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

REPLY 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

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INTRODUCTION

Defendants-Appellees U.S. Department of the Interior, *et al*. ("Interior") adopted a policy toward the Nooksack Indian Tribe and Plaintiffs-Appellants Robert Doucette, Bernadine Roberts, Saturnino Javier, and Tresea Doucette (collectively, "Doucette"). Interior changed its policy for an illegal reason. That reason is now clear from at least four documents that Interior concealed ("Scherer-Porter Emails"). ER 0096, 0097, 0108, 0159. Interior concealed those decisional documents to hide the illegal reason for its policy change. *Compare id.*, *with* FER 0027-0029, 0047. Interior violated the Administrative Procedures Act ("APA"), including its duty to produce the whole administrative record ("AR").

Interior argues that (1) its approach to Nooksack over the course of two years and five determinations did not rise to the level of policy enforceable under the APA; and that (2) even if it did, Interior need not explain why it changed its policy. Interior tacitly admits that if its approach to Nooksack is a policy, it would be liable under the APA. It is now clear why Interior did not explain its policy change: that change was made (1) to accommodate inappropriate influence by a lobbyist and (2) to aid and abet federal racketeering. *See* ER 0096, 0097, 0108, 0159. Interior then hid the proof. *See* Motion to Take Judicial Notice (December 14, 2020); Declaration of Gabriel S. Galanda in Support of Motion to Take Judicial Notice (December 14, 2020) ("Galanda Decl."), Ex. A.

By concealing decisional documents from the AR that expose the reason for Interior's policy change, the federal government deprived Doucette of the opportunity to challenge Interior's decision. The Court should reverse and remand, to at minimum and order Interior to produce everything that the Principal Deputy Assistant Secretary ("PDAS") considered before issuing the March 9, 2018, decision ("Recognition Decision").[1] This Court should not allow Interior to assist racketeers appearing before this Court in another matter, and then cover up the proof to deprive Doucette of his day in District Court.

ARGUMENT

A. INTERIOR'S POLICY CONSTITUTES AN APA "POLICY."

Over the course of two years and five determinations, Interior formed agency policy—rules implicit in an agency's course of conduct where that conduct gives rise to a "common law" administrative rule. *Wilkinson v. Legal Servs. Corp.*, 27 F. Supp. 2d 32, 61 (D.D.C. 1998). Interior concedes that the question of whether a course of conduct rises to a policy under the *Accardi* rule hinges on whether Interior "manifested its intention to be bound by the policy such that it may be considered to have the force and effect of law." Dkt. # 10 (Response) at 41.[2] Each of the

[1] Interior also failed to disclose a "Draft Resolution/Proposal" emailed or exchanged between Interior and Nooksack circa February 2, 2018. FER 0072 ("the AR is also void of any such communication.").

[2] Both Doucette's Opening Brief and Interior's Answering Brief were filed as Dkt. # 10, each under a different case number. For clarity, Doucette refers to the

determinations issued by Interior's Assistant Secretary of Indian Affairs ("ASIA") or PDAS (1) manifests the agency's intention to be bound by the policy of applying Nooksack law (2) such that was considered to have the force and effect of law in how Interior and the entire federal government dealt with Nooksack.

Interior cannot argue it did not interpret Nooksack law in the five determinations. ER 0053-0072, 0090-0091. It simply argues that when it did so, five times, over the course of two years, it was not creating a policy that it intended to follow. But Interior clearly intended to announce and be bound by its policy. On October 17, 2016, for example, Interior made clear how important it was that it itself followed the announced policy:

> Under Federal law, the United States has a duty to ensure that tribal trust funds, Federal funds for the benefit of the Tribe, and our day-to-day government-to-government relationship is with a full quorum of the Council as plainly stated in the Tribe's Constitution and Bylaws. As such, the Bureau of Indian Affairs (BIA) will examine any self-determination contracts or funding agreements it has with the Tribe to ensure the Tribe's compliance with all contract provisions. In the event of non-compliance, BIA will take action to reassume the particular Federal services, in whole or in part, and provide direct services to currently enrolled tribal members.
>
> The BIA stands ready to provide technical assistance and support to the Tribe to carry out elections open to "all enrolled members of the Nooksack Tribe, eighteen years of age or over" regardless of county residency, to vote to fill the vacant Council seats. Please be advised that elections inconsistent with Nooksack law will not be recognized by

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Answering Brief as "Dkt. # 10 (Response)." Also, the Scherer-Porter Emails are ER 0096, 0097, 0108, 0159, not ER 0893-0899 as cited once in the Opening Brief.

> the Department. Should you have any questions, please contact my office[.]

ER 0054. In other words, Interior policy was necessary for *the federal government* to fulfill *its* duty. Of course Interior manifested to be bound by its own policy. Interior stated within the first mention of the policy that it was *required* to be bound by this policy.

Interior reiterated the policy a month later on November 14, 2016, announcing how the agency was bound by and would treat its policy of examining Nooksack law. ER 0056.

On December 23, 2016, Interior once again explained how it would be bound by its policy of applying Nooksack law for federal funding purposes: "we can only contract Federal services with a duly authorized tribal council pursuant to Federal law and a Tribe's constitution." ER 0057. Interior could not have been clearer about its intentions to be bound by these obligations.

Interior suggests that *not* writing down the policy more clearly absolves the agency of responsibility. That is not the rule. If Interior's actions at Nooksack are unreviewable under the APA, the federal government can never be held responsible for arbitrary and capricious policy changes. Interior will simply adopt unwritten policies and arbitrarily vacillate depending on the whim of politically compromised individuals, instead of adhering to federal law and reasoned policy.

Even if, for sake of argument, there were no policy at issue here under the *Accardi* rule, Plaintiffs are still entitled to relief under Section 702 of the APA. In *Presbyterian Church v. United States*, the Court allowed claims to proceed without even deciding whether an APA cause of action was available. 870 F.2d 518 (9th Cir. 1989). Section 702 waives Interior's sovereign immunity for claims seeking non-monetary relief such as Doucette's. *Id*. at 523-24; *Sierra Club v. Trump*, 929 F.3d 670, 699–700 (9th Cir. 2019); *see also* FER 0024, 0100-0101.

B. Interior Changed Policy For Illegal Reason—And Hid It.

Interior was required to explain why it changed policy. It is now clear why Interior hid its reason for the policy change. Interior changed its policy for an illegal reason and then withheld from the AR the documents that revealed that reason: to avoid "risk that a federal court could . . . find duly elected Tribal officials liable for RICO claims for the first time[3] ER 0096; *see also* ER 0097, 0108, 0159. The "federal court" is *this* Court and the "first time" was March 9, 2018—the exact same

[3] In his Opening Brief, Doucette gave Interior the benefit of the doubt regarding the four emails, simply observing to this Court that they "should have been produced." *See* Dkt. # 10 at 12 n. 8; Dkt. # 10 (Response) at 60 ("Doucette implies that the [AR] submitted by Interior was clearly faulty."). Doucette believed Interior was derelict in not producing those four emails as part of the AR. *See id*. But Doucette has since learned that dating back to June 18, 2018, and spanning the entirety of his lawsuit, Interior knew of the need to produce those emails, but concealed them from Doucette and withheld them from the District Court. *See* Motion to Take Judicial Notice; Galanda Decl., Ex. A. Doucette has no reason to believe the U.S. Department of Justice was at fault but now knows that Interior's actions were knowing and willful. *Id.;* FER 0093-0095.

day and time when Interior issued the Recognition Decision. *Id.* In particular, they hid the Scherer-Porter Emails.[4] *Id.*

Interior claims it was "harmless error . . . to omit these email messages from the administrative record." FER 0043-0044. Interior suggests that Kyle Scherer's personnel transfer between ASIA and its Office of the Solicitor "could explain why these records were not found" or produced with its AR. *Id*. That is false. Scherer knew of the need to produce those documents soon after this lawsuit was filed in June of 2018. Galanda Decl., Ex. A. He acknowledged that need but chose to hide his damning emails with lobbyist Robert Porter, as did Interior when it filed the AR. *Id*. That was not "error"; it was deliberate. *Id*. Nor was it "harmless"; it imperiled Doucette's lawsuit because the District Court concluded he lacked any evidence "showing that [Interior's] actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" ER 0020. The Scherer-Porter Emails show—and would have shown—the Recognition Decision is illegal.

Interior withheld those documents because they reveal that Interior issued the Recognition Decision on March 9, 2018, to advantage third-party RICO appellant-

[4] Meanwhile, Interior produced emails from Doucette's lawyer that were sent to the ASIA and PDAS and were before the agency when the Recognition Decision was issued. *See* FER 0029 (Doc ## 7-9); FER 0047 (Doc ## 1, 2). Interior cannot pick and choose which emails it believes were before the agency when producing or defending the AR it produced to the Court, as per 5 U.S.C. § 706. Dkt. # 10 (Response) at 63-64.

defendants as they appeared before this Court in related litigation that very day. No "slant" is required to realize from the concealed emails that (1) a lobbyist requested Interior's decision in time to countervail oral argument that "the lack of DOI recognition means that the Tribe's officials are acting ultra vires, and thus operating a 'racket' under RICO"; and (2) the lobbyist got what he wanted from Scherer—precisely when he wanted it. Dkt. # 10 (Response) at 53; ER 0097, 0108.

Doucette concedes that as to the AR, an agency is ordinarily "'entitled to a strong presumption of regularity.'" *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534, 2019 WL 2028709, at *2 (D.D.C. May 8, 2019) (quoting *Sara Lee Corp. v. Am. Bakers Ass'n*, 252 F.R.D. 31, 34 (D.D.C. 2008)). That presumption is rebutted, however, when "clear evidence" reveals that the documents the plaintiff seeks to add to the AR were before the decisionmaker. *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006). The plaintiff "'must identify reasonable, non-speculative grounds for its belief that documents were considered by the agency and not included in the record.'" *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010) (quoting *Pac. Shores*, 448 F. Supp. 2d at 6). A court can otherwise consider ordering a new AR when the plaintiff demonstrates "unusual circumstances," like if the agency "deliberately or negligently excluded documents that may have been adverse to its decision" or "failed to explain administrative action so as to frustrate judicial

review." *City of Dania Beach v. F.A.A.*, 628 F.3d 581, 590 (D.C. Cir. 2010) (quotation omitted)

The Scherer-Porter Emails are in and of themselves clear evidence they were considered by Interior. PDAS John Tahsuda delegated matters pertaining to the Recognition Decision to Scherer, including rendering, drafting, and issuing that decision. *See* ER 0104 (PDAS Tahsuda: "Kyle has been overseeing [Nooksack]" for ASIA); ER 0107-0108. Scherer sent the March 9, 2018, email to Nooksack that attached the Recognition Decision for PDAS Tahsuda—with a blind copy to Porter. ER 0108 ("Please find attached a letter from Principal Deputy Assistant Secretary Tahsuda . . ."). The fact that Porter repeatedly asked for the Recognition Decision to issue on March 9, 2018, and Interior issued it on that exact date, constitutes reasonable, non-speculative grounds that Porter's insistent request of Scherer was considered—and granted—by Interior. *Id*.; ER 0096-0097.

Unusual circumstances also exist insofar as Interior excluded the Scherer-Porter Emails from the AR, knowing they were adverse to the Recognition Decision. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C Cir. 2008). Soon after Doucette first filed suit, Interior and Scherer knew of the need to produce those emails. ER 0153; Galanda Decl., Ex. A. Scherer then asked for a "'search string . . . a list of searches," feigning: "I can search for 'Nooksack' but I'm not sure that would catch everything that's responsive." Galanda Decl., Ex. A. Each of the

Scherer-Porter Emails mention Nooksack. *See, e.g.,* ER 0096 ("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."); ER 0097 ("I wanted to touch base regarding the DOI recognition of the Nooksack Council. . . . there is a March 9th hearing before the 9th Circuit Court of Appeals . . ."). Notwithstanding the acute relevance of the Scherer-Porter Emails, Interior withheld them from its AR filing.[5] *Compare* ER 0893-0899 *with* FER 0027-0029, 0047. Interior buried the inculpatory emails because they undermine the Recognition Decision.[6] *Am. Wildlands*, 530 F.3d at 1002.

As previously briefed, Interior also failed to in any way explain its departure from its own policy. Dkt. # 10 at 16-18. By abruptly "declin[ing] to insert itself and interpret tribal law" on March 7, 2019, and not explaining that policy change, Interior intended to frustrate APA review. ER 0144; *Am. Wildlands*, 530 F.3d at 1002. There is no other explanation. Indeed, Interior offers no other explanation.

[5] The Scherer-Porter Emails were originally due in response to Doucette's counsel's May 18, 2018, Freedom of Information Act ("FOIA") request. ER 0153.

[6] Doucette always alleged an "inexplicable shift[]" in approach at Interior by early 2018, but it was not until he obtained the Scherer-Porter Emails via FOIA when Scherer and Porter's pre-decisional conversations or meetings became evident. FER 0057; FER 0071 ("Mr. Porter's email suggests he had previously been in communication with Mr. Scherer . . . but the AR is also void of any such communication."); FER 0103 ("Mr. Porter learned that DOI was prepared to issue the Recognition Decision."). The extent of Scherer and Porter's coordination is still unknown, as is the extent to which documents are missing from the AR.

See generally Dkt. # 10 (Response) at 10. These highly "unusual circumstances" require a remand so that Interior can at least produce a complete AR and come officially reveal why it deviated from its own policy. *City of Dania Beach*, 628 F.3d at 590.

C. THE COURT CORRECTLY RULED NOOKSACK IS NOT A REQUIRED PARTY.

According to this Court:

> The first step in compulsory joinder analysis is to determine whether the [tribe] is a required party to the action. "Joinder of the [tribe] is 'required' if either: (1) the court cannot accord 'complete relief among existing parties' in the [tribe]'s absence, or (2) proceeding with the suit in its absence will 'impair or impede' the [tribe]'s ability to protect a claimed legal interest relating to the subject of the action, or 'leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.'"

Alto v. Black, 738 F.3d 1111, 1125-26 (9th Cir. 2013) (quoting Fed. R. Civ. P. 19; citation omitted). Only if the Court determines that a tribe is a required party should it proceed to the second Rule 19 inquiry: "whether joinder is feasible or is barred by sovereign immunity." *Id.* Finally, only if joinder is impossible must the Court determine whether, in "equity and good conscience," the suit should be dismissed. *Id.* Here, the District Court correctly ruled Nooksack's presence is not required.

1. Complete Relief Is Available Between Interior and Doucette.

The injury complained of here is Interior's violation of the APA in carrying out an "election of federal concern." FER 002. The injury resulted from Interior's, not the Tribe's, acts or omissions. Declaring the Recognition Decision arbitrary or

unlawful would afford Doucette complete relief. Either way, the Tribe will not be affected; it will continue to abide by the Recognition Decision, or not. *See* ER 0074; Dkt. # 10 at 7 n.4. But that issue is not before the Court. Complete relief—"that is, relief limited to that available in an APA cause of action, which is affirmation, reversal or remand of the agency action"—can be provided between the parties. *Alto*, 738 F.3d at 1127. The practical implications of Interior's decision do not hinge upon the federal courts but on the Tribe's duties to its members "under its own governing documents and applicable federal law. In short, the Tribe's absence does not preclude 'complete relief.'" *Id.*

Interior argues that the Tribe is necessary because Doucette seeks "to set aside agency action that would impact the interests of an absent Tribe." Dkt. # 10 (Response) at 32-33. This is not necessarily true, and Interior knows it. *See id.* at 20 ("[T]he 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."). Interior makes decisions when it must. *See, e.g.*, ER 0054. The Tribe is not bound by those decisions. Internal to Nooksack, the Tribe can flout or legislate around an Interior decision vis-à-vis any federal court order. *Cf.* ER 0074; Dkt. # 10 at 7 n.4. In short, "complete relief," within meaning of compulsory joinder rule, is meaningful relief

as between the parties. *Lennar Mare Island v. Steadfast Ins. Co.*, 139 F. Supp. 3d 1141, 1150 (E.D. Cal. 2015). Doucette seeks nothing more.

2. Interior Has Protected Tribal Legal Interests And Avoided Inconsistent Obligations

First, Interior shares with the Tribe an interest in defending the Recognition Decision. Interior has vigorously defended its decision on its merits. Interior has not cited to any argument that the Tribe might make that Interior has not or would not make. *See* Dkt. # 10 (Response) at 19-22.

Second, consistent with its fiduciary responsibility to Indian tribes, Interior has repeatedly avowed its intention and ability to represent tribal interests in relation to the APA. "[T]he federal government, including the Secretary, has a trust responsibility to the Tribe[]," which "obligates the Secretary to protect the Tribe['s] interests in this matter." *Washington v. Daley*, 173 F.3d 1158, 1168 (9th Cir. 1999). Here, Interior is defending the election to which Tribe acceded. *See, e.g., Alto*, 738 F.3d at 1128. Interior has fiduciary duties to both the Tribe and Doucette. Since those duties did not deter the Tribe from making Interior the final election arbiter, they do not prevent Interior from defending its decision. ER 0068.

Finally, because the Court's review of the election is limited to the AR before the Court, the Tribe could not offer new evidence in this judicial proceeding that would materially affect the outcome of the action. *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010); *cf. Union Pac. R.R. Co. v. Runyon*,

320 F.R.D. 245, 253 (D. Or. 2017). As to the Tribe's legal interest in maintaining sovereign control over elections, granting the relief requested would not undermine that control. The Tribe itself delegated its authority on that front to Interior. ER 0068. Doucette does not seek to alter Tribal election decisionmaking; any attempt to do so in the Tribe's absence would be impermissible. *Cf. Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1099 (9th Cir.1994). Instead, Doucette is challenging *federal* decisionmaking, given that the Tribe has specifically granted Interior "final decisionmaking authority" to approve a specific area of its election process. *Dine Citizens Against Ruining Our Envt. v. Bureau of Indian Affairs*, 932 F.3d 843, 855 (9th Cir. 2019); ER 0068.

3. Interior's Cited Cases Are Inapposite.

Vaguely citing to *Dine Citizens*, 932 F.3d 843, and *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020), Interior submits that although the relief requested by Doucette "runs directly against Interior, it would impact the [Tribe] by delegitimizing its current governing body and harming its ability to carry out the necessary day-to-day business of the Tribe." Dkt. # 10 (Response) at 32. Not so. This is not a case where the Tribe's involvement is "necessary because the litigation could affect already-negotiated lease agreements and expected jobs and revenue," *Dine Citizens*, 932 F.3d at 853; or where Interior's "federal actions [would] alter tribal rights." *Jamul Action Comm.*, 974 F.3d at 997. Just the opposite. As described

above, the Tribe has the discretion and domestic legal tools to ignore Interior's decision or to take any number of internal maneuvers to otherwise avoid being bound by Interior's decision, should it so choose. *See, e.g., Alto*, 738 F.3d at 1129. All that is under review is the federal decisionmaking process, which is unquestionably subject to the bounds of the APA. That process must now be brought to light.

DATED this 14th day of December, 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

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 3,093 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 14th day of December, 2020.

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document, **REPLY 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 December 14, 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 14th day of December, 2020.

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