IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GTEC INDUSTRIES, INC.,
a Georgia corporation,

Plaintiff,

vs. **Civil Action No. 19-1030 (CJN)**

ISABEL GUZMAN, Administrator,
U.S. Small Business Administration,

Defendant.
_____/

Plaintiff's Memorandum of Law in Support of Its Motion for Summary Judgment

Plaintiff GTEC Industries, Inc., a Georgia corporation ("GTEC"), provides this Memorandum of Law in support of the company's Motion for Summary Judgment filed herewith. For the several reasons that follow, the Court should find that SBA's final decision to deny GTEC entry into the 8(a) Business Development Program (the "Program") was contrary to applicable law - particularly SBA's own Program Regulations and Georgia state law - and was also arbitrary and capricious. As a result, the Court should direct Defendant to admit GTEC to the Program without further delay.[1]

[1] This Memorandum is supported by all matters of record, particularly GTEC's pending Amended Complaint deemed filed on April 28, 2021 ("Compl.," Doc. 26-2) and SBA's Answer filed May 12, 2021 ("Ans.," Doc. 27). This Memorandum is also supported by the pertinent portions of the administrative record related to GTEC's application to the Program, as certified by SBA on June 25, 2021. *See* Doc. 29 and LCvR 7(n). SBA has helpfully numbered that record as SBA 00001-001728 (the "Record"). In the discussion that follows, any reference to that Record will be signaled by an "R" followed by the pertinent page(s). Thus, R. 237-47 would refer to the SBA Administrative Law Judge's Decision dated February 4, 2021, that denied, for a third and last time, GTEC's application to the Program. This is the decision now under review.

Statement of the Pertinent Facts[2]

1. This is an action for a declaratory judgment and supplemental relief in which GTEC seeks review of SBA's now-final agency action denying, for a third time, GTEC's application for admission to the Program. Compl. ¶1.

2. Defendant SBA is an independent agency of the United States established under the Small Business Act, 15 U.S.C. §631 *et seq.* (the "Act"). The Agency is charged with responsibility to aid, counsel, assist, and protect the interests of small business concerns. Compl. ¶15; Ans. ¶15. Defendant Isabel Guzman is SBA's duly appointed Administrator. She is sued only in that capacity. Compl. ¶15; Ans. ¶15 & fn. 1.

3. As SBA had stated on its website maintained at commencement, the primary purpose of the Program is "[t]o help provide a level playing field for small businesses owned by socially and economically disadvantaged people or entities." Compl. ¶2; Ans. ¶2. The Program does so by, among other things, limiting competition for certain federal contracts only to entities that SBA certifies as being eligible to participate. That occurs after an entity formally applies to SBA and demonstrates that the small business meets the Program's eligibility requirements set forth in the governing regulations. *Id.*[3]

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[2] This case involves judicial review of final agency action under the Administrative Procedures Act, 5 U.S.C. §551 *et seq.* (the "APA"). Therefore, "the Court is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action against the administrative record. As a result the normal summary judgment procedures requiring the filing of a statement of undisputed material facts is not applicable." Comment to LCvR 7(h). Thus, the "pertinent" facts are drawn from the Record or admissions contained in the pleadings.

[3] In what appears to be a subsequently revised web page related to the Program, SBA again confirms in pertinent part that "[t]he 8(a) program is a robust . . . program created to help firms owned and controlled by socially and economically disadvantaged individuals." Moreover, certification into the Program makes the small business "eligible to compete for the program's sole-source and competitive set-aside contracts." *See* www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program#section-header-0 last accessed on 02/10/2022.

4. Under the Program's contract set-aside provisions, the federal government seeks to award at least five percent of total federal contracting dollars to small business entities enrolled in the Program. Compl. ¶3; Ans. ¶3.

5. SBA administers the Program that Congress, in turn, created under sections 7(j)(10) and 8(a) of the Small Business Act (15 U.S.C. §§ 636(j)(10) and 637(a)) (the "Act"). As a general matter, certain persons or people groups who Congress determined were socially or economically disadvantaged, and their associated business entities, were eligible for admission to the Program. *Id.* American Indian Tribes and their "tribally owned concerns" are included among them. *Id.*; *see also* 13 C.F.R. §§124.3; 124.109;[4] Compl. ¶5; Ans. ¶5.

6. GTEC is a for-profit Georgia corporation that was formed in 2009. R. 255, 271, 457-58. The company remains active and current through reports filed with the Georgia Secretary of State, while holding all required licenses to conduct its business affairs. R. 337-38, 457-58. Nothing in the Record suggests that GTEC is anything other than a legitimate business enterprise existing under Georgia law.

7. GTEC's application to the Program stated that GTEC had not earned any money during the three years preceding its initial submission, and did not reflect that the company had other than nominal assets of its own. R. 263, 525-28. However, if admitted to the Program, GTEC stated that it intended to offer Information Technology (IT) and related services to federal agencies. R. 96 at ¶4.

[4] SBA's regulations related to the Program underwent substantial revision in 2020. *See* 85 FR 66146-01, 2020 WL 6082069 (Oct. 16, 2020) (effective Nov. 16, 2020). Citation in this Memorandum to any regulations bearing on the Program or GTEC's Application will refer to those that were in effect prior to November 16, 2020, or while SBA was considering the Application, unless stated otherwise.

8. GTEC asserts that all of its issued and outstanding voting shares are ultimately owned, as reflected in an issued stock certificate, by the Georgia Tribe of Eastern Cherokee (the "Tribe"). Compl. ¶4.[5] This is an American Indian Tribe that the State of Georgia recognized in 1993 as being one of three "legitimate" American Indian Tribes recognized for purposes of that state's laws. *See* Official Code of Georgia Annotated ("O.C.G.A.") §44-12-300(a)(1). The Tribe's members by state statute consist of those persons who are "descendants of American Indians indigenous to Georgia." O.C.G.A. §44-12-260(2).[6] The Tribe, however, is not recognized under federal law, including that administered by the Department of the Interior's Bureau of Indian Affairs. R. 1361-1457; *see* Compl. ¶25.

9. Consistent with that Georgia state law, GTEC further asserts that the Tribe's members consist of *all* those persons directly descended from the Cherokee peoples who suffered forced deportation, primarily to Oklahoma, from their Georgia ancestral homelands. Compl. ¶4.[7]

10. GTEC's officers include Mr. L. Lamar Sneed ("Sneed") and his wife, Glenda B. Sneed. R. 95 at ¶2; R. 256. He thus directly manages GTEC's business and financial affairs. He is, without dispute, a member of the Tribe. R. 95 at ¶1 & Exhs. 1-4 (R. 101-08); R. 473. So is

[5]More specifically, the shares are held by Georgia Tribe of Eastern Cherokee, Inc., a Georgia not for profit corporation that serves as the Tribe's legal presence in lieu of the Tribe otherwise existing under applicable law merely as an unincorporated association. That company in turn owns all of GTEC's shares. R. 268, Stock Certificate. Viewed on a consolidated basis, the Tribe owns Georgia Tribe of Eastern Cherokee, Inc., which in turn owns GTEC, thus leaving the Tribe as the company's actual owner in fact.

[6] GTEC pledged to SBA that if admitted to the Program, it would seek to use the services of Tribal members to offer its benefits to federal agencies. Similarly, the company pledged that any profits the business did not need to retain would be "used to further the welfare of Tribal members and the enhancement of Tribal culture." R. 96 at ¶4.

[7] That route is commonly referred to as the "Trail of Tears." *See* https://en.wikipedia.org/wiki/Trail_of_Tears#Cherokee_forced_relocation.

she. R. 472. Moreover, each member of GTEC's Board of Directors is also required to be a Tribal member. R. 278, 349.

11. Business entities that are owned by federally- **or** state-recognized American Indian Tribes are eligible for admission to the Program under criteria that Congress set forth by statute and that SBA has implemented by regulation. *See* 15 U.S.C. §637(a)(13); 13 C.F.R. §124.3. *Cf.* 13 C.F.R. §124.1 *et seq.* (hereafter the "Program Regulations"). Thus, if GTEC is owned by the Tribe, and the company's only issued stock certificate confirms that it is, the company is eligible for admission to the Program, assuming all other requirements set forth in the Program Regulations, as discussed below, are satisfied. *Cf.* R. 268.

GTEC's Program Application

12. Claiming to be such an eligible, "tribally-owned concern" under the Program Regulations, GTEC submitted an initial application and supporting materials to SBA in May 2017, or nearly five years ago. Compl. ¶34, Ans. ¶34; R. 253-488; *see* R. 344.

13. SBA was charged under the Act and the Program Regulations with receiving and reviewing, on a timely basis, applications from small businesses to participate in the Program. SBA, as a general matter, must approve those applications and certify the applying entity to participate in the Program, if the applicant demonstrates that it holds the necessary qualifications, and meets the eligibility criteria set forth in the Act and the implementing Program Regulations. Compl. ¶16; Ans. ¶16.

14. A business entity is entitled to receive SBA's approval or certification to participate in the Program if, as a general matter, the applicant demonstrates that -

> it is a small business which is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens

> of and residing in the United States, and which demonstrates potential for success.

13 C.F.R. §124.101.

15. An eligible "tribally-owned concern" is, under the Program Regulations, "any concern at least 51 percent owned by an Indian tribe . . . ." 13 C.F.R. §124.3. The term "Indian tribe" means, in pertinent part -

> *any Indian tribe, band, nation, or other organized group or community of Indians* . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is *recognized as such by the State in which the tribe, band, nation, group, or community resides.*

Id. (emphasis added).

16. SBA at 13 C.F.R. §124.109, in turn, promulgated special rules governing tribally-owned entities' admission to the Program. Any applicant claiming that status must first demonstrate that an Indian tribe *owns* the applicant and *controls* it. These are separate and distinct, albeit related, requirements. *See* 13 C.F.R. §124.106 ("Control is not the same as ownership . . . ."). In addition, the applicant must demonstrate that (i) its tribal owner is "economically disadvantaged," 13 C.F.R. §124.109(b)(2), and (ii) the applicant itself has "reasonable prospects for [economic] success." 13 C.F.R. §124.109(c)(6).

17. Focusing for the moment on the issues of ownership and control, 13 C.F.R. §124.109(c)(3)(i) provides the applicable ownership test. Namely, "a Tribe must unconditionally own at least 51 percent of the [applicant's] voting stock and at least 51 percent of the aggregate of all classes of stock." *Id.*

18. On the separate issue of control, the Program Regulations generally provide that "[t]he management and daily business operations of a Tribally-owned concern must be

controlled by the Tribe." 13 C.F.R. §124.109(c)(4)(i). The Program Regulations then provide several ways that an applicant can demonstrate requisite tribal control. One of them is that "[m]anagement [of the entity] may be provided by committees, teams, or Boards of Directors which are controlled *by one or more members* of an economically disadvantaged tribe . . . ." 13 C.F.R. §124.109(c)(4)(i)(A) (emphasis added).

19. GTEC contends that its Application satisfied all requirements for admission as set forth in the Program Regulations, including those bearing on tribal ownership and control of an applicant claiming to be a tribally-owned concern. Compl. ¶¶32-33.

20. The Agency determined that the Application was complete on October 17, 2017, *see* 13 C.F.R. §124.204(a), and notified GTEC of that determination on October 23, 2017. R. 543, 548, 552; Compl. ¶35; Ans. ¶35. SBA officials then began to process the Application to prepare a final report and recommendation to senior SBA officials. R. 546, 547

21. SBA was required to issue a written decision to approve or deny the Application within 90 days of its acknowledged completion, or in this instance by no later than January 15, 2018. *See* 13 C.F.R. §124.204(a). That did not occur. Compl. ¶36; Ans. ¶36.

22. Instead, SBA, acting through Acting Associate Administrator Sharon A. Gurley, issued its letter dated May 14, 2018, or over 120 days late, denying the Application for what would prove to be the first of three times (the "Initial Denial," R. 502-06, Compl., Exh. B). Compl. ¶37; Ans. ¶37. SBA failed to offer, and the Record does not reflect, the reasons for SBA's failure to act within the required time frame.

23. The Program Regulations also directed SBA to state specifically each basis for its denial of the Application, and the facts upon which the Agency relied in support of each of those bases. *See* 13 C.F.R. §124.204(f). To satisfy that requirement, the Initial Denial claimed, in

pertinent part, that GTEC had not provided financial statements reflecting the Tribe's financial condition as the Program Regulations required. As a claimed result, the Initial Denial found that GTEC had not established that (i) the Tribe was "economically disadvantaged," or (ii) that GTEC had a reasonable "prospect for [economic] success." *Id.* at pp. 1-2, R. 502-03. SBA asserted *no other grounds* in the Initial Denial for its decision to deny GTEC entry into the Program. Importantly, SBA did not express any concerns or raise any issues regarding the Tribe's ownership or control of GTEC.

24. In fact, GTEC had submitted Tribal financial statements to SBA on October 6, 2017, marked or identified as such. Compl. ¶39; Ans. ¶39. *See also* R. 444-52. They were therefore sitting in the Agency's file related to the Application for any SBA reviewing official to see. *Id.* The Record does not reflect, however, how these financial statements were overlooked or ignored by Ms. Gurley and, apparently, each of her subordinate reviewing officials.

GTEC's First Request for Reconsideration

25. The Initial Denial was not a final one, however, for all purposes. Instead, the Program Regulations provided GTEC (but importantly not SBA, as will be seen later) with the right to seek reconsideration of the Agency's *initial* decision to deny the Application. S*ee* 13 C.F.R. §124.205(a). The Initial Denial acknowledged this, while also stating that if GTEC submitted (or more accurately re-submitted) Tribal financial statements, the Application on reconsideration initiated at GTEC's request could be viewed more favorably. *Id.* at p. 3, R. 504. Nothing else was stated in this regard.

26. Before exercising any right to seek reconsideration, GTEC requested and obtained a telephone conference with Mr. Robert E. Willis, the SBA official primarily tasked to review the Application. R. 498, 500-01. GTEC requested the conference so the company would have

clear guidance regarding what the company had to do and submit in order to obtain approval of the Application on reconsideration. R. 501.

27. The conference occurred on June 12, 2018. R. 500. As memorialized in GTEC's later, timely request for reconsideration dated June 17, 2018, R. 1027-46, Compl. ¶40 & Exh. C; Ans. ¶40, the company noted, among other things, that

> Mr. Willis . . . discussed with our tribal CPA the information needed to satisfactorily address [SBA's] reconsideration requirements. This information is provided at Exhibit B (Item 1) [R. 518-523[8]] From what we understood in our conference call, this information (along with the information provided previously), should satisfy the requirement that the Tribe establish its economic disadvantage.

Id. at p. 2, R. 1028. The Record does not reflect that SBA took any issue with GTEC's letter's statements in this regard.

28. The Program Regulations at 13 C.F.R. §124.205(b)[9] directed SBA to announce any decision to approve or deny the Application following reconsideration within 45 days, or by August 2, 2018. *Id.* SBA missed that deadline as well.

29. Instead, it was only on November 26, 2018, that SBA, this time acting through Acting Associate Administrator John W. Klein,[10] again denied the Application after claiming that SBA had undertaken another "thorough review" (the "Second Denial," R. 979-81, Compl.

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[8] These were revised and updated Tribal financial statements that did not vary materially in substance from what GTEC had submitted months previously.

[9] This regulation was extensively amended in 2020. *See* fn. 4, *supra.* The currently applicable version eliminated an applicant's former right to seek reconsideration. *Id.* Now, a frustrated applicant is confined to seeking administrative review, if available, before SBA's Office of Hearings and Appeals, or to re-apply after 90 days. *Id. See also* 13 C.F.R. §§124.206 & 124.207 (2022).

[10] The Record does not reflect why SBA did not have Ms. Gurley continue to consider the Application on reconsideration and, instead, why Mr. Klein was tasked with that duty.

Exh. D). The substantive grounds for the decision were the same ones asserted in the Initial Denial (failure to demonstrate tribal economic disadvantage and GTEC's prospect for success), but the factual reasons related to each consideration differed from what SBA had stated previously. *Id.* at p. 1, R. 979.

30. Mr. Klein readily acknowledged that GTEC on reconsideration had provided SBA with updated Tribal financial statements as the Initial Denial had required. *Id.* at pp. 1, 2, R. 979-80. He nonetheless again concluded that GTEC had not shown that the Tribe was *economically disadvantaged* because, according to him, the Application file did not contain *other* required information bearing on that issue. *Id.* More specifically, he claimed that GTEC had not provided all the information that the Program Regulations required at 13 C.F.R. §124.109(c)(6). *Id.* at p. 1, R. 979.[11]

31. But, in fact, GTEC had previously submitted all of that information. R. 313.[12] Just like the previously overlooked financial statements, the required information was contained in SBA's Application file.

32. Mr. Klein in the Second Denial once again departed from what SBA had stated

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[11] The information was primarily statistical and included, according to Mr. Klein -

> (i) The number of tribal members; (ii) The present tribal unemployment rate; (iii) The per capita income of tribal members, excluding judgment awards; (iv) The percentage of the local Indian population below the poverty level; (v) The tribe's access to capital; (vi) The tribal assets as disclosed in a current tribal financial statement . . .; (vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each.

Id.

[12] The required information is primarily reported in SBA's required Form 1010. R. 311-14.

previously when he again found that GTEC had not demonstrated its "potential for success" because, this time, the Company had supposedly not provided SBA with documents reflecting the Tribe's "firm written commitment to support the operation of [GTEC]," or that the Tribe "has the financial ability to do so." Second Denial at p. 2, R. 980. More specifically, Mr. Klein stated in this regard that -

> You submitted financial records for the tribe, but we are unable to determine if the tribe has the financial ability to support [GTEC]. The current financial statement for 2018 lists total net assets for the tribe at $52,835. *However, it is unclear how much of this is available to [GTEC] and in what form it is available. It is also unclear if the tribe has any additional resources to financially assist [GTEC].* Therefore, there is insufficient information to determine if [GTEC] has the potential for success *based on the letter of commitment from the tribe*.

Id. (emphasis added).

33. Even though several times during its review of the Application down to that point SBA had requested and then promptly received additional information from GTEC, R. 489-96, 617-19, Mr. Klein had not asked GTEC to clarify anything related to what had been submitted on these (new) points bearing on the "potential for success" issue. Instead, Mr. Klein noted that because the Second Denial was on reconsideration, the denial was final and not subject to any further GTEC request for reconsideration. *Id.* at p. 2, R. 980. Instead, GTEC was merely invited to resubmit another Program application, if the company wished to do so, but only after 1 year had passed. *Id.*

GTEC Files Suit, Causing SBA to Seek to Change Course Yet Again

34. The Second Denial constituted, at least at the time of its issuance, final agency action for purposes of the APA, thereby entitling GTEC to seek judicial review. *See* 5 U.S.C. §§704, 706; Doc. 9-2 at ¶8. GTEC timely commenced these proceedings on April 12, 2019 (Doc.

1). The company in its initial Complaint claimed, among other things, that the Second Denial, similar to the First, was arbitrary, capricious, and contrary to law and, therefore, due to be reviewed and overturned by this Court. *Id.* at ¶¶4-5, 48, 54.[13]

35. SBA appeared with the assistance of the Department of Justice which, after reviewing the Initial Complaint, did not seek to defend the propriety of either the First or the Second Denials. Instead, SBA acting through yet another of its administrators, namely Ms. Donna L. Peebles, first acknowledged to this Court that "[a]fter reviewing the Complaint and conducting internal discussions, [she had] concerns about the thoroughness and clarity of the initial and final agency decisions." *See* Declaration of Dr. Donna L. Peebles, dated August 2, 2019 (Doc. 9-2) at ¶8.[14] Hinting at what was later to come, Ms. Peebles next stated that SBA "*has [only] recently* come into credible information that GTEC's owner may not be the tribe recognized by the State of Georgia." *Id.* (emphasis added). However, Ms. Peebles did not state or explain, nor does the Record reflect, how or why any "new" information bearing on that issue had only recently come to the Agency's attention, particularly only after this litigation had commenced. Nor did SBA explain how it had lacked the ability to learn of any of it earlier.

36. Ms. Peebles nonetheless requested that SBA be allowed to effectively conduct a whole new examination of the Application. More particularly, she stated that she intended -

> *to rescind* the final agency decision and *to re-open* GTEC's 8(a) application for the purpose of thoroughly accounting for all

[13] Moreover, by republishing at the initial Complaint's ¶¶50-54 (Doc. 1 & R. 45-46) the pertinent portions of the Tribe's written commitment to support GTEC financially, and the pertinent portions of the submitted Tribal financial statements showing clearly what funds were available for that purpose, GTEC argued and, indeed demonstrated, that Mr. Klein had lacked a proper and reasonable basis, on the undisputed facts reflected in the Record, to conclude that he "could not determine" what assets were available to support the Tribe's financial commitment.

[14] The Record is again silent as to why SBA switched, yet again, its senior official reviewing the Application.

> information submitted by GTEC to the agency, requesting additional information concerning the Tribe's financial resources, tribal recognition status, tribal economic data, and any other information that the agency deems necessary to process GTEC's 8(a) application, provide GTEC an opportunity to submit its responses to these issues, *and to issue a new agency determination*.

Id. (emphasis added) Ms. Peebles offered no authority, including from the Act, the Program Regulations or otherwise, for what would be, effectively, an agency "do over", known in golf parlance as a "Mulligan."

37. SBA in this regard requested and obtained, over GTEC's objection, a stay of these proceedings so the Agency could conduct a further review of the Application. *See* Docs. 9, 17, 18 & Minute Order entered February 3, 2020.

SBA Conducts Yet More Proceedings Related to the Application

38. Ms. Peebles commenced the further review in her letter sent to GTEC on August 21, 2019. R. 1047-50, Compl. Exh. E. Signaling SBA's intent to deny the Application on entirely new grounds, she stated in pertinent part that -

> the Agency has recently received information indicating that the Tribe is not the same entity recognized by the Georgia General Assembly. *Specifically, SBA is in receipt of a study commissioned by the Georgia Council on American Indian Concerns* – and at the request of the Governor – to investigate the claims of the various parties claiming to be that Indian group recognized by the Georgia General Assembly as being the Georgia Tribe of Eastern Cherokee. As pertinent to GTEC's 8(a) BD application, *this study concluded that your organization is not the Georgia Tribe of Eastern Cherokee as recognized by the Georgia General Assembly.* In fact, this study found that the Tribe *is not functioning as an Indian tribe as contemplated by criteria defined by the State of Georgia and federal authorities*; rather, it serves as a non-profit Indian heritage organization engaged in recruitment of Indians in the State of Georgia who are of Cherokee heritage. Based on the foregoing, SBA [now] questions whether GTEC qualifies as a tribally-owned concern for 8(a) BD program purposes.

Id. at p. 2, R. 1048 (emphasis added). Ms. Peebles also requested yet *more* information from GTEC bearing on the issues of the Tribe's economic disadvantaged status, and GTEC's "potential for success." *Id.* at pp. 2–3, R. 1048-49.

39. The "study" in question was one that had been commissioned by the Georgia Council on American Indian Concerns (the "Council") in 2007, or more than a decade before (the "Council Study," R. 1555-94).[15] Generally summarizing the positions taken in the "study," the Council opined that only certain sub-groups of persons who could trace their ancestry back to one or more Georgian Cherokees were the actual members of the Tribe. The Council Study also took the position that Cherokee descendants associated with and managing GTEC were not "functioning" as an American Indian Tribe under unspecified state or federal criteria. *Id.*

40. GTEC responded with undersigned counsel's letter dated March 18, 2020. R. 1051-68; Compl. Exh. F. Among other things, it provided SBA with a copy of an opinion from the Office of the Georgia Attorney General that dismissed the Council Study as not being legally authoritative. R. 1086-89. Instead, that Office opined that the issue of which people groups or associations of individuals were an "American Indian Tribe" in general, and this Tribe in particular, was an issue or matter that was reserved exclusively to the Georgia Legislature to decide, not the Council. R. 1088.

41. GTEC's response letter also provided or noted substantial additional documentation, including Sneed's sworn statement demonstrating that he and other persons associated with GTEC were members of the Tribe, and that it both owned and controlled the

[15] When seeking and obtaining this Court's stay of further proceedings, SBA did not inform either the Court or GTEC that any newly discovered information that was the impetus of the stay request had been published years before.

company. R. 1069-80. The response also addressed Ms. Peebles' other inquiries by providing yet more factual support for SBA to find that the Tribe was economically disadvantaged, and that GTEC had the required prospect of achieving economic success.

42. SBA disagreed, but only in part. More specifically, Ms. Peebles in another letter dated April 24, 2020, R. 1650-56; Compl. Exh. G,, announced SBA's decision to deny the Application yet again, but this time for only one purported reason - namely, "SBA cannot determine whether [GTEC] is owned and controlled by an eligible Indian tribe." *Id.* at p. 1, R. 1650.[16]

43. She initially relied on the previously disclosed Council Study as the initial basis for the adverse finding. *Id.* But she then added in her letter yet another, completely new reason. More particularly, Ms. Peebles stated for the first time on this Record that in addition to the Council Study -

> SBA independently examined the Office of Federal Acknowledgment's (OFA)[[17]] findings in connection with the Tribe's petition for Federal acknowledgment as an Indian Tribe. These findings demonstrate a complicated history marked by competing leadership claims within the Tribe, as well as other groups purporting to be the Tribe.

Id. at p. 2, R. 1651. OFA's Proposed Findings are dated May 6, 2016 ("OFA Proposed Findings," R. 881-977).[18] Ms. Peebles' letter then quoted extensively from purported findings

[16] The Agency thereby at least implicitly conceded that GTEC had established or satisfied all other requirements or criteria for entry into the Program, despite what SBA had stated previously in either the Initial Denial or the Second Denial.

[17] This Office is contained within the Department of the Interior and, in particular, the Office of the Assistant Secretary - Indian Affairs and the Bureau of Indian Affairs. *See https://www.bia.gov/as-ia/ofa*.

[18] The Record is again silent on how, when, and why SBA obtained the Proposed Findings but, as they appear in the Record for the first time after GTEC responded to Ms. Peebles' initial inquiry, it certainly appears that SBA sought out the Findings because the

contained in this additional report that caused OFA, particularly after that federal agency noted numerous disputes that had existed over the years bearing on the leadership issue, to deny an application for *federal* recognition of the Tribe that was being pursued by other Tribal members.

44. GTEC again sought, in timely fashion, reconsideration in the company's letter and accompanying materials sent on June 8, 2020. R. 1657-73; Compl. ¶61; Ans. ¶61. GTEC argued, in pertinent part, that in seeking to deny the Application on completely new grounds, SBA was ignoring its own Program Regulations. GTEC also stated that the issue of whether the Company was owned by the Tribe was one that was left ultimately under the Act and the Program Regulations to Georgia state law, which confirmed that was indeed the case.

45. Ms. Peebles was unmoved. Instead, in her letter dated August 10, 2020, R. 1674-78; Compl. Exh. I, she, on SBA's behalf, declined to reconsider its denial decision. Instead, she stated, in pertinent part, that "SBA has again concluded that the Agency cannot determine whether GTEC *is owned and controlled* by an eligible Indian Tribe." *Id.* at p. 1, R. 1674 (emphasis added). SBA again relied on the Council Study and the OFA Proposed Findings as the sole factual bases for its denial of the Application on these stated grounds.

Proceedings Before SBA's Office of Hearings and Appeals (OHA) Ending in the Final Denial

46. GTEC sought timely review through OHA. Compl. ¶66; Ans. ¶66. The assigned Administrative Law Judge affirmed SBA's decision to deny the Application as stated in Ms. Peeble's letter dated August 10, 2020 (the "Final Denial," R. 237-47). Citing to the Council

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Agency apparently thought it necessary, having had the benefit of GTECs' responses to each of Ms. Peebles' inquiries, to seek out additional grounds and support for any decision to deny the Application. But in any event, because the Proposed Findings were issued two years prior to the date of GTEC's submission of its Application, the information was available to SBA at all times prior to the issuance of the Second Denial.

Study and OFA's Proposed Findings, the Administrative Law Judge first found, in pertinent part, that –

> it was not unreasonable for SBA to assign greater weight to findings of fact made by another federal agency [OFA] with subject matter expertise in tribal affairs. Additionally, it is not unreasonable for SBA to give due consideration to the findings of the only administrative body overseeing tribal affairs in the State of Georgia [namely the Council], even if they are to be construed as advisory in nature.

Id. at pp. 10-11, R. 246-47.

47. Next, he found that SBA had the authority to reopen and reconsider the Application over GTEC's objections, and to deny it on newly asserted bases and factual grounds that nowhere appeared in either the First Denial or the Second Denial, because –

> SBA's regulation provides that it has sole discretion to request clarification of information contained in the application *at any time in the application process.* 13 C.F.R. §124.204(b). As such, SBA properly re-opened Petitioner's application to reconsider previous grounds for denial, as well as new concerns related to Petitioner's status as an Indian tribe.

Id. at p. 11, R. 247 (emphasis added). The Final Denial rejected any other arguments that GTEC advanced before affirming SBA's decision to deny the Application.

Current Procedural Posture

48. The Final Denial constituted SBA's final agency action related to the Application and the Agency's final statement of the reasons for its denial. *See* 15 U.S.C. §637(a)(9)(D);[19] 13 C.F.R. §134.409(a).

49. GTEC accordingly requested, and this Court granted leave, to file the pending Amended Complaint where the company again contends that SBA's decision to deny the

[19] The statute was recently amended effective December 27, 2021.

application was both contrary to law, and arbitrary and capricious, all in contravention of the APA. Doc. 26-2 & Minute Order filed April 28, 2021; Doc. 26-2 at ¶¶76-93.

Summary of the Argument

The Final Denial upholding SBA's decision to deny the Application was contrary to applicable law, more particularly SBA's own Program Regulations and Georgia state law. It was also reached in a manner that was arbitrary and capricious. This is true for several reasons.

SBA, when promulgating the version of the Program Regulations in effect at times material to the Application, established a detailed administrative review process whereby applicants, being informed of all Program admission requirements, could then apply for admission to the Program. SBA in return promised to review their applications expeditiously over periods of time that the Program Regulations measured by weeks or months, not years as has happened in this case.

The Program Regulations had the force and effect of law. Hence, they were equally binding on SBA as they were on GTEC. Moreover, GTEC as the applicant was entitled to expect, as a matter of federal law, that SBA would follow its own rules when reviewing and ultimately acting upon the Application. Under settled law, SBA would violate the APA if the Agency acted contrary to its own Program Regulations in that regard.

That is what occurred here. SBA in the Program Regulations committed to GTEC that it would review its Application expeditiously once it was deemed complete and, importantly, then committed that it would state in any denial decision each substantive ground for any unfavorable decision while explaining the factual bases for each of those grounds. That occurred in this case with SBA's belated issuance of its First Denial.

The Program Regulations, as SBA elected to draft them, afforded the Agency the

opportunity to reopen and reconsider an initial denial decision (and to deny a Program application on newly asserted grounds) in only one instance – namely, at the *applicant's* request made following the Agency's *initial* denial decision.

In this case, GTEC requested such reconsideration and in denying the request, and the Application, yet again in the Second Denial, the Program Regulations required that SBA again state the bases for that denial decision. At that point, any "application process" that had been pending before SBA came to a full and final end. Nothing in the Program Regulations granted SBA the further authority, as it has sought to exercise here, to reopen the Application on the Agency's own initiative, and not at GTEC's request, to deny the Application a third time on substantive and factual grounds not stated previously.

Instead, GTEC was entitled to rely on what SBA had stated in the Second Denial and, more to the point, SBA was bound under its own Program Regulations by what the Agency had found – or not found – there. Thus, in issuing the Final Denial that again denied the Application on completely new grounds, SBA acted without authority and in a manner that violated its own Program Regulations. Thus, the Agency violated the APA for this initial reason.

But the Final Denial, when giving weight and credence to the Council Study and OFA's Proposed Findings, also ignored controlling Georgia state law bearing on (i) which persons constituted the Tribe, (ii) whether it owned GTEC, and (iii) hence, whether the company was a "tribally-owned concern" eligible for admission to the Program. Turning to each of those questions, Georgia by statute had already declared that the Tribe consisted of *all* persons, not just some groups of them, who could trace their ancestry back to a Georgia Cherokee. Thus, when the Council Study attempted to determine which *sub-group(s)* of such persons actually constituted the Tribe, it sought to consider and determine an issue that the Georgia Legislature

had already decided. Moreover, as a matter of controlling state law on business corporations, the one and only Tribe owned GTEC. Thus, the Final Denial was again contrary to law, and indeed failed to apprehend the applicable controlling law, when SBA stated in its Final Denial that it supposedly could not determine whether the Tribe owned GTEC.

Lastly, the Final Denial was arbitrary and capricious. The only grounds to deny the Application that SBA was authorized to reach are those set forth in the Second Denial. SBA has now either receded from those bases, or wisely has chosen not to try to defend them here. In any event, none of Mr. Klein's conclusions find proper support in the Record and, indeed, they are completely refuted by it. Thus, there are no pending bases for SBA to deny the Application. Being thus completely unsupported, it necessarily follows that SBA's continuing decision to refuse to admit GTEC to the Program is arbitrary and capricious.

This Court should therefore find that the Final Denial was issued contrary to law, and was arbitrary and capricious, while directing Defendant to admit GTEC to the Program without further delay.

Argument

I. The Governing Legal Standards, In General.

The Final Denial, being SBA's last word on the Application, constitutes final agency action for which judicial review is now available under the APA. *See* 5 U.S.C. §704; *U.S. Army Corps of Eng'rs v. Hawkes Co, Inc..*, 578 U.S. 590, 597 (2016) (agency action is final when the agency's decision-making process is complete and the action determines legal "rights or obligations" or otherwise gives rise to "legal consequences" (citing *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). *See also PGS Geophysical AS v. Iancu,* 891 F.3d 1354, 1361 (Fed. Cir. 2018).

The APA expressly empowers this Court to review the Final Denial, *see* 5 U.S.C. §704, and provide appropriate relief. *See* 5 U.S.C. §706. More particularly, the Court may "(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." *Id. See also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 41 (1983).

Turning to the last stated basis to overturn an agency's final decision under the APA, namely one reached in a manner "not in accordance with law," the Program Regulations have the force of law. *See, e.g., Morton v. Ruiz,* 415 U.S. 199, 235 (1974); *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 265 (1954), *superseded by statute on other grounds as stated in Department of Homeland Sec. v. Thuraissigiam*, ___ U.S. ___, 140 S.Ct. 1959 (2020). Therefore, just as GTEC was obligated to follow the Program Regulations while seeking admission to the Program, so too was SBA when it considered GTEC's Application. *See Leslie v. Attorney Gen. of U.S.,* 611 F.3d 171, 180 (3d Cir. 2010) ("when an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation"); *U.S. v. Griglio*, 467 F.2d 572, 576 (1st Cir. 1972) ("A person dealing with an agency is entitled to be treated according to the previously established and published ground rules"). Thus, if the agency fails to comply with its own regulations before reaching a decision adverse to a person or entity coming before the agency, the APA has necessarily been violated, and judicial relief from the adverse agency decision becomes available. *See, e.g., Bradley v. Weinberger,* 483 F.2d 410, 414 n.2 (1st Cir. 1973) ("If an agency action violates a regulation, it is 'not in accordance with law' [under the APA] as well

as violative of due process"). As GTEC argues in the next two sections, the Final Denial was issued in a manner that was contrary to applicable law, in this case both federal and state.

As an alternative basis for reversal of the Final Denial under the APA, namely that the decision to deny the Application was reached in a manner that was "arbitrary" or "capricious," this Court will find that occurred if SBA failed to "examine the relevant data and articulate a satisfactory explanation for its action." *F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 513 (2009) (citing *Motor Vehicle Mfrs. Assn. of U.S, Inc.*, 463 U.S. at 43). The Court, however, "is not to substitute its judgment for that of the agency," *id.,* and should instead "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Fox Television Stations,* 556 U.S. at 514 (citing *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.,* 419 U.S. 281, 286 (1974)). As GTEC argues in its final Point below, SBA denied the Application in a manner that was arbitrary and capricious, even under these admittedly "narrow" standards of review.

II. SBA Lacked Authority Under the Program Regulations to Re-Open Its Consideration of the Application After Already Denying It Following GTEC's First Request for Reconsideration.

In her Declaration dated August 2, 2019 (Doc. 9-2 & R. 56-57), Ms. Peebles on behalf of SBA stated her intention, *sua sponte,* to "rescind," and "re-open" the Agency's prior, otherwise final decision to deny the Application as reflected in the Second Denial, and "issue a new agency determination." But she was unable to articulate any substantive or procedural bases in the Program Regulations permitting such further review. The reason for this omission is simple. None exists. In fact, any reopening of the Application following SBA's issuance of the Second Denial was directly contrary to what SBA had stated in its Program Regulations.

Reviewing the Program Regulations in effect at the time of the First and Second Denials, the regulations stated as an initial matter that SBA after reviewing the Application was required to "approve or deny [it] in writing. A decision to deny admission *will state the specific reasons for denial,* and will inform the applicant of any appeal rights." 13 C.F.R. §124.204(f) (emphasis added). Thus, quite clearly, SBA was required to settle upon any grounds for denying a Program application during a review period that was, under the Program Regulations, supposed to be measured in weeks or months, not in years as occurred in this case. SBA was then required to clearly state to the applicant any grounds for a denial decision so that the applicant could understand why its application had been denied, and to afford the applicant an opportunity to determine what available next steps the applicant might choose to take.

Three such routes were available to any frustrated applicant. It could, for example, seek SBA's reconsideration within 45 days of the date of the Agency's denial decision. *See* 13 C.F.R. §124.205(a). Otherwise, similar to a litigant whose civil complaint had been dismissed by a district court, the applicant in response could elect to "stand" on its previously submitted application by electing to seek immediate judicial review under the APA. The applicant proceeding along that second route, like GTEC did in this case, would then argue that the Agency's then-final decision was reached in a manner that arbitrary, capricious, or contrary to applicable law. Or, as a third option, the applicant could seek to re-apply to the Program after waiting a year to do so.[20] *See* 13 C.F.R. §124.207.

[20] A fourth avenue for relief was available to only some denied applicants. *See* 13 C.F.R. §134.102(j)(1). That regulation states in pertinent part that OHA review jurisdiction existed to review Program application denials when SBA's determination was "based solely on a negative finding as to social disadvantage, economic disadvantage, [or] ownership or control . . . ." In this case, because the Second Denial was founded on SBA's additional conclusion that GTEC lacked the required "prospect for success," further review before OHA was unavailable to GTEC at that

Importantly, looking at the first route available to a disappointed applicant, the Program Regulations then quite clearly stated that only the applicant was authorized to request reconsideration of an initial denial decision – SBA was not. *See* 13 C.F.R. §124.205(a) ("*An applicant* may request [that SBA] reconsider his or her initial decline decision by filing a request for reconsideration with SBA") (emphasis added). SBA did not give itself the right, *sua sponte,* to reopen and reconsider its own denial decisions. Conceivably, the Agency could have granted itself that right, but chose not to do so. Thus, if the applicant chose not to seek reconsideration in a timely manner, the application process would necessarily have come to a final and complete end.

However, *if* SBA had received an *applicant's* timely request for reconsideration, processing of the application under the Program Regulations would then continue. SBA, *in that one instance post-initial denial,* was permitted to seek from the applicant "additional information and documentation pertinent to overcoming the reason(s) for the initial decline, whether or not available at the time of initial application, including information and documentation regarding changed circumstances." 13 C.F.R. §124.205(a). If the Agency's decision following reconsideration was to deny the application a second time, SBA was again required, within 45 days, to "explain *why the applicant is not eligible* for admission to the 8(a) BD program *and give specific reasons for the decline*." 13 CFR §124.205(b) (emphasis added).

Importantly, the Program Regulations also state that SBA was authorized to deny a Program application on newly asserted grounds *again in only one instance*. Namely, following the applicant's request for reconsideration. *Id.* (SBA "may either approve the application, deny it on the same grounds as the original decision, *or deny it on other grounds*") (emphasis added). If

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juncture.

SBA settled upon such new grounds after receiving such a request, the applicant was again entitled to request reconsideration. *See* 13 CFR §124.205(c).

Thus, stepping back to examine this regulatory scheme as SBA had elected to promulgate it, the Program Regulations contemplated and set forth an administrative review process whereby SBA was required to consider and expeditiously act upon an application from an individual or business entity claiming to be eligible to participate in the Program. That "application process" could have concluded with SBA's approval of the application on initial review. Or any "application process" could have concluded with an initial agency decision to deny the application, following which the applicant did not timely seek reconsideration. Or, if reconsideration were sought, the application process was scheduled to again conclude no later than 45 days later either with SBA's decision to approve the application, deny it on the previously asserted grounds, or on new grounds for which further reconsideration could be sought.

In this case, SBA's consideration of the Application fully and finally concluded under the Program Regulations upon the issuance of the Second Denial that again denied the Application for the same substantive reasons the Agency had asserted in the First Denial. At that point, any administrative "process" set forth in the Program Regulations associated with the Application had ended. GTEC's only recourse at that point, at least as far as the Program Regulations were concerned, was to re-apply for Program admission after one year had passed, using that time to fortify or augment the previously submitted Application to address SBA's stated denial reasons.

GTEC raised each of these points and arguments, without success, before the Administrative Law Judge before he reached the Final Denial. R. 17-21. More particularly, GTEC specifically argued that SBA lacked required authority to deny the Application on

grounds not stated in the Second Denial. In the Final Denial, however, the judge unfortunately disagreed. Instead, the Final Denial found, in pertinent part, on this point that –

> SBA's regulation provides that it has sole discretion to request clarification of information contained in the application *at any time during the application process.* 13 C.F.R. §124.204(b). As such, SBA properly re-opened Petitioner's application to reconsider previous grounds for decline, as well as new concerns related to Petitioner's status as an Indian tribe.

R. 245 (emphasis added). The Final Denial articulated no other bases for the Agency's alleged authority to reopen the Application.[21] The cited regulation, however, only stated that –

> SBA, in its sole discretion, may request clarification of information contained in the application *at any time in the application process.* SBA will take into account any clarifications made by an applicant in response to a request for such by SBA.

13 CFR § 124.204(b) (emphasis added).

Thus, the Administrative Law Judge's legal analysis and ultimate conclusion unfortunately begged the very question that he felt was before him. Namely, under the Program Regulations, was there any "application process" pending before SBA following the issuance of the Second Denial such that the Agency could, under this regulation, properly request clarification of any information that GTEC had submitted previously? But as has already been noted above, the Program Regulations stated quite clearly that after SBA in the Second Denial had denied the Application on grounds that did not allow for further administrative review before

[21] The Final Denial did not find, and hence SBA did not take the position below, that it also or in the alternative enjoyed some *inherent* authority to reopen and reconsider the otherwise fully denied Application. Instead, just as GTEC argues here, the Agency felt constrained by its own comprehensive Program Regulations to attempt to find within them *some* provision that justified the Agency's actions.

OHA, the Application was fully and finally denied at least as far as SBA was concerned.[22] Thus, at that point, there was no "application process" pending before the Agency. As a result, 13 C.F.R. §124.204(b) provided no proper, substantive basis for the Administrative Law Judge to reach any conclusion that SBA had the authority, following the Second Denial, to reopen the Application and demand and receive yet more information related to it before reaching a decision to deny it solely on completely new grounds.

The Administrative Law Judge in the Final Denial similarly erred as a matter of law when he concluded, again after citing to 13 C.F.R. §124.204(b), that SBA also had the authority, after reopening the Application for further consideration, to deny it on grounds that differed from what Agency had stated previously in the Second Denial. R. 247. As previously noted, under 13 C.F.R. §124.205(b), SBA is permitted to affirm an earlier denial decision based upon new grounds in only one instance – following a request for reconsideration *from an applicant*. No authority is conferred in the Program Regulations upon SBA, including at 13 C.F.R. §124.204(b), to deny an application on new grounds when any further review was commenced by the Agency acting on its own initiative, and not following an applicant's request for reconsideration.

With SBA being left bereft under its own law, namely the Program Regulations, of any authority to deny the Application that were not fully reflected in the Second Denial, the propriety of the Agency's decision to deny the application must by necessity now rise or fall by what SBA had previously stated there. But SBA has wisely withdrawn or receded from the positions that

[22] The Administrative Law Judge in the Final Denial acknowledged that this was indeed the case when, referring to the Second Denial, he stated that "[o]n November 26, 2018, SBA issued a *final agency decision* declining [GTEC's] application on identical grounds but for different reasons." R. 237 (emphasis added).

Mr. Klein stated there, because they were patently without support in the Record. Thus, at this very late date, or nearly four years after GTEC first approached SBA for admission to the Program, SBA now lacks any stated basis to continue to deny the Application. Nothing can be more "arbitrary or capricious" than this anomalous state of affairs.

III. Under Controlling Georgia State Law, The Tribe Owns GTEC and, Hence, SBA's Decision to Deny the Application Was Again Contrary to Law.

The Final Denial devotes the bulk of its discussion to a defense of SBA's decision to deny the Application because the Agency was of the view that it could not determine or confirm that GTEC was in fact owned by the Tribe, or at least by the one that the Georgia Legislature had recognized. R. 244-46. Citing to the Council Study and OFA's Proposed Findings, the Administrative Law Judge concluded, in pertinent part, that SBA had properly weighed the evidence that was before it on that question. *See* R. 246 ("It is clear that SBA carefully weighed the Council's and OFA's findings against the evidence submitted by [GTEC] in support of [the company's] status as an Indian tribe as defined by the regulations").[23]

When considering whether the Administrative Law Judge again erred before reaching these findings and conclusions (he did), it bears emphasis in the first instance that who constitutes the Georgia Tribe of Eastern Cherokee, and hence who owns GTEC, is a question for which Georgia state law, and not federal law, provides the applicable, substantive rule of decision. This is a necessary product of both the Act and the Program Regulations which both

[23] The Administrative Law Judge in this respect seemingly failed to apprehend that GTEC was a tribally-owned concern under the Program Regulations, and not itself the Tribe. SBA's counsel appearing before OHA was similarly confused. *See also* SBA Answer at p. 5, n.1; R. 146, where counsel conceded in pertinent part that "[i]n this case a determination that [GTEC] qualifies as a state-recognized Indian Tribe per SBA regulations would resolve all eligibility concerns…"

recognize that an eligible American Indian Tribe, and the business entities it owns, may be determined under applicable state law. *See* 15 U.S.C. §638(a)(13); 13 C.F.R. §124.124(3).

With that important point in mind, the ultimate question the Council took upon itself to answer in its "study" was *which particular groups or sub-groups of people had the State of Georgia intended in 1993 to recognize as the Tribe. See* Council Study at p.5, §2 (R. 796), where it was stated that the Council was attempting to discern which of several groups of individuals, each of whom traced their ancestry back to Cherokees who had formerly resided in Georgia, were the "legitimate" Tribe that the Georgia Legislature had intended to recognize at O.C.G.A. §44-12-300(a)(1).[24] The Council apparently spent a great deal of time, and spilled much ink in its "study," wrestling at length with that question.

But before launching into that exercise, the Council should have first paused to consider and reflect upon what the Georgia Legislature *had already stated* on that very point and question at O.C.G.A. §44-12-260(2). There the Legislature defined an "American Indian tribe" to mean, for purposes of its law, "any nation, tribe, band, group, or community that was indigenous to Georgia . . . *or whose members are descendants of American Indians indigenous to Georgia*." *Id.* (emphasis added). The Georgia Legislature then recognized three such tribes, and the Georgia Tribe of Eastern Cherokee was one of them. *See* O.C.G.A. §21-12-300(a)(1)–(3). Thus, contrary to what the Council Study had assumed, the Tribe did not consist of only *some* subset of persons

[24] More particularly in this regard, the Council Study stated in pertinent part that "[t]hree different Indian groups located within the State of Georgia claim to be the authentic Georgia Tribe of Eastern Cherokee (GTEC) or to somehow share in that affiliation or authority. Since there can be only one GTEC, this memorandum discusses the controversy in depth in several sections…." R. 796.

who shared one or more ancestors who were Georgia Cherokee Indian. No, under controlling Georgia state law, the Tribe consisted of *all such persons.*[25]

Unlike the Council, GTEC acknowledges that this is indeed the case. Indeed, it acknowledges that as a tribally-owned concern, it is owned by all such members of the one and only Tribe (R. 1663). The company completely rejects any notion or argument contained within the Council Study subscribing to the illegal (and frankly deeply offensive) view that the Tribe, and hence GTEC's owners, only consists of some narrow, insular set of individuals who would seek to exclude from the Tribe other people who shared their Georgia Cherokee ancestry.[26]

Thus, by finding that the Council study was somehow credible (even though according to the Georgia Attorney General the document lacked any legal authority) and hence a proper foundation on which to base the denial of the Application, SBA ignored controlling state law that held directly to the contrary. SBA, in its Answer filed in the proceedings conducted before OHA, recognized that if Georgia state law were contrary to any conclusions reached in the Council Study, then the Application was due to be approved. *See* R. 146 n.2. As that is indeed the case, the Final Denial is without proper support and, indeed, is contrary to law.

The Final Denial's alternative reliance on OFA's Proposed Findings was equally unavailing. The issue before that federal agency was whether various applicants claiming to

[25] Thus, much like quarreling members of an extended family who may have wished that they were not bound by common genetic or ancestral ties, or may have even sought to disclaim the existence of any such familial ties or relationships, they were still bound by any common ancestry - whether they liked it or not. In this case, while the various sub-groups reported in the Council Study may have thought that only they were the "true" Tribe, or rejected others' claims to that status, in point of fact and under Georgia law, they were all bound together as Tribal members, again like it or not, provided each of them could trace their ancestry back to a Georgia Cherokee Indian and, likely, a deported one.

[26] It is noteworthy that the Council Study readily acknowledged that each of the supposedly competing sub-groups were all composed of "Indians." R. 796.

represent the Tribe had demonstrated that it was eligible for recognition under applicable, and quite different, *federal* law and standards. In finding that the applicants were unsuccessful, the Proposed Findings noted that governance of the Tribe, and who spoke for it at various times and in various capacities, had been the subject of much dispute. The Final Denial quotes the Proposed Findings at some length in this regard. R. 245-46.

But OFA's Proposed Findings were necessarily not concerned with what controlling Georgia state law said on any of those issues. Instead, a different, federal regulatory scheme was in view. Thus, the Proposed Findings say nothing at all on the questions germane here, namely under Georgia law, who is the Tribe and does it own GTEC?

Moreover, at the very most, OFA's Proposed Findings stand for the proposition that serious Tribal leadership disputes had arisen in the past such that it may not be clear at any given time which persons were authorized to act on the Tribe's behalf. But, looking at the Program Regulations and what GTEC had to show for admission to the Program, OFA's Proposed Finding's concerns in this regard should have at most preliminarily caused SBA to be concerned not whether the Tribe *owned* GTEC, but whether the Tribe would really *control* the company if admitted to the Program.

But any such concerns, if SBA had in fact harbored them, were not applicable to the Application. Instead, as has been noted previously, requisite Tribal control was present under the Program Regulations if GTEC demonstrated that it was managed by Tribal members. Sneed, who is indisputably a member of the Tribe on this Record, is managing GTEC and, hence, the company is controlled by the Tribe. SBA has never held to the contrary. R. 145 n. 2. Putting the same matter another way, the mere fact that the OFA had found (the Council did too) that the Tribe in the past had been riven by leadership disputes was not a proper basis to deny the

Application. Simply put, OFA's Proposed Findings were irrelevant to the issues that were actually before SBA under its Program Regulations. Because requisite Tribal control was demonstrated on this Record, SBA was required to approve the Application and, more to the point here, its refusal to do so was contrary to applicable law.

On the related question of whether the Tribe, as properly defined and understood under Georgia state law, actually owned GTEC, Georgia's law on business corporations again provides the requisite answers. O.C.G.A. §14-2-625(1) states, for example, that ownership of a corporation may be evidenced by certificated stock. GTEC's only issued stock certificate evidences its Tribal ownership and, on this Record, nothing in applicable Georgia state law stands for any contrary proposition. Again, it bears emphasis that this is a question relegated to applicable state law, not federal law. *See CTS Corp. v. Dynamics Corp. of Am.,* 481 U.S. 69, 91 (1987) ("It . . .is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares").[27]

Georgia law also provides that any GTEC officers or directors owe fiduciary duties to the company's owner, namely the Tribe. Thus, in agreeing as a Tribal member to manage and oversee GTEC, Sneed has assumed a duty to proceed with that management only in good faith and without regard to only his personal interests. *See, e.g., Paul v. Destito,* 250 Ga. App. 631, 635(1), 550 S.E.2d 739 (2001).

[27] SBA at least implicitly acknowledges that this is the case because its form for applying to the Program asks for applicants that are incorporated businesses to produce copies of any issued stock certificates, presumably to allow the agency to confirm thereby who are the applicant's actual owners. *See* R. 673 ("Documents Required").

In sum, the Record before SBA showed that the Tribe indeed owns GTEC as a matter of controlling state law. Moreover, the company's managers would face significant consequences under Georgia law if they failed to manage and oversee the company's financial affairs, following admission to the Program, for the exclusive benefit of the Tribe.

IV. For Many of the Same Reasons, the Final Denial Was Arbitrary and Capricious.

The Final Denial will also not survive judicial review under the APA if the Court were to conclude, in the alternative, that the decisions SBA reached there were arbitrary or capricious or, more particularly, that the Agency failed to consider the *relevant* facts before arriving at a reasoned decision based upon them. *See Fox Television Stations, Inc.,* 556 U.S. at 513. In this case, the Final Denial rested on SBA's giving decisive weight to both the Council Study and OFA's Proposed Findings. But, as has already been seen, those documents were not relevant to the issues and concerns bearing on the Application that were actually pending before the Agency. SBA's reliance upon those materials was necessarily improper, and hence arbitrary and capricious, requiring reversal of the Final Denial on this alternative ground.

Conclusion

For the foregoing reasons, the Court should find that contrary to the APA, the Final Denial was reached in a manner that was contrary to applicable law, and also arbitrary and capricious. This Court should therefore find that SBA lacked a proper basis to deny the Application. As a result, nearly five long years after GTEC set upon this odyssey with the submission of its Application, the Court should direct SBA to admit the company into the Program without further delay. The Court should also provide GTEC with such additional and alternative relief that the Court deems appropriate.

Dated: February 15, 2022.

s/ J. Stephen Simms
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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2022 I caused the foregoing, its related motion and draft order, to be filed on the Court's CM/ECF system for service on all record counsel.

/s/ J. Stephen Simms