UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RUDY ST. GERMAIN, MICHELLE ROBERTS, enrolled Nooksack Tribal members, Plaintiffs, v. UNITED STATES DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; SALLY JEWELL, Secretary of the Interior; KEVIN K. WASHBURN, Assistant Secretary of Indian Affairs; SCOTT AKIN, Acting Northwest Regional Director; JUDITH R. JOSEPH, Superintendent for the Puget Sound Agency, Defendants.	NO. C-13-945-RAJ RESPONSE RE: MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

"[T]he Reorganization Act, as amended, ***requires*** the Secretary to determine if a constitutional amendment is 'contrary to applicable laws' both before the election and after the election." Dkt. # 25, at 7 (citing 25 U.S.C. § 476(c)(2)(B) & § 476(d)(1)) (emphasis added). These Secretarial reviews are mandatory. *See e.g.* 25 U.S.C. § 476 ("[T]he Secretary ***shall*** . . . review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.") (emphasis added).

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

The Administrative Procedures Act ("APA") ***requires*** that a federal agency's "action 'must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements.'" *Yetiv v. U.S. Dep't of Hous. & Urban Dev.*, 503 F.3d 1087, 1089 (9th Cir. 2007) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977) (quoting 5 U.S.C. § 706(2)(A))). A district court may also "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

"[P]rocedural requirements or duties that [an] agency is compelled to perform may be dictated by internal policy guidelines. . . . [Thus,] the failure to abide by internal guidelines can give rise to an action under the A[P]A." *Confederated Tribes and Bands of Yakama Nation v. Holder*, No. 11-3028, at 7-8 (E.D. Wash. Sept. 12, 2011), ECF No. 159 (citing *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 399 (D.S.D. 1995); *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)). Further, "[t]he internal policies that can bind an agency and give rise to a cause of action under the APA are not limited to only those rules promulgated pursuant to notice and comment rule making." *Confederated Tribes and Bands of Yakama Nation*, 2011 WL 5835137, at *3 (citing *Alcaraz v. Immigration and Naturalization Serv.*, 384 F.3d 1150, 1162 (9th Cir. 2004)).

Here, Plaintiffs have alleged that Defendants have not conducted the legal review required by 25 U.S.C. § 476(c)(2)(B) and § 476(d)(1). Dkt. # 3, at pp. 14, 28-29. Plaintiffs have also alleged that Defendants violated numerous written policies, guidelines, and directives, by failing to at all conduct the legal review ***required*** by 25 U.S.C. § 476(c)(2)(B) and § 476(d)(1), and have therefore violated the APA. *Id*. at pp. 30-33. Plaintiffs have further alleged that Defendants' have engaged in discriminatory and unconstitutional election practices and have

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

violated their trust responsibility to Plaintiffs, both made actionable pursuant to the APA. *Id.* at p. 29.

Defendants' motion, Dkt. # 37, must be denied. Plaintiffs have standing, statutorily conferred by 25 U.S.C. § 476(d)(2) and 5 U.S.C. § 706(1). *See e.g. Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999); *Sekayumptewa v. Salazar*, No. CV 11-8005, 2011 WL 231460 (D. Ariz. Jan. 24, 2011). To the extent that there is any question that Plaintiffs have stated a cause of action, discovery is required pursuant to Fed. R. Civ. Proc. 56(d) and federal common law. *See e.g. Yakama Nation*, 2011 WL 5835137.

II. STATEMENT OF FACTS

Plaintiffs Rudy St. Germain and Michelle Roberts are members of the Nooksack Indian Tribe and spokespersons for the "Nooksack 306,"[1] a group of 306 enrolled Nooksack Indians who have been targeted for disenrollment by a faction of the Nooksack Tribal Council, the governing body of the Nooksack Indian Tribe. Throughout 2013 and until January 20, 2014, Plaintiffs St. Germain and Roberts also served on the Nooksack Tribal Council.[2]

On Friday, March 1, 2013, Nooksack Tribal Council passed Resolution No. 13-38, titled "Request for Secretarial Election on Amendment to Tribal Constitution." Dkt. # 17, at p. 8. Resolution No. 13-38 proposed "an amendment to the Tribal Constitution in Article II – Membership, to remove § 1(h), which states: 'Any person who possesses at least one-fourth (1/4) degree Indian blood and who can prove Nooksack ancestry to any degree.'" *Id.* at p. 1. That same day, a signed and codified version of Resolution No. 13-38 was driven and hand delivered to BIA Puget Sound Agency Superintendent Judith Joseph. Dkt. # 5-1, 5-2.

[1] *See* Sanford Levinson, *"Who Counts?" "Sez Who?"*, 58 St. Louis U. L.J. 937, 945, 981 (2014) (discussing the plight of the "Nooksack 306" generally).
[2] Declaration of Ryan D. Dreveskracht ("Dreveskracht Decl."), Exhibit A.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Within one business day, on Monday, March 4, 2014, Superintendent Joseph wrote to the BIA's Northwest Regional Director "requesting authorization to conduct the requested secretarial election on the proposed amendment to the constitution." Dkt. # 5-3. Superintendent Joseph immediately wrote Chairman Kelly to advise him that the BIA was "requesting secretarial election on the proposed amendment to your constitution." *Id.*

On March 20, 2013, Defendant Acting Northwest Regional Director Scott Akin authorized Defendant Superintendent Joseph "to call and conduct the secretarial election." Galanda Decl., Dkt. # 5-6. Defendant Akin did so without having conducted the legal review required by federal law. Dkt. # 25, at 7, *supra*; *see also* Dkt. # 3, at p. 14.

On April 29, 2013 — 40 days after the Acting Northwest Regional Director's authorization was given — Superintendent Joseph issued a Notice of Secretarial Election and voter registration packet to the Nooksack electorate. Dkt. # 16, at p. 7-14. The Notice stated that Defendant BIA Regional Director had "approved and authorized a Secretarial Election" and that Defendant Superintendent Joseph had been appointed as "Chairman" of the Election Board "to conduct the Secretarial Election pursuant to regulations found in 25 CFR Part 81." *Id.* at p. 8. The "Rules of Secretarial Election" enclosed with the Notice explained to Nooksack voters: "This election will be conducted by mail-in ballot. NO POLL VOTING WILL BE ALLOWED." *Id.* at p. 9. Superintendent Joseph set the date of the Secretarial Election for June 21, 2013, and stated that all voter registration forms must be received by May 10, 2013 — only ten working days later. *Id.* Superintendent Joseph set June 4, 2013, as the deadline for challenging omissions from the official eligible voter list — even though 25 C.F.R. § 81.13 allowed ten days, until June 11, 2013, for doing so. *Id.*

In all, Superintendent Joseph set a 90-day process for the federal election, including a mere 10 days for voters to register, many of which reside in Canada. *Id.* Dkt. # 16, at p. 7-1.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Indeed, several of the Nooksack 306 never received a Voter Registration Packet and were therefore unable to register to vote by the May 10, 2013 deadline. Dkt. # 7-9. These Nooksacks were not allowed to register, despite that 25 C.F.R. § 81.19 mandates that "requests for absentee ballots received less than ten days before an election will be promptly honored." Other Nooksack 306 received the Secretarial Election voter registration packet, but ten working days between April 29 and May 10, 2013, proved to be an insufficient amount of time for them to get registered via received and returned mail. Dkt. # 10, 11. This category of Nooksack voters were not listed on the "Final Official List of Registered Voters" promulgated by Secretary Joseph. Dkt. # 5-6.

Several of the Nooksack 306 who registered before May 10, 2013, but were not listed on the Voter Registration List, filed "written challenges" to their omission with Superintendent/Election Board Chairman Joseph, per 25 C.F.R. § 81.13. Dkt. # 12, 13, 15. Superintendent Joseph denied those challenges, however. Dkt # 5-9. No opportunity was given for the challenger to provide proof that they "filled out the voter registration form and mailed it to the BIA by May 10, 2013." *Id.* Defendant Joseph denied other challenges because the registration form was received after the deadline. Dkt. # 5-8. Again, this was in violation of 25 C.F.R. § 81.19, which requires that "requests for absentee ballots received less than ten days before an election will be promptly honored."

On June 17, 2013, Plaintiffs filed an Amended Complaint in this action, asserting that (1) "Neither Defendant Akin nor any other Defendants conducted a federal legal review, . . . in violation of, at least, 25 U.S.C. § 476(c)(2)(B) and 5 U.S.C. § 706," Dkt. # 3, at p. 14; (2) the manner that Secretary Joseph conducted the Secretarial election violated Plaintiffs' constitutionally protected voting rights and rights to equal protection of the laws, *id.* at p. 29; and

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

(3) the manner that Secretary Joseph conducted the Secretarial election violated the trust responsibility owed to the Plaintiffs, *id.* at pp. 33-34.

III. ARGUMENT

Defendants are seeking to dismiss Plaintiffs' claims for Defendants' violations of (1) of the Indian Reorganization Act ("IRA"); (2) the U.S. Constitution; and (3) the trust duty owed to enrolled Indians. Dkt # 37, p. 3. Defendants do not seek to dismiss or otherwise obtain judgment in regard to Plaintiffs' claims for violation of the APA or the Freedom of Information Act. *Id.*

Defendants have moved to dismiss these three claims pursuant to Fed. R. Civ. Proc. 12(h)(3). Dkt. # 37, p.1. This Rule provides that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. Proc. 12(h)(3). Courts apply "a single standard to a motion to dismiss pursuant to Rules 12(b)(1) and 12(h)(3)." *Johnson v. California Welding Supply, Inc.*, No. 11-1669, 2011 WL 5118599, at *2 (E.D. Cal. Oct. 27, 2011) (citation omitted). Under this Rule, a complaint should only be dismissed if it is determined that the court lacks subject matter jurisdiction to adjudicate the claims. Fed. R. Civ. Proc. 12(b)(1). When ruling on a motion to dismiss for lack of subject matter jurisdiction, the court must take the allegations in the complaint as true. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

Defendants have also moved to dismiss the three claims pursuant to Fed. R. Civ. Proc. 12(c). Dkt. # 37, p. 1. A motion for judgment on the pleadings under Rule 12(c) attacks the legal sufficiency of the claims alleged in the complaint. When conducting this analysis, courts must construe "all material allegations of the non-moving party as contained in the pleadings as true, and [construe] the pleadings in the light most favorable to the [non-moving] party." *Doyle v. Raley's Inc.*, 158 F.3d 1012, 1014 (9th Cir. 1998). Judgment on the pleadings is only proper

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

"when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989).

Plaintiffs also seek summary judgment pursuant to Fed. R. Civ. Proc. 56.[3] Dkt. # 37, at p.1. Summary judgment under Rule 56 is proper only where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(a). When analyzing a motion for summary judgment, a court must decide whether there exist "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U .S. 242, 250 (1986). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial, which it can meet by presenting evidence establishing the absence of a genuine issue or by "pointing out to the district court . . . that there is an absence of evidence" supporting a fact for which the non-moving party bears the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has carried its burden, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue of fact. *Id.* at 324. To defeat summary judgment, the non-moving party must put forth "affirmative evidence" that shows "that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256-57. In reviewing the record, the Court must believe the non-moving party's evidence, and must draw all justifiable inferences in its favor. *Id.* at 255. "A Court must be very cautious in granting a summary judgment, in that the relief is drastic . . . ." *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 24 (D. Or. 1966).

//

[3] Plaintiffs assert only that they "seek partial summary judgment" on the three claims. Dkt. # 37, at p. 4. But it is not clear which "part" of these claims they are seeking summary judgment on.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

A. Plaintiffs Have Standing.[4]

In the Ninth Circuit, the elements of standing required to defeat a motion to dismiss are as follows:

> [A] plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. There is also a prudential component of the standing inquiry when suit is brought under [a federal statute], requiring Appellants to show that they fall within the "zone of interests" to be protected or regulated by the underlying statute in question.

Physicians Comm. for Responsible Med. v. U.S. E.P.A., 292 F. App'x 543, 544 (9th Cir. 2008).

1. Plaintiffs Have Suffered An Injury In Fact.

Defendants argue that Plaintiffs have not suffered an injury in fact because they are alleging only that Defendants violated 25 U.S.C. § 476 "by failing to notify the Tribe before the election that its proposed constitutional amendment was (in plaintiffs' view) contrary to 25 U.S.C. § 1302." Dkt. # 37, at 10. Defendants are mistaken; their description of Plaintiffs' claim is once removed. While indeed Plaintiffs do allege that the consequence of Defendants' failure to comply with 25 U.S.C. § 476 was a constitutional amendment contrary to 25 U.S.C. § 1302, their failure to comply with 25 U.S.C. § 476's requirement that they conduct a review is the heart of Plaintiff's grievance. At this point, Defendants have offered zero evidence that they conducted any review at all.

In *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999), the Seventh Circuit Court of Appeals expressly held that four enrolled tribal members had standing to sue, in a factually indistinguishable circumstance. In *Thomas*, four tribal-member plaintiffs who would have been

[4] Although it is not indicated, Defendants are presumably moving to dismiss for lack of standing only under Fed. R. Civ. Proc. 12(h)(3). *See In re CT-1 Holdings, Inc.*, No. 10-19927, 2014 WL 5475216, at *6 (C.D. Cal. Oct. 27, 2014) (if a party "has no constitutional standing, its suit must be dismissed [under] Fed. R. Civ. P. 12(h)(3)").

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

affected by a constitutional amendment — one of whom "served as the spokesperson" for a group of citizens who sought federal action under 25 U.S.C. § 476 in regard to a constitutional amendment that would affect her tribal membership — brought a suit under 25 U.S.C. § 476 and 5 U.S.C. § 706 to "challenge the way certain federal officials administered an election for which they were both substantively and procedurally responsible." *Id.* at 665, 667, 669. The plaintiffs alleged that they were affected by the BIA's decision because they were not able to obtain full membership under the constitution as drafted, but would be able to obtain full membership if an amendment were approved under the 25 U.S.C. § 476 process. *Thomas v. United States*, 141 F. Supp. 2d 1185, 1194 (W.D. Wis. 2001). As here, the plaintiffs asserted that in conducting the secretarial election the Secretary made procedural errors not consistent with 25 U.S.C. § 476 and its implementing regulations, and sought injunctive and declaratory relief. *Id.* at 1186.

The Seventh Circuit began by describing the secretarial election provision of the IRA as follows:

> One can question the wisdom of retaining federal control over matters of such fundamental importance to the tribe as its own constitutional ratification and amendment process. Nonetheless, the balance of power that Congress struck in this context is the compass we must follow for determining the legal significance of the tribal interest . . . . As recently as 1988, the Department of the Interior urged Congress to entrust the amendment process to the tribes, arguing that "Secretarial involvement in the calling of elections and approval of constitutions and bylaws, and amendments to them, is not consistent with the policy and goal of tribal self-determination. . . . Any challenges to tribal elections of tribal governing documents should be resolved through a tribal process in the tribal forums." But Congress rejected this recommendation and instead passed the current version of 25 U.S.C. § 476, which establishes the present version of the Secretarial election process. Congress thereby refused to reflect the tribal interest in the legal structure of tribal constitutional elections, notwithstanding the core values of government and self-determination that a tribal constitution necessarily embodies.

Thomas, 189 F.3d at 667-68 (citation omitted). Thus, as to standing, the Court ruled that the Tribe's "interest in the lawful administrative process under 25 U.S.C. § 476 is equivalent to

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

plaintiffs," individual aggrieved tribal members. *Id.* at 688. In other words as to Under 25 U.S.C. § 476:

> [T]he IRA . . . provides a private right of action to enforce the statutory scheme in federal district court. . . . [Tribes] ha[ve] no special legal status to the Secretarial election that gives it a different position from which to mount a post election challenge than that held by any other group of tribal voters. In fact, to the extent that if anyone has a special legal status in regard to [an] election that should be taken into account it is plaintiff Sandra Thomas, who served as spokesperson for the amendment petitions. . . .

Id. at 664-65, 668-69 (citation omitted).

Here, the facts are nearly identical. Plaintiffs are members of the Nooksack Indian Tribe and spokespersons for 306 Nooksacks who have been injured by Defendants' failure to conduct the required legal review. What is more, until January 20, 2014 — *i.e.* while Defendants should have been conducting the required review — Plaintiffs also served as councilmembers on the Nooksack Tribal Council, the governing body of the Nooksack Indian Tribe. As spokespersons and members of a group of 306 persons affected by the Defendants' acts and omissions — and as tribal officials acting on behalf of their government — Plaintiffs have a right to ensure that the Secretary is complying with 25 U.S.C. § 476.

If not these Plaintiffs, then who? As in *Thomas*, Plaintiffs are members affected by Defendants acts and omissions in relation to fulfilling a statutory requirement. *See Feezor v. Babbitt*, 953 F. Supp. 1, 5 (D.D.C. 1996) ("members of a federally recognized tribe and are among the intended beneficiaries of the IRA" who possess standing to enforce the statute). Plaintiffs are also representatives of the Nooksack Tribal government, which Defendants concede are the intended beneficiaries of the IRA and will suffer an injury in fact by Defendants' noncompliance.[5] Dkt. # 37, at p. 11. Defendants have deprived Plaintiffs of a statutory right.

[5] Legislative history makes it clear that both tribal governments and tribal members were intended to benefit from 25 U.S.C. 476, and therefore possess standing to sue the government when it fails to so comply. *See* S. Rep. No. 100-

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Plaintiffs possess standing. *See Robins v. Spokeo*, Inc., 742 F.3d 409, 412 (9th Cir. 2014) ("[T]he violation of a statutory right is usually a sufficient injury in fact to confer standing.").

2. Plaintiffs' Injury Is Fairly Traceable To The Challenged Actions Of Defendants.

Defendants also argue that their failure to "notify the Tribe of the presumed illegality of the proposed constitutional amendment prior to the Secretarial Election has no causal connection to the harm plaintiffs say will befall them." Dkt. # 37, at p. 12. But Defendants again miss the mark; Plaintiffs have already been harmed. In both their capacities as government officials and as "members of a federally recognized tribe," Plaintiffs were injured when Defendants did not do what was required of them by 25 U.S.C. § 476. *Feezor*, 953 F. Supp. at 5. The harm befallen to Plaintiffs is directly traceable to the acts and omissions of Defendants because it is "fairly traceable to [a] statutory prohibition," particularly those subsections of 25 U.S.C. § 476 which prohibit Defendants from failing to conduct the requisite legal review. *In re McKenna*, No. 12-1443, 2013 WL 2321960, at *3 (9th Cir. May 28, 2013); *see also Women's Med. Ctr. of Providence, Inc. v. Roberts*, 512 F. Supp. 316, 321 (D.R.I. 1981) (standing exists where the plaintiff's injury "is fairly traceable to the statutory enactment in question").

3. It Is Likely That The Injury Will Be Redressed By A Favorable Decision.

Plaintiffs have requested a declaration that Defendants have approved a constitutional amendment without conducting the requisite legal review, as well as an injunction that would prevent them from doing so in the future. If obtained, the declaratory relief will send the Defendants back to the drawing board to conduct the requisite legal review. As noted by Judge Heaney in *Shakopee Mdewakanton Sioux (Dakota) Cmty. v. Babbitt*, this result is that the only

---

577, at 2, 26 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3908, 3909, 3916 (noting that Subsection (d)(2) of the IRA "gives the appropriate party a right to bring an action in Federal District Court in order to enforce the provisions of th[e] section. . . . **The tribe *also* has the right** to challenge any finding made by the Secretary as to the legality of a proposed tribal document in the appropriate Federal court") (emphasis added).

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

process by which the Tribe can "modify its membership requirements to the satisfaction of the United States is a secretarial election which is now indefinitely postponed until the Secretary determines [the proposed amendment] to his satisfaction." 107 F.3d 667, 674 (8th Cir. 1997) (Heaney, J., dissenting); *see also e.g. Thomas*, 141 F. Supp. 2d at1199 (W.D. Wis. 2001) (voiding action violative of 25 U.S.C. § 476 nine years post).

4. Plaintiffs Meet The Prudential Component Of The Standing Inquiry.

Generally, because "Congress may eliminate prudential standing requirements by providing a broad private right of action," *J2 Global Commc'ns, Inc. v. Protus IP Solutions*, No. 06-0566, 2010 WL 9446806, at *3 (C.D. Cal. Oct. 1, 2010), if a plaintiff can "prove that it has a private right of action against the [defendant], then it would satisfy the prudential component of standing requiring that its interests fall within the 'zone of interests' to be protected by the statute." *In re 19 Court St. Associates, LLC*, 190 B.R. 983, 992 (S.D.N.Y. 1996); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 96-98, 117-18 & 118 n.6 (1998) (inquiry for statutory standing is identical to that for a private right of action); *Hawaii Disability Rights Ctr. v. Cheung*, 513 F. Supp. 2d 1185, 1191 (D. Haw. 2007) (same); *Patterson v. Heartland Indus. Partners, LLP*, 428 F. Supp. 2d 714, 721 n.4 (N.D. Ohio 2006) ("[P]rudential standing and the determination of an implied private right of action use tests similar in nature . . . .").

Undoubtedly, 25 U.S.C. § 476(d)(2) "provides a private right of action to enforce the statutory scheme" found within 25 U.S.C. § 476 for all members who believe that the statute has not been complied with. *Thomas*, 189 F.3d at 664-65; *see also Thomas*, 141 F. Supp. 2d at 1195 ("The Indian Reorganization Act provides a private right of action to enforce the statutory scheme of the act in federal district court."); *Sekayumptewa v. Salazar*, No. 11-8005, 2011 WL 231460, at *2 (D. Ariz. Jan. 24, 2011) (noting that section "476(d)(2) grants a right of action for issues arising under § 476"). Plaintiffs have alleged that Defendants did not fulfill the federal

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

legal review required by, at least, 25 U.S.C. § 476(c)(2)(B).[6] Dkt. # 3, at p. 14. Because Plaintiffs have a private right of action to enforce this provision, they clearly meet the prudential standing requirement. *See Robins*, 742 F.3d at 412 (9th Cir. 2014) ("Congress's creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right.").

B. Plaintiffs Have Sufficiently Pleaded A Constitutional Claim.[7]

To prevail on a claim based upon the federal_15th Amendment, a plaintiff must allege "the existence of discriminatory intent on the part of the defendant." *Bonilla v. City Council of City of Chicago*, 809 F. Supp. 590, 599 (N.D. Ill. 1992) (citing *Mobile v. Bolden*, 446 U.S. 55, 62 (1980); *Ketchum v. Byrne*, 740 F.2d 1398, 1403 (7th Cir. 1984)). Consequently, "a plaintiff must plead and prove that the plan was conceived or operated as a purposeful device to further racial discrimination." *Id.* (citing *Mobile*, 446 U.S. at 62-66). In addition, to meet the requirements of the 5th Amendment, the discrimination must be intentional. *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411, 1413-14 (7th Cir. 1992).

Defendants argue that "plaintiffs' complaint is devoid of any allegation that identifies any actor as having taken any step to unlawfully discriminate on the grounds of race or any other unlawful criteria against any otherwise eligible voter who [wa]s attempting to exercise his or her right to vote." Dkt. # 37, at p. 21. According to Defendants, the fact that the federal Secretarial Election Board engaged in "race-based distribution of election information" and otherwise acted

[6] Defendants submit that "if the Secretary's finding was arrived at on the basis of competent counsel . . the Secretary's finding based upon such advice would nevertheless not be arbitrary and capricious." Dkt. # 37, at p. 19. Be that as it may, Defendants have not provided *any* evidence that "the Secretary's finding was arrived at on the basis of competent counsel," or that the requisite legal review was even conducted. *Id.* Defendants' failure to provide evidence of said phantom "finding" — *i.e.* that the legal review was conducted at all — is fatal. *Id.*

[7] Although it is not indicated, Defendants are presumably seeking judgment in their favor on this claim, pursuant to Fed. R. Civ. Proc. 12(c) and 56(a). *See Goldyn v. Moran*, 122 F.3d 1071, 1071 (9th Cir. 1997) ("[S]ufficiently alleged genuine issues of material fact [will] overcome a summary judgment challenge . . . .").

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

with discriminatory intent cannot be "imput[ed] to the federal government." Dkt. # 37, at p. 22. Defendants are mistaken for at least two reasons.

First, the federal Election Board is a federal entity and the acts and omissions of its board members can and should be imputed to the Defendants when made in their official capacities. As the Election Board's role was described in the leading treatise:

> The tribal election board will compile an official list of registered voters, which will be supplied to district election boards and posted at the headquarters of the local administrative unit of the Bureau of Indian Affairs, the tribal headquarters, and various other public locations at least 20 days before an election. . . . The election board must make a decision on claims and challenges no later than 10 days before the election, and its decision is final. . . . Elections held within a tribe pursuant to regulations prescribed by the Secretary of the Interior (secretarial elections) are specific federal elections regulated by a federal statute to which the provisions of the [U.S. Constitution] apply.

John J. Dvorske et al., *Election Procedure*, 19 Fed. Proc., L. Ed. § 46:906 (2014). And as noted by the Seventh Circuit in *Thomas*,

> It bears emphasizing that Secretarial elections, such as the one at issue here, are federal — not tribal — elections. Tribes are sovereign only to the extent that their sovereignty has not been qualified by statute or treaties. The IRA explicitly reserves to the federal government the power to hold and approve the elections that adopt or alter tribal constitutions.

Thomas, 189 F.3d 662, 667 (emphasis added); *see also King v. Norton*, 160 F. Supp. 2d 755, 763 (E.D. Mich. 2001) ("Elections to amend tribal constitutions must be conducted pursuant to the rules prescribed by the Secretary of the Interior and . . . are not conducted under tribal authority, but rather they are federal elections."); *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1088-89 (8th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978) ("The Congress, not the Tribe, delegates to the Secretary the authority to call and conduct Secretarial elections."); *Shakopee*, 906 F. Supp. at 516 ("[A] secretarial election is a federal proceeding."); *Rosales v. Sacramento Area Director*, 34 IBIA 50, 54, 1999 WL 980163, at *4 (1999) ("Secretarial elections are federal elections . . . .").

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Plaintiffs have alleged that members of the federal Election Board intentionally discriminated against themselves and the members of the "Nooksack 306" by "conducting an election involving discriminatory election practices, such as [distributing] election information only to non-Filipino voters." Dkt. # 3, at para. 92. Defendants counter that the members of the federal Election Board only took discriminatory actions in their personal capacity. Dkt. # 37, at p. 22. But this is a question of fact that precludes summary judgment. Construing the pleadings in the light most favorable to the Plaintiffs, as the Court must, there is simply nothing to suggest that the members of the federal Election Board were acting in their personal capacities when they intentionally engaged in discriminatory election practices. Defendants do not offer any proof to the contrary, and are therefore precluded from obtaining summary judgment on this claim.

Second, the federal Election Board aside, Plaintiffs have alleged that the BIA and its Secretary have intentionally engaged in a discriminatory voting scheme. As a result of Superintendent Joseph (1) setting only 10 days for voters in Canada, who are primarily made up of members of the Nooksack 306, to register; (2) preventing many members of the Nooksack 306 from requesting absentee ballots required per 25 C.F.R. § 81.19; and (3) failing to conduct the required legal review, members of the Nooksack 306 have been intentionally discriminated against. Defendants do not offer any proof to the contrary, and are therefore precluded from obtaining summary judgment on this claim.

C. Plaintiffs Have Sufficiently Pleaded A Breach Of Trust Claim.[8]

Plaintiffs have alleged that Defendants breached the trust relationship between the federal government, themselves, and roughly 306 Nooksacks, by failing to comply with its statutory requirements while conducting a Secretarial Election and intentionally discriminating against

[8] Although it is not indicated, Defendants are presumably seeking judgment in their favor on this claim, pursuant to Fed. R. Civ. Proc. 12(c) and 56(a). *See supra*, at n.7.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

these persons, causing harm to the trust corpus. *See Moose v. United States*, 674 F.2d 1277, 1281 (9th Cir. 1982) (a trust relationship exists between the federal government and tribes unless there is explicit language to the contrary); *Split Family Group v. Moran*, 232 F.Supp.2d 1133, 1136 (D. Mont. 2002) (rushing a Secretarial election will result in "a needlessly uninformed electorate, greater expense, [and a] mistake in creating the election roll and preparing the ballot"). Defendants waived their sovereign immunity to enforce this trust obligation by allowing suits to be brought in federal court via 25 U.S.C. § 476(d)(2).

As a "general rule[,] a trustee can be held liable for losses caused by breach of trust obligations." *Moose*, 674 F.2d at 1282-83. The trust corpus at issue here involves the management and organization of the Nooksack tribal government, which includes all of the property rights — tangible and intangible, real and personal—of Plaintiffs and the 306 Nooksacks who have been denied the protection owed by their trustee. This includes any health, education, housing, or other benefits which persons who met the criteria required prior to the Secretarial Election would have been entitled to, as well as the aggregate rights that are owed to the Nooksack Indian Tribe as a federally recognized Indian tribe.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

IV. CONCLUSION

Plaintiffs respectfully request that Defendants' Motion be denied. Plaintiffs have standing, and have sufficiently pleaded their claims. In addition, there are issues of material fact that preclude a judgment on the pleadings and/or summary judgment.

DATED this 17th day of November, 2014.

s/Gabriel S. Galanda
Gabriel S. Galanda, WSBA# 30331
s/Anthony S. Broadman
Anthony S. Broadman, WSBA #39508
s/Ryan D. Dreveskracht
Ryan D. Dreveskracht, WSBA #42593
Attorneys for Plaintiffs
GALANDA BROADMAN, PLLC
P.O. Box 15146 Seattle, WA 98115
(206) 691-3631 Fax: (206) 299-7690
Email: gabe@galandabroadman.com
Email:anthony@galandabroadman.com
Email: ryan@galandabroadman.com

CERTIFICATE OF SERVICE

I, Gabriel S. Galanda, say:

1. I am now and at all times herein mentioned, a legal, permanent resident of the United States, over the age of eighteen years, not a party to the above-captioned action, and competent to testify as a witness.

2. On November 17, 2014, I caused to be filed I filed the foregoing document, which will provide service to the following via ECF:

Brian C Kipnis

The foregoing statement is made under penalty of perjury under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 17th day of November, 2014.

s/Gabriel S. Galanda
Gabriel S. Galanda, WSBA# 30331

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509