Judge Coughenour

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE NOOKSACK INDIAN TRIBE,

Plaintiff,

v.

RYAN K. ZINKE, in his official capacity as Secretary of the Interior[1]; the U.S. DEPARTMENT OF THE INTERIOR; MICHAEL S. BLACK, in his official capacity as Acting Assistant Secretary – Indian Affairs; WELDON "BRUCE" LOUDERMILK, in his official capacity as Director, Bureau of Indian Affairs, Department of the Interior; STANLEY M. SPEAKS, in his official capacity as Regional Director, Northwest Region, Bureau of Indian Affairs; MARCELLA L. TEETERS, in her official capacity as Superintendent, Puget Sound Agency, Bureau of Indian Affairs; TIMOTHY BROWN, in his official capacity as Senior Regional Awarding Official for the Bureau of Indian Affairs, Northwest Region; and THE UNITED STATES OF AMERICA,

Defendants.

CASE NO. C17-0219JCC

FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO NOOKSACK MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

(Note on Motion Calendar For:
April 28, 2017)

1 On March 1, 2017, Ryan K. Zinke was sworn into office as Secretary of the Interior by Vice President Mike Pence. He is hereby substituted for Kevin "Jack" Haugrud, formerly Acting Secretary of the Interior, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

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Defendants Ryan K. Zinke, Michael S. Black, Weldon "Bruce" Loudermilk, Stanley M. Speaks, Marcella L. Teters[2], Timothy Brown, and The United States of America (hereafter collectively referred to as "the Secretary") through their attorneys, Annette L. Hayes, United States Attorney, and Brian C. Kipnis, Assistant United States Attorney, for the Western District of Washington, hereby move this Court pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing this lawsuit for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction, or, in the alternative for summary judgment.

This motion is made and based on the pleadings and papers filed herein, and such oral argument as the Court may entertain.

DATED this 3rd day of April 2017.

Respectfully submitted,

ANNETTE L. HAYES
United States Attorney

s/ Brian C. Kipnis
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2 Ms. Teters name is incorrectly spelled in the caption of the complaint.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

A preliminary injunction, like all injunctions, is a matter of equitable discretion; it does not follow as a matter of course, even where the party seeking the injunction has fully prevailed on the merits.[3] And, a time-honored consideration in the equitable calculus is the maxim of equity that holds that "one who seeks equity must do equity."[4] That maxim is of considerable importance here.

This lawsuit was filed under false pretenses. Although the plaintiff is identified in the caption as "The Nooksack Indian Tribe," the Nooksack Indian Tribe (Tribe) is not truly before the Court. After the former Nooksack Tribal Council chose to unilaterally "suspend" the 2016 tribal elections for expiring Council seats, commencing on March 24, 2016, and continuing to the present day, the Tribe has lacked a tribal government that is recognized as such by the United States. Instead, since March 24, 2016, the Tribe has been run by a group of individuals, comprised mostly of unelected "councilmembers," who have no legitimate claim to be the governing body of the Tribe nor any authority to approve the filing of a complaint in a United States District Court against the Secretary of the Interior (Secretary) in the name of the Tribe. This unelected, unrecognized, and illegitimate group, hereafter referred to as "the Kelly Faction," and not the Tribe, stands before this Court as plaintiff and invokes its equitable power.

If those circumstances were not worrisome enough, the Kelly Faction has used its *de facto* control to systematically abridge the rights of a disfavored group of tribal members, thereby depriving many of them of their right to fully participate in and receive benefits under federal programs which the Department of the Interior and other federal agencies either administer directly for the Tribe or contract with the Tribe to administer equally and fairly to *all* of its duly enrolled members. As part and parcel of this scheme, the Kelly Faction, while lacking the legal authority to do so, has endeavored to unilaterally declare members of this minority group "disenrolled" using a

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3 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008), citing *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 313 (1982). ("[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law").

4 *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947).

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sham hearing process while also systematically depriving them of the means to challenge the actions of the Kelly Faction in the tribal judicial system. Based on these purported disenrollments, the Kelly Faction has also sought to evict individual members of this minority group from homes which they occupy with the assistance of federal housing programs, interfered with their ability to access necessary health care for which they are eligible through the Indian Health Service of the U.S. Department of Health and Human Services, and attempted to cut them off from social services to which they are otherwise entitled, including, in at least one case, refusing to authorize a grant of federal funds to the school-age child of a purportedly disenrolled tribal member who sought the assistance so her child could go on a school trip to California with the public school he attends.

Because of the Kelly Faction's effective control over the Tribe's instruments of government, and principally the tribal judicial system, it has been able to perpetuate itself in power for more than a year despite engaging in conduct that can only be described as abusive. However, the Kelly Faction now faces a hurdle which, absent the assistance of this Court, it cannot overcome. The Department of the Interior has informed the Kelly Faction that it does not recognize it as the legitimate government of the Tribe. Because the absence of recognition impairs the Kelly Faction's ability to receive federal funding and administer the many federal programs though which federal funds are procured in the Tribe's name, the Kelly Faction's refusal to stand for election as prescribed by the Tribe's constitution has brought about a problem from which the Kelly Faction mightily hopes this Court will rescue it so that it may continue to have access to the federal funding that it needs to prolong its illegitimate grasp on power over the Tribe.

The Secretary has concluded that it is past time for these abuses of power to stop, at least insofar as a government-to-government relationship with the United States serves in any way to enable the Kelly Faction to retain its grip over the Tribe. This lawsuit, then, and the present motion for preliminary injunction, putatively sought by the Tribe, but actually brought by the Kelly Faction, represents an effort to force the United States to have a government-to-government relationship with a group of individuals who have no legitimate claim to represent themselves as the governing body of the Tribe, and to allow that group to administer federal programs for the Tribe despite that group's checkered history.

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This Court should refuse to allow itself to be made "'the abetter of iniquity'" by granting the Kelly Faction the preliminary injunction it seeks. See *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) (quoting *Bein v. Heath*, 47 U.S. 228, 247, 6 How. 228, 12 L. Ed. 416 (1848)). All the more so, since a preliminary injunction requiring the United States to have a government-to-government relationship with the Kelly Faction cuts against the well-accepted principle that "the [United States] must speak with one voice" with respect to its government-to-government relationships, and that voice must emanate from the Executive. *Cayuga Nation v. Tanner*, 824 F.3d 321, 328 (2nd Cir. 2016) (quoting *Zivotofsky ex rel. Zivotofsky v. Kerry*, ___U.S. ___, 135 S.Ct. 2076, 2086, 192 L.Ed.2d 83 (2015)). If the Kelly Faction is successful in obtaining the injunction it seeks, it will not only force a government-to-government relationship upon the United States, at least for the duration of the injunction, but it will also indefinitely perpetuate the Kelly Faction's unlawful hold on the Tribe's reins of power, allowing abuses of that power to persist for the time at least.

This memorandum not only represents the Secretary's opposition to the Kelly Faction's motion for summary judgment, it also supports the Secretary's cross-motion to dismiss or, in the alternative, for summary judgment. The Secretary principally asks the Court to dismiss this action for lack of subject matter jurisdiction. The United States does not recognize the Kelly Faction as the governing body of the Tribe. Absent recognition, the Kelly Faction lacks the authority to file and prosecute an action in this Court against the Secretary in the name of, and on behalf of, the Nooksack Indian Tribe. See *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 713 (2d Cir. 1998). Accordingly, the complaint should be dismissed for lack of subject matter jurisdiction.

STATEMENT OF FACTS

Because the history of mistreatment of a disfavored class of some 306 members of the Tribe is directly relevant to the Kelly Faction's request for the intervention of equity on its behalf, this statement of facts commences with the efforts of the Nooksack Tribal Council to expel this disfavored group of tribal enrollees from the Tribe's membership rolls.

A. Initial Measures Related to the Disenrollment of Some 306 Tribal Members

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Beginning in late 2012, various members of the Council began to question the Nooksack ancestry of certain tribal members. Those initial questions led to an investigation from which the Council concluded that two individuals from whom about 306 current Nooksack members claim descent did not have Nooksack ancestry.

On March 1, 2013, the Council passed Resolution No. 13-38, which commenced proceedings to amend the Tribe's Constitution to remove a clause that granted membership to "[a]ny person who possesses at least one-fourth (1/4) degree Indian blood and who can prove Nooksack ancestry to any degree." Nooksack Const., Art. II, § 1(H).

As prescribed by the Nooksack Constitution, Nooksack Const., Art. X, the Secretary conducted a "Secretarial Election" allowing members of the Tribe to cast their vote for the approval or disapproval of the proposed constitutional amendment.[5] An election was held, the constitutional amendment was ratified by a majority vote, and the Secretary approved the results of the election pursuant to 25 U.S.C. § 476(d) (now 25 U.S.C. § 5123(d)).

As held by the Nooksack Tribal Court at the time, this Constitutional amendment would have only a prospective effect, affecting only those seeking enrollment in the Tribe. As to the existing 306 or so members of the Tribe whose ancestry had been questioned, the Council's plan for a mass disenrollment did not go smoothly, in part because of rulings of the Nooksack Tribal Court. Thus, when the time came to hold constitutionally required elections in 2016 to fill four expiring seats on the Council, prospective candidates for the vacant seats would be facing an electorate that included many tribal members whom the Council had been actively attempting to disenroll.

B. Cancellation of Tribal Elections

On January 20, 2016, the Council announced at a Nooksack Community Council meeting that it had decided to cancel the February 20, 2016, Primary Election and the March 19, 2016,

5 This clause of the Nooksack Constitution is consistent with § 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476. That section of the Reorganization Act, which Congress amended in 1988, requires the Interior Secretary to conduct elections for tribes who wish to adopt or amend their constitutions or bylaws. The "Secretarial elections" that the Reorganization Act authorizes are elections that the federal government conducts, but in which only registered tribal voters may participate. *St. Germain v. U.S. Dep't of Interior*, No. C13-945RAJ, 2013 WL 3148332, at *1 (W.D. Wash. June 19, 2013).

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General Election for four vacant Council seats that were expiring on March 24, 2016.[6] The Council also announced that it had decided to "postpone" any Tribal election for those seats until after disenrollment proceedings against the 306 prospective disenrollees were complete. Thus, at the Council's behest, neither a Primary Election nor a General Election were held to fill the expiring Council seats. Dkt. # 16, ¶ 3.

C. Subversion of the Rule of Law

i. Termination of Nooksack Tribal Judge

Efforts by the Council, represented by the Tribe's in-house counsel, to prevent the prospective disenrollees from voting in the Spring 2016 Council elections were meeting with little success in the Nooksack Tribal Court. Dkt. # 16, ¶ 7. On March 28, 2016, the Kelly Faction abruptly terminated the employment of Nooksack Tribal Court Chief Judge Susan Alexander and, afterwards, filled the Chief Judge position with the Tribe's former in-house counsel. *Id.* Thereafter, the Nooksack Tribal Court began refusing to act on complaints challenging the legality of the Kelly Faction's actions. Dkt. # 15, ¶¶ 7-10.

ii. "[T]he rule of law on the reservation . . . has completely broken down."

Efforts by private law firms to represent the prospective disenrollees before tribal courts have met with resistance from the Kelly Faction. One such law firm, Galanda Broadman, PLLC, sought to challenge the legality of its "disbarment" from Nooksack courts. The results of those efforts led a panel of the Nooksack Tribal Court of Appeals[7], to decry the extraordinary state of affairs on the Reservation in an order dated September 21, 2016:

> Notwithstanding our efforts, the orders of this Court have been unlawfully ignored and the rule of law on the reservation, at least within the scope of this case, has completely broken down.

Dkt. # 15, p. 51 Exhibit K. The circumstances which led to this conclusion were, as described by the Court:

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6 Following the "recall" of Position B Councilmember Carmen Tageant for "treason," the only members of the Nooksack Tribal Council who, after March 24, 2016, hold office by virtue of winning a majority of votes in a general election were Council Chairman Robert Kelly, Council Secretary Nadene Rapada, and Position A Councilmember Robert Solomon.

7 The appellate function of the Nooksack Court of Appeals was carried out by Northwest Intertribal Court System (NICS) pursuant to a March 12, 2013 agreement.

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> On the record before this Court it is unclear whether the Plaintiffs have been disbarred already or whether the process initiated by the Tribal Council is on-going. As is wellknown to those familiar with this case, the Plaintiffs have sought a review of this process before the Tribal Court, but the court clerk returned their pleadings and refuses to accept any filings from them. Unable to obtain a review of this process before the trial court of the Nooksack Tribe, the Plaintiffs have petitioned this Court of Appeals on numerous occassions [sic] seeking some form of relief from us. This Court has already issued a mandatory injunction that the court clerk accept their pleadings and other filings. Moreover, when this order was ignored, we issued an order finding the court clerk in contempt. When this contempt was not corrected, we ordered the Police Chief to arrest the court clerk. When the Police Chief refused to enforce the Court's order to arrest the court clerk, we held the Police Chief in contempt. Most recently, when the Police Chief failed to correct his contempt, we imposed significant monetary fines on him for each day that the contempt continues. Notwithstanding our efforts, the orders of this Court have been unlawfully ignored . . .

Id.

iii. The Kelly Faction Acts to Vacate Twelve Prior Adverse Judicial Rulings

On October 7, 2016, by Resolution No. 146a, the Kelly Faction purported to create a new "Nooksack Supreme Court." Dkt. # 15, ¶¶ 17-18; Exhibit M. It then proceeded to fill the five seats of the "Nooksack Supreme Court" with five of its members, including naming Tribal Chairman Robert Kelly "Chief Justice." *Id.* Thereafter, on petition of "[t]he Nooksack Indian Tribe and its Officers and Councilmembers" (in other words, themselves), this newly constituted "Nooksack Supreme Court" purported to vacate 12 prior orders of the Nooksack Court of Appeals as "null and void." *Id.* at ¶ 19; Exhibit N.

D. The Kelly Faction Acts to Deprive Purported Disenrollees of Federal Benefits

Commencing in April 2016, the Kelly Faction commenced a series of actions whereby it purported to disenroll certain members of the Tribe, divest them of benefits for which they were otherwise eligible as members of the Tribe, and deprive them of the means to challenge those actions within the Tribe's judicial system.

One such case is that of Margretty Rabang, a 56-year-old resident of Whatcom County. Ms. Rabang is a participant in a HUD-assisted housing program, the Mutual Help Homeownership Opportunity Program that is administered for members of the Tribe by the Nooksack Indian Housing Authority.[8] Dkt. # 16, ¶ 11. Ms. Rabang entered into a lease-to-own agreement with Nooksack Indian Housing Authority on December 3, 1996, with the intent of eventually owning her home. On

8 A program description is set forth at https://portal.hud.gov/hudportal/HUD?src=/programdescription/muthelp

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June 3, 2016, the Kelly Faction, acting without a quorum, passed a resolution purportedly disenrolling Ms. Rabang from the Tribe. Dkt. # 16, pp. 13-15.[9] Thereafter, on August 19, 2016, the Nooksack Housing Authority mailed a "Notice of Termination/Notice to Vacate" to Ms. Rabang. Dkt. # 15, p. 21. The stated grounds for the termination included her purported disenrollment from the Tribe. *Id*. The Notice stated that Ms. Rabang's participation in the federal housing assistance program would be terminated along with her lease-to-own agreement under that program. *Id*. Thereafter, on December 22, 2016, the Nooksack Tribal Court, acting on a Complaint for Unlawful Detainer filed by the Nooksack Housing Authority, issued an order purporting to authorize the Nooksack Tribal Police to forcibly evict Ms. Rabang "and all members of her household" by December 28, 2016. Dkt. # 16, ¶ 13, Exh. 6.

Other Tribal members who were purportedly disenrolled by the mostly unelected Kelly Faction necessarily acting in the absence of a quorum of members have also been terminated from federal programs or denied federal programs in violation of federal law.[10] Based on over 289 Nooksack Indian Tribal Council Resolutions authorized between November 10, 2016, and November 22, 2016, necessarily passed in the absence of a quorum of elected councilmembers, the Tribe informed certain tribal members that they were no longer eligible for Temporary Assistance For Needy Families ("TANF") benefits based on their disenrollment from the Tribe.[11] Dkt. # 16, ¶¶

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9 Though the resolution purports to result from a 4-1 vote with a quorum of 7 councilmembers in attendance at the Kelly Faction meeting, as set forth above, only three councilmembers were elected to their council seat in a general election conducted pursuant to the Nooksack Constitution and By Laws. A quorum of five members is necessary to take action on any business coming before the Council as required by Article II, Section 4 of the Nooksack Constitution and By Laws, and such a quorum was necessarily lacking.

10 The manner in which the disenrollment occurred is a separate cause for concern by the Secretary. Reportedly, the Kelly Faction held mass disenrollment "hearings" consisting of a conference call of no more than 10 minutes in length. The apparent denial of adequate due process constitutes a separate basis for doubting the validity of the disenrollments. Federal law provides that a tribal government cannot deny tribal members due process; Indian Civil Rights Act, 25 U.S.C. § 1302. Like many tribes, Nooksack incorporated ICRA into its tribal constitution (Article IX of the Nooksack Constitution and By Laws). An order of the Nooksack Tribal Court dated January 26, 2016, elaborates on the due process requirements for disenrollment.

11 The TANF program, administered by HHS's Administration for Children and Families, essentially replaced the Aid to Families with Dependent Children (AFDC) program. According to HHS:

> Since 1996 . . . the TANF program has served as one of the nation's primary economic security and stability programs for low-income families with children. TANF is a block grant that provides $16.6 billion annually to states, territories, the District of Columbia, and federally-recognized Indian tribes. These TANF jurisdictions use federal TANF funds to provide income support to low-income families with children, as well

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15-16. For example, on December 1, 2016, the Tribe notified a recipient of federal assistance through the TANF program that:

> On November 28, 2016, we received notice that you are no longer enrolled with the Nooksack Indian Tribe. Pursuant to the TANF eligibility requirements, you or one of your household members must be a currently enrolled member of a federally recognized Indian Tribe. Because the TANF Program lacks any evidence that you or one of your household members is a currently enrolled member of a federally recognized Indian Tribe, you are no longer eligible for further benefits from our Program commencing ten days following this notice, December 11, 2016.

Dkt. # 16, Exh. 7.

Similarly, tribal members have been notified that their access to healthcare services was being discontinued because of their purported disenrollment. For example, in a letter dated November 30, 2016, a tribal member was informed by the Nooksack Tribal Health Department that:

> The Nooksack Indian Tribe Health Department received notification you have been dis-enrolled as a member with the Nooksack Indian Tribe effective November 10, 2016, Tribal Resolution number DE16-58 (copy attached). As of the disenrollment date listed above, you are deemed ineligible for services provided by the Nooksack Health Center. The Nooksack Indian Tribe provides direct care services to persons of Indian descent belonging to the Indian community. You have not provided evidence to prove that you are eligible for Contract Health Services (CHS) by the Nooksack Health Center in accordance with 42 C.F.R. Pt. 1 36.12 and 36.23 through certain agreements. As a result of your disenrollment, the clinic lacks any information demonstrating your eligibility for continued services under these programs.

Dkt. # 16, p. 33. The author of the letter is presumably referring to ineligibility under 42 C.F.R. part 136, and, specifically, 42 C.F.R. §§ 136.12 and 136.23, regulations promulgated by HHS' Indian Health Service through which federal health services are provided to American Indians and Alaska Natives.[12]

> as to provide a wide range of services (e.g., work-related activities, child care, and refundable tax credits) designed to accomplish the program's four broad purposes . . .

https://www.acf.hhs.gov/ofa/about/what-we-do

12 According to HHS:

> The Indian Health Service (IHS), an agency within the Department of Health and Human Services, is responsible for providing federal health services to American Indians and Alaska Natives. The provision of health services to members of federally-recognized Tribes grew out of the special government-to-government relationship between the federal government and Indian Tribes. This relationship, established in 1787, is based on Article I, Section 8 of the Constitution, and has been given form and substance by numerous treaties, laws, Supreme Court decisions, and Executive Orders. The IHS is the principal federal health care provider

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In other cases, applications have been denied for Community Health Care benefits, for which funding has been provided to the Tribe pursuant to an agreement with the Indian Health Service, because of the purported disenrollments of the applying members of the Tribe. Dkt. # 16, ¶¶ 8-9.

Last, in at least one case, an application for funding assistance through the Johnson-O'Malley Program was denied. The application sought financial assistance to enable the son of a purported disenrollee to embark on a public school science trip to California.[13]

E. The Secretary's Response

On October 17, 2016, in a letter signed by Lawrence S. Roberts, then the Principal Deputy Assistant Secretary - Indian Affairs of the Department of the Interior, the Nooksack Tribal Chairman was informed that the Council, as of March 24, 2016, lacked a quorum and therefore the Department would not recognize actions taken by the Council after March 24 because the Tribe failed to hold an election, as required by its Constitution and By Laws, to fill expiring council seats. Dkt. # 21, pp. 15-16. As the Principal Deputy Assistant Secretary ("PDAS") observed, "pursuant to the plain language of the Tribe's Constitution and Bylaws, the Council must have five duly elected officers to take any official action." *Id.* Accordingly, describing the circumstances as "exceedingly rare," the PDAS informed the Tribal Chairman that "the Department will only recognize those actions taken by the Council prior to March 24, 2016, when a quorum existed, and will not recognize any actions taken since that time because of the lack of a quorum." *Id.* The PDAS correctly observed that:

> Under Federal law, the United States has a duty to ensure that tribal trust funds, Federal funds for the benefit of the Tribe, and our day-to-day government-to-government relationship is with a full quorum of the Council as plainly stated in the Tribe's Constitution and Bylaws. As such, the Bureau of Indian Affairs (BIA) will examine any self-determination contracts or funding agreements it has with the Tribe to ensure the Tribe's compliance with all contract provisions. In the event of non-compliance, BIA will take action to reassume the particular Federal services, in whole or in part, and provide direct services to currently enrolled tribal members.

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and health advocate for Indian people, and its goal is to raise their health status to the highest possible level. The IHS provides a comprehensive health service delivery system for American Indians and Alaska Natives.

https://www.ihs.gov/aboutihs/overview/

13 The Johnson-O'Malley Program is authorized by the Johnson-O'Malley Act of 1934 and the implementing regulations are provided in Part 273 of Title 25 of the Code of Federal Regulations. As amended, this Act authorizes contracts for the education of eligible Indian students enrolled in public schools. This local program is operated under an educational plan, approved by the Department of the Interior's Bureau of Indian Education which contains educational objectives to address the needs of the eligible American Indian and Alaska Native students.

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Id. at 16. He pledged that "[t]he BIA stands ready to provide technical assistance and support to the Tribe to carry out elections open to "all enrolled members of the Nooksack Tribe, eighteen years of age or over" regardless of county residency, to vote to fill the vacant Council seats." *Id.* But the Tribal Chairman was warned that "elections inconsistent with Nooksack law will not be recognized by the Department." *Id*.

In a November 14, 2016 response to a letter from the Nooksack Tribal Chairman, PDAS Roberts reiterated Interior's position. Dkt. # 15, pp. 11-12. The Tribal Chairman was informed that the Department would not recognize actions of the Council until "a Council is seated through an election consistent with tribal law and the decisions of the Northwest Intertribal Court System." *Id.* He again pledged the technical assistance and support of BIA "to carry out elections open to 'all enrolled members of the Nooksack Tribe, eighteen years of age or over,' regardless of county residency, to vote to fill the vacant tribal council seats." *Id.* Finally, Chairman Kelly was informed that elections or actions that were inconsistent with Nooksack law and the ruling of its own courts, particularly those holding that council elections must be open to tribal members facing disenrollment, would not be recognized. *Id.* at 11-12.

Subsequently, Interior learned of two worrisome developments as described in a third letter, dated December 23, 2016, that PDAS Roberts sent to the Tribal Chairman. Dkt. # 15, pp. 14-15. The first development was the Kelly Faction's action to throw over its court system and appoint its members to a new "Nooksack Supreme Court" which then promptly overturned a series of earlier decisions by Nooksack courts. *Id*. at 14. Second, Interior learned that persons whom the Kelly Faction had purported to disenroll after March 24, 2016, though it lacked a quorum, were being evicted from their homes with the assistance of the federally funded Nooksack Police officers. *Id*. The Tribal Chairman was warned that the actions of the Kelly Faction in using federally funded police officers to carry out invalid or unlawful orders would be grounds for BIA to "reassume" the responsibility for providing law enforcement services at Nooksack. *Id.* at 15. The Chairman was again encouraged to hold council elections in accordance with the Nooksack Constitution and By Laws as determined by its own courts.

F. The January 21, 2017 "General Election"

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The Kelly Faction represents that it held a "general election" on January 21, 2017, shortly before filing this lawsuit.[14] The Tribe has not asked for a determination from the Secretary whether this election met the Secretary's conditions for restoring a government-to-government relationship with the United States and, hence, the Secretary has made no determination in that regard. Specifically, the Kelly Faction has made no effort to prove to the Secretary that the January 21, 2017 "general election" was a full and fair election that met the requirements of the Nooksack Constitution. Thus, there has been no decision, much less any "final agency action"[15], which could support judicial review of the Secretary's position on restoring a government-to-government relationship with the Tribe, or not, in light of the January 21, 2017 election. That said, there is certainly good reason to believe that a determination by the Secretary in the wake of the January 21, 2017 "general election" will not favor the restoration of government-to-government relations with the presently constituted "council."[16]

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14 The Tribe's General Manager, Katherine Canete, one of the four councilmembers who clung to their tribal council seats after the expiration of their terms, complains that:

> On January 21, 2017 a general election was conducted in which all enrolled Nooksack tribal members over the age of 18 years, who were therefore qualified to vote under the Nooksack Constitution, voted to fill the seats held by the Kelly Faction members. There were no challenges to the election results. The results were certified by the duly-appointed Election Superintended [sic], consistent with Nooksack law. The new Council members were sworn in, and notice of the election results was timely provided to the Bureau of Indian Affairs. Yet, defendants have failed or refused to acknowledge the Council, have not rescinded the Roberts letters, and have continued to take steps to reassume the responsibilities for federal programs the Tribe administers under its 638 contracts.

Dkt. #21, ¶ T. Unfortunately, Ms. Canete is complaining about a decision which has not yet been made by the Secretary. Nothing in the record before the Court reflects a request from the Tribe that government-to-government relations be restored in light of this January 21, 2017 election, and nothing in the record reflects a final decision by the Secretary on that issue.

15 As a matter of subject matter jurisdiction, only final agency actions are justiciable under the APA. *Rattlesnake Coalition v. U.S. E.P.A.*, 509 F.3d 1095, 1104 (9th Cir. 2007) (affirming dismissal for lack of subject matter jurisdiction because the challenged activity was not a "final agency action."). In other words, plaintiff may not seek in this lawsuit an adjudication of the legality of an administrative decision in this lawsuit that the Secretary has not yet made.

16 As the PDAS informed the Kelly Faction in his December 23, 2016 letter:

> We continue to urge the Tribe to hold elections for the vacant Tribal Council seats in accordance with the Tribe's Court of Appeals ruling in *Belmont v. Kelly*, issued on March 22, 2016. We do not view the recent primary election or the general election purportedly scheduled for January 21, 2017 as legitimate and we will not accept the results pursuant to our Nation-to-Nation relationship given that the primary election did not allow for votes by those allowed to vote under the Court of Appeals decision in *Belmont v. Kelly*.

Dkt. # 15, p. 15.

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ARGUMENT

I. STANDARD OF REVIEW

As the Kelly Faction's memorandum indicates, the present preliminary injunction motion rests on the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et. seq.* (APA).[17] Thus, the motion requires the Court to meld the requirements for preliminary injunctions with the standard of review applicable to final agency actions under the APA.

First, the party seeking a preliminary injunction must establish that he or she is likely to succeed on the merits; that he or she is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his or her favor; and that an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

Second, a movant attempting to show that he or she is likely to prevail on a claim based on the APA must do so within the discretionary framework of the arbitrary and capricious standard, 5 U.S.C. § 706(2). See, *Lands Council v. McNair (Lands Council II)*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*) ("[O]ur review of the district court's determination as to whether Lands Council was likely to prevail on the merits of its NEPA and NFMA claims necessarily incorporates the APA's arbitrary and capricious standard.").

Under this standard of review, a reviewing court may set aside only agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *Id*. The arbitrary and capricious standard of review is "highly deferential," and an agency action may not be set aside unless "there is no rational basis for the action." *Friends of the Earth v. Hintz*, 800 F.2d 822, 831 (9th Cir. 1986). Under this standard, "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *Lands Council II*, 537 F.3d at 987. Under Congress' general formulation in the APA of the basic criteria for review of administrative agency determinations, agency action is presumed to be valid in the absence of a

17 See Nooksack Motion for Preliminary Injunction, Dkt. #19, p. 2, *ll.* 7-11("The Tribe's motion is based on 5 U.S.C.S. § 705 . . .").

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substantial showing to the contrary. *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 283 n.28, 292 (D.C. Cir. 1981). Review is generally confined to the administrative record before the Court. *Florida Power and Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). While the level of review is not to be perfunctory, it is relatively narrow and designed only to ensure that the agency's decision is not contrary to law, is rational, has support in the record, and is based on a consideration of the relevant factors. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978). A "heavy burden" rests on the party who seeks to demonstrate that, in regard to the agency action which it disputes, the agency acted unlawfully. *Enos v. Marsh*, 616 F. Supp. 32, 58 (D. Haw. 1984), aff'd, 769 F.2d 1363 (9th Cir. 1985) (quoting *Short Haul Survival Committee v. United States*, 572 F.2d 240, 244 (9th Cir. 1978)).

In summary, the Kelly Faction's task is to convince the Court that it is likely to prevail on the merits of its claim that some final agency action of the Department of the Interior was unlawfully irrational. In addition, the Kelly Faction must convince the Court that it is likely to suffer irreparable injury, that the balance of hardships tips in its favor, and that the public interest favors the issuance of an injunction. As set forth below, the Kelly Faction's motion fails to meet any of these criteria.

II. THE KELLY FACTION IS UNLIKELY TO PREVAIL ON THE MERITS

As disclosed by its proposed order, the Kelly Faction seeks three forms of relief. Principally, it seeks a mandatory injunction compelling the Secretary to "recognize the current Nooksack Tribal Council, elected on January 21, 2017, as the governing body of the Nooksack Tribe, with all the power appertaining thereto." Id. at p. 3. The other two requests follow from the first. The Kelly Faction seeks an order enjoining "the enforcement of the three letters issued by Lawrence Roberts on October 17, 2016, November 14, 2016, and December 23, 2016 . . . and the letters shall have no further force and effect." Dkt. # 19-1, p. 2. And the Kelly Faction asks the Court to enjoin the Secretary from "taking further steps to re-assume any federal law [sic] the Nooksack Indian Tribe administers pursuant to self-determination contracts entered into pursuant to the Indian Self-Determination and Education Assistance Act (ISDA)." *Id.*

a. The Kelly Faction has no Standing to bring this Action.

It is undisputed that the Secretary does not recognize the Kelly Faction as the government of

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the Tribe as of March 24, 2016. Without recognition, the Kelly Faction lacks standing to sue on behalf of the Tribe.

Ordinarily, persons lack standing to bring suit on behalf of anyone other than themselves. See *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (noting that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"); accord, *Hong Kong Supermarket v. Kizer*, 830 F.2d 1078, 1081 (9th Cir. 1987). In the Indian law context, tribal members who are not a tribe's official representatives may not assert claims on behalf of a tribe. See *Hackford v. Babbitt*, 14 F.3d 1457, 1466 (10th Cir. 1994) (individuals lack standing to sue based on tribal right to manage irrigation project). Where a case is captioned in the name of a tribe, the suit cannot be maintained as such if the plaintiffs "ha[ve] no authority to act for the [tribe] and bring suits in its name." *Cherokee Nation v. United States*, 80 Ct. Cl. 1, 3 (1932). Thus, it is held that "'[t]he [Government's] determination that [a certain member] does not represent . . . [a tribe] may well moot plaintiffs' claims." *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 938 (D.C. Cir. 2012) (quoting *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 713 (2d Cir.1998)). Elaborating, the court said:

> In these circumstances, we owe deference to the judgment of the Executive Branch as to who represents a tribe. See *California Valley Miwok Tribe v. U.S.*, 515 F.3d [1262] at 1267 [D.C. Cir. 2008)] ("Although the sovereign nature of Indian tribes cautions the Secretary not to exercise freestanding authority to interfere with a tribe's internal governance, the Secretary has the power to manage 'all Indian affairs and ... all matters arising out of Indian relations.' " (quoting 25 U.S.C. § 2)); see also *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419, 18 L.Ed. 182 (1866) ("In reference to [matters of tribal recognition], it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs.").

Id.

The Secretary does not recognize the Kelly Faction as of the date that the terms of four members of the Council expired and those seats were not filled by candidates who were elected by a vote of all enrolled tribal members as prescribed by the Nooksack Constitution and By-Laws. Because this action is brought by an unrecognized faction rather than the recognized government of the Tribe, the plaintiff lacks standing and the lawsuit should be dismissed.[18] While the Kelly Faction

18 The Kelly Faction, relying on nothing more than a convenient *post hoc* rationalization, argues that Nooksack law recognizes the concept of the "holdover Council member." It cites to no circumstance in which the Nooksacks, or anyone else for that matter, have applied this concept to situations even remotely similar to the one presented here, *i.e.*, a

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appears to be asserting that the law *requires* the Secretary to extend recognition to the post-January 21, 2017 "council," it has come forward with nothing to establish that the Secretary violated any law in not recognizing the "council."[19] An APA cause of action requires a party to establish that the Government acted arbitrarily and capriciously by failing to act although legally required to do so. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (federal agency may be compelled to act under the APA only if a legal duty to act exists). The Secretary is unaware of any such law, and the Kelly Faction has brought none to the attention of the Court. The Kelly Faction may seek recognition from the Secretary by requesting it, and the Secretary will act on that request in due course.

b. The Secretary Acted Within His Authority in Refusing to Recognize the Kelly Faction

The Kelly Faction's motion is premised on the notion that in choosing whether to recognize a tribal government, or not, the Secretary essentially has no choice. In substance, the Kelly Faction argues that the Secretary's hands are tied and he lacks any authority to examine the means by which a faction has risen to power within a Tribe, no matter how illegitimate. The law is distinctly to the contrary. Indeed, it is well-accepted that the Secretary has a duty "to promote a tribe's political integrity." *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008) ("CVMT II") ("A cornerstone of this [trust] obligation is to promote a tribe's political integrity, which includes ensuring that the will of the tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits."). This means that when the federal government engages in government-to-government relations with a tribe, it must ensure that it is dealing with a

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self-created "exigency" to allow the sitting council to perpetuate itself in power rather than face a hostile electorate. That the Kelly Faction cannot muster any salient authority to support its position is not surprising. The very notion that one can lawfully extend his or her term of office by voting to suspend a constitutionally-required election is inherently anti-majoritarian and flies in the face of universally-accepted principles of democratic government.

19 The Kelly Faction appears to be engaging in half-truths when it asserts that the election encompassed "all enrolled Nooksack tribal members over the age of 18 years, who were therefore qualified to vote under the Nooksack Constitution." Dkt. # 19, p. 4. In fact, the Secretary is informed and believes that many members of the electorate, *i.e.*, those purportedly "disenrolled" by the unrecognized Kelly Faction without a quorum of elected councilmembers, were not permitted to vote in the election. See Dkt. # 15, p. 95. Moreover, the Secretary is informed and believes that, of the remaining tribal enrollees, only those residing in Whatcom County were allowed to vote, thereby reducing the potential electorate from approximately 1,570 voters to approximately 586 voters. *Id*.

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duly constituted government that represents the tribe *as a whole*. *Morris v. Watt*, 640 F.2d 404, 415 (D.C. Cir. 1981) (emphasis added) (noting that tribal governments must "fully and fairly involve the tribal members"); *CVMT II*, 515 F.3d at 1267-1268 (rejecting an attempt to force the Secretary to recognize the Tribe as organized under the IRA as an "antimajoritarian gambit [that] deserves no stamp of approval from the Secretary"); *CVMT I*, 424, F.Supp.2d 197, 201 (the Secretary must "ensure that he deals only with a tribal government that actually represents the members of the tribe."); *Seminole Nation v. Norton*, 223 F.Supp.2d 122, 140 (D.D.C. 2002) (noting that the Secretary "has the responsibility to ensure that [a tribe's] representatives, with whom [she] must conduct government-to-government relations, are valid representatives of the [tribe] as a whole"); *Ransom v. Babbitt*, 69 F.Supp.2d 141, 153 (D.D.C. 1999) (the Secretary was "derelict in [her] responsibility to ensure that the Tribe make its own determination about its government consistent with the will of the Tribe").

Apart from his obligation to promote a Tribe's political integrity, the Secretary has the authority and responsibility to ensure that the Tribe's representatives will faithfully apply federal funds responsibly and for the benefit of the Tribe as a whole. See *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) ("Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.").

Therefore, the Secretary is not just authorized but obligated to ensure that those who purport to act on behalf of the Tribe are faithful to all members of the Tribe as well as responsible stewards of federal funds. Consequently, the remaining question on the merits is whether the Kelly Faction has shown any likelihood of success with respect to its contention that the Secretary has acted arbitrary and capriciously in concluding that the Kelly Faction should not be recognized after March 24, 2016 under the highly deferential APA standard of review. See *Seminole Nation of Oklahoma v. Norton*, 2001 WL 36228153, at *17 (D.D.C. 2001) (Secretary's determination was not without "rational justification" when Interior could not discharge its trust responsibilities because the

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governing body of the Tribe was "no longer lawfully constituted."). Clearly, the Kelly Faction has not carried its burden.

As the record reflects, the Kelly Faction unilaterally cancelled the 2016 Council election required by the Nooksack Constitution and By Laws without any basis and without justifiable cause. Thereafter, it was impossible for the Kelly Faction to muster the quorum necessary to act on any official business affecting the Tribe. Moreover, far from acting on behalf of *all* members of the Tribe, *including* those Tribal members who it wished to disenroll, but could not in the absence of a quorum, the Kelly Faction nevertheless proceeded with mass purported disenrollments with only a pretense of due process. When the Nooksack judiciary, exercising its constitutional role, stood in the way of the Kelly Faction, judges were fired and replaced by judges who would refuse to hear the claims of the disfavored; whole courts were abolished; and, ultimately, the Kelly Faction appointed itself as a "Supreme Court" and dispensed with prior rulings that were not to its liking.

The Kelly Faction has moved to illegally throw these disfavored Tribal members out of homes they occupy with federal assistance, and denied them federally assisted health care and social services to which they are otherwise entitled. In other words, the Secretary had ample reason to conclude that the Kelly Faction did not represent the Tribe as a whole and was not worthy of acting as an honorable steward of the federal funds which are made available to Nooksack Indians by the federal government.

c. The Kelly Faction is not Entitled to an Order Compelling Recognition of the post January 21, 2017 Council.

For a variety of reasons, this aspect of the Kelly Faction's preliminary injunction motion is not conventional. Apart from the oddity of the purpose of the motion itself, it is legally noteworthy that the motion seeks not to preserve the status quo, but to change it. Its goal is to force the Secretary to take action, *i.e.*, to recognize the post- January 17, 2017 "general election" council formed by an election run by the Kelly Faction. See *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014) ("A mandatory injunction orders a responsible party to take action . . .").[20] Also of importance is that the Kelly Faction's motion seeks not limited and temporary relief to

20 The Kelly Faction appears to believe that the relevant status quo is recognition. The Secretary disagrees. While the Council was recognized by the Secretary *prior to* March 24, 2016, the Kelly Faction has never been recognized by the

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prevent irreparable harm pending a hearing on the merits, but full and complete relief.

In this Circuit, mandatory injunctions are "particularly disfavored." *Stanley v. University of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994). Thus, a much more demanding showing of potential success on the merits is required. "When a mandatory preliminary injunction is requested, the district court should deny such relief unless the facts and the law clearly favor the moving party." *Id*. (internal quotations omitted); see also *Committee of Central American Refugees v. Immigration and Naturalization Service*, 795 F.2d 1434, 1441 (9th Cir. 1986) (Courts should be "extremely cautious" about issuing mandatory preliminary injunctions); *Martin v. International Olympic Committee*, 740 F.2d 670, 675 (9th Cir. 1984).

The Kelly Faction's burden here is further intensified, however, because they are requesting a mandatory preliminary injunction which grants them the full relief requested in the action. A mandatory preliminary injunction which grants full relief is viewed with even greater disfavor than one which does not. See *Senate of the State of California v. Mosbacher*, 968 F.2d 974 (9th Cir. 1992) (discussed infra); *Bricklayers, Masons, Marble & Tile Setters, Protective Benevolent Union No. 7 of Nebraska v. Lueder Construction, Co.*, 346 F. Supp. 558, 561 (D. Neb. 1972). In *Tanner Motor Livery, Ltd v. Avis, Inc.*, 316 F.2d 804 (9th Cir. 1963), cert. denied, 375 U.S. 821 (1963), the Court said:

> It is so well settled as not to require citation of authority that the usual function of a preliminary injunction is to preserve the status quo ante lite pending a determination of the action on the merits. The hearing is not to be transformed into a trial of the merits of the action upon affidavits, and it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial. This is particularly true where the relief afforded, rather than preserving the status quo, completely changes it.

Id. at 808-809; see also *Litton Systems, Inc. v. Sundstrand Corporation*, 750 F.2d 952, 961 (Fed. Cir. 1984).

Thus, in considering the Kelly Faction's request for a mandatory preliminary injunction compelling the Secretary to recognize it as the governing body of the Tribe, the law compels it to

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Secretary. More to the point, however, the Secretary has *never* recognized the latest iteration of the Kelly Faction which was created by the January 17, 2017, "general election," nor has he ever been requested to do so. It is recognition of this post- January 17, 2017 iteration of the Kelly Faction which the motion seeks to compel. The *status quo* for recognition of the post- January 17, 2017 Kelly Faction is non-recognition. The Kelly Faction's motion seeks to change that status quo.

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demonstrate that "the facts and the law clearly favor" its position. See *Stanley v. University of Southern California*, supra, 13 F.3d at 1320. The Kelly Faction's motion does not meet this standard.

First, the Kelly Faction's motion runs afoul of a procedural hurdle that has jurisdictional dimensions. As the Court knows, the Kelly Faction cannot assert a claim in a United States District Court against the federal government unless, among other things, it is able to demonstrate that its claim fits with the boundaries of an express congressional waiver of sovereign immunity. *Roberts v. United States*, 498 F.2d 520, 525 (9th Cir. 1974), *cert. denied*, 419 U.S. 1070 (1974) (axiomatic that a congressional waiver of sovereign immunity is a prerequisite to any suit brought against the United States). While the judicial review provisions of the APA do indeed waive the United States' sovereign immunity, that waiver is subject to important conditions of relevance here. Of primary importance is the final agency action requirement. As a jurisdictional matter, only a "final agency action" may be challenged under the APA. *Rattlesnake Coalition v. U.S. E.P.A.*, 509 F.3d 1095, 1104 (9th Cir. 2007). To be "final," an action "must mark the consummation of the agency's decisionmaking process ... [and] not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

In regards to the January 21, 2017 "general election," which occurred only weeks before the Kelly Faction filed this lawsuit, the Kelly Faction pointed to no final agency action by which the Secretary has announced a definitive position on post January 21, 2017 recognition. Indeed, the Kelly Faction has pointed to nothing in the record which reflects a request that the Secretary recognize the "council" which emerged from the January 21, 2017 "general election" as the governing body of the Tribe nor, more importantly, has it pointed to a final decision of the Secretary to refuse recognition. It will, of course, be necessary for the Tribe to come forward with proof that it conducted a full and fair election as outlined in the earlier correspondence from the PDAS. The Secretary will then examine the Tribe's proof and make a decision on the matter. If the Secretary's decision is not to recognize the post January 21, 2017 "council" as the governing body of the Tribe it may, presumably, seek judicial review and attempt to show arbitrariness based on the administrative record before the Court. However, because there is no final agency action at present with respect to

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that question, and because a final agency action is a jurisdictional prerequisite for judicial review, the Kelly Faction has failed to show that the facts and the law are clearly in its favor. Moreover, because there is no subject matter jurisdiction for this aspect of the Kelly Faction's lawsuit, the Secretary is entitled to dismissal of the claim.[21]

d. There has been no Final Agency Action in regards to Reassumption

Similarly, the Kelly Faction has failed to establish that there has been any final agency action by the Secretary in regards to reassumption of any programs administered on the Secretary's behalf by the Tribe. The PDAS has mentioned reassumption as a possible outcome *if* the Kelly Faction does not yield to a constitutionally elected government. But the Secretary has not yet taken any affirmative steps to reassume programs from the Tribe.[22] The first step in an "emergency reassumption" is for the Secretary to immediately give the Tribe a detailed statement in writing of the findings supporting the Secretary's determination to reassume and notice of the Tribe's right to a hearing within 10 days (or such later date as the Tribe approves).[23] For a "non-emergency

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21 While the December 23, 2016 PDAS letter reflects a distinct disinclination to recognize any body emerging from a January 2017 election based on the information available to the PDAS at the time, this letter was written in advance of the election and therefore could not constitute final agency action with respect to an election which had not yet occurred. See *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (To be "final," an action "must mark the consummation of the agency's decisionmaking process ... [and] not be of a merely tentative or interlocutory nature."). If the Tribe indeed conducted a full and fair election on January 21, 2017, it should be able to prove that to the Secretary's satisfaction. And if it is unhappy with the result of the Secretary's deliberations, it may presumably seek review here.

22 In his October 17, 2017 letter, the PDAS indicates:

> Under Federal law, the United States has a duty to ensure that tribal trust funds, Federal funds for the benefit of the Tribe, and our day-to-day government-to-government relationship is with a full quorum of the Council as plainly stated in the Tribe's Constitution and Bylaws. As such, the Bureau of Indian Affairs (BIA) *will examine* any self-determination contracts or funding agreements it has with the Tribe to ensure the Tribe's compliance with all contract provisions. *In the event of non-compliance*, BIA will take action to reassume the particular Federal services, in whole or in part, and provide direct services to currently enrolled tribal members.

Dkt. #21, p. 16 (emphasis added). In his third letter, describing information he received concerning Nooksack Tribal Police assisting the Kelly Faction by enforcing invalid orders of eviction, the PDAS states:

> [S]uch unlawful action *would constitute a basis* for the BIA Office of Justice Services to reassume the Tribe's law enforcement program. *If* the Tribe continues to pursue eviction actions stemming from actions taken by Tribal Council without a valid quorum, BIA is prepared to reassume jurisdiction.

Dkt. # 15, pp. 14-15 (emphasis added).

23 25 C.F.R. §§ 900.252 & 900.253.

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reassumption," the Secretary must, *inter alia*, notify the Tribe in writing by certified mail of the details of the deficiencies in contract performance and request specified corrective action to be taken within a reasonable period of time, which in no case may be less than 45 days.[24] Further, the Tribe can appeal from an emergency reassumption or a non-emergency reassumption to the Interior Board of Indian Appeals (IBIA).[25]

Moreover, apart from the fact that there has been no final agency action, the matter is simply not ripe for judicial review. Ripeness has both constitutional and prudential components. *Portman v. Cty. of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993). The constitutional component of ripeness overlaps with the "injury in fact" analysis for Article III standing. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138–39 (9th Cir. 2000) (*en banc*); see also *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). Whether framed as an issue of standing or ripeness, the inquiry is largely the same: whether the issues presented are "definite and concrete, not hypothetical or abstract." *Thomas*, 220 F.3d at 1139 (internal quotation marks omitted). To evaluate the prudential component of ripeness, two considerations are important: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967) abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977). "'A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.'" *US West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999), quoting *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir.1989). "'To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss.' " *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir.2009), quoting *US West Commc'ns*, 193 F.3d at 1118.

Here, it is evident that any claim concerning reassumption by the Secretary is unripe. While the Secretary has warned the Kelly Faction that he may initiate reassumption of some Interior

24 25 C.F.R. § 900.248(a), (b). Moreover, there is an administrative hearing process afforded to a tribe to challenge a proposed non-emergency reassumption. 25 C.F.R. §§ 900.249-900.251.

25 25 C.F.R. §§ 900.170-900.176 (emergency reassumption): 25 C.F.R. §§ 900.150-900.169 (non-emergency reassumption).

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Department programs if the Kelly Faction remains on its present course, no effort as of yet has been taken by the Secretary to reassume any program. Moreover, the direction that the Secretary might take in regards to reassumpton, and what programs might be involved, is entirely unknown. Finally, given the amount of due process that the Secretary must provide in order to reassume, withholding judicial review results in no direct and immediate hardship nor direct financial loss to the Tribe. In summary, the question of reassumption is simply not ripe for review at the present time.[26]

III. ANY IRREPARABLE INJURY SUFFERED BY THE KELLY FACTION IS WHOLLY SELF-INFLICTED

A prerequisite to a preliminary injunction is a showing that the movant will suffer "irreparable injury." In order to obtain a preliminary injunction, the movant must establish that irreparable harm is likely, not just possible. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Irreparable harm has been described as "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction. See 11A Wright & Miller, Fed. Prac. & Proc. § 2948.

It is well settled, however, that "a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted." *Citizens of the Ebey's Reserve for a Healthy, Safe & Peaceful Env't v. U.S. Dep't of the Navy*, 122 F. Supp. 3d 1068, 1083 (W.D. Wash. 2015) (citing 11A Wright, Kane, Miller & Marcus, Federal Practice and Procedure § 2948.1 (2d ed. 2011)). Any harm that the Kelly Faction has suffered, and will suffer, as a consequence of non-recognition follows directly from its own actions and choices. The Kelly Faction could have avoided a loss of recognition and its consequences, simply by following the Nooksack Constitution and By Laws. Instead, it chose to cancel the 2016 elections and to conduct the business of the Tribe lawlessly. Its anti-democratic and anti-majoritarian actions speak for themselves. The Kelly Faction may not clothe itself in the garb of the "victim" here. It has not been shown that it faces irreparable injury and the motion for a preliminary injunction may be denied on that basis alone.

Moreover, the Kelly Faction has not shown the need for a preliminary injunction. The means

26 The Secretary of Health and Human Services, through the Indian Health Service, has commenced non-emergency reassumption proceedings in regard to programs administered for it by the Tribe. However, the HHS Secretary is not a party to this lawsuit.

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to gain the recognition from the Secretary that it asks this Court to compel have always been in the Kelly Faction's hands. The Kelly Faction only needs to prove to the Secretary that it has conducted a full and fair election according to the Nooksack Constitution and By Laws, and that the election afforded an equal opportunity for all enrolled Nooksack members to vote, including those who the Kelly Faction sought to disenroll from the Tribe after March 24, 2016. If, on the other hand, the January 2017 election was a sham election which did not follow the PDAS' guidance as to the fundamental elements of an election process that would be necessary in order to regain recognition, the Kelly Faction has only itself to blame, and it should bear any injury that comes to it because of the questionable choices it has made.

IV. THE EQUITIES TILT SHARPLY AGAINST THE KELLY FACTION

For any person who prizes the rule of law as among the highest principles of the democratic form of government, it is difficult to review the history of the Kelly Faction's "governance" of the Tribe since 2016, and its anti-majoritarian ways, without being appalled. Rather than expose itself to the will of the voters in 2016, the Kelly Faction simply cancelled the election. Then, despite lacking the legitimacy of an elected government, it embarked on plans to expel hundreds of enrolled members of the Tribe with only the slimmest pretense of due process. When the tribal judiciary acted in its rightful role of requiring the Kelly Faction to follow the law and respect the legal rights of those it sought to disenroll, those judicial officers and courts were replaced by the Kelly Faction with others who simply ignored the legal claims of the disenfranchised.

Even that was not enough for the Kelly Faction. When rulings of the Nooksack Court of Appeals proved to be a hindrance, the Kelly Faction simply appointed itself as the "Supreme Court" of the Tribe and then proceeded to overturn *en masse* all of the bothersome prior legal rulings. With the tribal judiciary no longer an obstacle to disenrollment, the Kelly Faction was able to move directly against these disfavored tribal members. Among other things, the unelected Kelly Faction has proceeded to evict people from homes which they lawfully occupy with federal assistance and, in the process, has enlisted the federally-funded Nooksack police force to provide the "muscle." The Kelly Faction has also acted to deny persons in need from access to federally-funded health care and social services to which they are fully entitled.

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These are not the actions of a party deserving of equitable intervention on its behalf. A basic tenet of equity jurisprudence is that the party seeking equitable relief must come to the court with "clean hands." The essence of this doctrine is that no person can obtain affirmative relief in equity with respect to a transaction in which he or she has been guilty of inequitable conduct; as was more fully explained in *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945):

> [H]e who comes into equity must come with clean hands. This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be the abettor of iniquity. Thus while equity does not demand that its suitors shall have led blameless lives, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion. Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor.

Id. at 814-15.

On the opposite side of the scale, the Tribe has shown *no* inequitable conduct by the Secretary. The Kelly Faction simply professes an inability to understand "what, if any, interest the defendants have in their continued enforcement of a series of flawed legal opinion letters issued by an appointed official in the waning hours of an outgoing administration." Dkt. # 19, p. 13, *ll*. 12-20. As stated previously, the Secretary has a well-recognized legal interest, indeed a duty, to ensure that when the federal government engages in government-to-government relations with a tribe, "it is dealing with a duly constituted government that represents the tribe as a whole." *Morris v. Watt*, 640 F.2d 404, 415 (D.C. Cir. 1981). As noted previously, the Secretary has ample reason to believe that that standard is not met in the case of the Kelly Faction, and his duty to fulfill the duty described in *Morris* is not altered by a change of administrations. In other words, in a balancing of the equities, the Kelly Faction is clearly the loser.

V. THE PUBLIC INTEREST FAVORS THE POSITION OF THE SECRETARY

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The Secretary does not disagree that *responsible and democratic* tribal self-governance is in the public interest. However, there is no public interest in forcing upon the Secretary government-to government relations with a faction which sustains itself by ignoring its own tribe's constitution, eschews generally accepted notions of democratic government and majority rule, and disregards the rule of law. There is also no public interest in prolonging that faction's effort to deprive needy individuals of the federal assistance to which they are entitled.

On the other hand, as the Courts have held, there is a substantial public interest in having the Secretary ensure that the Tribe's representatives will faithfully use federal funds responsibly and for the benefit of the Tribe as a whole. See *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). It is in fulfilling that responsibility that the Secretary has informed the Kelly Faction that it is not the recognized governing body of the Tribe and it is in the public interest to permit the Secretary to fulfill his responsibility by denying the Kelly Faction's request for a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the motion of the Kelly Faction be denied, and the cross-motion of the Secretary for dismissal or summary judgment be granted.

DATED this 3rd day of April 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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I further certify that on this date, I mailed, by United States Postal Service, the foregoing to the following non-CM/ECF participant(s), addressed as follows:

-0-

DATED this 3rd day of April, 2017.

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