EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA CAVAZOS, *et al.*, Plaintiffs, v. DEBRA HAALAND, *et al.*, Defendants.	Civil Action No. 1:20-cv-2942 (CKK)

PLAINTIFFS' SURREPLY TO FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. Plaintiffs did not misrepresent the JFA's drafting or legislative history. 1

A. The February 28, 1986 letter from Mr. Swimmer to Senator Udall 1

B. Mr. Wilson's testimony 3

II. Case law and logic support the proposition that an agency's departure from a prior policy is a change in agency policy. 4

III. Plaintiffs have not "conced[ed] that their 706(1) claims have no merit." 4

CONCLUSION 5

TABLE OF AUTHORITIES

Cases **Page**

Grace v. Barr,
965 F.3d 883 (D.C. Cir. 2020) 4

Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs,
417 F.3d 1272 (D.C. Cir. 2005) 5

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., LTD,
484 U.S. 365 (1988) 5

INTRODUCTION

The Federal Defendants' ("DOI") reply memorandum misconstrues certain points made in Plaintiffs' opposition and reply memorandum and makes new arguments and relies on new authorities. This short surreply responds to these arguments.

ARGUMENT

I. Plaintiffs did not misrepresent the JFA's drafting or legislative history.

In its opening brief, DOI dismissed the drafting and legislative history of the JFA as irrelevant and limited its analysis of that history to the extent it appeared in the DOI Decision. DOI Opening Br., ECF No. 30, at 18–19, 23–26. DOI's reply brief for the first time contends that Plaintiffs' account of the legislative history is inaccurate, identifies particular records in the legislative history, and makes new arguments about those records. DOI Reply Br., ECF No. 39, at 11–15. DOI's arguments are arbitrary and mispresent the portions of the records DOI highlights.

A. The February 28, 1986 letter from Mr. Swimmer to Senator Udall

DOI states, for the first time, that "the most important piece of evidence" "regarding BIA's understanding of the 'bargain' struck by the [JFA]" is the February 28, 1986, letter from DOI Assistant Secretary Ross Swimmer to Senator Udall. DOI Reply Br. at 12. Plaintiffs quoted this letter in their opening brief, ECF No. 21, at 12; DOI did not respond. The letter proves Plaintiffs' point that BIA withdrew its opposition to the JFA bill only after Congress added several provisions designed to protect the JFA Enrollees. Mr. Swimmer noted that the JFA permitted the "actual transfer of monies" to the Tribe only after receiving "verification" that the Tribe had adopted the constitutional amendments the JFA referred to, Swimmer Letter at AR-000920–21—amendments which permitted "[a]ll descendants" of one-quarter Indian blood to enroll in the Tribe. Resolution L&O-03-85 at AR-000560. Mr. Swimmer also cited the JFA's non-discrimination clause as a reason for BIA's withdrawing its opposition to the bill, and "note[d] with approval that the bill as

reported includes language which precludes any additional amendments of the tribal constitution for 18 months." Swimmer Letter at AR-000921–22. Mr. Swimmer pointed to the "provisions . . . for secretarial intervention," noting that the JFA "*require[s]* secretarial intervention only on the receipt of verified information that the tribal council has materially failed to administer the Investment Fund in accordance with the bill." *Id.* at AR-000921 (emphasis added).

Mr. Swimmer summarized BIA's previous opposition to the JFA in two points. First, the bill as previously drafted excluded "a substantial group of those persons who should be beneficiaries" of the JFA Funds, and second, the government would give the JFA Funds to the Tribe "without adequate justification or protection." *Id.* As to BIA's first objection, Mr. Swimmer wrote that the constitutional amendments would "permit inclusion on tribal rolls of many additional descendants of the historic tribe." *Id.* Plaintiffs demonstrated that BIA, the Band descendants, and Congress all understood these "many additional descendants" to include all descendants of individuals listed in the constitutional base rolls, both collateral and lineal, of one-quarter Indian blood. Pls.' Opening Br. at 24–30; Pls.' Opp. Br., ECF No. 34, at 6–10. Indeed, carving out the numerous collateral descendants from the constitutional membership criteria would leave so few Band descendants eligible to join the Tribe—fewer than one out of ten, *see* Pls.' Opp. Br. at 7–9, Decision at AR-001861—that it would be quite a stretch to refer to that small group as "many." After having specified the JFA's protective provisions—the constitutional amendment requirement, the non-discrimination mandate, the prohibition on constitutional amendments during open enrollment, and the Secretary's enforcement power—and approving of the Tribe's plans for the JFA Funds—Mr. Swimmer wrote that BIA's second objection was "no longer warranted." AR-000920–22. And it was only after these protections were added to the JFA that BIA supported the legislation.

B. Mr. Wilson's testimony

DOI contends that Plaintiffs took Mr. Wilson's testimony "out of context." DOI Reply Br. at 15. According to DOI, "Mr. Wilson was criticizing the per capita distribution system in place before the [JFA] was enacted, not testifying as to the meaning of 'descendants' in the Amended Constitution." *Id.* It is DOI that misconstrues the "context." When Mr. Wilson made these statements, Congress was considering the JFA as an alternative to BIA's proposed per capita distribution to Band descendants, which included many descendants of less than one-quarter Indian blood, so of course Mr. Wilson, an attorney for the Tribe, testified against BIA's distribution proposal. But that is beside the point. Mr. Wilson testified that, under "BIA certified rules"—which considered collateral descendants of one-quarter Indian blood eligible for membership under the 1986 Constitution—"there were 864 descendants who [were] quarter-blood or more." *1985 S. Hearing* at AR-000578. Mr. Wilson did not carve out the nearly 500 Band descendants of one-quarter Indian blood who were collateral descendants from his number. *See* Decision at AR-001861.

Any doubt is settled by the exchange which immediately followed Mr. Wilson's statement. Senate staff member Peter Taylor asked Mr. Wilson: "Essentially, your figures correspond with the roughly 900 that the Department of Interior agreed to." *1985 S. Hearing* at AR-000578. Mr. Wilson responded, "Yes, sir." *Id.* Earlier during the hearing, Senator Andrews told BIA official Hazel Elbert that "the tribe is proposing to amend their constitution to include persons that are one-quarter blood Chippewa descendants, living off the reservation. They estimate that this would expand their membership by about 900 persons." *Id.* at AR-000538. Sen. Andrews then asked Ms. Elbert: "Do you agree with this estimate?" *Id.* Ms. Elbert responded: "I believe we do agree with this; it may be a little bit more than that, but we are not sure how many of those would apply for membership in the tribe." *Id.* Mr. Wilson thus testified that he agreed with DOI that the Tribe's

constitutional amendments would permit "roughly 900" individuals—a number which included both lineal and collateral Band descendants of one-quarter Indian blood—to enroll in the Tribe.

II. Case law and logic support the proposition that an agency's departure from a prior policy is a change in agency policy.

DOI argues that refraining from adopting a policy that it previously adopted does not constitute a change in policy, and suggests that the absence of case law in Plaintiffs' opposition brief supports its position. DOI Reply Br. at 16. Plaintiffs thought this was simply a matter of common sense. Between 1986 and 1988, DOI enforced the policy that all Band descendants, including collateral descendants, of one-quarter Indian blood who submitted complete applications for membership during open enrollment must be enrolled in the Tribe. *See* Pls.' Opening Br. at 13, 40–41; Pls.' Opp. Br. at 20–21. DOI does not dispute that, had the Tribe refused to enroll collateral descendants during open enrollment, or had it expelled all JFA Enrollees the day after open enrollment ended, DOI would have taken action to enforce the JFA's non-discrimination mandate. *See* Pls. Opp. Br. at 3, 17–18. DOI now asserts that it cannot answer the question whether Plaintiffs were properly enrolled pursuant to the JFA and the 1986 Constitution and that it takes no position on the question. DOI's refusal to take its previous position clearly constitutes a departure from a prior policy, and one which DOI has not acknowledged, let alone justified. DOI's change in policy is therefore arbitrary and capricious. *See Grace v. Barr*, 965 F.3d 883, 898 (D.C. Cir. 2020) (USCIS's adoption of a "new, more demanding standard" for asylum while insisting its standard had not changed was arbitrary and capricious).

III. Plaintiffs have not "conced[ed] that their 706(1) claims have no merit."

DOI contends that "Plaintiffs are conceding that their 706(1) claims have no merit." DOI Reply Br. at 22. Plaintiffs make no such concession, and DOI's arguments on this point misunderstand or mischaracterize what Plaintiffs have actually said. Section 706(1) authorizes this

Court to "compel agency action unlawfully withheld or unreasonably delayed," and Plaintiffs have demonstrated that, properly read, the JFA requires that DOI restore Plaintiffs' tribal membership, including access to the benefits of the JFA Funds. As Plaintiffs drove home in their opening brief, statutory construction is a "holistic endeavor," *see*, *e.g.*, *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., LTD*, 484 U.S. 365, 371 (1988) (Scalia, J.), and a fair reading of the JFA's text, especially its non-discrimination mandate, demonstrates that Congress intended DOI to ensure that the Tribe did not renege on the bargain struck by the JFA. *See* Pls.' Opening Br. at 36.

Equally unsound is DOI's treatment of Plaintiffs' reference to *National Association of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1281 (D.C. Cir. 2005), which DOI claims is "neither helpful nor coherent and demonstrates that Plaintiffs do not understand the distinction between their 706(1) and 706(2) claims." DOI Reply Br. at 21. DOI has it backwards. Plaintiffs cited *Home Builders* because it clearly addresses the unusual posture of this case, namely that Plaintiffs are challenging both DOI's failure to act *and* the action that DOI has already taken. Plaintiffs' Section 706(1) claim asks the Court to compel DOI to act, by invoking the non-discrimination mandate and restoring Plaintiffs to the *status quo ante*. At the same time, Plaintiffs' Section 706(2) claim challenges agency action already taken; Plaintiffs argue that the Decision misreads the JFA, and that the Decision therefore should be vacated on the ground that it is arbitrary and capricious and not in accordance with the law.

CONCLUSION

For the reasons set forth above and in Plaintiffs' opening and opposition briefs, the Court should find that the DOI Decision violated the APA and JFA in contravention of the Secretary's duty to protect Plaintiffs and order Defendants to require the Tribe to reinstate Plaintiffs to their rightful membership status.

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