NOS. 19-35743, 20-35269

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,

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
No. 2:18-cv-00859-TSZ

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

Gabriel S. Galanda
Anthony S. Broadman
Ryan D. Dreveskracht
GALANDA BROADMAN PLLC
P.O. Box 15146
8606 35th Avenue NE, Ste. L1
Seattle, WA 98115
PH: 206-557-7509
FX: 206-299-7690
Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

JURISDICTIONAL STATEMENT

The District Court possessed jurisdiction under 28 U.S.C. § 1331 over claims Plaintiff-Appellants Robert Doucette, Bernadine Roberts, Saturnino Javier, and Tresea Doucette (collectively, "Doucette") brought under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706.

On August 9, 2019, the District Court granted summary judgment to Defendant-Appellees and dismissed Doucette's complaint with prejudice. Doucette filed a notice of appeal on August 24, 2019.

On March 20, 2020, the District Court denied Doucette's motion for Rule 60(b) and Rule 15(a)(2) relief, including a request that Defendant-Appellees be required to produce the whole administrative record ("AR"). Doucette filed a second notice of appeal on March 23, 2020.

The Court consolidated Doucette's two appeals on March 31, 2020. The Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the United States can arbitrarily withdraw from performing its duties in tribal affairs, having previously intervened and created justifiable reliance by Doucette and other tribal members.

2. Whether the United States should be ordered to produce the whole AR, with lobbyist emails evidencing influence over Interior's decision making.

CONCISE STATEMENT OF THE CASE

On March 9, 2018, the U.S. Department of the Interior, *et al*. ("Interior") improperly recognized the Nooksack Tribal governing body ("Recognition Decision"). They did so for an illegal reason: to aid third-party racketeers appearing before this Court as RICO defendant-appellants on the same day.

As a rule, Interior does not involve itself in tribal governance matters, except when necessary for the government-to-government relationship with a legitimate tribal governing body. When Interior does choose to get involved, it must do so under the most exacting fiduciary standards—or, at the least, not arbitrarily.

Here, in the middle of a Nooksack Tribal Council special election—which Interior compelled, funded, and regulated—the agency unlawfully changed its approach and withdrew. That unlawful change in policy is manifested in the Recognition Decision, which Doucette sued to challenge in June of 2018.

In early 2019 Interior withheld from the AR at least four emails that it exchanged with a lobbyist in the days and hours immediately preceding the Recognition Decision. Those emails show that Interior issued the Recognition Decision on March 9, 2018, for an ulterior and illegitimate reason: to help avoid the possibility that this Court might "find Tribal officials liable for RICO claims" after a scheduled hearing that same day. ER 0096.

Doucette did not learn of that proof until November 2019, when Interior

produced the emails in response to a Freedom of Information Act ("FOIA") request. By then, the District Court had dismissed Doucette's case for want of evidence "showing that [Interior's] actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" ER 0020. Doucette sought post-judgment relief, to no avail. When eventually faced with the withheld Interior-lobbyist emails, the District Court erroneously ruled that Doucette "failed to demonstrate any basis to overturn the [Bureau of Indian Affairs ("BIA")]'s[1] decision to recognize the Nooksack Tribal Council." ER 0024. Those emails were an additional reason to overturn the Recognition Decision; they showed that Interior's change of policy was unquestionably arbitrary, capricious, and unlawful.

Interior's policy change was intended to abet racketeers. The United States helped bad actors escape personal legal liability as a political favor, and then tried to cover it up. "[R]esponsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decision making process" in the executive branch. 2 U.S.C. § 1601(1). Doucette's suit sought nothing less.

STATEMENT OF FACTS

A. INTERIOR INTERCEDES IN "EXCEEDINGLY RARE" SITUATION.

The facts giving rise to Interior's policymaking in 2016 to cease recognition

[1] It was Interior's Principal Deputy Assistant Secretary—Indian Affairs ("PDAS") who issued the Recognition Decision, not the BIA. ER 0106.

of the Nooksack Indian Tribe ("Tribe"), are described in *Nooksack Indian Tribe v. Zinke*, No. 17-0219, 2017 WL 1957076 (W.D. Wash. May 11, 2017). Interior interceded to reestablish the "day-to-day government-to-government relationship" required by federal law because of the "exceedingly rare" situation at Nooksack that had developed—a "holdover Council" refused to convene an election by March of 2016. ER 0053-0054; *see also* 25 U.S.C. § 5301, *et seq*. Interior mandated a Council election. *Id*. In each of three decisions—dated October 17, November 14, and December 23, 2016—Interior Principal Deputy Assistant Secretary ("PDAS") Lawrence Roberts interpreted Nooksack law to require an election that adhered to Tribal law. ER 0053-0058. PDAS Roberts repeatedly warned that any election "inconsistent with Nooksack law . . . will not be recognized by the Department." ER 0053; *see also* ER 0058.

On August 25, 2017, Interior Acting Assistant Secretary—Indian Affairs ("ASIA") Michael Black signed a Memorandum of Agreement ("MOA") with the former Nooksack Tribal Chairman, which set forth a process for a federally funded and regulated special election "in accordance with the NOOKSACK CONSTITUTION, BYLAWS, AND TRIBAL LAWS and ORDINANCES." ER 0067 (emphasis in original). To ensure compliance with Tribal law, the MOA allowed ASIA to "have an observer present at any time ballots are being handled, processed, or counted." *Id*. The BIA Northwest Regional Director would then

issue an independent decision to Interior regarding whether the election comported with Nooksack law, either in the form of an "endorsement . . . or an explanation for withholding the endorsement." *Id*. If the Regional Director issued an endorsement, ASIA would "issue a letter granting full recognition" of the Tribal Council as the Tribe's governing body. *Id*.

B. HOLDOVER COUNCIL IS SUED FOR FEDERAL RACKETEERING.

Meanwhile, six non-party Nooksack members sued the members of the holdover Council personally in District Court for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964, alleging that those defendants' schemes were part of a broader effort to defraud them of property. *Rabang v. Kelly*, No. 17-0088 (W.D. Wash. Jan. 23, 2017) ("*Rabang*"), ECF No. 1.

In April of 2017, the District Court denied the *Rabang* defendants' motion to dismiss, disagreeing that sovereign immunity barred the civil RICO suit. *Rabang*, ECF No. 62 at 11. Those defendants appealed to this Court, which set oral argument for March 9, 2018. *Rabang v. Kelly*, No. 17-35427 (9th Cir. Mar. 9, 2018) ("*Rabang I*"), ECF No. 32. March 9, 2018, was also the date Interior issued the Recognition Decision—not a coincidence, as Doucette later discovered.[2]

[2] With the Recognition Decision blind copied to the holdover Council's lobbyist on March 9, 2018 (ER 0108), the *Rabang* holdover Council voluntarily dismissed their appeal in *Rabang I*. ECF. No 39. Upon remand, the District Court reversed

C. NEW INTERIOR OFFICIAL CONSPIRES WITH LOBBYIST TO ALTER TRAJECTORY AT NOOKSACK AND ACHIEVE COUNCIL RECOGNITION.

The primary election occurred on November 4, 2017, followed by the general election on December 2, 2017. Doucette made it through to the general election. Nooksack elections are mail elections according to Nooksack's Election Ordinance: "Voting shall be conducted entirely through the United States Postal Service . . . Only ballots postmarked at or before the close of the polls on Election Day shall be counted." ER 0042-0043. As with state mail voting,[3] before any ballot is counted it must be validated by both postmark and signature on an outer return envelope. *Id*. Replacement ballots can be obtained and cast if a voter's "ballot is destroyed, spoiled, lost, or not received by the voter." ER 0043.

After the Nooksack Election Board ("Board") announced that "all ballots ***postmarked*** by the U.S. Postal Department no later than the close of polls on Election Day will be counted," the Board abruptly changed course, announcing instead: "voter ballots must be ***received*** by the Election Board by the end of business on Election Day." ER 0078-0079 (emphasis added). The Board's "rule"

---

course by granting dismissal in their favor because: "Pursuant to the MOA and the Interior's recent recognition decision, the Interior's past decisions no longer provide a basis for this Court to exercise jurisdiction." *Rabang,* ECF Nos. 166 at 7, 167. The *Rabang* plaintiffs appealed to this Court, which has held the proceeding in abeyance pending the resolution of this appeal. *Rabang v. Kelly*, No. 18-35711 (9th Cir. Sept. 16, 2019) ("*Rabang II*"), ECF No. 41.

[3] Nooksack's mail election system is modeled after Washington State's. *See* RCW 29A.40.0110(3) ("The canvassing board . . . shall examine the postmark on the return envelope and signature on the declaration before processing the ballot.").

change meant that ballots that could not be validated would be counted. *Id*. In other words, in the middle of the election, the Board abandoned an "entirely" mail election, in favor of an in-person election, despite Tribal law. *Id.* By November 9, 2017, both ASIA and the BIA were notified of emerging general election "irregularities or illegalities." ER 0075.

By December 1, 2017, the Election Board and its Election Superintendent—the twin sister of an "incumbent" candidate[4]—recruited multiple voters to "go down to the Tribal Council offices and get and cast replacement ballots." ER 0110, ER 0115. By the next day's election, 812 ballots were purportedly cast—the highest general election ballot total in Nooksack history, by a margin of over 100 ballots. ER 0158, 0113. According to the Regional Director, "the BIA observed... the handling of ballots received, and the counting of ballots for the general election," but not the opening of *any* outer envelopes or validation of *any* ballots via postmark or signature. ER 0102; *see also* ER 0112, 0117. In the final analysis, not a single ballot was validated before being counted. *See id*.

[4] Pursuant to the MOU, in September of 2017 the BIA Regional Director ordered the Tribal Chairman to "[a]ppoint a new Election Superintendent" because "the appointment of the twin sister, one of the so-called 'holdover' council members . . . gives the appearance of skewing the election process." ER 0074; *see also id.* ("At minimum, the appointed Election Superintendent should not have either a close personal or familial connection or any sitting councilmember or so-called holdover council member."). The Chairman defied the Regional Director.

Three days later, the holdover Council's Washington, D.C. lobbying firm requested a meeting with Interior. ER 0082. Meanwhile, Doucette wrote the BIA asking the agency "to especially scrutinize . . . the outer envelopes in the General Election for postmarks." ER 0059; *see also* ER 0085 ("[T]he crux of the Special Election concerns whether the 812 ballots . . . were validated according to postmarks on the outer envelopes in which they arrived to the Election Board.").

On or about December 11, 2017, PDAS John Tahsuda met with the holdover Council's lobbyist, Robert Porter, "[t]o discuss the results of the recent Nooksack tribal election and plans for moving forward." ER 0082. For that meeting, Interior Counselor Miles Janssen—the Nooksack point person for both PDAS Roberts throughout 2016 and ASIA Black into late 2017—furnished PDAS Tahsuda a briefing document, which noted "two BIA representatives on site during the election mentioned a number of concerns with the election process." ER 0081. Interior redacted those concerns from the AR. *Id*.

Up to this point, the United States had been intimately involved with the election—the election only occurred because of Interior. *See* ER 0067. In January of 2018, however, Interior's attitude suddenly shifted. *See* ER 0153. That was when a new Interior hire, Counselor Kyle Scherer, replaced Janssen. ER 0119, 0095, 0083, 0089, 0104. Within days, Scherer called the BIA Regional Director

and "asked about status of ballot review and requested a copy of [Doucette's] letter"[5]—signaling his desire to extricate Interior from Nooksack. ER 0089.

By February 2, 2018, the BIA Regional Director had prepared a draft endorsement decision and discussed it with Scherer ("Endorsement Memorandum"). ER 0094. Meanwhile, Scherer was talking to Porter. *See* ER 097. Two weeks later, Porter emailed Scherer:

> FYI-I just heard from the Nooksack Tribal attorney that the 9th circuit has scheduled an oral argument in the RICO case against the Nooksack elected officials. The record as you know does not reflect that the DOI recognizes a Nooksack Gov't. Were the DOI certification not occur [sic] by then, there is great risk that a federal court could if it's a Tribal sovereign immunity defense and [sic] find duly elected Tribal officials liable for RICO claims for the first time.
>
> I believe you need to urge the Refional [sic] Director to complete his recommendation as soon as possible. It's been three weeks since the site visit and it seems really hard to believe - given his original letter - that there is any basis for not certifying to the AASIA.

ER 0096 (emphasis added). Porter's email regarding *Rabang I* confirmed that Scherer was guiding the Regional Director's endorsement decision and that Porter was privy to developments taking place inside Interior. *Id*. On February 28, 2018, Porter again emailed Scherer:

> [T]here is a March 9th hearing before the 9th Circuit Court of Appeals and there is the need to prepare if the AASIA recognition letter is still pending by next week. (Recall that this case is RICO action brought by plaintiffs arguing that the lack of DOI recognition means that the

[5] *See* ER 0084-0085 or ER 0086-0088.

> Tribe's officials are acting ultra vires, and thus operating a "racket" under RICO.)
>
> In short, the AASIA's recognition letter is needed asap, certainly by early next week.

ER 0097. By the following week—on March 7, 2019 at 1:34 p.m. ET—the Regional Director issued her Endorsement Memorandum, concluding "the special election was conducted according to the Nooksack Constitution, Bylaws and Tribal Law Ordinances." ER 0098, 0099, 0103. Without a stated reason, she demurred on the "serious" issue of ballot validation: "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." ER 0102.[6] She demurred despite Interior's established practice and policy of interpreting Nooksack law, which Doucette relied upon.

By 9:45 a.m. the next morning, Porter was already aware that Interior was poised to issue the Recognition Decision. ER 0159. In an email to Scherer titled, "Letter delivery," Porter wrote: "Hi Kyle - I'm on a plane much of the day, so could you please copy the Tribal attorney Charles Hurt on the email with the letter when you send it? Thanks, Rob." *Id.* By the following morning, Scherer had

[6] In other instances in the Endorsement Memorandum, however—where it supported Interior's newfound support of Nooksack—the Regional Director did insert herself and interpret Nooksack election law. *See, e.g.*, ER 0100.

already drafted and surnamed/approved the Recognition Decision.[7] ER 0107. Two hours later—while this Court deliberated in *Rabang I*—Scherer emailed the Recognition Decision to the Nooksack Chairman. ER 0108. He blind copied his email to Porter, who replied to all: "Thank you, Kyle." *Id.*

D. PROCEDURAL HISTORY

On June 13, 2018, Doucette filed suit in the Western District of Washington. Doucette amended the APA complaint on January 3, 2019. Interior produced the initial AR by February 21, 2019, as ordered, and supplemented it on March 4, 2019. The AR revealed Porter's involvement, *see* ER 0771, which Doucette contended caused the change in policy and resultant Recognition Decision. There was nothing else in the record that suggested why Interior abruptly "decline[d] to insert itself and interpret tribal law" in this single pivotal instance. ER 0144. As it turned out, Interior failed to furnish the "whole" AR as required by 5 U.S.C. § 706. Interior withheld the emails between Scherer and Porter, which showed the extent of Porter's access and influence at the Department and explained the change in

[7] Unlike a January 18, 2018—a fifth—decision that PDAS Tahsuda issued and was twice discussed with the Regional Director before being surnamed by six Interior officials over a span of fourteen days, the Recognition Decision was never discussed with the Regional Director and only surnamed by Mr. Scherer and one other agency lawyer in less than 48 hours. ER 0090; *compare* ER 0107 *with* ER 0083, 0093-0093; *see also* U.S. DEP'T OF THE INTERIOR - INDIAN AFFAIRS, INDIAN AFFAIRS CORRESPONDENCE HANDBOOK, 7 IAM-H, CH. 8, at 44-47 (setting forth an elaborate intra-agency review process "to ensure that written information is accurate and that the organization provides consistent policy statements").

Interior policy. ER 0893-0899 (collectively, "Scherer-Porter Emails").

In the summer of 2019, Interior defended Doucette's APA claim on cross-summary judgment motions, with indignation:

> Plaintiffs' argument . . . strongly intimates that the decision to recognize the Council was made in bad faith due to the influence of "Beltway Lobbyists" on the leadership of the Department. Regardless, plaintiffs' lengthy diatribe, and their irresponsible and unfounded allegations about . . . the influence of "Beltway Lobbyists," do not make out a claim of arbitrary and capricious conduct by defendants.

ER 0142; *see also* ER 0143, n.1 ("Nor are plaintiffs' insinuations about meetings with 'Beltway Lobbyists' meaningful."). Interior was steadfast that "there is nothing in the record concerning the substance of conversations between the Department and the 'lobbyists.'" ER 0143, n.1. Ruling that Doucette had "not made any showing that defendants' actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" the District Court granted Interior summary judgment. *Id*. Doucette appealed. ER 0147.

On November 20, 2019, Doucette's lawyer obtained the Scherer-Porter Emails—via FOIA[8]—and soon presented them to the District Court under Rule

[8] The Scherer-Porter Emails should have been produced to Doucette's counsel via FOIA by the summer of **2018**, pursuant to a May 18, 2018 request for: "Any email or written communication transmitted to or received by [ASIA] or [the BIA] Central Office regarding the Nooksack Special Election that culminated in December 2017 . . ." ER 0153. To obscure its dereliction, Interior will claim, as the District Court suggested in a footnote, that Doucette's counsel's "third-party"

62.1. ER 0153, 0149-0151. Doucette sought "a full and fair opportunity to present the whole case to the Court," particularly as to the reasoning behind Interior's change in policy. Interior offered no excuse for withholding the Scherer-Porter Emails. On March 20, 2020, the District Court denied Doucette's Rule 62.1 motion, ruling that the Scherer-Porter Emails added nothing to Interior's decision to "'decline to insert itself and interpret tribal law'" in this single instance, despite having done so throughout 2016, 2017, and early 2018. ER 0024.

SUMMARY OF ARGUMENT

When the United States involves itself in a tribal matter, it cannot abruptly violate an established practice and policy in order to arbitrarily retreat from the matter, especially for the purpose of aiding and abetting racketeering. The Court also erred in not compelling Interior to produce the whole AR.

ARGUMENT

I. INTERIOR'S POLICY REVERSAL VIOLATED THE APA.

A. Interior's Approach To Nooksack Was A "Policy."

An administrative rule published in the Federal Register is not required to bind a federal agency—"gratuitous" self-imposed policy and procedure can be equally compulsory. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260,

---

FOIA requests are irrelevant here. FOIA *should* be irrelevant here; Doucette should not have needed it to discover the Scherer-Porter Emails. But what has always been relevant is the APA, particularly its plain requirement that Interior produce the "whole" AR, even at the risk of embarrassing its officials.

266-68 (1954); *see also Wilkinson v. Legal Services Corp.*, 27 F.Supp.2d 32, 56 (D.D.C. 1998) ("[An] agency can gratuitously supply 'law' that limits discretion sufficient to trigger judicial review . . . ."). "[T]he 'law' to which an agency will be bound are those rules to which it intended to be bound . . . can also include those rules implicit in an agency's course of conduct where that conduct gives rise to a 'common law' administrative rule." *Wilkinson*, 27 F.Supp.2d at 60-61 (quoting *Doe v. Hampton*, 566 F.2d 265, 281-82 (D.C. Cir. 1977)). Indeed, the "judicially evolved rule of administrative law" requiring that "he who takes the procedural sword shall perish with that sword," applies "even when the administrative action under review is discretionary in nature." *Vitarelli v. Seaton*, 359 U.S. 535, 546-47 (1959); *see also generally Service v. Dulles*, 354 U.S. 363, 372 (1957); *Morton v. Ruiz*, 415 U.S. 199 (1974); *Mons v. McAleenan*, No. 19-1593, 2019 WL 4225322, at *10 (D.D.C. Sept. 5, 2019).

The District Court's ruling that "Interior never adopted a policy of construing Nooksack law with respect to how Nooksack Tribal Council elections should be conducted" is mistaken. ER 0856. At least five decisions that Interior issued from October of 2016 to January of 2018, establish that the agency formed agency policy—or "rules implicit in an agency's course of conduct." *Wilkinson*, 27 F.Supp.2d at 60-61 (quoting *Doe*, 566 F.2d at 281-82). Interior can, and did in this case, interpret Tribal law as necessary to affect federal-tribal relations, through

at least five decisions issued by its most senior Indian affairs official—either the ASIA or PDAS—from October of 2016 to January of 2018. 25 U.S.C. § 2; ER 0053-0072, 0090-0091. In doing so, Interior formed agency policy—or "rules implicit in an agency's course of conduct." *Wilkinson*, 27 F.Supp.2d at 60-61 (quoting *Doe*, 566 F.2d at 281-82).

To justify its initial intercession in October of 2016, Interior interpreted the five-member quorum requirement in Nooksack Bylaws Article II, Section 4 for the Council "to transact *any business* that may come before it," to declare that "the Council must have five duly elected officers to take *any action*" whatsoever. ER 00238, 0053 (emphasis added); *see also* ER 0055 (stating that "the Department will only recognize actions taken by the Tribal Council prior to March 24, 2016, when a quorum existed, and will not recognize any actions taken since that time"); ER 0057 (Interior "will recognize only those actions taken by the Council prior to March 24, 2016, when a quorum existed"). The types of "action" that Interior in turn invalidated in the coming months extended far beyond Council meetings or agenda items; it extended internally to actions taken by the Tribal Court and Tribal Police, for example. ER 0057-0058.

Also, through January of 2018, Interior repeatedly interpreted Article IV, Section 1 of the Nooksack Constitution to reject any attempt to impose geographic restrictions on Tribal member voting in elections; other than a minimum age

requirement for voting, the Nooksack Constitution provides no other member voting criteria. ER 0030, 0053, 0055, 0090. The BIA got in on the act, too. In her Endorsement Memorandum, for example, the Regional Director interpreted the Nooksack Bylaws in order to "recognize" which version of the Election Ordinance applied to the election "as validly enacted." ER 0068. In all, Interior's protracted course of conduct formed a policy of construing Nooksack law, until it arbitrarily changed that policy. *See* ER 0102; *Wilkinson*, 27 F.Supp.2d at 60-61. Such conduct is "policy" for purposes of a change-in-policy APA claim.

B. Interior's Change In Policy Was Unreasonable And Arbitrary, And Violated The APA.

A change in agency policy only complies "with the APA if the agency (1) displays awareness that it is changing position, (2) shows that the new policy is permissible under the statute, (3) believes the new policy is better, and (4) provides good reasons for the new policy." *Organized Village of Kake v. U.S. Dept. of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)) (internal punctuation and quotation marks omitted; emphasis added). As to (4), "if the new policy rests upon factual findings that contradict those which underlay its prior policy," the agency "must include a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id*.

Underscoring both (1) and (4), "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005)). "When an agency changes its existing position, it 'need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.'" *Id.* (quoting *Fox*, 556 U.S. at 515). The agency must, however, at least "'show that there are good reasons for the new policy.'" *Id.*

Here, Interior's policy change fails under *Kake*. Interior was aware of its change in policy, which makes its policy change more egregious. That awareness is obvious from the fact that Interior overtly "decline[d] to insert itself and interpret tribal law" when it mattered. ER 0102. Interior also knew why it was changing its policy, *i.e.,* to protect racketeers from the impact of a ruling by this Court. Interior had statutory authority to make the change in policy, but not for the sake of racketeers. 25 U.S.C. § 2. In deciding to forgo interpretation of Tribal election law when it mattered the most, Interior failed to demonstrate both any belief that its new approach was better, and good cause for that sudden change in approach. ER 0144. That is because the real reason Interior made the policy change—at the precise moment it made the change—was to protect racketeers from facing the consequences of their actions before this Court. *See* ER 0096-0108, 0159. Interior

knew full well that the change was neither better nor for any good cause, so it offered no explanation for the change—violating the APA.

II. IMPROPER INFLUENCE AND SECRET MEETINGS VIOLATED THE APA STANDARD OF REVIEW REQUIRING DUE PROCESS.

Under the APA, courts "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). This review is both substantive and procedural. *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1098 (D.C. Cir. 1996) ("judicial review . . . under the APA must go beyond the agency's procedures to include the substantive reasonableness of its decision"). Courts review agency decisions by a "searching and careful inquiry" of the record. *Mississippi v. EPA*, 744 F.3d 1334, 1342 (D.C. Cir. 2013). An agency's decision can violate the APA as arbitrary and capricious if it was not the product of the requisite processes. *U.S. v. Dist. Council of N.Y.C. and Vicinity of the United Brotherhood of Carpenters*, 880 F.Supp. 1051, 1066 (S.D.N.Y. 1995).

"The due process clause guarantees no person shall be deprived of life, liberty, or property without due process of law." *Guenther v. C.I.R.*, 889 F.2d 882, 884 (9th Cir. 1989). In *Greene v. Babbitt,* the Western District of Washington determined that "the Samish were entitled to Fifth Amendment due process in connection with their recognition proceedings." 943 F. Supp. 1278, 1285 (W.D. Wash. 1996) During the Samish's recognition decision hearing, an Interior lawyer

and government witness had an *ex parte* meeting with then ASIA Deer before the decision was made. *Id.* at 1283. This violated the APA. *Id.* at 1289. Prior to remand, the Ninth Circuit found:

> [T]he interests affected by meeting threshold eligibility requirements for the myriad federal benefits available to Indians is very great. The risk that such eligibility might unfairly be denied is real because of the lack of procedural safeguards . . . Informal decision-making, behind closed doors and with an undisclosed record, is not an appropriate process for the determination of matters of such gravity.

Greene v. Babbitt, 64 F.3d 1266, 1275 (9th Cir. 1995). Here, too, informal decision-making, behind closed doors, with an undisclosed record—all of which has now been brought to light through the Scherer-Porter mails—was inappropriate and violated the APA. *See* ER 0096-0108, 0159.

III. THE RECOGNITION DECISION, WITHOUT PROPER PROCEDURE, WAS ARBITRARY AND CAPRICIOUS.

In *Tarbell v. Department of Interior*, the trial court found that Interior acted arbitrarily and capriciously when it recognized a tribal governing body without following proper procedure. 307 F. Supp. 2d 409, 422-23 (N.D.N.Y. 2004). The *Tarbell* court recognized that the Interior's authority and responsibility in determining a proper tribal governing body—authority and responsibility rooted in 25 U.S.C. § 2—"can have significant impact upon tribal members, and [be] generally complex, requiring the BIA to consider the unique history and circumstances of the specific tribe involved." *Tarbell*, 307 F. Supp. 2d at 423.

The court held that without adhering to appropriate procedure for determining the governing body, including reviewing and interpreting tribal election procedures, Interior's recognition decision was arbitrary and capricious. *Id.* at 423. 426; *see also Ransom*, 69 F.Supp.2d at 153 (holding that BIA defendants "failed to fulfill their responsibility to interpret tribal laws and procedures in a reasonable manner in order to carry out their duty to recognize a tribal government."). Here, Interior breached its duty to interpret Nooksack election procedures—at *the* instant when it mattered the most. ER 0102. It reviewed the ballot validation procedure but simply decided not to interpret it. *Id*. Interior, therefore, failed to fulfill its duty to recognize a legitimate governing body; it was arbitrary and capricious.

Tarbell's finding that Interior's power and duty to determine the proper tribal governing body derives from 25 U.S.C. § 2 is notable, too. Other courts have noted likewise. *See United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir.1986) (noting that 25 U.S.C. § 2 serves "as the source of Interior's plenary administrative authority in discharging the federal government's trust obligations to Indians"); *Seminole Nation of Oklahoma v. Norton,* 223 F. Supp. 2d 122, 139-140 (D.D.C. 2002) (same). Interior's duty is one of "moral obligation of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). That duty includes "obligations to . . . which national honor has been committed," *Heckman v. United States*, 224 U.S. 443, 437 (1912), and

requires protection of not only "the rights of the tribe, but also the rights of individual members." *Milam v. U.S. Dep't of the Interior*, 10 ILR 3013, 3017 (D.C. Cir. Dec. 23, 1982).

A "cornerstone" of the trust obligation is to promote a tribe's political integrity. *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008). More specifically, Interior "has the authority and responsibility to ensure that the [tribe's] representatives, with whom it must conduct government-to-government relations, are the valid representatives of the [tribe] as a whole." *Norton,* 223 F. Supp. 2d at 139-140 (D.D.C. 2002) (citing 25 U.S.C. § 2); *see also California Valley Miwok Tribe v. United States*, 424 F.Supp.2d 197, 201 (D.D.C. 2006) (the Secretary must "ensure that he deals only with a tribal government that actually represents members of the tribe").

Generally, Interior does not involve itself in tribal elections, except when its involvement is contemplated by a tribe's constitution. *Norton*, 223 F. Supp. 2d at 132. While Interior can otherwise get involved as necessary to carry out its statutory and regulatory obligations, in practice and in deference to tribal self-determination, it rarely does. *Id.* at 140; 25 U.S.C. § 2. But, in the very limited instance when Interior chooses to get involved, it must behave and "be judged by the most exacting fiduciary standards." *Seminole Nation*, 316 U.S. at 296-97. It

cannot behave haphazardly, dishonestly, or without integrity. 5 U.S.C. § 706(2)(A); *Cayuga v. Bernhardt*, 374 F.Supp.3d 1, 21 (D.D.C. 2019).

Interior got involved in the "exceedingly rare" situation at Nooksack. ER 0053-0054. Interior charted a nearly two-year course toward recognition of a Nooksack governing body through a special election that needed to accord with tribal law, so the agency could fulfill its own statutory and regulatory obligations. 25 U.S.C. § 2; ER 0053, 0058. But after a post-special election federal personnel change, Interior suddenly and inexplicably reversed course. By March 9, 2018, Interior issued the Recognition Decision for a purpose not authorized by Congress—specifically, to advantage racketeers appearing before this Court on that very same day. ER 0096-0108, 0159.

In so doing, Interior "relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994) ("The test is whether 'extraneous factors intruded into the calculus of consideration' of the individual decisionmaker.") (quoting *Peter Kiewit Sons' Co. v. United States Army Corps of Eng'rs*, 714 F.2d 163, 170 (D.C. Cir. 1983)); *cf. Connecticut v. U.S. Dep't of the Interior*, 363 F. Supp. 3d 45, 65 (D.D.C. 2019) (APA claim where "significant political pressure was brought to bear on the issue and the Secretary may have improperly succumbed to such

pressure"); *Saget v. Trump*, 375 F. Supp. 3d 280, 360 (E.D.N.Y. 2019) (finding an agency "decision was arbitrary and capricious due to improper political influence").

The District Court discounted the Scherer-Porter Emails as coincidental. ER 1028. They were not coincidental. A reasonable fact-finder could find that they were the but-for cause of the Recognition Decision. The District Court erred in ruling that Doucette failed in "showing that [Interior's] actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'" and that they "failed to demonstrate any basis to overturn [Interior's] decision to recognize the Nooksack Tribal Council." ER 0020, 0024.

IV. INTERIOR'S AFFIRMATIVE ACTS CREATED A DUTY TO ACT REASONABLY; IT FAILED TO DO SO.

Interior took affirmative, discretionary steps by interceding in Nooksack governance. 25 U.S.C. § 2. While Interior can argue that it had no legal obligation to intercede, the APA makes clear that if Interior chooses to intercede—as it did here—it cannot then act without care. But by issuing the Recognition Decision based on improper political influence, that is exactly what Interior did.

This rule that affirmative acts can create a duty finds support in exceptions to the "public duty" or "duty to no one" doctrine: While "there is no duty to rescue . . . , once a rescue is undertaken, the rescuer must exercise ordinary care." *Babcock v. Mason Cty. Fire Dist. No. 6*, 30 P.3d 1261, 1275 (Wash. 2001)

(Chambers, J., concurring). This "rescue" exception finds nearly universal application. *See, e.g., Jackson v. City of Joliet*, 715 E2d 1200, 1202 (7th Cir. 1983) ("[I]f you do begin to rescue someone you must complete the rescue in a nonnegligent fashion even though you had no duty of rescue in the first place.").

In October of 2016, Interior embarked upon rescuing the Nooksack Tribe; it exercised its statutory discretion to get involved. ER 0053. Interior proclaimed that any election "inconsistent with Nooksack law . . . will not be recognized by the Department"; the special election needed to be "in accordance with the NOOKSACK CONSTITUTION, BYLAWS, AND TRIBAL LAWS and ORDINANCES." *Id.*; ER 0067 (emphasis in original); *see also* ER 0058. Interior created justifiable reliance in Doucette that it would continue involve itself in the election process that *Interior itself initiated*, until Nooksack law was honored. *Id*. Interior carried out that rescue operation until January of 2018, when a new employee and a lobbyist commenced with *ex parte*, behind-closed-doors interactions regarding the need to save third-party racketeers. ER 0096-0108, 0159. By March 7, 2018, Scherer—at the lobbyist's behest—caused the Regional Director to retreat; two days later, he caused PDAS Tahsuda to abort the Nooksack rescue operation. *See id.*; ER 0899. Interior retreated at the exact moment when, according to its own terms of engagement, it was required to ensure that the

election was consistent with and in accordance with Nooksack law. ER 0053, 0058, 0067, 0102. Interior violated its duty, by any standard of care.

V. THE DISTRICT COURT ERRED BY NOT REQUIRING INTERIOR TO PRODUCE THE WHOLE ADMINISTRATIVE RECORD.

"The whole administrative record," as per 5 U.S.C. § 706, "is not necessarily those documents that the *agency* has compiled and submitted as the administrative record. The whole administrative record . . . consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis in original; citations omitted); *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir.1993) ("The complete administrative record consists of all documents and materials directly or indirectly considered by the agency."). The critical inquiry is what was before the decisionmaker "at the time of the decision."[9] *Thompson*, 885 F.2d at 555. Lobbyist Porter's dogged requests that Interior aid his clients in *Rabang I* by March 9, 2018, were directly or indirectly before PDAS Tahsuda at the time of his decision on that very same day. ER 0096-0108, 0159.

[9] Indirect consideration, as per this Court in *Thompson,* reflects "the reality that agency heads act through subordinates and subordinate decisionmakers prior to the agency head making a final decision." LELAND E. BECK, AGENCY PRACTICES AND JUDICIAL REVIEW OF ADMINISTRATIVE RECORDS IN INFORMAL RULEMAKING, 69 (2013) (citing *Thompson*, 885 F.2d at 555).

Interior was required to produce the Scherer-Porter Emails as part of the AR. Interior did not, and the Court erred in not compelling it to produce the whole record or otherwise holding the federal government publicly accountable. ER 0024; *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 758 (9th Cir. 1992) ("The procedural safeguards of the APA help ensure that government agencies are accountable and their decisions are reasoned.").

CONCLUSION

The District Court erred. Remand is appropriate.

DATED this 22nd day of May 2020.

GALANDA BROADMAN PLLC
/s/ Anthony S. Broadman
Gabriel S. Galanda, WSBA #30331
Anthony S. Broadman, WSBA #39508
Ryan D. Dreveskracht, WSBA #42593
P.O. Box 15416,
8606 35th Avenue NE, Suite L1
Seattle, WA 98115
PH: 206-557-7509
gabe@galandabroadman.com
anthony@galandabroadman.com
ryan@galandabroadman.com
Attorneys for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Doucette identifies *Rabang v. Kelly*, No. 18-35711 (9th Cir.), as a related case.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,230 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

DATED this 22nd day of May 2020.

/s/ Anthony S. Broadman
Anthony S. Broadman WSBA #39508

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document, **OPENING BRIEF OF PLAINTIFFS-APPELLANTS,** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 22, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to the following parties:

Brian C. Kipnis
Assistant United States Attorney
Office of the United States Attorney
5220 United States Courthouse
700 Stewart Street
Seattle, Washington 98101-1271
brian.kipnis@usdoj.gov

Attorney for Defendants-Appellees

Signed under penalty of perjury and under the laws of the United States this 22nd day of May 2020.

/s/ Anthony S. Broadman
Anthony S. Broadman WSBA #39508