THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

THE NOOKSACK INDIAN TRIBE,

Plaintiff,

v.

RYAN K. ZINKE, in his official capacity as Secretary of the Interior; 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. TETERS, 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. 2:17-cv-00219-JCC

NOOKSACK INDIAN TRIBE'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

NOTED FOR HEARING: April 7, 2017

Oral Argument Requested

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The issue before the Court at present[1] is whether the Tribe has demonstrated that it is entitled to a preliminary injunction preventing the defendants from further relying on the conclusions of Former Acting Assistant Secretary Roberts that there has not been a "valid" Tribal Council at Nooksack since March 24, 2016 and the present Tribal Council is not valid. The Tribe has met its burden, and the Court should grant it the injunctive relief it seeks.

A. The Tribe Has Standing

The Nooksack Indian Tribe's Constitution grants to the Tribal Council the power "[t]o present and prosecute any claims or demands of the Nooksack Indian Tribe." Art. VI, Sect. 1(C). Exhibit 1, Kelly Decl. There is no direction anywhere in the Constitution or Nooksack law describing the process by which the decision to prosecute Nooksack claims must be reached, or how such prosecution may be undertaken.

The Council, like the United States Congress, has the ability to delegate its powers under broad standards. *See*, Art. VI, Sect. 1(f) (express powers of Tribal Council include "select[ing] subordinant boards, officials, and employees not otherwise provided for in this constitution and to prescribe their tenure and duties"); *see*, *also*, *Mistretta v. United States*, 488 U.S. 361, 372-73, 109 S. Ct. 647, 655, 102 L.Ed.2d 714, 731 (1989) ("Congress simply cannot do its job absent an ability to delegate power under broad general directives."); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) ("The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function."). "Accordingly, this Court has deemed it 'constitutionally sufficient if Congress clearly delineates

[1] The Tribe responds in this Reply to only those issues relevant to its pending motion. The Tribe will respond later to the other issues raised in the defendants' cross-motions to dismiss or for summary judgment. Because the cross-motion is not noted for consideration until April 28, 2017, the Tribe's response to the motion is not due until April 24. LCR 7(d)(3).

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the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta*, at 372-73, *quoting American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). A person or entity acting pursuant to "delegated" power is acting as an agent or arm of the government delegating the power. *See, e.g.*, *United States v. Enas*, 255 F.3d 662, 679 n.4 (9th Cir. 2001). Like the power to prosecute Nooksack claims, Nooksack law is silent regarding the method by which the Tribal Council may exercise its delegation powers.

The Tribal Council indisputably has "standing" to prosecute claims on the Tribe's behalf, in the Article III sense. *Cayuga Nation v. Tanner*, 824 F.3d 321, 327 (2nd Cir. 2016). What the defendants argue is that the current Tribal Council, which includes four members who were elected on January 21, 2017, lacks the authority to prosecute this lawsuit on the Tribe's behalf. "Though not a question of constitutional standing, that issue nonetheless implicates the subject matter jurisdiction of this Court." *Id.*

The defendants are wrong. They are also misguided, because even if the current Tribal Council was not authorized to prosecute the Tribe's claims – which it is – Chairman Kelly has the power to prosecute those claims on the Tribe's behalf, through a 2012 delegation of authority from the Tribal Council. Kelly Decl., ¶ 3.

1. **Chairman Kelly has delegated authority to prosecute the Tribe's claims.**

It cannot be disputed that Robert Kelly was elected Chairman of the Nooksack Tribe on March 20, 2010, reelected on March 15, 2014, and is the recognized, current Chairman and leader of the Tribe. Kelly Decl., ¶ 1. The three opinion letters by former Acting Assistant Secretary/Principal Deputy Assistant Secretary Roberts were addressed to letters to "The Honorable Robert Kelly, Jr., Chairman, Nooksack Indian Tribe." Kelly Decl., Exhs. 4, 6, 7.

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Recent correspondence from the Department of Housing and Urban Development and the Indian Health Service providing notice of those agencies' intent to reassume the Tribe's self-determination duties, based on the opinions of the DOI set forth in the Roberts letters, are also addressed to Mr. Kelly as Chairman. Kelly Decl., Exh. 8. Thus the United States has recognized Chairman Kelly as the leader of the Tribe as recently as April 4, 2017.

Nor can the defendants dispute the fact that the Tribal Council has the power to delegate authority, and exercised its power to delegate to Chairman Kelly the power to make litigation decisions, prosecute the Tribe's claims, and initiate and manage litigation. Kelly Decl., ¶ 3. Chairman Kelly, in prosecuting the Tribe's claims presented in this lawsuit, is exercising powers delegated to him by the Tribal Council in 2012, which has never been rescinded. *Id.* The Tribe has Article III standing, and Chairman Kelly is authorized to act. The Tribe has met its burden.

2. **The three Council members held over in their seats during the period of delayed general elections.**

Due to extraordinary circumstances related to the disenrollment of approximately 306 individuals and previous security concerns and threats of violence associated with disenrollment protests, the Chairman postponed the regular elections that were to have been held on March 14, 2016. Kelly Decl., ¶¶ 8-9. Vice-Chairman George, Council Member/Treasurer Smith, and Council Member Canete continued to occupy their Council seats as holdovers until an election could be held, consistent with the holdover terms provided for under Nooksack law. *Id.*

In August, 2016, defendant Stanley Speaks confirmed that neither the Nooksack Constitution nor federal law authorized the Secretary of the Interior to conduct or approve Tribal Council elections. Kelly Decl., ¶ 10, Exh. 3. As Mr. Speaks noted, "Tribal Council elections are recognized as sovereign tribal processes. *Garcia v. Western Regional Director*, 61 IBIA 45

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(2015). Absent any constitutional authority specifically instructing the Secretary to conduct a tribal election, it is up to the Nooksack Tribe through its own internal processes and operating through its own internal forums to carry out this inherently sovereign function." *Id.*, at 1-2.

The three Council members whose terms were set to expire in March, 2016 held over in the positions, as permitted under Nooksack law, when the general election was postponed for 10 months until January 21, 2017. Kelly Decl., ¶ 9. Those three Council members – Vice Chairman Rick George, Treasurer Agripina Smith, and Katherine Canete – were re-elected in the January 21 election. Decl. Romero, Exh. C. The fourth seat, which had been vacated following a recall election, was filled by Roy Bailey. *Id.*

The current Council is, with the exception of Council Member Roy Bailey, the same as the last "undisputed" Tribal Council – which, according to the Roberts letters, was the Council then-seated as of March 24, 2016. The defendants contend that the expiring terms of three Council members left the Tribe without a quorum, and unable to govern. That argument is contrary to well-established principles of democratic government and Nooksack law.

It is true that the BIA has the authority to make recognition decisions regarding tribal leadership, but "only when the situation [has] deteriorated to the point that recognition of some government was essential for Federal purposes." *Wadena v. Acting Minneapolis Area Director*, 30 IBIA 130, 145 (1996). Such decisions typically carry some kind of limiting language. *Cayuga Nation*, 824 F.3d at 329, *citing Acting Governor Leslie Wandrie-Harjo*, 53 IBIA 121, 123 (2011) (discussing BIA decision recognizing an official "for purposes of the ISDA contract modifications and related drawdown requests"); *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 937 (Dist. D.C. 2012) (citing BIA decision that recognized one faction "for the limited

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purpose of conducting government-to-government relations necessary for holding a special election").

The BIA "has both the authority and responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe." *United Keetoowah Band of Cherokee Indians*, 22 IBIA 75, 80 (1992). Real or perceived internal dysfunction within tribal governance standing alone, however, does not permit the BIA to decide who constitutes the legitimate leadership of a tribe. *Cf. Goodface v. Grassrope*, 708 F.2d 335, 338-39 (8th Cir. 1983); *Alturas Indian Rancheria*, 54 IBIA 138, 143-44 (2011).

If the Court accepted the defendants' position that the government simply ceased to operate upon the expiration of Council members' terms, it would impermissibly and effectively "creat[e] a hiatus in tribal government which jeopardize[s] the continuation of necessary day-to-day services on the reservation." *Goodface*, 708 F.2d at 338-339 (concluding BIA acted arbitrarily and capriciously by refusing to recognize the tribal council until an election dispute could be resolved through tribal court).

Recognizing the status of holdover elected officials – and, indeed, requiring elected officials to continue to serve the needs of their people until a new official can be sworn in - has long been recognized as the means by which governmental power is orderly transitioned. It has long been established in constitutional democracies that – in situations where a constitution is silent on the status of a holdover elected official – an official holds office until a successor is duly appointed and qualified. "As nature abhors a void, the law of government does not ordinarily countenance an interregnum. *Bradford v. Byrnes*, 221 S.C. 255, 70 S.E.2d 228, 231 (S.C. 1952) (upholding as valid acts of commissioners serving more than two years after terms

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expired); *Burleson v. Hancock Co. Sheriff's Dept. Civil Service Com'n*, 872 So.2d 43, 51 (Miss. 2003) ("public officials can serve after the expiration of their term until they are replaced"); *Grooms v. LaVale Zoning Bd.*, 340 A.2d 385, 391 (Md. 1975) ("it has long been recognized … that the public interest requires. . . that public offices should be filled at all times, without interruption"); *Carpenter v. State*, 139 N.W.2d 541, 546 (Neb. 1966), (two-year holdover period not unconstitutional); *Fort Osage Drainage Dist. of Jackson County v. Jackson County*, 275 S.W.2d 326, 331 (Mo. 1955) (officer holding over after expiration of term, where no successor has been appointed, continues to exercise functions of office as *de facto* officer); *Case v. Mich. Liquor Control Comm'n*, 314 Mich. 632, 23 N.W.2d 109, 113 (Mich. 1946) (officers holding over after their term expired were *de facto* officers until the appointment of their successor), overruled on other grounds, Bundo v. Walled Lake, 238 N.W.2d 154 (1976).

There is also Nooksack law allowing for holdover. For example, because newly-elected Council Members cannot, by ordinance, be sworn in until the election results are certified, and the results cannot be certified until all pending appeals have been decided, the Election ordinance implicitly provides that the Council members whose terms expired continue on as holdovers during any appeal period, so the Tribe is not left in a position of being unable to govern or transact the business of the Tribe. N.T.C. 62.07.030.

In addition, if an election results in a tie, a run-off election must be scheduled within thirty days, and the ordinance explicitly requires the incumbent holds over in his or her office ("[t]he incumbent shall remain in office until the Council Elect is sworn in." N.T.C. 62.06.070).

There is also Nooksack case law recognizing holdovers. In a 1997 opinion, the Nooksack Tribal Court upheld the holdover of Council members for more than a year during an

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election dispute, and refused to invalidate Council action taken during that time, to provide for "the orderly transition of power of the government." April 7, 1997 Order, *Campion v. Swanaset*, No. NOO-C-96-004, at 2-3. The reasons for this holdover rule are manifest - there must be continuity and stability in government to protect the best interests of the people being governed.

In a recent breach of contract suit brought by the Tribe against the organization that formerly provided its appellate court services, the Nooksack Tribal Court affirmed *sub silentio* the validity of the Council members' holdover terms. *Nooksack Indian Tribe v. Northwest Intertribal Court System*, Case No. 2016-CI-CL-006, (10/7/2016 TRO, 11/17/2016 preliminary injunction in Tribe's favor, over defendant's objection that the holdover Tribal Council had no standing to initiate litigation because of Roberts letter, alleged lack of quorum).

For interpretations of tribal law, such as the hold-over status of Council members, the defendants and the federal courts are required to defer to a tribe's reasonable interpretation of its own laws. *Tabor v. Acting Southern Plains Regional Director*, 39 IBIA 144, 151 (2003) (Department must defer to tribal governing body's reasonable interpretation of its own laws); *see also Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004) (federal court defers to tribal court's interpretation of tribal law). As such, the defendants' position should be given no weight with regard to matters of tribal concern, specifically the allowance under Nooksack law for holdover Council terms.

In addition, because a tribe's right to hold an internal election without federal interference "is essential to the exercise of the right of self-government." *Wheeler v. Swimmer*, 835 F.2d 259, 262 (10th Cir. 1987), the Court should reject the defendants' unsupported,

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conclusory allegation that the January 21, 2017 election was invalid. Federal interference in matters involving tribal elections is particularly restricted where a tribe has in place administrative or judicial processes for handling disputes and contesting the elections. Where a tribe provides such a system, as the Nooksack Tribe does, the appropriate remedy is the tribal forum – not a federal one. *Wheeler v. U.S. Department of Interior*, 811 F.2d 549, 553 (10th Cir. 1987).

Allowing the defendants to defeat the Tribe on standing grounds by arguing that they do not recognize the Council, and therefore the Council has no authority to sue the defendants to redress the harms caused by the defendants' failure to recognize them, must not be permitted. Indeed, that is the holding in *Cayuga Nation*:

> To require tribes to cite a BIA decision recognizing a tribal government for all purposes, or for the specific purpose of initiating litigation in order to establish the authority of particular individuals to initiate litigation on behalf of the tribe could in many situations prevent tribes from vindicating their rights in federal court. Like the BIA, which must determine whom to recognize as a counterparty to administer ongoing contracts on behalf of the Nation, **the courts must recognize someone to act on behalf of the Nation to institute, defend, or conduct litigation.** Lacking jurisdiction to resolve the question of governmental authority under tribal law . . . the only practical and legal option is for the courts to consider the available evidence . . .

Cayuga Nation, 824 F.3d at 329-30 [emphasis added].

B. <u>The Tribe is Likely to Prevail in Establishing that Defendants' Refusal to Acknowledge *any* Government at Nooksack is Arbitrary and Capricious.</u>

The January 21, 2017 election was open to all enrolled Nooksack Tribal members 18 years or older, regardless of residency, as required by the Constitution. Kelly Decl., ¶ 16; Romero Decl., ¶ 5. There were no challenges to the election. *Id.* The results were certified by the duly-appointed Election Superintendent, and the results were transmitted to the defendant BIA, in accordance with Nooksack law. Romero Decl., ¶¶ 5-6. The BIA did not object to or

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otherwise express disagreement with the certified election results. Romero Decl., ¶ 6.

Thus, the Tribe has complied with Mr. Roberts' directive that the Tribe conduct an election consistent with the Nooksack Constitution that permitted "'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." And yet the defendants persist in their refusal to rescind the Roberts letters, or to acknowledge and recognize the Tribal Council. Their refusal causes ongoing harm to the Tribe, and is arbitrary and capricious and contrary to law.

This is not a case where there are rival factions claiming to be the governing body of the Tribe. Here, there is a duly elected governing body for the defendants to deal with, yet they refuse to do so. The defendants argue that the harm to the Tribe is of its own doing, but that is false. The harm to the Tribe flows directly from the defendants' refusal – without any consultation with the Tribe, meeting with the Chairman, investigation of the facts or legal analysis whatsoever – to recognize any governing body at Nooksack. Kelly Decl., ¶ 12. That is arbitrary and capricious. This Court has the jurisdiction to assess the acts and omissions of the defendants and determine whether they comported with their statutory and fiduciary obligations to the Tribe. In order to reach that issue, the elected (and only) Tribal Council must be permitted to prosecute the Tribe's claims.

The defendants' failure in other cases to recognize a tribal government, creating a hiatus in tribal governance, has been set aside as arbitrary and capricious. In *Bullcreek v. United States DOI,* where the BIA refused to recognize either of two rival leadership groups in a dispute, the Eighth Circuit held "it was an abuse of discretion for the BIA to refuse to recognize one council or the other until such time as Indian contestants could resolve the dispute themselves."

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Bullcreek, 426 F. Supp. 2d 1221, 1231 (D. Utah 2006), *quoting Goodface*, 708 F.2d at 339. The court ordered the BIA, "in its responsibility for carrying on governmental relations with the Tribe . . . to recognize and deal with some tribal governing body" until the tribe resolved its own election dispute. *Id.*

C. The Roberts Letters are Final Agency Action Appealable Under the APA.

To determine whether agency action is to be deemed "final" for purposes of judicial review, it must be determined whether challenged agency action is "definitive" and whether it has direct and immediate effect on day-to-day business of challenger. *Chicago Truck Drivers, etc. v National Mediation Bd.,* 670 F.2d 665 (7th Cir. 1981). "Final agency action" is characterized by imposition of obligation, denial of right, or fixing of legal relationship. *NAACP v Meese,* 615 F. Supp. 200 (Dist. D.C. 1985). An agency's own characterization of finality is not determinative, and thus the Court should not be swayed by the defendants' position. *Carter/Mondale Presidential Committee, Inc. v Federal Election Com.,* 711 F.2d 279 (D.C. Cir. 1983).

An agency's interpretation of its enabling statute is within the definition of "rule" in 5 USCS § 551(4) and is reviewable under § 704 as final agency action. *Rocky Mountain Oil & Gas Ass'n v Watt,* 696 F.2d 734 (10th Cir. 1982). An interpretive ruling published by a person who heads agency, when it is product of process provided by agency for taking into account position of agency staff as well as outside presentation and is not labeled as tentative or otherwise qualified by arrangement for reconsideration, has a feature of "expected conformity" by person or entity affected by the ruling as well as by agency personnel, is "final" for purposes of judicial review under § 704. *National Automatic Laundry & Cleaning Council v Shultz,* 443 F.2d 689 (D.C. Cir. 1971). It is clear that the Roberts letters – signed by the person who heads

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the agency, interpreting the authority granted to the agency under 25 U.S.C. § 2, and not labeled as tentative or otherwise qualified for reconsideration – are final for purposes of § 704.

The Supreme Court has outlined a two part test to determine whether, for purposes of the APA, an agency action has achieved the requisite degree of finality:

> First, the action must mark the "consummation" of the agency's decisionmaking process - it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined", or from which "legal consequences will flow".

Bennett v. Spear, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 1168-69, 137 L. Ed. 2d 281 (1997) (internal quotations and citations omitted); *see, also, In re Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 756 (8th Cir. 2003).

The Tribe has satisfied the two-part test. The Tribe's rights to self-determination funding and contracts were determined by the Roberts letters, and legal consequences have flowed therefrom. The Tribe's previously-awarded 2016 self-determination funds were withheld without notice or process, 2017 funds have been withheld, and the re-assumption process has been initiated. *See*, Kelly Decl., Exh. 8.

Letters from the Associate Solicitor of DOI's Division of Indian Affairs have been held not to require exhaustion prior to judicial review because the letters articulated the official agency position, which DOI felt constrained to apply, and DOI's predisposition precluded any need for plaintiffs to undertake the pointless exercise of pursuing the matter internally. *Tarbell v DOI,* 307 F Supp. 2d 409 (N.D. N.Y. 2004). Here, not only did the letters from the then-highest-ranking official in DOI's Division of Indian Affairs articulate the official agency position, which the defendants are "constrained to apply," other United States agencies are similarly constrained to apply that position and are denying funding and proceeding with reassumption of the Tribe's

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self-determination contracts. Kelly Decl., Exh. 8.

Tarbell is instructive on both the issue of finality, and the issue of harm to the Tribe. In that case, the Court noted:

> As one might gather, determinations regarding tribal leadership recognition can have significant impact upon tribal members, and are generally complex, requiring the BIA to consider the unique history and circumstances of the specific tribe involved. *See, e.g., Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995). With the agency's consideration of a matter of such complexity and import, one naturally would envision a process which affords all interested parties a meaningful opportunity to offer support for their respective contentions. Presumably, once all positions are fully aired, the agency could then issue a decision stating its conclusion regarding leadership recognition and detailing the reasoning employed to arrive at the given result. In that way, the resulting determination could then be challenged through internal agency channels and, if deemed appropriate, in the courts under the auspices of the APA, and any reviewing body would have the benefit of elucidation of the agency's rationale.

Tarbell, 307 F. Supp. 2d at 423.

Here, of course, there was no process, no meaningful opportunity for Chairman Kelly and the Tribe to offer support for its position, despite the Chairman's request for consultation, and no airing whatsoever of the Tribe's position. Kelly Decl., Exhs. 4-7. Nor is any provided in the defendants' brief. Instead, based solely on false information communicated by attorneys for third parties whose agenda was to disrupt the Tribe's leadership, Mr. Roberts prepared his three letters, which were widely disseminated and publicized by those same third parties, to devastating effect. Those letters offered no explanation of the reasoning employed by Mr. Roberts because no reasoning was employed; there was no analysis or consideration of the Tribe's position. The Tribe has established that it is likely to prevail on the merits. Mr. Roberts' decision to blindly accept the misrepresentations of third parties, parroted here in the defendants' response brief, in lieu of engaging in meaningful analysis of the issues, cannot stand.

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Dated this 7th day of April, 2017.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 7th day of April, 2017, I arranged for service of the foregoing NOOKSACK INDIAN TRIBE'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION to the parties via the Court's CM/ECF system as follows:

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