amend a tribal constitution.

B. In 1935, Congress Fine-tuned the Tribal Quorum, Further Demonstrating that Congress Reserved the Quorum From Its Delegation to the Secretary.

Only a year after the 1934 passage of the IRA, Congress would fine-tune the 50 percent quorum to 30 percent. Their reason for doing so is clear from the history of the implementation of the IRA. Section 18, another key provision of the IRA, allowed Tribes to opt out of application of the IRA to their reservations altogether. Originally, Section 18 provided that "This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 478 (1934) (emphasis added). Unlike the procedure for adoption and amendment of tribal constitutions, Section 18 provided that the IRA would automatically apply to Tribes unless half the adult members actually voted against it. Historian Curtis Berkey explained that resentment from the effects of this "opt-out" process led to the 1935 amendment to both Section 18 and Section 16 of the IRA:

> Many Indians who didn't vote thought they were expressing their opposition, but they had not been told that by refusing to vote they were actually voting in favor. In some cases, the Bureau's interpretation changed the outcome of an election…. An amendment to the I.R.A., which was passed June 15, 1935, attempted to make future votes more representative of the will of the tribe by stipulating that the outcome would be determined by a majority of Indians who actually voted. But this amendment came after many tribes had already voted. This amendment also applies to elections for adopting a constitution and ratifying a charter.

Curtis Berkey, Implementation of the Indian Reorganization Act, 2 Am. Indian J. 2, 2 1976. AR 253-4. Accordingly, Congress revisited the IRA's quorum requirement in 1935 by adding a new Section 18a which reduced the quorum for both Section 18 and Section 16 to a simple majority vote, provided that 30 percent of adult members actually vote. In so doing, Congress' purpose was to resolve exactly the evil that Plaintiff complains of now – that election outcomes

determined by only a small minority of voters elections were not representative of the will of the Tribe. The amended IRA reads the same today:

> 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.

25 U.S.C. § 5127 (emphasis added).

There was no ambiguity in the language of the statute and there was no ambiguity in Congress' intent to enforce majoritarian rule in Secretarial elections. Defendants concede that neither the BIA nor the Tribe was at all confused by Congress' clear orders:

> Neither the IRA nor the Tribe's Constitution define the term "entitled to vote," and it is undoubtedly true that prior to 1967, both the BIA and the Tribe understood the phrase "those entitled to vote" to mean the adult members of the Tribe, without any registration requirement.

Defs.' Cross-Motion at 20. This would remain the interpretation of Defendants for the next 40 years.

C. Congress' Use of the Phrase "Entitled to Vote" Did Not and Does Not Inject Ambiguity or Create a Statutory Gap.

Defendants hang their argument that they are free to implement two contradictory policies on the naked premise that the 1935 Amendment "introduced an ambiguity into the statute, which the Department of the Interior had implicit authority to define pursuant to 25 U.S.C. § 476" because it used the phrase "entitled to vote" without expressly defining it. Defs.' Mem. Spt. Cross-Motion. Summ. J., Docket No. 38 (hereinafter Defs.' Br.) at 15.

Defendants attempt to inject ambiguity where there is none. Congress' use of common English words without providing an express definition does not create ambiguity. "A statute's silence on a given issue does not confer gap-filling power on an agency unless the question is in fact a gap—an ambiguity tied up with the provisions of the statute." *Prestol Espinal v. Attorney Gen*., 653 F.3d 213, 221 (3d Cir. 2011). "Chevron does not require Congress to explicitly delineate everything an agency cannot do before we may conclude that Congress has directly spoken to the issue. Such a rule would 'create an ambiguity in almost all statutes, necessitating deference to nearly all agency determinations.'" *Contreras–Bocanegra v. Holder*, 678 F.3d 811, 818 (10th Cir. 2012) (quoting *Prestol Espinal*, 653 F.3d at 220). Courts have a "duty to construe statutes, not isolated provisions." *Gustafson v. Alloyd Co*., 513 U.S. 561, 568 (1995).

The 1935 Amendment was Congress' refinement of the IRA to resolve tension created by the anti-majoritarian effect of that law among Indian tribes. Defendants' argument that it created a dramatic ambiguity, which laid dormant for decades only to suddenly reappear in the defense of Plaintiff's challenge, is strained at best and contradicts Defendants' own concession that at the time of enactment, "both the BIA and the Tribe understood the phrase 'those entitled to vote' to mean the adult members of the Tribe..." Defs.' Br. at 20. Congress' use of the phrase "entitled to vote," rather than repeating "adult members of the Tribe," is explained by the question at the time of whether voting in Secretarial Elections would be limited to on-reservation adult members, *see* AR 192, 55 Decisions of the Dep't of the Interior 355, 356 (Oct. 18, 1935). Ultimately, the Secretary would open voting to off-reservation members for the very reason that such a limited franchise made it difficult to achieve the statutory tribal quorum that Defendants now argue does not exist. *See* Solicitor's June 8, 1956 M-Opinion 36346, AR 240; Solicitor's June 20, 1956 M-Opinion 35350, AR 244.

There is simply no requirement that Congress define every phrase to avoid agencies' misconstruction of clear statutory language.

D. Defendants' Procedurally Defective Regulations Are Owed No Deference.

Defendants repeatedly reference the notice-and-comment procedures they underwent over the history of their policy. Defs.' Br. at 10-14. In fact, their procedure was so deficient that it cannot command judicial deference because it precluded any meaningful notice or feedback.

First, the 1964 and 1967 regulations are entirely irrelevant to this litigation because those regulations introduced a registration requirement, which Plaintiff does not challenge, but did not eliminate the statutory tribal quorum at issue in this litigation. It was only in 1981 that the regulations appeared to disregard the statutory quorum: "Only registered voters will be entitled to vote, and all determinations of the sufficiency of the number of ballots cast will be based upon the number of registered voters." 25 CFR 81.11(a) (1981). But even these words fail to create adequate notice of Defendants' major policy reversal because it is possible to read the words "the number of registered voters" as the numerator for the determination, which would accord with the statute, rather than the denominator. Accordingly, the determination of the sufficiency of ballots would involve dividing the number of registered voters by the number of adult tribal members. Such a reading would make perfect sense, preserve the statutory tribal quorum, and save the agency and Tribe the expense of conducting an election doomed to fail. By mischaracterizing Hudson's challenge as a challenge to registration, Defendants misrepresent the amount of notice and comment they conducted to make it appear as though their change of position was well-known and accepted by Indian tribes since 1964.

The Supreme Court has recently held that unexplained changes in longstanding agency regulations are procedurally defective in light of the Administrative Procedure Act and should receive no deference under *Chevron*. In *Encino Motorcars, LLC v. Navarro et al*., 579 U.S. ___

(2016), the Court struck a Department of Labor regulation interpreting the Fair Labor Standards Act, reasoning that a "lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law… It follows that this regulation does not receive *Chevron* deference in the interpretation of the relevant statute." *Id*. at 12. The Court held that, in light of decades of reliance on the former policy, the Department had a "duty to explain why it deemed it necessary to overrule its previous position." *Id*. at 10. The Department's procedural failure and departure from the statutory requirement resulted in the Court ordering that the FLSA "must be construed without placing controlling weight on the Department's 2011 regulation." *Id*. at 12.

The Defendants' defective process mirrors that of the Department of Labor in *Encino Motorcars*. Because Defendants never expressly disclosed their reversal in the Federal Register in the promulgation of the 1964 and 1967 regulations, there was no opportunity for objection. See 28 Fed. Reg. 6546 (June 26, 1963); 32 Fed. Reg. 3061 (Feb. 18, 1967).

And, while Defendants went through the motions of notice-and-comment in 1981, they made no reference to the total elimination of the IRA's requirement "[t]hat in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote," either in the initial notice of the proposed rule, 44 Fed. Reg 40435 (June 21, 1979)[1], or in the summary of the comments received in the final rule, 46 FR 1668 (January 7, 1981)[2]. Like the Department of Labor, the BIA clearly did not carry its duty to explain such a radical change in position. Their duty to explain was redoubled by the fact that the new regulation could also be read to respect the statute. And when the Defendants repromulgated the rule in 2015, they simply dismissed

[1] Available online at https://cdn.loc.gov/service/ll/fedreg/fr044/fr044133/fr044133.pdf
[2] Available online at http://cdn.loc.gov/service/ll/fedreg/fr046/fr046004/fr046004.pdf

comments that the new regulation violated the IRA's 30 percent quorum. *See* Secretarial Election Procedures, 80 Fed. Reg. 63094-01, 63102 (Oct. 19, 2015).

Because the Defendants' notice-and-comment was procedurally defective, their undisclosed interpretation, which they claim is based on the 1981 regulation provides no quarter for Defendants' claim of Tribal acquiescence and should receive no deference from this Court.

II. Defendants' Construction Is Not A Permissible Construction of the Quorum.

A. Defendants' Construction is Anti-Majoritarian and Therefore Unreasonable.

While the Supreme Court has held that even agency interpretations of ambiguous statutes must be "reasonable," in this case the D.C. Circuit has laid out what is reasonable in judicial review of federally-controlled elections for Indian tribes: Defendants' interpretations of the IRA's Secretarial election procedures must reflect majoritarian values. *See* Plaintiff's Mem. Spt. Mot. Summ. J. at 24, Docket No. 35-1. "As Congress has made clear, tribal organization under the Act must reflect majoritarian values…. And as we have previously noted, tribal governments should 'fully and fairly involve the tribal members in the proceedings leading to constitutional reform.'" *California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008) (quoting *Morris v. Watt*, 640 F.2d 404, 414 (D.C.Cir. 1981)).

The dictionary defines "majoritarianism" as "the philosophy or practice according to which decisions of an organized group should be made by a numerical majority of its members." Merriam-Webster Online Dictionary. http://www.merriam-webster.com (June 22, 2017). This grade-school element of democratic government should not require years of litigation to implement. Defendants do not even dispute that their interpretation disparages those majoritarian values, but instead, in a footnote, state that such values must be "weighed in light of" competing values:

> Although such values are also a part of the IRA's purpose, in accordance with the Supreme Court's pronouncement in *Morton v. Mancari*, these values must be weighed in light of other purposes, specifically including furthering tribal sovereignty and self-governance.

Defs.' Cross-Motion at 18-19 n.8.

It is nonsensical to balance majoritarianism, which encourages greater participation, with tribal sovereignty and self-governance because they are three complementary concepts. Defendants' reliance on *Morton v. Mancari* is misplaced because that Court equated, rather than distinguished, those concepts, stating, "[o]ne of the primary means by which self-government would be fostered and the Bureau made more responsive was to increase the participation of tribal Indians in the BIA operations." 417 U.S. 535, 543 (1974) (emphasis added). The Court reasoned that Congress' purpose in the IRA's Indian hiring preference "has been to give Indians a greater participation in their own self-government…" *id*. at 541, because "the primarily non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes," *id*. at 543. The Court did not weigh participation *against* self-government, but held that increased participation by tribal members in their affairs *bolstered* self-government. Accordingly, there is no Supreme Court precedent that majoritarian participation conflicts with self-government. And no-one would seriously argue that the United States Constitution's difficult amendment process somehow limits the sovereignty of the United States. To the contrary, the process protects the Constitution from arbitrary changes by a minority group. But Defendants' interpretation has left the Tribe vulnerable to radical changes by a tiny minority.

Defendants' complain that, but for their unlawful interpretation, "the Secretary might rarely, if ever, have been able to certify an election." Defs.' Br. at 18. Secretarial elections and amendments to Tribal constitutions should be rare, and the Defendants' and Tribe's prior

practice was to refuse to certify these elections when they failed to reach the tribal quorum. Defendants are silent as to why certifications of tribal constitutional amendments abruptly became an urgent priority for the BIA at the expense of the integrity of the Tribe's foundational governing document.

B. The Statute Cannot Admit Two Diametrically Opposed Constructions.

Defendants' concede that the Secretary has taken a 180-degree turn in its interpretation of the quorum. Defs.' Br. at 20. Defendants argue that ambiguity of the statute admits both, mutually incompatible constructions, but the Supreme Court does not agree that federal agencies are so free to fundamentally alter statutory schemes. In *MCI Telecommunications Corp. v. AT&T Co*., 512 U.S. 218 (1994), the Supreme Court struck down the Federal Communications Commission's attempt to fundamentally alter a statutory scheme of regulation by revoking the statutory requirement that common carriers report tariffs, even though Congress had expressly delegated to that agency broad power to "modify any requirement" of the statutory provision. *Id*. at 234. The Court reasoned that even a broad and express statutory delegation to the FCC cannot mean "to change fundamentally," 512 U.S. at 227, and that the FCC's reversal in policy amounted to "a fundamental revision of the statute" which was impermissible. Here, there was no express delegation to the Defendants and, because Congress took ownership of this specific issue and spoke not once but twice to the quorum, Defendants have exceeded their authority. Even if this Court were to accept that Congress left a gap for the agency to fill, no gap is so wide as to admit both constructions, arbitrarily advanced at various times by Defendants.

III. The Tribe Has Neither Endorsed Nor Incorporated Defendants' Reversal.

Defendants make a convoluted and entirely speculative argument that tribal law has somehow tracked the Defendants' own reversal of their interpretation of the quorum. *See* Defs. Br at 20-21. Defendants state,

> Plaintiff asks this court to vacate the Secretary's construction of the ambiguous term "entitled to vote" in the Tribe's Constitution, but he provides no evidence whatever that, since 1967, the Tribe has ever construed the term in the way Plaintiff suggests.

Defs.' Br. at 20-21.

First, there is no basis for Defendants' statement that the term "entitled to vote" in the Tribe's constitution is ambiguous. The Tribal Constitution was approved in 1936, during the period in which even Defendants concede there was no ambiguity: "it is undoubtedly true that prior to 1967, both the BIA and the Tribe understood the phrase "those entitled to vote" to mean the adult members of the Tribe, without any registration requirement." *Id.* at 20. The relevant provision of the Tribal Constitution has never been amended. And, for the same reasons that the term as used in the IRA is unambiguous, see Sec. I, *supra*, the 1936 Tribal Constitution's use of the term unambiguously means the adult membership, since there was no federal registration requirement in 1936.

Further, Defendants state that Hudson has brought "no evidence" of the Tribe's interpretation, but their conspicuous omission of the evidence brought by Hudson in his original administrative challenge is telling. Plaintiff, in his IBIA Opening Brief, submitted evidence that both the Tribe and the Secretary rejected the results of a Secretarial Election to amend the Fort Berthold Tribal Constitution held in 1955 because "281 votes does not constitute 30% of those entitled to cast their ballots, in accordance with Section 16 [of the IRA]." AR 96-97.

Defendants ask the Court to accept that, like the Department, the Tribe underwent a silent reversal of its policy in 1967 (even though the next Secretarial election did not occur until 1974), and that "the Tribe's consistent concurrence in the federal regulations' definition over nearly fifty years provides substantiating evidence that the Tribe has interpreted its Constitution as consistent with the federal regulatory definition." Defs.' Br. at 21-22. This is a more sensitively

worded version of the Defendant's reference to "50 years of Tribal acquiescence" to their interpretation in their Decision on Remand. Docket No. 30-1 at 3.

What is clear, and requires no speculation, is that the Tribe and tribal members have repeatedly indicated their understanding that the 30 percent tribal quorum in Article X means the adult membership and that Constitutional amendments with low participations are abhorrent to the Tribe:

A July 20-21, 1955 report from the Fort Berthold Tribal Business Council shows that the election failed despite overwhelming support because the result "does not constitute the 30% of those entitled to cast their ballots." The report does not cite any failure to reach 30% of those registered to vote. AR 239.

A 1956 bulletin from the Tribal Council Chairman Martin Cross noticing a Secretarial Election noted that the previous election had failed to achieve the statutory tribal quorum due to low turnout. "Chairman's Comments," August 10, 1956, AR 251. In this bulletin, Chairman Cross advised the tribe that, in order to rectify the failure to meet the 30% quorum of adult members voting in the prior two secretarial elections, voting in a new election would be open to off-reservation voters. The Chairman noted that 350 votes would be required to meet the 30% quorum of adult members. Because this letter was issued before any registration requirement, it is clearly evident that the only quorum denominator relevant to the Tribe was the adult membership of the Tribe. *Id*.

The Tribal Council has twice passed resolutions complaining of the low turnouts caused by the Defendants' misinterpretation – including the 2013 election at issue here. *See* Resolution 08-193VJB, December 4, 2008, AR 319 (requesting new election "due to the low number of tribal members voting on the amendment"); Resolution 13-122-VJB, August 13, 2013, Docket 1-

4 ("the Tribal Business Council find this [5.5% turnout] to be a disproportionate number of the eligible voters of the Three Affiliated Tribes to adequately and fairly indicate the wishes of the enrolled membership").

Finally, Plaintiff Hudson was not the only Ft. Berthold citizen to challenge the 2013 Election on the basis of the lack of the tribal quorum in the Tribe's Constitution. A similar challenge was made which did not appear in Defendants' Administrative Record. *See* August 5, 2013 Email from Theodora Bird Bear to Tim LaPointe, attached as Exhibit 1. That challenge stated:

> Historically, the federal interpretation of the constitutional language, "provided that at least thirty (30) percent of those entitled to vote shall vote in such election." reflected and followed the full intent of the federal originators for the tribal constitution to mean that any federally-ran election on Fort Berthold is only valid if a minimum of 30% of all eligible tribal voters voted in any election on Fort Berthold. The July 2013 Secretarial Election operators have misinterpreted the original intent and meaning of the constitutional language to reduce the voter requirement. As a consequence - as a Fort Berthold BIA Administrative staff person explained to me - only 30 people out of 100 registered voters could change the constitution for all 13,000-plus enrolled tribal members. This is a questionable federal process which potentially can lead to undue harm and potential, future liability for the federal government.

Id. at 2 (emphasis in original). Bird Bear's challenge was denied as untimely[3] and on the basis that "the authority to call and conduct [Secretarial elections] is delegated to the Bureau of Indian

[3] Bird Bear's challenge was denied on the basis that it was untimely filed because it was filed at 4:04pm on August 5, 2013. Likewise, the Defendants initially denied Hudson's challenge, filed at 2:55pm on August 5, 2013, AR 142, as untimely, but later conceded in their IBIA briefing that August 5, rather than August 3, was the deadline date because the weekend days should not have been counted. AR 64. Therefore, Bird Bear's challenge was denied even though it was received one hour and nine minutes after Hudson's. In fact, the Notice and Rules of Election did not even provide an email address, only a mailing address and FAX number, making three days a crushingly short deadline to present "substantiating evidence" demanded by Defendants. AR 137. Defendants later informed the Tribe that "Three individuals challenged the conduct of the election by e-mail on August 5, 2013…. These challenges were not timely filed

Affairs." Letter from Regional Director Tim LaPointe to Theodora Bird Bear, Sept. 13, 2013, attached as Exhibit 2.

While Tribal officials have concurred in certifications of tribal elections from 1974 to 2016, any objections, whether brought by Tribal members such as Hudson and Bird Bear or from the Tribal Council itself, have been paternalistically dismissed. In fact, Defendants gave Hudson, Bird Bear and the Tribal Chairman the exact, verbatim denial of their various complaints to the conduct of the election, summarily informing them that Secretarial elections are "federal election[s]" and subject to federal regulations, regardless of the Tribe's own laws. *Compare* Letter from Regional Director Tim LaPointe to Charles Hudson, Sept. 13, 2013; Letter from Regional Director Tim LaPointe to Three Affiliated Tribes Chairman Tex Hall, Sept. 13, 2013; Letter from Regional Director Tim LaPointe to Theodora Bird Bear, Sept. 13, 2013:

> When the Secretary is asked to call for an election pursuant to the Indian Reorganization Act of June 28, 1934 (IRA), as amended, the authority to call and conduct that election is delegated to the Bureau of Indian Affairs. This election is a federal election, not a tribal election, therefore, we follow the regulations for Secretarial Elections found in Title 25 of the Code of Federal Regulations, Part 81 (25 C.F.R., Part 81), which were developed pursuant to § 16 the IRA.

AR 160; AR 165; Exhibit 2.

Although the Tribe's 2013 complaint was framed as a challenge to low turnout, and Hudson and Bird Bear's challenges were framed as a violation of the IRA and Tribal Constitution, it is telling that all received the verbatim response. In essence, Defendants' response to any challenge based on tribal law has been, essentially, to tell the Tribe to "butt out"

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and therefore dismissed in accordance with 25 C.F.R. § 81.22." AR 166. Defendants never informed Bird Bear or the third, unnamed challenger that their challenges were in fact timely filed. This failed process is "arbitrary and capricious" and illustrative of Defendants' attitude towards challenges to its authority.

of federal business. In that context, Defendants' argument of tribal acquiescence is fragile at best.

IV. Neither Plaintiff's As-Applied Nor Facial Challenge is Time Barred.

Defendants' latest attempt to avoid the merits of this challenge appears in a footnoted claim that any facial challenge to the regulations is time-barred. Defs.' Mem. at 16 n.7. To be clear, Plaintiff challenges the certification of the 2013 Election as illegal under both the IRA and the Tribal Constitution and, to the extent that the applicable regulations conflict with the IRA, challenges those as facially in conflict with the IRA. Neither challenge is time-barred. "("[A] substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to the specific challenger." *Wind River Mining Corp. v. United States*, 946 F.2d 710, 716 (9th Cir. 1991) (emphasis added). Hudson brought his challenge immediately after the agency applied its unlawful regulation in conducting and certifying the July 30, 2013 election. AR 143. Subsequently, Hudson diligently and timely pursued his appeal to the Regional Director, the IBIA and this Court.

Further, a facial challenge to an agency regulation may only be time-barred if the plaintiff's challenge was ripe during the six-year limitation period. "A time limitation on petitions for judicial review, it should be apparent, can run only against challenges ripe for review." *Baltimore Gas and Electric Company v. Interstate Commerce Commission*, 672 F. 2d 146 (D.C. Cir 1982). Hudson had not been born when Defendants claim the Tribe began to acquiesce to the Defendants' change in policy. Hudson's right to review accrued in 2013, decades after Defendants began implementing their illegal policy, and the clock started upon the Defendants' certification of the election.

Finally, this challenge is timely because the agency has reopened the issue even during the pendency of this challenge by repromulgating it in 2015. "The time for seeking review starts

fresh at repromulgation if an agency reopens the issue by holding out the unchanged section as a proposed regulation, offering an explanation for its language, soliciting comments on its substance, and responding to the comments in promulgating the regulation in its final form." *American Iron and Steel Inst. v. EPA*, 886 F.2d 390, 398 (D.C. Cir. 1989) (citing *Ohio v. EPA*, 838 F.2d 1325, 1328-29 (D.C.Cir.1988)). Here, the Agency repromulgated the rule in 2015, addressed exactly the question at issue here response to another commenter, and insisted that they would certify an election "even though less than 1 percent of the eligible voters cast a vote." Secretarial Election Procedures, 80 Fed. Reg. 63094-01, 63102 (Oct. 19, 2015). This notice of the unlawful interpretation reset the clock and precluded any defense that a facial challenge is not ripe for review.[4]

The Court should not countenance this defense, especially brought at this late stage in the litigation after many opportunities to raise it.

V. Defendants' Misleading Ballot Materials Speak For Themselves.

Defendants argue that, when read together, their Cover Letter, AR 129, and the Absentee Ballot Request Form, AR 139, relieve any confusion in the ballot materials. Defs.' Br. at 22. Even reading these materials together does not resolve the problem that a third document clearly precludes use of absentee ballots by permanent off-reservation voters. The voter pamphlet provides: "Absentee Voting: A registered voter my vote by absentee allot if they are unable to

[4] The 2013 Election at issue here was conducted pursuant to the 1981 regulations. In 2015, the Department promulgated new Part 81 regulations which also unlawfully disregard the statutory tribal quorum by continuing to use registered voters, rather than the adult tribal population, as the relevant denominator. *See*, e.g., 25 CFR § 81.39 (2015); Secretarial Election Procedures, 80 Fed. Reg. 63094-01, 63102 (Oct. 19, 2015). The July 22, 2016 election to which Hudson has brought a separate challenge, *See Hudson v. Zinke et al*, No.16-cv-01747 (D.D.C. filed Aug. 29, 2016), was conducted pursuant to the 2015 version of the Part 81 regulations. Accordingly, Plaintiff requests relief that will preclude future statutory violations under both versions of Part 81.

vote at the polling place because of temporary absence from the reservation, illness or disability." AR 137 (emphasis added). The word "temporary" qualifies "resident," conveying that permanent, off-reservation voters may not vote by absentee ballot.

It would be impracticable or impossible to show definitively that any one resident failed to vote for this reason, so requiring such evidence would preclude any review or accountability with regards to the sufficiency of ballot materials. In light of Defendants' other attempts to limit the franchise in Secretarial elections, this practice is intolerable.

CONCLUSION

In truth, Defendants hope this Court will determine that Defendants' misinterpretation of the quorum is justified by the fact that they have gotten away with it for so long. But challenges to government action such as the instant litigation are extremely costly, time consuming and have no prospect of remuneration. Defendants rely on "50 years of Tribal acquiescence." Decision on Remand, Docket No. 30-1 at 3. Mr. Hudson's experience mirrors that of the Tribal Council and other members when challenging the BIA: total resistance and paternalistic dismissiveness.

DATED this 26th day of June 2017.

WASHINGTON, DISTRICT OF COLUMBIA

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2016, 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