No. 19-35743 and 20-35269
(consolidated by order of Court)
[NO. 2:18-cv-00859-TSZ, USDC, W.D. Washington]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DOUCETTE, et al.

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF THE INTERIOR, et al.,

Defendants-Appellees.

ANSWERING BRIEF OF UNITED STATES

Appeal from the United States District Court
for the Western District of Washington at Seattle
The Honorable Thomas S. Zilly
United States District Judge

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STATEMENT OF JURISDICTION

1. Subject Matter Jurisdiction of the District Court

The District Court had general subject matter jurisdiction under 28 U.S.C. § 1331.

2. Appellate Jurisdiction

This Court has jurisdiction in regard to the issues subsumed by the final judgment (ER 26) entered herein on August 13, 2019. 28 U.S.C. § 1291.[1]

This Court does not have jurisdiction in regard to the issues subsumed by the Minute Order (ER 27-28) entered herein on March 20, 2020, denying Appellants' motion for an indicative ruling pursuant to Rule 62.1, F. R. Civ. P. *Martinez v. Ryan*, 926 F.3d 1215, 1229 (9th Cir. 2019), *cert. denied*, *Martinez v. Shinn*, __ U.S. __, __ S.Ct. __, 206 L. Ed. 2d 942 (May 18, 2020); *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 930 (9th Cir. 2000).[2]

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[1] ER refers to "Plaintiffs'-Appellants' Excerpt of Record" (Dkt. 11).

[2] *See* Argument, *infra* at pp. 49-52.

3. Timeliness of Appeal

Appellants have filed two notices of appeal. The first, filed October 30, 2019, is from the final judgment. ER 149-150. The second, filed on March 23, 2020, is from the aforementioned Minute Order denying appellants' motion for an indicative ruling. ER 158-159. Both are timely.

ISSUES PRESENTED

I. Should the lawsuit be dismissed because the Nooksack Indian Tribe is a required party with respect to Appellants' (collectively referred to hereafter as "Doucette") claim that seeks to set aside recognition of the Nooksack Tribal Council as the governing body of the Tribe?

II. Should the final judgment be affirmed because Doucette failed to show that the Department of the Interior's recognition of the Council as the Tribe's governing body violated any enforceable agency rule or requirement?

III. Should Doucette's appeal of the district court's denial of his post-judgment motion for an indicative ruling pursuant to Rule 62.1, F. R. Civ. P., be dismissed for lack of appellate jurisdiction?

IV. Should the district court's denial of Doucette's post-judgment motion for an indicative ruling pursuant to Rule 62.1, F. R. Civ. P., be affirmed because Doucette's new allegations are both immaterial to, and separate and independent from, the claim adjudicated by the district court?

STATEMENT OF THE CASE

I. Nature of the Case

This is an action brought under 5 U.S.C. § 706 of the Administrative Procedure Act ("APA") by four disappointed Council candidates, including Doucette, to set aside Interior's recognition of the Council, as constituted after a December 2017 special election, as the governing body of the Tribe. The Tribe is not a party to this lawsuit.

Doucette argued below that Interior's decision to recognize the new Council violated an enforceable agency rule or requirement. The district court concluded otherwise. Doucette appeals from the judgment.

Subsequently, Doucette filed a post-judgment motion pursuant to Rule 62.1, F. R. Civ. P., asking the district court to request this Court to remand the case so that it could reconsider its judgment. Doucette's motion was based on a separate and independent APA claim in which he alleged that Interior's decision to recognize the Council resulted from undue influence by an attorney representing the Tribe. The district court denied Doucette's motion, and Doucette also appeals from that denial.

II. Statement of Facts

A. Background

In January 2016, the Nooksack Tribal Chairman announced the cancellation of a primary election and a scheduled March 19, 2016, general election for Council seats set to expire on March 24, 2016. The Nooksack Constitution requires a quorum of at least five members in order for the eight member Council to conduct the business of the Tribe. Because of the cancellation of this election, after March 24, 2016, the Council was unable to muster a quorum. Nevertheless, ostensibly relying on the votes of councilmembers whose terms of office had expired, the Council continued, purportedly, to transact the business of the Tribe after March 24, 2016.

Following this development, and other notably provocative undertakings by this "holdover council," the Principal Deputy Assistant Secretary-Indian Affairs (PDAS), in a series of letters, informed the Tribal Chairman that Interior would not recognize the holdover council as the governing body of the Tribe with respect to actions taken after March 24, 2016. ER 55-56, 57-58, 59-60.

B. Nooksack Indian Tribe v. Zinke

Thereafter, the holdover council, purportedly in the name of the Tribe, commenced a lawsuit against Interior to compel it to recognize the holdover council as the governing body of the Tribe. The district court instead dismissed the action for lack of subject matter jurisdiction. *Nooksack Indian Tribe v. Zinke*, No. C17-0219-JCC, 2017 WL 1957076 (W.D. Wash. May 11, 2017). The district court concluded that, because Interior did not recognize the holdover council as the governing body of the Tribe, it lacked any authority to sue Interior in the name of the Tribe. *Id.* at *7.

C. The Memorandum of Understanding

After the district court issued the aforementioned order, the Nooksack Chairman and Interior signed a memorandum of understanding dated August 25, 2017. ER 69-74. The purpose of the memorandum of understanding was to "provide and outline a procedure" whereby Interior could again recognize the Council as the governing body of the Tribe. ER 69.

Pursuant to the memorandum of understanding, the Nooksack Chairman agreed to hold a special election within 120 days to replace

the cancelled March 2016 regular election. *Id.* The memorandum of understanding provided that Interior could have an observer present when ballots were being handled, processed or counted. ER 69-70. Interior also agreed, in the interim, to recognize the Nooksack Chairman as "a person of authority within the Nooksack Tribe" through whom Interior would maintain government-to-government relations with the Tribe. *Id.* at 70.

The memorandum of understanding also provided that when the counting of ballots was completed, the Tribal election board would certify and submit the election results and a report to BIA's Northwest Regional Director. *Id.* at 69. Thereafter, BIA was to forward the Tribe's report to Interior with the Regional Director's endorsement of the report, or an explanation for withholding such endorsement. ER 70. Upon receipt of BIA's endorsement, Interior agreed to issue a letter recognizing the newly elected Council as the governing body of the Tribe. *Id.*

The memorandum of understanding expresses the clear intent of the parties that the document was to represent a statement of agreed principles rather than a binding and enforceable agreement. ER 72.

D. The Special Election

The Tribe held a primary special election on November 4, 2017, and a general special election on December 2, 2017. ER 101. On December 8, 2017, the Nooksack election board certified the election results. *Id.* On December 11, 2017, the election board mailed a copy of the certified election results to the BIA and the election report the following day. *Id.*

E. BIA Endorsement

In a letter dated March 7, 2018, BIA issued an endorsement of the special election. See ER 101-105. BIA noted that one of the conditions of the memorandum of understanding required the Tribe to conduct its special election in accordance with the Nooksack Constitution, bylaws, and tribal law and ordinances. ER 101, 102. In assessing the Election Board's report on its compliance with its own laws, BIA reviewed four sworn declarations submitted by the Tribe's election superintendent setting forth the process followed by the Tribe at each phase of the primary and general special election. ER 102.

BIA also reviewed the elections board's response to a challenge lodged by the unsuccessful candidates. ER 102-103. The challenge

made four allegations of wrongdoing. Only the first, alleging that the Tribe's elections code forbade acceptance of hand-delivered ballots, and that the elections board improperly received and counted these hand-delivered ballots in violation of the code, is salient to this appeal. ER 103.

BIA found the election board's explanation of the disposition of the challengers' allegations to be satisfactory. In regards to the allegation that the election board unlawfully counted hand-delivered ballots, the election board determined that there was no evidence that votes were illegally cast and, even if misconduct occurred, the number of challenged votes was too small to affect the outcome of the election.

SER 34.[3] Upon its review, BIA found "nothing to indicate that the Board's decision should be disturbed." ER 103.

Expanding on that conclusion, BIA concluded that even if hand-delivered ballots were received and counted by the election board, and even if this constituted a violation of the Tribe's elections code (a question that BIA declined to answer in this instance), the violation was technical in nature and did not amount to, as the challengers alleged, a fraudulent augmentation of votes through "ballot stuffing:"

> The BIA was involved throughout the entire special election and closely inspected the election process. As will be discussed in the following section, the BIA has reconciled the voters list and accounted for all ballots printed for the election. The BIA inspected the ballot identification numbers of received ballots and determined they match up to the list of returned ballots.

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[3] The Nooksack Election Board concluded:

> The ballot accepted by the Election Superintendent in Ms. Tageant's declaration was a replacement ballot under NTC § 62.06.020(B)(4), which may be processed "in person." The unknown person collecting ballots at the Ballot Party was the postmaster of the Deming Washington Post Office and those ballots were duly processed by the U.S. Postal Service, in accordance with NTC §62.06.020(A). There was no misconduct and certainly none that could have affected the outcome of the election.

SER 34.

> There is neither evidence that ballots were cast by deceased individuals or people voting more than once, nor evidence that vote totals were altered. Ultimately, the question of whether ballots could be received by hand or whether all ballots had to be postmarked is one of tribal law and the BIA declines to insert itself and interpret tribal law in this instance. The evidence before the BIA indicates that the election was conducted in a proper manner and the BIA finds nothing to disturb the Board's conclusions.

Id. at 104. Thus, in light of its successful reconciliation of the ballots cast by eligible members, and the Tribe's conclusions that the ballots in question were properly counted and, in any event, that the number of ballots implicated by the challenge was too small to affect the election results, BIA concluded that it was unnecessary for it to attempt to resolve the dispute over the correct interpretation of Tribal law.

Accordingly, BIA forwarded the election board's report to Interior with BIA's endorsement. *Id.* at 105.

F. Interior's Recognition of the Council

In a letter to the Tribe's Chairman, dated March 9, 2018, Interior acknowledged receipt of the March 7, 2018, letter from BIA advising Interior that BIA had not "identified any reason to reject the validity of the Special Election." Accordingly, in line with the principles set forth in the memorandum of understanding, Interior recognized the Council

as constituted after the December 2017 special election to be the Nooksack governing body. ER 108.

III. The District Court's Decision.

A. Decision on Motion to Dismiss for Failure to Join a Required Party

Doucette filed this action in the District Court on June 13, 2018, SER 1, seeking to set aside the Department's recognition of the Council despite not having joined the Tribe as party to the lawsuit.[4] Arguing that the Tribe is a party who is required to be joined to an action seeking to set aside Interior's recognition of the Tribe's governing body, Interior filed a motion to dismiss pursuant to Rule 12(b)(7), F. R. Civ. P. The district court denied the motion. SER 25-32.

B. Decision on Cross-Motions for Summary Judgment

The case came before the district court on cross-motions for summary judgment. CR 28; CR 31. The district court denied Doucette's motion for summary judgment and granted Interior's cross-motion for summary judgment. ER 5. The district court concluded that Doucette failed to demonstrate the existence of any policy requiring

[4] "SER" refers to Appellees' Supplemental Excerpts of Record.

Interior to independently construe Tribal constitutional, statutory, and common law in order to endorse the special election results under the arrangement proposed by the memorandum of understanding or to recognize the Council. ER 20. Thus, the district court concluded that Doucette failed to establish that Interior violated any of its policies in endorsing the election and recognizing the newly elected Council as the legitimate governing body of the Tribe. ER 20-21.

Additionally, rejecting Doucette's criticisms of Interior's monitoring of the election, the district court concluded "[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.'" ER 24 (citation omitted).[5]

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[5] The district court noted the narrow line Interior is required to tread in order to assure itself that it is dealing with a duly constituted government that represents the Tribe as a whole, while at the same time honoring the important principles of tribal sovereignty and self-determination. The district court concluded, "during the course of and subsequent to the 2017 elections, Interior admirably balanced the

The court entered judgment in favor of Interior on August 13, 2019. ER 26.

IV. Decision on Post-Judgment Motion for Indicative Ruling

Following the district court's entry of judgment, Doucette filed a post-judgment motion pursuant to Rule 65.1, F. R. Civ. P., requesting that the district court "indicate" to the Court of Appeals its interest in adjudicating a motion for reconsideration pursuant to Rule 60(b), F. R. Civ. P. CR 45. Doucette relied on two e-mail messages sent to Interior by an attorney representing the Tribe on February 15, 2018, and February 28, 2018, respectively, encouraging Interior to act quickly on the recognition issue. The e-mail messages suggested that a timely resolution of this dispute would be helpful to third parties in other pending litigation. [6]

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deference it owes the Tribe, as a sovereign entity, with its responsibility to ensure that it deals only with a duty constituted governing body for the Tribe." *Id*. at p. 3, *ll*. 8-11.

[6] While Doucette's argument refers to four e-mails from the Tribe's attorney, it is difficult, even with a particularly jaundiced eye, to see anything nefarious about two of them. One of the four simply requests an Interior attorney to send a copy of an expected letter, presumably communicating to the Tribe Interior's anticipated decision regarding

Doucette alleged that these e-mails demonstrated Interior's recognition of the Council was the product of improper political influence. *See, e.g.,* SER 39, *ll.* 9-14. However, Doucette's motion also emphasized that the claims he sought to bring before the district court in his proposed motion for reconsideration were entirely new claims that he would be free to assert in a separately filed lawsuit if the district court denied his motion. SER 40, *ll.* 1-9; *and see* SER 42, n.1 ("Plaintiffs intend to bring such a suit should this Motion not be granted.").

The district court denied Doucette's motion for an indicative ruling. ER 27. The court found Doucette's supposed "new evidence" to be immaterial to the soundness of the judgment entered on the claim presented by Doucette's complaint. ER 27-28. Agreeing with Doucette that the claims he wished to pursue on reconsideration were different from those already adjudicated, the court concluded, "[a]ny new challenge based on the 'New Evidence' should not be part of this action." ER 28 at n.2 (citations omitted).

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recognition of the Council, to a Nooksack Tribal attorney. ER 161. A second comes a day later, and thanks the Interior attorney, presumably for sending a copy of the aforesaid. ER 110.

STANDARDS OF REVIEW

The following standards of review apply to the issues that are before this Court on appeal:

1. Motion to Dismiss for Failure to Join an Indispensable Party

This Court may affirm the district court on any ground supported by the record. *Serrano v. Francis*, 345 F.3d 1071, 1076 (9th Cir. 2003). Thus, this Court may affirm the district court on the ground that the action was subject to dismissal because Doucette failed to join an indispensable party as required by Rule 19, F. R. Civ. P.

A district court's joinder determinations under Rule 19, F. R. Civ. P., are generally reviewed under the abuse of discretion standard of review. *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996). (Citation omitted.) However, if the district court's decision that an absent party's interest would be impaired involves a legal determination, that determination is reviewed *de novo*. *Id.*

2. Cross-Motions for Summary Judgment.

With respect to Doucette's claim that Interior violated its own policy in recognizing the newly elected Council as the governing body of the Tribe, this Court reviews *de novo* the district court's grant of

summary judgment to the Department. *L. F. v. Lake Washington Sch. Dist. #414*, 947 F.3d 621, 625 (9th Cir. 2020). As to the contention that Interior's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," this Court's review is deferential and narrow, establishing a "high threshold" for setting aside agency action. *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1146 (9th Cir. 2020). Purely legal questions are reviewed *de novo*. *Id.*

3. Post-Judgment Motion for an Indicative Ruling

If there is appellate jurisdiction to consider the denial of Doucette's motion pursuant to Rule 62.1, F. R. Civ. P., for an indicative ruling, abuse of discretion is the appropriate standard of review. *See Jackson v. Allstate Ins. Co.*, 785 F.3d 1193, 1206 (8th Cir. 2015).

SUMMARY OF ARGUMENT

Using this Court's binding precedents, the Tribe is a required party to an action in which the remedy sought is an order setting aside the federal government's recognition of its governing body. Although the district court denied the government's motion to dismiss based on Doucette's mischaracterization of the nature of the remedy he would ultimately seek in this lawsuit, *i.e.,* an order setting aside Interior's

recognition of the Council, this Court may affirm the judgment on any basis appearing in the record. Because the record reflects that the lawsuit should not have gone forward without the presence of the Tribe, the appeal and underlying lawsuit is subject to dismissal.

The judgment may also be affirmed on the merits. Doucette's argument rests upon the belief that an agency, through a course of conduct, can manifest the existence of a policy that, although nowhere extant in writing, is nevertheless binding on the agency and enforceable under the APA. In this case, the supposed enforceable agency policy is one that required Interior to independently construe the Nooksack elections code in order to determine whether, contrary to the Tribe's position on the meaning of its own code, the Tribal election board was required to disqualified otherwise valid ballots that were hand-delivered rather than received through the U.S. Mail.

As the district court concluded, the supposed policy that is the basis of Doucette's claim does not exist. The only agency policies that are binding on the agency, and are therefore enforceable in a lawsuit based on the APA, are policies that the agency has manifested an intent to be bound by, either through the promulgation of regulations or by

substantially equivalent means. Doucette did not show that any regulation exists that binds the agency to the supposed policy he describes. Thus, because Doucette failed to demonstrate arbitrary or unlawful conduct by the Department, the judgment should be affirmed.

Doucette's appeal from the district court's order denying his post-judgment motion for an indicative ruling pursuant to Rule 62.1, F. R. Civ. P., should be dismissed for lack of jurisdiction. This order lacks the finality necessary for appellate jurisdiction required by 28 U.S.C. § 1291.

Moreover, the new claims that Doucette sought to assert in his motion for reconsideration are immaterial to the claim already adjudicated. And, as Doucette conceded in the district court, these new claims are separate and independent claims that may be asserted in a different lawsuit. Accordingly, the district court did not abuse its discretion in denying this motion and, if this appeal is not dismissed for lack of jurisdiction, the order should be affirmed.

ARGUMENT

I. THE JUDGMENT SHOULD BE AFFIRMED EITHER BECAUSE DOUCETTE'S CLAIM WAS SUBJECT TO DISMISSAL DUE TO THE TRIBE'S ABSENCE FROM THE LAWSUIT OR BECAUSE DOUCETTE FAILED TO DEMONSTRATE ANY ARBITRARY OR UNLAWFUL AGENCY ACTION BY INTERIOR

A. Doucette's claim should be dismissed for failure to join the Tribe as a required party.

Although Doucette's avowed goal in this lawsuit is to set aside Interior's recognition of the Council as the governing body of the Nooksack, thereby delegitimizing that body and harming its ability to carry out the necessary day-to-day business of the Tribe, Doucette chose to file this action in federal court without joining the Tribe as a party. Therefore, the Tribe was not present in the district court to defend the *bona fides* of its own election process under its own elections code, and the legitimacy of its Council as the governing body of the Tribe. Consequently, Interior filed a motion to dismiss pursuant to Rule 12(b)(7), F. R. Civ. P., for failure to join a party required to be joined under Rule 19.

The district court denied this motion based in large part on deceptive representations made by Doucette in opposition to the motion

concerning the nature of the relief sought by him in this action. Doucette represented that he was not seeking as a remedy in the lawsuit to terminate the United States' recognition of the Council. The Court accepted that representation as true in denying Interior's motion to dismiss. SER 30, n.4. Nevertheless, once the motion was denied and the lawsuit moved past the pleading stage, Doucette began requesting precisely that form of relief.

In two recent cases, *Dine Citizens Against Ruining our Environment v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019) and *Jamul Action Comm. v. Simermeyer*, ___ F.3d ___, No. 17-16655, 2020 WL 5361652 (9th Cir. Sept. 8, 2020), this Court has dismissed APA actions for failure to join a required party, where setting aside the challenged federal agency action would impair the interests of an absent Indian tribe, which cannot be joined due to sovereign immunity. Although the federal defendants filed a motion to dismiss this case on Rule 19 grounds below, the United States generally does not believe that Rule 19 requires dismissal of APA lawsuits seeking relief solely against a federal agency, even where setting aside that federal action would impact non-party Indian tribes. But this Circuit has held

otherwise, and the United States recognizes that those decisions are binding in this proceeding.

Under this Court's rulings in *Dine Citizens* and *Jamul Action Committee*, Doucette's lawsuit should be dismissed. Doucette's avowed goal in this lawsuit is to set aside Interior's recognition of the Council as the governing body of the Nooksack. Although that relief runs directly against Interior, it would impact the Nooksack by delegitimizing its current governing body and harming its ability to carry out the necessary day-to-day business of the Tribe. Doucette's misrepresentations to the district court do not show otherwise. In attempting to avoid a motion for dismissal on Rule 19 grounds, Doucette told the District Court that he was "not seeking to terminate the United States' recognition of anything." SER 27 (internal quotations omitted). Nevertheless, once the motion was denied and the lawsuit moved past the pleading stage, Doucette began requesting precisely that form of relief.[7] Doucette therefore plainly does seek to set

[7] *See, e.g.* SER 37 ("PDAS Tahsuda's March 9, 2017 [sic], decision [granting recognition to the Council] is arbitrary and capricious and therefore must be set aside.").

aside agency action that would impact the interests of an absent Tribe which cannot be joined due to sovereign immunity. Dismissal is therefore proper under *Dine Citizens* and *Jamul Action Committee.*

B. The Department did not violate any regulation when it recognized the newly elected Council

Doucette's claim that Interior acted inconsistently with its own policy when it recognized the Council conflates three separate legal bases for setting aside agency action. As applied to the facts of this case, none has merit. First, Doucette alleges that Interior acted arbitrarily and capriciously under the APA when it recognized the Council. Second, relying on law that has developed under *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954), Doucette argues that Interior has violated a "binding, though gratuitous, procedural regulation." AOB at 13-14 (*citing Wilkinson v. Legal Services Corp*, 27 F.Supp.2d 32 (D.D.C. 1998)). Third, Doucette argues that Interior's recognition of the Council was based upon a reversal of prior policy that was inadequately explained and, therefore, arbitrary and capricious. None of these arguments has merit.

1. Interior did not violate any agency regulation enforceable under the APA.

Doucette's first theory hinges on the belief that a claim lies under the APA to enforce a purported violation of an unwritten and unpublished policy of Interior whose purported existence can only be discerned by parsing principally a series of letters sent to the Tribe by the Principal Deputy Assistant Secretary-Indian Affairs ("PDAS") between October and December 2016. *See*, ER 55-56, 57-58, 59-60 ("PDAS Letters"). In these letters, the PDAS explained that Interior did not recognize the Council as the governing body of the Tribe after March 23, 2016, or consider any action of the Council after that date a valid exercise of Tribal authority. From his reading of these letters, Doucette deduces that Interior had an "agency policy" of "interpreting Tribal law as necessary to affect federal-tribal relations . . ." AOB, pp. 14-15.

Implicit in Doucette's argument is the admission that this supposed policy does not appear anywhere in the Code of Federal Regulations. Indeed, Doucette does not even claim that the policy he seeks to enforce is expressed as such in the PDAS Letters, or anywhere else for that matter. Instead, Doucette argues that evidence of the

existence of this policy (but not its precise contours) may be deduced from the references in the PDAS Letters to Tribal law. *Id* at pp. 14-16.

It has long been the law in the Ninth Circuit that "not all agency policy pronouncements which find their way to the public can be considered regulations enforceable in federal court." *Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir. 1982), *cert. denied*, 459 U.S. 907 (1982). Thus, the question posed by Doucette's claim is whether a policy that has neither been promulgated according to the notice and comment rulemaking provisions of the APA, 5 U.S.C § 553, or any other statutory authority, nor codified in the Code of Federal Regulations, nor otherwise set forth as such in any writing, and that can only be unearthed by intuiting its existence from a series of agency letters and actions, can form the basis for a claim under the APA.

In *United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131 (9th Cir. 1982), this Court held that only agency pronouncements having the force and effect of law are enforceable against federal agencies under the APA, and it established a two-part test for determining which agency pronouncements are accorded such

enforceability:

> To have the force and effect of law, enforceable against an agency in federal court, the agency pronouncement must (1) prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice—and (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.

Id. at 1136 (internal quotes and citations omitted).

Fifty-Three (53) Eclectus Parrots was followed by *Western Radio Services Company, Inc., v. Espy*, 79 F.3d 896 (9th Cir. 1996), a case in which the plaintiff argued that the United States Forest Service improperly denied its application for a special use permit because the agency allegedly followed procedures in processing the application that violated sections of the Forest Service's Manual and Handbook. *Id.* at 900-901. In rejecting that argument, this Court recognized that the fundamental question was whether the manual and handbook had "the force and effect of law." According to the Court, "[i]f we hold that the provisions in the Manual and the Handbook do not have the force and effect of law either independently or by reference, we will not need to review Western's contention that the Service failed to comply with the

guidelines contained in either." *Id.* at 901.

Addressing this question, the Court concluded that neither the manual nor the handbook had the force and effect of law because neither satisfied either of the two requirements set forth in *Fifty-Three (53) Eclectus Parrots*. *Id.* Specifically, the Court determined that neither the manual nor the handbook were "substantive in nature." *Id.* Rather, they contained only a set of procedures for the conduct of Forest Service activities and did not serve as binding limitations on the Service's authority. *Id.* Also, the Court concluded that neither the manual nor the handbook were promulgated in accordance with the formal rulemaking requirements of the APA or pursuant to any independent congressional authority. *Id.*

In *River Runners for Wilderness v. Martin*, 593 F.3d 1064 (9th Cir. 2010), this Court held that environmental organizations could not mount a challenge under the APA to a National Park Service management plan that allowed continued use of motorized rafts in the Grand Canyon National Park. The policies the plan allegedly violated were deemed not to have the force and effect of law under the test established in *Fifty-Three (53) Eclectus Parrots*. *Id.* at 1070-1073; *and*

see Earth Island v. Carlton, 626 F.3d 462, 473-474 (9th Cir. 2010) (tree marking guidelines did not have the force and effect of law and their violation could not form the basis of an APA claim).

The supposed policy which forms the basis of Doucette's claim here meets neither of the *Fifty-Three (53) Eclectus Parrots* tests for enforceability. What Doucette describes as a policy has not been shown to be anything more than a unique approach adopted by the agency to meet an exceptional sets of circumstances. Moreover, even accepting Doucette's invitation to intuit an agency policy from this series of letters, the policy so-revealed is strictly non-substantive in character. No doubt for purposes of establishing or maintaining a government-to-government relationship with a Tribal body, Interior may on occasion find it necessary to examine how the group came to power with reference to Tribal law. However, this serves as strictly an internal guidepost and not a binding or enforceable limitation on the Department's authority. Stated another way, Interior has never promulgated a policy that mandates whether, when, and how the agency should consult, interpret, or construe Tribal law in this setting.

Doucette's contention that he may use the APA to enforce an

unwritten, unpublished "agency policy" also runs afoul of the second test found in *Fifty-Three (53) Eclectus Parrots*. Doucette must demonstrate that the policy has been "promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." *Id*. at 1136. Doucette's opening brief makes no showing in this regard for the obvious reason, as noted above, that Interior has never promulgated such a policy as an enforceable regulation.

For these reasons, Doucette's effort to enforce a policy that he gleans principally from the PDAS Letters must fail. A policy that was neither published in the Federal Register nor disseminated to the public for scrutiny and comment does not have the force and effect of law and is therefore not enforceable under the APA. As this Court has observed, "[a]n agency policy that can only be unearthed by discovery of the agency's internal workings cannot be a policy that was disseminated to the public." *United States v. One 1985 Mercedes*, 917 F.2d 415, 423 (9th Cir. 1989). In sum, because Doucette has failed to show that the Department's supposed policy of "interpret[ing] Tribal law as necessary to affect federal-tribal relations" has the force and effect of law, he has

not made out a claim of arbitrary and capricious conduct under the APA.

2. Interior did not violate any enforceable regulation under the Accardi doctrine.

Lacking published regulations to support his claim under the APA, Doucette turns to a "judicially evolved rule of administrative law" that has developed in the wake of *United States ex rel Accardi v. Shaughnessy,* 347 U.S. 260, (1954). The so-called *Accardi* doctrine holds that government agencies are bound to follow their own self-imposed procedural rules that limit otherwise discretionary decisions. *See Wilkinson,* 27 F.Supp.2d at 50 n.28.[8]

According to Doucette's argument, even though the policy Interior allegedly violated is unwritten and its existence can only be discerned through an examination and interpretation of Interior's past actions, and even though its scope and contours are unknown, Interior was nevertheless legally obligated to follow this supposed policy under the *Accardi* doctrine, and a violation of this supposed policy is enforceable

[8] The *Accardi* doctrine is not a constitutional one. *Carnation Co. v. Sec'y of Labor*, 641 F.2d 801, 804 (9th Cir. 1981)

in an action filed against the Department in a district court.

Doucette's argument is not a correct statement of the law. Indeed, not one case cited by Doucette holds that an agency action may be set aside on the basis of a "policy" that can only be discovered by examining a past course of conduct. Instead, as the cases establish, whether the issue is analyzed under the *Fifty-Three (53) Eclectus Parrots* line of authority or under cases applying the *Accardi* doctrine, Doucette's argument falters at the same point of convergence— an agency action may be set aside on the basis of an internal agency regulation, order, directive, or guideline adopted by the agency only if the agency manifested its intention to be bound by the policy such that it may be considered to have the force and effect of law.

Here, Doucette has failed to identify anything in the record that establishes the existence of a regulation, much less evidence of an intent by Interior to be bound. Accordingly, Doucette's argument in reliance on the *Accardi* doctrine fails.

a. Accardi and its Progeny

In *Accardi,* the Supreme Court held that the Board of Immigration Appeals' failure to exercise discretion conferred upon it by

binding INS regulations necessitated the issuance of a writ of habeas corpus and a new hearing for the petitioner. The regulations in question provided that in regard to waivers of removal, the Board "shall exercise such discretion and power conferred upon the Attorney General by law." 347 U.S. at 266 (quoting applicable regulations). The violation resulted from the Attorney General's circulation of a list of "unsavory characters," that included Accardi. On the basis of the Attorney General's list, Accardi's removal was summarily approved by the Board. The Supreme Court held that as long as the regulation granting the Board broad discretion remained operative, the Attorney General could not sidestep the Board or dictate its decision in any manner. *Id*. at 266–267.

After *Accardi*, the Court applied the *Accardi* doctrine to decide two cases in the employee discharge context, *Service v. Dulles*, 354 U.S. 363 (1957), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959). In *Service,* the Court invalidated a Foreign Service Officer's national security discharge pursuant to the so-called McCarran rider, which afforded the Secretary of State "absolute discretion" to terminate the employment of any Foreign Service Officer whenever deemed "necessary or advisable

in the interests of the United States." The Court's ruling rested upon the Department of State's failure to comply with agency regulations granting certain procedural safeguards to Foreign Service Officers facing discharge notwithstanding the Secretary's absolute discretion. Acknowledging that the Secretary of State was not required to adopt the regulations in question, the Court nonetheless held that, "having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them." *Id.* at 388.[9]

A decade later, in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), the Court clarified that not every regulation is of such a nature that a violation should invalidate agency action. There, in awarding temporary operating authority to a carrier, the Interstate Commerce Commission failed to comply with its own regulations requiring applicants for that authority to document efforts

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[9] Similarly, in *Vitarelli*, 359 U.S. 535, the Court demanded that the Department of the Interior adhere to its employee-discharge procedures, as embodied in a Department of the Interior order, when terminating an employee on loyalty grounds, even though the Secretary could have dismissed the employee summarily on non-loyalty grounds. Concurring in the opinion of the Court, Justice Frankfurter explained, "[h]e that takes the procedural sword shall perish with that sword." *Id.* at 547 (Frankfurter, J., concurring).

to obtain service from other carriers. *Id*. at 538. Distinguishing *Accardi* and *Vitarelli*, the Court characterized the regulation at issue as a mere "procedural rule[ ] adopted for the orderly transaction of business" in order to "aid the Commission in exercising its discretion," rather than a rule "intended primarily to confer important procedural benefits upon indivduals [sic] in the face of otherwise unfettered discretion." *Id*. at 538–539 (quotation and citation omitted). Applying the "general principle" that an agency may always relax its own "procedural rules," the Court held that the action was "not reviewable except upon a showing of substantial prejudice to the complaining party." *Id*. at 538, 539; *and see*, *United States v. Calderon–Medina*, 591 F.2d 529, 531 (9th Cir. 1979) ("Violation of a regulation renders a deportation unlawful only if the violation prejudiced interests of the alien which were protected by the regulation.")

Lastly, in *United States v. Caceres*, 440 U.S. 741 (1979), the IRS adopted regulations requiring its agents to obtain authorization of a supervisor before tape-recording conversations between its agents and the target of an investigation. At his criminal trial for bribing an IRS agent, Caceres sought to suppress the Government's recordings of his

conversations with the agent on the ground that authorization had not been obtained. The Government conceded the procedural violation but argued that suppression of relevant evidence was not an appropriate remedy. The Court agreed, concluding that Caceres had not relied on the IRS regulations for his guidance or benefit. *Id.* at 752; *and see Carnation Co. v. Sec'y of Labor,* 641 F.2d 801, 804 n.4 (9th Cir. 1981) (The standard of when a Court's "supervisory powers" should be invoked is "whether violation of the regulation prejudiced the party involved.")

b. The sources for the application of the Accardi Doctrine

In none of the aforementioned cases, nor in any cases cited by Doucette in his opening brief, has a court as the basis for an application of the *Accardi* doctrine *intuited* the existence of a binding requirement on an agency from a course of conduct. All cases involved specific written requirements that an agency placed upon itself in either a formally or informally promulgated regulation, agency order or agency manual. Moreover, as clarified by *American Farm Lines,* the *Accardi* doctrine is primarily applicable to rules intended to confer important procedural benefits upon individuals in the face of otherwise unfettered

agency discretion. *Id*. at 538–539. Neither circumstance is present here.

Doucette's argument rests entirely upon *dictum* in *Wilkinson,* 27 F.Supp.2d at 56. *Wilkinson* involved specific agency commitments to conduct performance evaluations and provide progressive discipline prior to termination that were published in agency manuals. In other words, the existence of the policies in question was not deduced from a course of conduct by the agency. *Id.* at 47.

In discussing the sources that a court must look to in order to determine whether a government actor is prohibited from taking the action (or inaction) alleged to have been wrongfully done (or not done) under the *Accardi* doctrine, the Court said:

> Form should be respected. Laws enacted through formal processes clearly are binding. Thus the Constitution, statutes, and "legislative rules" that have been promulgated after public notice and comment are binding . . . But determination of the "law" that binds agencies under the *Accardi* doctrine goes beyond form and looks to substance. *Ruiz*[10] teaches that even internal,

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[10] In *Morton v. Ruiz*, 415 U.S. 199 (1974), the Court determined that the Department of the Interior was required to pay general assistance to a member of the Papago Tribe who was living off-reservation despite unpublished BIA rules limiting its general assistance program to Indians living on reservations. A requirement of an internal BIA Manual committed the agency to formally promulgate in the Code of

> unpublished rules can be binding, at least on the agency . . . *Ultimately, with regard to rules that have not been formally promulgated, the "law" to which an agency will be bound are those rules to which it intended to be bound.* This "law" can include written rules governing adverse action towards employees that are not published in the Federal Register . . . and to procedures in agency employee manuals . . . It can also include those rules implicit in an agency's course of conduct where that conduct gives rise to a "common law" administrative rule.

Id. at 60-61 (internal citations and footnotes omitted) (emphasis added).

Doucette's argument seizes upon the last sentence of the passage quoted above. However, upon closer examination it is evident that this *dictum* does not have the meaning attributed to it by Doucette. (As discussed *infra,* the focus on the intent of the agency in the sentence emphasized above, is far more important to the outcome of Doucette's argument.)

Wilkinson cites *Doe v. Hampton*, 566 F.2d 265 (D.C. Cir. 1977), as

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Federal Regulations directives informing the public, including Indians, about eligibility qualifications for benefits programs. In light of this manual provision, and the requirements of the APA, the Court concluded that the Department's limitation on eligibility for general assistance, which had not been formally promulgated as a regulation, could not be applied by the agency to deny respondent the general assistance benefits he sought. According to the Court, "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Id.* at 235.

authority for this *dictum*. *Hampton* was an action brought by a federal civil-service employee dismissed from her job on grounds of mental disability. The plaintiff asserted that by removing her instead of reassigning her to another civil service position, the agency violated a provision in the Civil Service Commission's Federal Personnel Manual providing that federal agencies "should" make "every reasonable effort . . . to reassign mentally disabled employees to other duties before removing the employee from the Service." *Id.* at 267. The Court held the propriety of plaintiff's removal from her civil service position required a determination of whether this manual provision was a mandatory regulation, and therefore enforceable against the agency, or merely "precatory." *Id.* at 280-281 (noting the "rather obvious proposition" that not every piece of paper emanating from an agency is a regulation).

Instead of deciding this question itself, the *Hampton* Court remanded the matter to the district court, noting "to determine the effect of a Manual provision, a court must determine the Commission's intent in authoring it, as ascertained by an examination of the provision's language, its context, and any available extrinsic evidence."

Id. at 281. In making this inquiry, the district court was instructed to consider not just the language of the provision in question, but also, among other things, "any evidence that the Commission or the agency have by their past actions created a 'common law' of reassignment or of granting leave-without-pay," in lieu of removal from federal service. *Id.* at 281-282.

In other words, nothing in *Hampton* (or, by extension, *Wilkinson*) was meant to suggest that the existence of an enforceable agency policy was something that could be derived through observance of a course of conduct by an agency absent the existence of a written requirement. Instead, according to *Hampton,* a legally enforceable regulation results from a manifestation by the agency that it intends to be bound by a particular requirement in a promulgated regulation or some other agency manual, order or directive. The "common law" referred to by the Court in *Hampton* was an examination of the agency's historical application of a particular regulation, apart from the permissive language used, in order to determine the extent to which the agency manifested an intent to be bound by the regulation, or not.

c. The importance of agency intent

The recognition in *Hampton* and *Wilkinson* that the intent of the agency is determinative in assessing whether a violation of an agency regulation, directive or order is enforceable in a court of law is consistent with the law of this Circuit.[11] For example, in *Alcaraz v. I.N.S.*, 384 F.3d 1150 (9th Cir. 2004), this Court considered a stopgap measure known as "repapering," implemented by the INS and the Executive Office of Immigration Review under the authority of Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) through a series of written directives as an interim measure pending the promulgation of formal regulations. *Id.* at 1156. The repapering process was intended to mitigate the harsh effects of a change in the law regarding eligibility for suspension of deportation. The Alcarazes were eligible for repapering and could thereby have avoided deportation if the policy was applied to their case. However, for unknown reasons, repapering was not applied

[11] *And see Farrell v. Dep't of Interior*, 314 F.3d 584, 590 (Fed. Cir. 2002) (and cases cited) ("[T]he general consensus is that an agency statement, not issued as a formal regulation, binds the agency only if the agency intended the statement to be binding.")

to the Alcarazes' case and they were ordered deported.

The Alcarazes argued on appeal that because the INS's repapering directives were substantive and developed pursuant to IIRIRA § 309, they created a judicially enforceable right under the APA. *Id.* at 1162. However, because these interim directives regarding repapering were not promulgated as regulations, this Court declined to rule that they created an enforceable policy under the APA. The Court acknowledged, citing *Accardi,* that in some cases agencies have been required to abide by "certain internal policies," but it refused to decide whether the written directives under review had the force and effect of law. *Id.* at 1162. ("[W]e decline to address whether the various memoranda issued by the agency are sufficient to establish a policy to which the agency was bound under the *Accardi* doctrine.") Instead, recognizing that the binding nature of the directives was a question of agency intent, the Court remanded the case to the agency to determine whether it considered itself to be legally bound by its directives. *Id.* at 1162-63.

The importance of agency intent to determining whether agency policy is binding is reflected in other cases in this Circuit. *See United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168 (9th Cir. 2000)

("Accordingly, Gateway cannot rely on the Engineering Regulation because it was not intended to have the force of law, but was instead a policy statement to guide the practice of district engineers."); *Fifty-Three (53) Eclectus Parrots*, 685 F.2d at 1136 ("Clearly, this internal procedure for alerting Customs officers to possible infringements of 19 U.S.C. § 1527 was not intended as a substantive rule, and was not entitled to the force and effect of law against the government.")

d. Nothing in the record establishes the existence of the policy relied upon by Doucette, much less an intent to be bound thereby on the part of Interior.

Doucette has not established that the policy he claims Interior violated even exists. There is neither a regulation, directive, order, nor a manual provision in the record that evidences the existence of such a policy. Doucette's argument rests almost entirely on a series of letters that neither make any mention of a policy nor set forth any requirement or limitation upon Interior, much less a binding one. At most the letters reflect that in the unique circumstances confronting Interior, Interior rested its conclusion that the Council had no authority to act for the Tribe after March 23, 2016, on the unambiguous quorum requirement for Council action in the Tribe's Constitution.

Regardless, even if Doucette has unearthed an unwritten agency policy, and even if the *Accardi* doctrine could be applied to such a policy, that discovery still places him far short of the mark in terms of demonstrating a legal entitlement to an order setting aside Interior's recognition of the Council.

These cases make clear that at least two important characteristics are found in the cases where the *Accardi* doctrine has applied. First, the doctrine's applicability is focused on cases in which the agency's failure to follow its policies was found to adversely affect an entitlement, right, or vested property interest of the plaintiff. *See American Farm Lines*, 397 U.S. at 538-539; *and see Caceres*, 440 U.S. at 753. That is not the case here.

The supposed policy that Doucette claims Interior violated does not confer important procedural benefits upon individuals in the face of otherwise unfettered agency discretion. Indeed, the policy, if it is to be described as such, has only an internal purpose—to guide the Department in its internal deliberations as to the legitimacy of a purported Tribal government where that is in doubt. In other words, the policy, if it exists, was not intended to confer any procedural benefit

upon Doucette. Thus, it is not the kind of policy that would be enforceable under the *Accardi* doctrine in any event.

Second, under the *Accardi* doctrine, the agency itself must have intended that the policy in question be binding upon the agency. Nothing in the record manifests an intent by Interior to be bound by the presumed policy that Doucette is relying upon. The fact that this supposed policy has not been reduced to writing, and Doucette can only offer deductive reasoning as evidence of its existence, belies any such conclusion. *Wilkinson*, 27 F.Supp.2d at 60. ("Form should be respected.")

In summary, even accepting for purposes of argument that the Department had an internal policy of interpreting and following the Nooksack election code in making a decision on recognition of the Council, and Interior deviated from that policy in this case, it does not follow that Doucette has stated a viable claim, because "an agency's deviation from its own guidelines is not *per se* arbitrary or capricious." *Lake Mohave Boat Owners Ass'n v. Nat'l Park Serv.*, 138 F.3d 759, 763 (9th Cir. 1998).

Here, Doucette has not established that the supposed policy he

wishes to have enforced against Interior either exists or, if it exists, that it was ever intended by the Department to be legally binding and enforceable against the agency. Accordingly, Doucette has not established an entitlement to relief under the *Accardi* doctrine.

3. Nothing in the record establishes that there has been any unexplained reversal in agency policy.

Doucette argues that Interior's refusal to interpret the Nooksack elections code in order to determine whether the Nooksack elections board should have disqualified otherwise valid hand-cast ballots was "a change in policy" that required some undefined administrative process whereby Interior would explain, presumably in writing, the reasons for a change in its supposed unwritten policy. This argument defies common sense.

As previously established, Doucette has not shown that the supposedly changed policy even exists. The most that he has shown is that the Department adopted a particular strategy to react to a unique set of circumstances presented at Nooksack commencing with the cancellation of its general election in March 2016. If one can glean any policy from this set of letters, it is clear that the policy is not one that

has any bearing on Doucette's individual rights *vis a vis* the Department or upon which there has been any reasonable reliance.

Moreover, even assuming a policy existed, and that Interior decided not to follow it, Doucette fails to show that Interior's decision represented anything more than a determination not to follow its policy in the circumstances presented. In other words, nothing in the record establishes that there has been a decision to permanently change, much less reverse, a preexisting policy. Indeed, if Interior does not intend a policy to be binding upon the agency and enforceable by third parties, it has no legal obligation to follow its policy in every instance, or in any instance. *See Lake Mohave Boat Owners Ass'n*, 138 F.3d at 763; *and see Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("[N]ot all agency publications are of binding force[.]")

Finally, having failed to demonstrate that Interior's putative policy is legislative in nature, nothing in the APA required Interior to explain its change in the putative policy by notice and comment. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 100-101 (2015) (holding that an agency may change its position in an interpretive rule without notice and comment). Indeed, in every case cited by Doucette, the policy

in question was widely published and well known to an interested class of persons, affecting their rights and interests in a direct and substantive way, and creating reliance interests. *See, e.g., Encino Motorcars, LLC v. Navarro*, __ U.S. __, 136 S. Ct. 2117, 2123, 195 L. Ed. 2d 382 (2016) (published regulation reversing position of the Department of Labor as expressed in formal opinion letter and Notice of Final Rulemaking that automotive dealership service advisors were exempt from the overtime provisions of the FLSA); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 506-510 (2009) (reversal of precedent established in a FCC formal order defining the term indecent speech); *and see Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 967-970 (9th Cir. 2015) (2003 NEPA Record of Decision as predicate for USFS formal promulgation of Roadless Area Rule included "Tongass exception," contradicting 2001 ROD without explanation).

The alleged policy here, which as described by Doucette prescribes only a particular agency approach to Tribal issues rather than one which purports to regulate any right or interest of Doucette, is not of that character. Moreover, it borders on the absurd to suggest that the APA requires an agency to explain in writing a change to a policy that

does not exist in writing, and whose existence is not even proven in the record before the Court.

4. Doucette forfeited the argument that Interior breached a legal duty created by the "rescue exception."

Doucette asserts that even if Interior did not act arbitrarily when it endorsed the Nooksack Special Election without construing the Nooksack elections code, this Court should still reverse the judgment because Interior violated the so-called "rescue exception" to the public duty doctrine.

There is no mention of the "rescue exception" in any of the memoranda Doucette filed in the district court. Having failed to make that argument meaningfully, or at all, in the district court, Doucette has forfeited the argument. *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011) ("Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so.").

Even if this Court were to decide to consider this argument on appeal, the argument is wholly without merit. The doctrine to which Doucette refers is wholly inapposite to this dispute, as are the two cases

he cites. Both cases arise in the realm of personal liability lawsuits and support the proposition that even where a person lacks a legal duty to act for purposes of imposing negligence liability for the actions of that individual, once the person decides to act, as in undertaking a rescue, liability may be imposed if the person acts negligently in carrying out the act. *See e.g., Jackson v. City of Joliet,* 715 F.3d 1200, 1202 (7th Cir. 1983).[12]

No case cited by Doucette applies this doctrine to a claim based on the APA, the purpose of which is not to apportion liability for personal injury but to review agency action for "arbitrary and capricious" conduct. *See Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1180 (9th Cir. 2004) ("Our judicial role is not to second-guess the decisions of the agency, but to determine whether, on the administrative record, the agency's actions were arbitrary and capricious, an abuse of discretion, or contrary to law.")

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[12] Doucette asserts that "Interior created justifiable reliance in Doucette that it would continue involve [sic] itself in the election process that *Interior itself initiated* until Nooksack law was honored," AOB at p. 31 (emphasis in original), but this is *ipse dixit*. Nowhere is there any evidence in the record of "justifiable reliance" by Doucette or anyone else.

5. The judgment should be affirmed.

For the foregoing reasons, the judgment of the district court should be affirmed, either on the merits or because the action was subject to dismissal for failure to join an indispensable party.

II. THE APPEAL OF THE POST JUDGMENT MOTION FOR AN INDICATIVE RULING SHOULD BE DISMISSED FOR LACK OF JURISDICTION

Doucette invokes this Court's jurisdiction under 28 U.S.C. § 1291 to review the district court's denial of his post-judgment motion pursuant to Rule 62.1, F. R. Civ. P., for an indicative ruling. Because such a determination lacks the requisite finality it cannot support appellate jurisdiction under 28 U.S.C. § 1291. *Martinez v. Ryan*, 926 F.3d 1215, 1229 (9th Cir. 2019), *cert. denied*, *Martinez v. Shinn*, __ U.S. __, __ S.Ct. __, 206 L. Ed. 2d 942 (May 18, 2020); *Defs. of Wildlife v. Bernal*, 204 F.3d at 930 ("A district court order declining to entertain or grant a Rule 60(b) motion is a procedural ruling and not a final determination on the merits."); On the facts of this case, it is clear why this is so.

Determinations of finality under 28 U.S.C § 1291 are made by applying a "practical rather than a technical construction." *Mohawk*

Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009). "The statute encompasses not only judgments that terminate an action, but also a small class of collateral rulings that, although they do not end the litigation, are appropriately deemed final." *Id*. (Internal quotations omitted.) There is nothing "final" about the district court's ruling on Doucette's post-judgment motion.

As Doucette himself declared in his motion, the issues that are on appeal to this Court from the final judgment are entirely "separate and distinct" from those that Doucette sought to bring into the case pursuant to Rule 60(b), F. R. Civ. P., after the final judgment had been entered and after the case had been appealed to this Court. SER 40. Indeed, according to Doucette, if the district court denied his motion, he would be perfectly within his rights to assert his claims in a new and different lawsuit. SER 42, n.1. Thus, as Doucette framed the question presented by his post-judgment motion, the district court was required to decide whether his new claims "should be part of this action." *Id.*

In a decision bearing none of the characteristics of finality, the district court definitively answered the question posed to it by Doucette's post-judgment motion. In substance, the district court

concluded that Doucette's "new evidence," and his arguments alleging that the timing of the Department's decision to recognize the new Council was the product of improper influence, had nothing at all to do with the issues adjudicated by the Court upon the parties' cross-motions for summary judgment, *i.e.,* whether Interior improperly declined to interpret the Tribe's election code to determine whether hand-delivered ballots were correctly tallied when it endorsed the Tribe's Special Election results and thereupon recognized the newly-elected Council.

Thus, the district court determined that Doucette's motion did not justify asking this Court to remand the case to the district court so it could consider Doucette's "new evidence" in this action under Rule 60(b), F. R. Civ. P.

According to Doucette, given the nature of his new claims, and their distinctiveness from the claim adjudicated by the district court and now on appeal, the district court's ruling on his motion does not foreclose him from filing an entirely new lawsuit based on those claims. Rather, according to Doucette's argument, the district court's denial of his post-judgment motion forecloses him from nothing in either theoretical or practical terms. Thus, given how Doucette framed the

issues for the district court, the court's ruling on Doucette's post-judgment motion is simply a procedural ruling concluding that the appeal of the final judgment should proceed on its ordinary course without interruption in the form of a remand to the district court for a hearing on Doucette's new "separate and distinct" claims.

In summary, as the motion was argued by Doucette, rather than prosecute his new claims in this action, he may simply prosecute those claims in a new and separate lawsuit. Accordingly, the district court's minute order denying the post-judgment motion is not final under 28 U.S.C. § 1291, and Doucette's appeal of that order should be dismissed.

III. IF THERE IS JURISDICTION TO CONSIDER DOUCETTE'S POST-JUDGMENT MOTION THE DISTRICT COURT'S ORDER DENYING THE MOTION WAS NOT AN ABUSE OF DISCRETION

Based principally on two e-mail messages sent to Interior representatives by an attorney representing the Tribe that were missing from the original administrative record, and which encouraged Interior to expeditiously recognize the Council, ER 98, 99, Doucette argues that Interior's decision to recognize the Council was the product

of improper influence. The alleged impropriety of these two e-mails is entirely the product of the harsh slant placed on them by Doucette rather than anything inappropriate appearing in the messages themselves.

As noted above, the district court decided not to ask that this case be remanded because of the court's determination that Doucette sought to litigate issues post-judgment that were materially different from those that it had already adjudicated. ER 28. And, as the Court recognized in its order, Doucette's argument only confirmed its determination. *Id.* at n.2. Doucette fails to establish that in denying this motion the district court committed an abuse of discretion.

A. No "secret meetings" occurred and no due process right of Doucette was violated by Interior's Actions.

Doucette asserts that his due process rights were violated by "secret meetings" supposedly conducted by the Department that allegedly preceded recognition of the Council. This argument was not made in the district court and therefore has been forfeited. *Baccei*, 632 F.3d at 1149.

Moreover, even if meetings, "secret" or otherwise, occurred prior to

the Department's recognition of the Council, Doucette has not indicated how his due process rights were violated. In order to make out a due process violation it is first necessary to establish a deprivation of a liberty or property interest. *Wright v. Riveland*, 219 F.3d 905, 913 (9th Cir. 2000). Doucette does not indicate how he has suffered a deprivation of any liberty or property because of the Department's actions.[13]

Importantly, the administrative proceedings that are at the heart of this appeal did not involve contested matters to which Doucette was a party. Rather, at stake was Interior's recognition of the Council and, in that setting, meetings between the Tribe and the Department were both perfectly normal and appropriate. Indeed, it would be highly unusual

[13] Any attempt to base a due process claim on the alleged illegality of the special election process fails. The special election was solely and exclusively conducted by the Tribe under its own authority and according to its own laws. While the Tribe agreed in the memorandum of understanding to allow Interior to monitor the election, it did not cede any of its authority to run the election according to Nooksack law. ER 69. Therefore, Interior cannot be the source of any deprivation Doucette claims to have suffered as a result of the election. Moreover, because Interior had no authority to direct the Tribe to rerun the election, there is no basis to argue that the Department is even indirectly the cause of any claimed depriviation.

for the directly interested party in such a process not to seek to have input in the Department's process for arriving at a decision.

For that reason, *Greene v. Babbitt*, 943 F. Supp. 1278, 1286 (W.D. Wash. 1996), cited by Doucette at AOB pp 18-19, is wholly inapposite. *Greene* involved a formal, on the record, contested adjudication pursuant to 5 U.S.C § 554 of the APA before an Administrative Law Judge (ALJ) for the purpose of deciding whether the Samish met the legal standards for acknowledgement as an Indian Tribe. After the ALJ issued a decision recommending that Interior recognize the Samish, the lawyer who represented Interior in the administrative adjudication met *ex parte* with an Assistant Secretary and recommended that the Assistant Secretary deny recognition and not adopt certain findings recommended by the ALJ. *Id.* at 1280-1281. Thereafter, Interior issued a final decision granting recognition but declining to adopt certain recommended findings to the detriment of the newly recognized Samish Tribe. *Id.* at 1281.

In *Greene,* the Tribe complained that it was deprived of due process by this *ex parte* meeting and it sought relief. Interior admitted that the *ex parte* meeting was a violation of an express provision of the

APA, 5 U.S.C. § 554(d)(2), which, *inter alia,* prohibited an agency employee having a prosecuting function in the hearing from participating or advising in the decision. *Id.* at 1286. The Court concluded that the *ex parte* meeting violated the APA and the due process rights of the Samish Tribe, and granted relief. *Id* at 1289.

In the instant case, there is no evidence in the record of meetings, "secret" or otherwise, in advance of Interior's decision to recognize the Council. Even if there had been meetings with representatives of the Tribe in advance of the decision to recognize the Council, there would be no violation of the law and no violation of due process because the proceedings were not an on-the-record contested adjudication under the APA, and Doucette was not a party to the process in any event.

The decision made by Interior in this instance was the product of an "informal adjudication." It was not an on-the-record administrative adjudication under 5 U.S.C. § 554, as was the case in *Greene*. Because the process at issue involved an informal adjudication, Doucette may only challenge the agency process if the procedures violated his right to procedural due process. *City of St. Paul v. F.A.A.*, 865 F.2d 1329 (D.C. Cir. 1989). Because Doucette was not a party to the proceedings

involving the recognition of the Council, and suffered no deprivation of a protected interest, he is unable to demonstrate any violation of his due process rights because of meetings between the Department and representatives of the Tribe prior to recognition of the Council.

B. Interior did not recognize the Council without "proper procedure."

Doucette diffusely asserts that Interior's recognition of the Council was arbitrary and capricious because Interior failed to follow "proper procedure." This argument was not made in the district court and, therefore, has been forfeited. *Baccei*, 632 F.3d at 1149. In any event, Doucette never specifies how the process employed by Interior to recognize the Council fell short of "proper procedure."

When the Due Process Clause is not implicated and an agency's governing statute contains no specific procedural mandates, the APA establishes the maximum procedural requirements a reviewing court may impose on agencies. *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653 (1990) (*citing Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978)). Because nothing in the law prescribed a specific procedure by which Interior was required

to make a determination in this case, the Department was lawfully permitted to proceed by informal adjudication, the minimal requirements for which are set forth in the APA, 5 U.S.C. § 555. *Id.* at 655-656. Nothing in Doucette's argument demonstrates that any aspect of the process employed by the Department was deficient under the standards applicable to an informal adjudication.[14]

Doucette's charge that Interior recognized the Council in order to "advantage racketeers" has no support in the record. Rather, the record sets forth the detailed basis for the Department's recognition of the Council. The decision was based on the results of a Tribal election that, as the district court concluded, produced a Council that was both duly constituted and represented the Tribe as a whole. ER 24. Absent record evidence of wrongful conduct by an agency, such conduct will not be presumed. *See United States v. Litton Indus., Inc.*, 462 F.2d 14, 18

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[14] *Tarbell v. Department of the Interior,* 307 F.Supp.2d 409 (N.D.N.Y 2004), is not to the contrary. The court did not hold that Interior was required in making a decision on recognition to abide by procedural standards that exceeded those of an informal adjudication. Instead, the agency was criticized for failing to properly implement the mandate of the district court on remand from a prior decision in the case. *Id.* at 424.

(9th Cir. 1972) (absent *prima facie* evidence of fraud, prejudice or other administrative wrongdoing, administrative regularity will be presumed).

Lastly, the district court did not conclude that the e-mail messages in question were "coincidental" as Doucette represents (AOB at 23). Rather, the district court concluded that "at most" the two e-mails pertained to the timing of the decision. ER 27. While the e-mails requested that Interior expedite its decision on recognition, they had nothing to do with the propriety or the substance of the BIA decision not to construe the Nooksack election code on the question of whether otherwise valid ballots should have been disqualified by the Tribe. ER 28.

This was a correct application of the law and not an abuse of discretion. The test applicable to a motion for reconsideration under Rule 60(b)(2), F. R, Civ. P., based on newly discovered evidence requires the movant to show that the evidence was of such magnitude that production of it earlier would have been likely to change the disposition of the case. *See Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990). Doucette failed in this regard because neither his "new evidence"

nor anything else in the record supported his rash allegations of misconduct by the Department. The district court's denial of Doucette's post-judgment motion on the ground that nothing in the two e-mails in question would change the disposition of this case was not an abuse of discretion.

C. The administrative record lodged with the district court was wholly adequate to adjudicate the claim asserted by Doucette

Doucette argues that the district court abused its discretion by refusing to request this Court to remand the case so that the district court could order the Department to produce the "whole administrative record." As grounds for reversing the district court, Doucette relies on the absence from the administrative record of the two unanswered e-mails sent to the Department by an attorney representing the Tribe encouraging the Department to reach a decision to recognize the Council in time to assist third parties in a separate lawsuit.[15]

In making this argument, Doucette implies that the

[15] The e-mail messages in question were disclosed by Interior in response to FOIA requests submitted by a third party.

administrative record submitted by Interior was clearly faulty, but this argument ignores the ambiguity inherent in defining the boundaries of a record for a review of an informal adjudication. The APA's judicial review provision, 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."

In the case of an administrative record for review of an informal adjudication, the record is not necessarily (or usually) compiled contemporaneously as the proceeding progresses, like in the case of an administrative hearing on the record. Rather, as in this case, the record is typically compiled by the defendant agency after, and because, a lawsuit has been filed.

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, in compiling an administrative record, some judgment must be exercised. An administrative record must be neither over inclusive nor 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). 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, as here, 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).

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.").

Here, Doucette has failed to make any showing that the two e-mails in question were "before the agency" when it made its decision. Doucette's suspicions that the decision was expedited at the insistence of the Tribe's attorney rests wholly upon the timing of the decision in relation to the date of an oral argument before this Court, and nothing more. 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. Neither of the two unanswered e-mails identified by Doucette have been shown to have played any part in the Department's decision to recognize the Nooksack Tribal Council on March 9, 2018 and their absence from the administrative record consequently did not violate the "whole record" requirement of the APA.

Nevertheless, even assuming that the Department should have

included these two e-mail messages 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).

Here, Interior concluded, based upon the BIA endorsement, that the December 2017 Nooksack Special Election was procedurally sufficient to reflect the will of the Nooksack electorate as a whole. The district court, upon its review of the administrative record, concluded that BIA's efforts to monitor the election, and its review of the election results, were a more than sufficient basis for Interior to draw that conclusion.

The "new evidence" proffered by Doucette does not undermine the basis for the Court's judgment. While Doucette imagines that a communication from the Tribe's attorney while the Department's decision was still pending was improper, the opposite is true. Interior was not making a decision as to who should prevail in a dispute

between two competing entities. Interior was deciding only whether the Council should be recognized. The Tribe was the only directly interested party in those proceedings, and it is unsurprising, as in any matter when a party is seeking the approval of an agency, that it would be encouraging the agency to move sooner on the matter rather than later. Even if the Tribe's attorney was encouraging the Department to act more quickly in order to benefit third parties in another lawsuit that fact does not make his communications with the Department improper or otherwise undermine the propriety of the Department's decision to recognize the Council.

In other words, even assuming that the two e-mail messages influenced the timing of the Department's decision, there is nothing in them that either changes the state of the existing administrative record submitted to the district court in any material way or that gives any substance to the contention that Interior's ultimate decision might have been affected by them.

More importantly, as the district court concluded, these two e-mail messages were immaterial to the issues already adjudicated. Thus, if it was error for the Department to omit these e-mail messages from the

administrative record, the error was harmless and the district court did not abuse its discretion in denying Doucette's motion.

CONCLUSION

For the foregoing reasons, the appeal from the order of the United States District Court for the Western District of Washington denying the post-judgment motion pursuant to Rule 62.1, F. R. Civ. P. should be dismissed for lack of jurisdiction, and the judgment should be affirmed.

DATED this 21st day of September 2020

Respectfully submitted,

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STATEMENT OF RELATED CASES

To the best knowledge of counsel for appellees, there are no other cases presently pending that are related to this case.

DATED this 21st day of September 2020.

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CERTIFICATE OF COMPLIANCE

I am the attorney of record in this case.

This brief contains 12,973 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Dated: September 21, 2020.

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