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 RESPONSE IN OPPOSITION TO FEDERAL DEFENDANTS' CROSS MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

NOTED FOR HEARING: April 28, 2017

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I. INTRODUCTION

The Federal Defendants' motion should be denied because they cannot establish through undisputed facts and admissible evidence that they are entitled to judgment as a matter of law. The Nooksack Indian Tribe, acting through its duly-elected Chairman, has standing to pursue the Tribe's claims for the Federal Defendants' arbitrary and capricious final decision refusing to recognize the Tribe's government and withholding the Tribe's self-determination contract funds that had already been awarded for 2016, without benefit of notice or process required under federal law. Moreover, the final agency action by the Federal Defendants has resulted in the loss of self-determination funds for 2017 and caused two other federal agencies, Housing and Urban Development (HUD) and Health and Human Services (HHS) – based solely on the letters of Lawrence Roberts – to begin to reassume the Tribe's self-determination contracts. Absent relief from this Court, the Tribe will suffer irreparable harm.

II. MATERIAL FACTS

Many of the "facts" alleged by the Federal Defendants in their cross-motion, particularly those related to the recent disenrollment of individuals who lacked the qualifications for membership, are false. Solomon Decl., ¶ 4. This is not, as the Federal Defendants contend, a matter of the "systematic[ ] abridge[ment] of the rights of a disfavored group of tribal members." To the contrary, it is the exercise of the sovereignty of the Tribe to determine who its members are, and are not – a right that has long been protected by the United States Supreme Court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 53, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); *Montana v. U. S.*, 450 U.S. 544, 564, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)("Indian tribes retain their inherent power to determine tribal membership").

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The disenrollment battle started approximately years ago, with the application of Terry St. Germaine to have his children enrolled in the Tribe. *Id.* On December 19, 2012, at a special meeting of the Tribal Council, the issue of erroneous enrollments of members who did not have demonstrated eligibility first arose. *Id.* On January 8, 2013, the Tribe's Chairman and its Enrollment Officer reported that research conducted at the Bureau of Indian Affairs (BIA) revealed that supporting documents for the enrollment of approximately 300 Tribal members either did not exist in the BIA files, or was missing from the BIA files. Solomon Decl., ¶ 5. Included in the approximately 300 were then-Council Secretary St. Germaine and then-Council Member Michelle Roberts. *Id.*

On February 12, 2013, the Tribal Council passed resolutions directing that notice be provided to each erroneously enrolled member of the Tribe's intent to disenroll them. Solomon Decl., ¶ 6. Notices of Intent to Disenroll were sent to about 306 members notifying them of their rights to hearing under Title 63 of the Nooksack Tribal Code, which governs enrollment and disenrollment procedures. Solomon Decl., ¶ 7.

On March 1, 2013, the Tribal Council passed Resolution 13-38 authorizing a request to the Secretary of the Interior to hold a Secretarial election to amend the Nooksack Constitution to delete the section which permitted enrollment of anyone who could establish ¼ Indian blood and some relationship to the Tribe. Solomon Decl., ¶ 9. The Secretary of the Interior conducted the election on June 21, 2013 and the Constitutional amendment passed and was certified on August 2, 2013. *Id.*

Thereafter, the Tribal Council amended Title 63, the enrollment code, to delete the corresponding provision that had been removed from the Constitution in the Secretarial

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Election, and to include rules governing disenrollment proceedings. Solomon Decl., ¶ 10.

The form and substance of the rules had already been litigated in the Nooksack Tribal Court and the Court of Appeals. *Id.* and Exh. A. The Tribe forwarded Title 63 to the Bureau of Indian Affairs and the Department of Interior, Northwest Regional Office, and obtained approval for the ordinance in late 2014. Solomon Decl., ¶ 11 and Exh. B. Each of the aforementioned actions took place long before the alleged "illegitimate" Council took over. And, indeed, Council members and the Chairman who acted to carry out the will of the Nooksack people and disenroll erroneously-enrolled individuals who failed to satisfy the Constitutional requirements for eligibility were re-elected in 2014. Solomon Decl., ¶ 12. Disenrollment was an issue that was front and center in the election. Solomon Decl., ¶ 12 and Exh. C.

In late 2015, faced with ongoing concerns about public safety and the potential for violence surrounding the election, the Chairman and the Council discussed postponing the regular election that was to be held on March 26, 2016. Kelly Decl., Doc. # 30 at ¶ 8; Solomon Decl., ¶ 13. After the Chairman satisfied himself that Nooksack law allowed for the holdover of Council positions until an election could be conducted, and with the support of the Council, the Chairman postposed the elections and did not appoint an Election Superintendent. Kelly Decl., Doc. # 30 at ¶ 9; Solomon Decl., ¶ 13. The postponement was justified, based on legitimate public safety concerns, and was supported by Nooksack law.

The three council members who were up for election - Vice-Chairman George, Council Member/Treasurer Smith, and Council Member Canete - continued to occupy their Council seats as holdovers during the delay before the election could be held, consistent with the

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holdover terms provided for under Nooksack law. Solomon Decl., ¶ 14. Although the Council still had one vacancy (as a result of an earlier recall election), with six Council members the Council had a quorum and was at all times able to govern and conduct the Tribe's business. *Id.*

The Tribe took several steps in the spring and fall of 2016 to protect its Sovereignty and ensure that Nooksack law was being enforced in the Nooksack courts consistent with the Constitution and the Court of Appeals' limited grant of authority. First, the Tribe fired its Tribal Court judge (an at-will employee) and hired a replacement, Judge Raymond Dodge. The Tribe also retained a pro tem judge who could serve on cases where Judge Dodge had a conflict. Finally, the Tribe enrolled in the BIA Office of Justice Services Tribal Court Assessment program, and a BIA consultant began her work of conducting an assessment of the Nooksack Tribal Court under Judge Dodge. Bernard Decl., Exhs. 1 and 2. Not only was the rule of law on the reservation ***not*** completely broken down, the Tribe was inviting the Federal Defendants in to evaluate the operations of its Tribal Court.

Second, the Tribe filed suit in Nooksack Tribal Court against the Northwest Intertribal Court System (NICS), a non-profit entity the Tribe contracted with to provide appellate court services, for breach of the appellate court services agreement. The Tribe successfully asserted that NICS judges had continued to issue decisions after their appointments expired, and had exceeded the scope of the Nooksack Court of Appeals' statutory jurisdiction by entertaining lawsuits as a court of original jurisdiction, not an appellate body reviewing final decisions appealed from the Tribal Court. See Bernard Decl., Exh. 3, *Nooksack Indian Tribe v. Northwest Intertribal Court System*, Case No. 2016-CI-CL-006, (10/7/2016 TRO, 11/17/2016

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preliminary injunction in Tribe's favor). The NICS appellate services contract expired in December, 2016, and the Tribe did not renew it.

Finally, the Tribe created a Nooksack Supreme Court as a court of last resort. Like numerous other tribal courts across the country, this appellate body comprised members of the Tribal Council or designees where required to comply with the Tribe's existing conflict of interest policy. The appellate code was amended to describe the court's jurisdiction, identify decisions for which review could be sought and the requisite contents of a Petition for Review, and define the review process and the rules of procedure. *See* Bernard Decl., Exh. 4, N.T.C. Chapter 80.11. In two separate proceedings, the Tribe petitioned the Supreme Court to vacate orders entered by the NICS judges after their appointments expired, and to vacate the injunctive orders entered to enjoin the disenrollments, based upon newly-enacted legislation. Bernard Decl., Exh. 5.

The Supreme Court vacated the NICS orders based on authority from other jurisdictions that a decision entered by a judge without authority to act is void. *See National Bank of Washington v. McCrillis*, 15 Wn.2d 345, 359, 130 P.2d 901 (1942) ("As the basis of Mr. Sieler's [pro tem] appointment is the consent of the parties, if there has been no consent, either in writing or orally in open court, he is without jurisdiction to hear the case, and the entire proceedings before him are void."); *Dike v. Dike*, 75 Wn.2d 1, 448 P.2d 490 (1968) (A judgment is void where the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved); *State v. Alter*, 67 Wn.2d 111, 406 P.2d 765 (1965); *cf. Bergren v. Adams County*, 8 Wn. App. 853, 509 P.2d 661 (1973); *see, also, In re Damian V.*, 197 Cal. App. 3d 933, 938, 243 Cal. Rptr. 185, 188 (1988) (a trial

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before an attorney, acting as a judge under no authority other than the consent of the parties, is a nullity); *Lackey v. State*, 364 S.W.3d 837, 841 (Tex. Crim. App. 2012) (if a judge has no authority to act, his putative actions are a nullity which may be attacked for the first time on appeal); *Smith v. Gallagher*, 408 Pa. 551, 600, 185 A.2d 135, 159 (1962) (an order signed by a judge without authority is null and void), *overruled on other grounds* by *In re Application of Biester*, 487 Pa. 438, 409 A.2d 848 (1979).

The Nooksack Supreme Court vacated the two injunctive orders because of intervening changes to Nooksack law, under the principle that prospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law. *Landgraf v. USI Film Products*, 511 U.S. 244, 273, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994) ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive"); see, also, *Miller v. French*, 530 U.S. 327, 344-45; 120 S. Ct. 2246, 147 L. Ed. 2d 326 (2000) ("This conclusion follows from our decisions in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 13 HOW 518, 14 L. Ed. 249 (1852) (*Wheeling Bridge I*) and *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 18 HOW 421, 15 L. Ed. 435 (1856) (*Wheeling Bridge II*).)"

Both the Intervenor Defendants and the Federal Defendants have questioned the legitimacy of the Nooksack Supreme Court as the court of appeal for the Nooksack Tribal Court. The Intervenor Defendants have mocked the tribe's court system as "defunct," and repeatedly referred to the court and its judges in quotation marks. The Federal Defendants have adopted the same posture, calling orders issued by the Nooksack court "so-called tribal court orders."

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The Indian Reorganization Act (IRA) allowed tribes to establish a government through the adoption of a constitution and bylaws, subject to review and approval by the BIA. *Strengthening What Remains*, Christine Zuni, 7 Kan. J.L. & Pub. Pol'y 17, 20-21 (1997).[1] The IRA, however, is silent as to whether or how tribes should create judicial systems. 25 U. S.C. 5101. The BIA tribal constitution template did not provide for three separate branches of government, and tribal councils very frequently act as the executive, legislative, and judicial branch among IRA tribes. *Mastering American Indian Law*, Angelique Eagle Woman & Stacy Leeds, Carolina Academic Press (2013).

When it comes to the judiciary, most IRA constitutions "typically include language authorizing the legislative branch of government to promulgate a law and order code, establish 'a reservation court,' and define 'its duties and powers.'" 1-4 Cohen's Handbook of Federal Indian Law § 4.04. A few original IRA constitutions established a tribal court in which tribal council either served as the trial court or the court of appeal, and the BIA has approved of this practice. The Original IRA constitutions approved by BIA for the Pueblo of Santa Clara New Mexico (Approved December 20, 1935),[2] Isleta Pueblo (Approved March 27, 1947),[3] and the Pueblo of Laguna (Approved December 21, 1949)[4] all provided that the tribal council served as the tribal court.

Although some tribes have since amended their constitutions to provide for separation

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[1] Available at https://poseidon01.ssrn.com/delivery.php?ID=845069121118114098084123028086092100034054008081016087100064101026124068076090024106117048061042052044115124022071077081029095112042011052088084081009071116120093093077021054001123067117115112000018089109080083110121104122073086000083109003016112071111&EXT=pdf.

[2] Available at http://thorpe.ou.edu/IRA/nmsccons.html.

[3] Available at http://thorpe.ou.edu/IRA/isnmcons.html.

[4] Available at http://thorpe.ou.edu/IRA/nmpuebcons.html.

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of powers, there are still many tribes that continue to have appellate review vested in tribal council or other elected leaders. Among Alaskan Native communities, the tribal council is often designated as the appellate court. *See, e.g.,* Lisa Jaegar, University of Alaska at Anchorage *Tribal Court Organization Training*.[5] At no point in time has the BIA mandated the structure of a tribal judiciary, because the BIA has long recognized that "the power to establish and maintain tribal judicial systems is an inherent, retained power that was never surrendered." *Strengthening What Remains*, at 22.

That the Federal Defendants now take such a dim view of the Nooksack Tribal Court system is surprising given the BIA's history of approving tribal constitutions that have the same basic court structure as Nooksack has now. The Indian Civil Rights Act requires tribes to afford due process, but does not require separation of powers. 25 U.S.C. 1301-1303. "It has long been recognized that a Tribal Council itself may hear appeals under tribal law without violating the ICRA's due process clause, and there does not appear to be any other Federal-law requirement for Tribes to maintain a separation of powers." *One Hundred Eight Employees v. Crow Tribe of Indians*, 2001 ML 5093 (Mont. Crow Ct. App. 2001),[6] *citing Seneca Constitutional Rights Organization v. George*, 348 F. Supp. 51, 58 (W.D. N.Y. 1972) (permitting appeals of decisions from Peacemakers Court to the Tribal Council).

The ongoing refusal of the Federal Defendants to recognize Chairman Kelly as the leader of the Nooksack Tribe is as troubling as it is arbitrary and capricious. Chairman Kelly

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[5] Available at https://www.uaa.alaska.edu/academics/college-of-health/departments/justice-center/events/2013-events/_documents/2013.ncjm.03c.tribal_court_training.pdf, slide 14 (current picture of Tribal Courts in the Tanana Chiefs Conference region).

[6] Appended hereto.

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was elected Chairman by a vote of all members of the Nooksack Indian Tribe in 2010, and re-elected in 2014, in the midst of the disenrollment furor. Chairman Kelly's second term expires March 17, 2018. *Id.* He is, despite the Federal Defendants' false and disparaging characterization as "unelected, unrecognized, and illegitimate," the Chairman of the Tribe and a member of the Tribal Council. He is not in "holdover" status. He is not a member of a "faction" – unless the "faction" is the entire Nooksack Tribe - he is the Chairman, elected and then re-elected by a majority of the Nooksack Tribe, entitled to the respect afforded his office, and arbitrarily and capriciously denied the respect that is owed him by the Federal Defendants.

Mr. Solomon was elected to the Tribal Council, Position A, by a vote of all members of the Tribe in 2014. His term expires on March 17, 2018. Ms. Johnson also was elected to the Tribal Council in 2014, occupying Position B, and her term expires on March 17, 2018. Neither Mr. Solomon nor Ms. Johnson was in "holdover" status after March 24, 2017. *See* Bernard Decl., Exh. 6.

The current Council was elected in January, 2017 by vote of all enrolled tribal members over the age of 18, without regard to residency – contrary to the footnoted assertion of the Federal Defendants. Kelly Decl., Doc. # 30, ¶ 16; Romero Decl., Doc. # 31, ¶ 5. The Council comprises, with the exception of newly-elected Council Member Roy Bailey, the exact same members as the last "undisputed" Tribal Council – which, according to the Roberts letters and the Federal Defendants' Cross-Motion, was the Council then-seated as of March 24, 2016.

In order to accept the Federal Defendants' position that the current Council is not the governing body of the Tribe, the Court would have to find, contrary to Nooksack law, that the

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Council members with expiring terms did not continue on in holdover status until the January 21, 2017 election. The Court would also have to find, again contrary to Nooksack law as well as contrary to the position of the Federal Defendants in their brief to the IBIA, that the rules adopted by the Tribal Council for disenrollment did not provide sufficient due process. Finally, the Court would have to accept the fiction that a Tribal Council that comprises the exact same members, save one, was valid on March 23, 2016 but invalid on January 21, 2017 following elections, and therefore cannot be recognized.

The Federal Defendants contend that as of March 24, 2016 the governing body of the Nooksack Tribe ceased to exist because the terms of three of its members expired. But, if the Court accepted that contention, 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 v. Grassrope*, 708 F.2d 335, 338-39 (8th Cir. 1983); *Alturas Indian Rancheria*, 54 IBIA 138, 143-44 (2011) (concluding BIA acted arbitrarily and capriciously by refusing to recognize the tribal council until an election dispute could be resolved through tribal court). The solution, as Mr. Roberts asserted in October, 2016, was for the Tribe to request the Federal Defendants' assistance in conducting an election – despite the absence of any authority for that solution under Nooksack law or federal law, as the Federal Defendants had themselves noted just two months prior to Mr. Roberts' first letter.

If the Court defers to Mr. Roberts' opinion, rejecting Mr. Speaks' contrary opinion, the end result is no recognized Tribal government – despite the following incontrovertible and critical facts: (1) Chairman Kelly, Council Member Solomon, and Council Member Johnson were not up for re-election in 2016 and thus are not "holdovers" or members of an alleged

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"faction," they are duly-elected members of the Tribal Council; (2) the current Tribal Council, which has been governing since the January 21, 2017 elections, is identical to the Council the Federal Defendants contend was the last "legitimate" council, with the exception of one member who filled a vacant seat; and (3) leaving the Tribe with no government is arbitrary and capricious conduct that the federal courts have rejected and chastised the Federal Defendants for in other circumstances. See *Goodface*, 708 F.2d at 338-39; *Alturas Indian Rancheria*, 54 IBIA at 143-44.

There is no mechanism under Nooksack law to allow the Federal Defendants to call or compel a new election. If the Court does not compel the Federal Defendants to recognize the Tribal Council – or the Tribal Council seated prior to March 24, 2016 – there is no body that can govern.

The Federal Defendants are not entitled to the relief they seek. Their cross-motion should be denied. The Tribe's demand that the Federal Defendants be compelled to recognize them during the pendency of this litigation should be granted, so there is no "hiatus in tribal government which jeopardize[s] the continuation of necessary day-to-day services on the reservation." *Goodface*, 708 F.2d at 338-39. The Tribe has standing, and this Court has jurisdiction.

A. The Court has Subject Matter Jurisdiction and the Federal Defendants' CR 12(b)(1) Motion Should be Denied

The question of whether or not the Tribal Council has standing to pursue the Tribe's claims in this lawsuit is not answered simply by virtue of whether or not the Secretary "recognizes" the Tribal Council. As the 2nd Circuit held in *Cayuga Nation v. Tanner*, 824 F.3d 321, 329-30 (2nd Cir. 2016), "Like the BIA, which must determine whom to recognize as

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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 . . ."

The federal government has no power to interfere in an intra-tribal governance dispute. *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 939 n. 7 (8th Cir. 2010). Because tribal governance disputes are controlled by tribal law, they fall within the exclusive jurisdiction of tribal institutions and the BIA's recognition of a member or faction is not binding on a tribe. *Id.* at 943, *citing Goodface*, 708 F.2d at 339. "Internal matters of a tribe are generally reserved for resolution by the tribe itself, through a policy of Indian self-determination and self-government as mandated by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341."

The Federal Defendants' feigned outrage over, and interference in, matters of internal tribal governance and membership is contrary to well-established federal law and longstanding BIA precedent. As the Court noted in *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171 (E.D. Cal. 2009):

> Unless surrendered by the tribe, or abrogated by Congress, tribes possess an inherent and exclusive power over matters of internal tribal governance. *See Nero v. Cherokee Nation*, 892 F.2d 1457, 1463 (10th Cir. 1989). Moreover, **a "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community**. *Id.* (*quoting Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)). Based on these principles, and although the BIA has attempted through multiple decisions to define the Tribal Council for government-to-government purposes, **the BIA will not interfere in the disenrollment issue**. In a May 5, 2008 letter in response to Plaintiffs' dispute of the disenrollment, the BIA wrote: The BIA adheres to a policy of Indian self-determination and self-government as mandated by the Indian Civil Rights Act,

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> 25 U.S.C. §§ 1301-1341. The BIA carries out a government-to-government relationship with the Timbisha Shoshone Tribe that includes the administration of trust and federally appropriated funds for which we are held accountable. It has long been the policy of the Department of the Interior and the BIA, in promoting self-determination, not become involved in the internal affairs of tribal governments. RJN, Ex. 20. Similarly, without authority, this Court will not interfere in the internal affairs of the Tribe. *See, Milam v. U.S. Dep't of Int.*, 10 Indian L. Rep. 3013, 3015 (D. D.C. 1982) (ordinarily, disputes "involving intratribal controversies based on rights allegedly assured by tribal law are not properly the concerns of the federal courts.").

Id., at 1185 [emphasis added].

While the BIA may at times be obliged to recognize one side or another in a dispute as part of its responsibility for carrying on government relations with the Tribe, as the *Goodface* court noted, once the dispute is resolved through internal tribal mechanisms, **the BIA must recognize the tribal leadership embraced by the tribe itself**. *Id.*; *see also Wheeler v. U.S. Dep't of the Interior, Bureau of Indian Affairs*, 811 F.2d 549, 552-53 (10th Cir. 1987). In situations of federal-tribal government interaction where the federal government must decide what tribal entity to recognize as the government, it must do so **in harmony with the principles of tribal self-determination**. *See Wheeler*, 811 F.2d 549 at 552.

This, the Federal Defendants have not done. To the contrary, the Federal Defendants have ignored Nooksack law, failed to investigate, and taken action that is arbitrary, capricious, and contrary to law. "As the BIA itself notes and indeed focuses on in its pleadings, **it is not for the federal government to adjudicate disputed tribal leadership according to tribal law**." *Winnemucca Indian Colony v. United States ex rel. DOI*, 837 F. Supp. 2d 1184, 1192 (D. Nev. 2011) [emphasis added], *citing* Cohen's Handbook of Federal Indian Law § 5.03[3][c], at 411 (2005 ed.); *Wheeler*, 811 F.2d at 551-52.

Indeed, that is the very position the Federal Defendants took with the Tribe just two

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months prior to the first letter from Mr. Roberts: "Tribal Council elections are recognized as sovereign tribal processes. *Garcia v. Western Regional Director*, 61 IBIA 45 (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**." August 8, 2016 Letter from BIA Regional Director Speaks, at 1-2, Kelly Decl., Doc. #30, Exh. 3 [emphasis added].[7]

The United States does not dictate to the Tribe who its members, or its leaders, are. *Winnemucca Indian Colony*, 837 F. Supp. 2d at 1192. The Secretary's arbitrary and capricious failure to recognize the duly-elected Tribal Council is not binding on the Tribe, nor is it binding on this Court.

1. <u>The Chairman has Standing to Assert the Tribe's Claims</u>

The Tribal Council indisputably has "standing" to prosecute claims on the Tribe's behalf, in the Article III sense. *Cayuga Nation*, 824 F.3d at 327. The Federal Defendants argue 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

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[7] The August 8, 2016 letter from Mr. Speaks was his response to the Intervenor Defendants' staging of an unsanctioned and unlawful election to install themselves as a shadow tribal council and compel the BIA to intercede and conduct an election. Mr. Speaks rejected the "general council" concept as contrary to Nooksack law, and rejected the Intervenor Defendants' demand that the BIA intercede in Nooksack elections as contrary to both Nooksack law and federal law.

Two months later, without explanation, Lawrence Roberts issued his first letter, taking a position that defied Defendant Mr. Speaks' and his staff's informed decisions and flies in the face of 20 years of BIA precedent in dealing with the Tribe. Indeed, in 2004 the Tribe sought the assistance of the Defendant BIA with a disputed election, only to be told that neither the Nooksack Constitution nor federal law provided BIA the authority to intercede. Bernard Decl., Exh. 7 at 6.

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Court." *Id.*

The Federal Defendants are wrong for two reasons. First, the Tribal Council was duly elected under Nooksack Law, is the current governing body of the Tribe, and the Court is not bound by the Secretary's opinion to the contrary. Second, 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., Doc. 30, ¶ 3; Solomon Decl., ¶ 3.

a. Nooksack Law Provides for the recognition of holdover Council members and all actions of the Council after March 24, 2016 are valid and enforceable.

It is nonsensical to suggest that the Nooksack Tribal Government simply ceases to exist upon the expiration of the terms of three Council members. 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. As the Tribe noted in its Reply in Support of Preliminary Injunction, Doc. #20 at 5-6, it has long been established in constitutional democracies that in situations where a constitution is silent on the status of a holdover elected official, that official continues to hold office until a successor is duly appointed and qualified.

Nooksack law is consistent with this basic principle. Under the Elections Ordinance, Nooksack law explicitly provides for holdover of Council seats in the event of a tie or a challenge to election results. Nooksack Tribal Code (N.T.C.) 62.06.080 ("In the event of a tie, unless one candidate withdraws, a run-off election will be scheduled within thirty (30) days. The incumbent shall remain in office until the Council Elect is sworn in."); N.T.C. 62.07.040 and 62.08.010 (election results cannot be certified until after the time for appeals has passed and there are no pending appeals, and Candidates-Elect cannot be sworn in until the day after

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the Tribal Council Secretary receives the certified results).

Since 1996, the Nooksack Tribal Court, sitting as an appellate body in an election challenge, has recognized the allowance for holdover Council seats and validated the governance of a Holdover Council during the nearly two year holdover period. *See Campion v. Swanaset*, No. NOO-C-496-004, April 7, 1997 Order at 2:38-40; *see, also*, Bernard Decl., Exh. 8, November 1, 1997 election results.

Finally, the Nooksack Tribal Court, acting through pro tem Judge Milton G. Rowland, has rejected the assertion that the Council that existed after March 24, 2016 lacked a quorum and standing to prosecute the Tribe's breach of contract claim because of the presence of holdover Council members. *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), Bernard Decl., Exh. 3.

The Tribe's court, interpreting Nooksack law, has rejected the position adopted by the Federal Defendants regarding holding over, and this Court is required to defer to the Nooksack court's conclusion. *Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004) (federal court defers to tribal court's interpretation of tribal law). The post-March 24, 2016 Council had a quorum and was qualified to govern and to carry out the Tribe's business. Even absent the delegation of authority to the Chairman addressed below, the Tribal Council has standing.

b. <u>The pre-March 24, 2016 Council recognized by the Secretary delegated its authority to prosecute the Tribe's claims to the Chairman.</u>

As the Tribe noted in its Reply in Support of its' Motion for Preliminary Injunction, Doc. # 29 at 1, 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). Kelly Decl. Doc. #30, Exh. 1, and to delegate its powers under broad standards. *See*, Art. VI, Sect. 1(f) (express powers of Tribal Council include "select[ing] subordinant boards, officials,

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and employees not otherwise provided for in this constitution and to prescribe their tenure and duties").

The Federal Defendants do not, and cannot, challenge the legitimacy of the Tribal Council that existed in 2012. Nor can the Federal Defendants rebut the evidence offered by the Tribe that in 2012 the Tribal Council delegated to Chairman Kelly the power to prosecute the Tribe's claims, and that in bringing this lawsuit, Chairman Kelly is acting pursuant to his delegated powers. Kelly Decl., Doc. #30 at Chairman Kelly has standing to sue. *Cayuga Nation*, 824 F.3d at 327.

2. The Federal Defendants' Actions are Final Agency Actions for Purposes of Review

The Roberts letters constitute "final agency action" reviewable under 5 U.S.C. § 704. "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 Federal Defendants' position. *Carter/Mondale Presidential Committee, Inc. v Federal Election Com.,* 711 F.2d 279 (D.C. Cir. 1983).

A final action may be an informal action. *Am. Mar. Asso. v. Blumenthal*, 458 F. Supp. 849, 858 (D.D.C. 1977). In such cases, courts have generally required that one of the following elements be present: direct and immediate impact as a result of this action; reliance on the action; the agency action is the final agency consideration of the matter or represents the final, crystallized agency position on the matter; or a high level agency official is directly responsible for the action. *See, e. g., Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-53, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d

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689, 698-702 (D.C. Cir. 1971).

Here, the Tribe has more than satisfied its burden. It has demonstrated that it has suffered a direct and immediate impact as a result of the Federal Defendants action. See Canete Decl., Doc. # 21 at ¶¶ 1(H) – 1(S). The Tribe has also demonstrated that the Roberts opinion – overruling the position of Defendant Speaks, and reiterated in three different letters and again in the Federal Defendants' Cross-Motion – is the final crystallized agency position on the matter of the recognition of the Tribal Council. The argument offered by the Federal Defendants – that they have not yet made a final decision on reassumption – is a straw man, because the agency action the Tribe challenges is the refusal to recognize the Tribal Council and the failure to fund already-awarded self-determination contracts; and two sister agencies have made final decisions on reassumption, based solely on the Roberts letters. Finally, the Tribe has established that Roberts, then the Acting Assistant Secretary for Indian Affairs, was a high level agency official directly responsible for the action.

It is clear that the Roberts letters – signed by the person who heads 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 5 U.S.C. § 704. The United States has consented to suit and waived its sovereign immunity pursuant to 5 U.S.C. §702 (review of final agency action) and 25 U.S.C. §5331(a) (contract disputes and claims). The Federal Defendants CR 12(b)(1) motion should be denied.

B. <u>The Defendants Failed to Satisfy their Burden under CR 56 and CR 12(b)(6)</u>

Although the Federal Defendants denominate their motion as one for dismissal or summary judgment, their proffer of extrinsic evidence in support of their motion (citations to

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the declarations of one of the Intervenor Defendants and their counsel, and inadmissible hearsay evidence submitted in support of the Intervenor Defendants' Motion to Intervene, about which the Federal Defendants have no personal knowledge) requires the court to consider the CR 12(b)(6) motion as one for summary judgment pursuant to CR 56(b). *Davis v. Chase Bank U.S.A., N.A.,* 650 F. Supp. 2d 1073, 1075 (C.D. Cal. 2009).

Under either CR 12(b)(6) or CR 56, the Court may only grant the motion if the Federal Defendants demonstrate that they are entitled to judgment as a matter of law, after accepting all factual allegations in the complaint as true and construing them in the light most favorable to the Tribe. *In re Boeing Sec. Litig.,* 40 F. Supp. 2d 1160, 1165 (W.D. Wash. 1998) (motion to dismiss); *Joseph v. Amazon.com, Inc.*, 46 F. Supp. 3d 1095, 1100 (W.D. Wash. 2014) (summary judgment), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The Federal Defendants cannot meet their burden.

1. The Evidence the Federal Defendants Rely on is Inadmissible, and the Tribe Objects and Moves to Strike it.

As an initial matter, statements such as those contained in the Galanda and Roberts declarations, on which the Federal Defendants rely, which paraphrase or summarize the Intervenor Defendants' allegations, "are arguably inaccurate, and therefore, 'subject to reasonable dispute.'" *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1022 (C.D. Cal. 2015), *citing* FED.R.EVID. 201(b)); *Garber v. Heilman*, No. CV 08- 3585 DDP (RNB), 2009 U.S. Dist. LEXIS 13128, 2009 WL 409957, *1 (C.D. Cal. Feb. 18, 2009). Those statements are disputed, and constitute disputed material facts which require the denial of the Federal Defendants' motion.

In addition, the Federal Defendants cannot rely on inadmissible evidence to support

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their motion. A moving party without the ultimate burden of persuasion at trial - usually, but not always, a defendant - has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000), *citing* 10A C. Wright, A. Miller and M. Kane, Federal Practice and Procedure § 2727 (3rd ed. 1998).

In order to carry its burden on summary judgment, the moving party must offer "materials of appropriate evidentiary quality". *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). In ruling on the Federal Defendants' motion, the Court is restricted to considering evidence that is both properly authenticated and admissible. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). A party may object that material cited to support or dispute a fact is inadmissible in evidence. Fed. R. Civ. P. 56(c)(2). "The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated." Advisory Committee Notes, 2010 Amendments to Subdivision (c). The Tribe objects to the following evidence cited in the Federal Defendants' cross-motion:

a. <u>Letters written by Defendant Intervenor Michelle Roberts. (Doc. #16, Exs. 1-2).</u>

Ms. Roberts attaches documents that she wrote to the BIA. These documents contain hearsay statements of Ms. Roberts. Hearsay is an out of court statement offered for the truth of the matter asserted. ER 801(c). Hearsay is inadmissible on summary judgment unless it is defined as non-hearsay or an exception applies. *Orr*, 285 F.3d 764 at 778. The assertions made in Ms. Robert's letters are cited in the Federal Defendants' brief as substantive evidence for the truth of the matter asserted by Ms. Roberts. The letters contain classic examples of hearsay so

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they must be stricken.

The Federal Defendants may contend that the assertions are not hearsay as admissions of a party opponent. FRE 801(d)(2). However, Ms. Roberts assertions contained in the letters are not admissions of a party opponent as Ms. Roberts is not the Federal Defendants' opponent; rather she is a co-defendant Intervenor so their interests are aligned. Further, such statements must be "offered against an opposing party[.]" FRE 801(d)(2). Federal Defendants are not citing such statements against Ms. Roberts, but rather Plaintiff Nooksack Tribe. As result, Ms. Roberts' statements are inadmissible hearsay.

The Federal Defendants may also content that Ms. Roberts may provide sworn testimony of their content as a Recorded Recollection. ER 803(4). Ms. Roberts has not testified that she cannot recall the contents of the letters so the exception does not apply. Even if it did, the letters themselves are not admitted as Federal Defendants have done here. ER 803(4).

b. Letters and Emails written by Intervenor Defendants' attorney Gabriel Galanda. (Doc. #15, Exs. H, I, J, O, P, R, S).

Mr. Galanda submits letters and emails that he drafted. The letters and emails are hearsay because Federal Defendants submit the contents of the letters and emails for the truth of the matters asserted by Mr. Galanda. ER 801(c). Hearsay is inadmissible on summary judgment unless it is defined as non-hearsay or an exception applies. *Orr*, 285 F.3d 764 at 778. The contents of Mr. Galanda's letters and emails do not satisfy any exception.

In some cases, the statements of a party's attorney can be admitted as the admission of a party opponent offered against that party. FRE 801(d)(2). However, Mr. Galanda's statements are not offered against his clients, but rather Plaintiff. Accordingly, no exception applies here.

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c. Pleadings filed in Nooksack Tribal Court by Intervenor Defendants. (Doc. # 15, D, E, and F).

Several of the Intervenor Defendants filed pleadings in the Nooksack Tribal Court. Federal Defendants cite the contents of those pleadings. Documents, including pleadings in a separate matter, must be properly authenticated pursuant to FRE 901 or 902. *Orr*, 285 F.3d 764 at 778; *Canada v. Blain's Helicopter's, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) ("In order to be considered by the court 'documents must be authenticated by an attached to an affidavit that meets the requirements of [Fed.R.Civ.P.] 56(e) and the affiant must be the person through whom the exhibits could be admitted into evidence.'"). In addition, even if authenticated, pleadings filed in an unrelated matter are hearsay if submitted to prove the truth of the matter asserted. FRE 801, 802.

Exhibit E and F are not properly authenticated pursuant to ER 901 or 902 because they are not certified copies and they are not attached to a declaration of the party that prepared them. Moreover, the contents of the documents are hearsay as they contain out of court statements offered for the truth of the matter asserted. FRE 801, 802. The pleadings are inadmissible.

Exhibit D may be properly authenticated by Mr. Galanda since he appears to be the individual that prepared it, but it is still hearsay without exception. FRE 801, 802. As a result, the pleading is inadmissible.

d. Ms. Roberts' statement about Ms. Oshiro. (Dkt# 16, p. 3 ¶ 10).

Ms. Roberts describes an event that occurred to a separate Intervenor Defendant, Ms. Oshiro. Testimony must be submitted by a witness with personal knowledge of the event described. FRE 602. Ms. Oshiro is not describing the event, but rather Ms. Robert's own recitation of the event as likely described to her by Ms. Oshiro. Ms. Roberts' statements are

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inadmissible because she lacks personal knowledge of the same.

In addition, Ms. Roberts' description assumes that she is reiterating a statement made by Ms. Oshiro. As such, Ms. Roberts' description must contain inadmissible hearsay. FRE 801, 802. Ms. Roberts' testimony is inadmissible.

e. Ms. Roberts statements about Ms. Rabang. (Doc. # 16, p. 4 ¶ 12).

Like the statements regarding Ms. Oshiro above, Ms. Roberts describes a similar event that allegedly occurred to Ms. Rabang. Ms. Roberts lacks personal knowledge to testify to this event. FRE 602. Moreover, like Ms. Oshiro above, Ms. Roberts' description also assumes statements made by Ms. Rabang to Ms. Roberts. Ms. Rabang's statements are hearsay if re-stated by Ms. Roberts. FRE 801, 802. Accordingly, Ms. Roberts' description is inadmissible hearsay.

2. The Federal Defendants Have Not Met Their Burden

In order to carry its burden of production, the moving party must produce either admissible evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990). The Federal Defendants have failed to meet their burden on either score. The evidence they rely upon is not admissible and the Court may not consider it over the Tribe's objection, and the Tribe has offered more than sufficient evidence of each of the essential elements to carry its burden at trial.

III. CONCLUSION

The Nooksack Indian Tribe moved this Court for entry of a preliminary injunction

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enjoining the Federal Defendants from (1) taking further steps to reassume responsibilities the Tribe performs for its enrolled members under its Public Law 638 contracts; (2) taking further actions based on three opinion letters written by former Principle Deputy Assistant Secretary of Interior Lawrence Roberts Roberts); and (3) continuing to interfere with the Tribe's self-governance by refusing to acknowledge that the current, duly-elected members of the Nooksack Tribal Council are the Tribe's governing body with all authority that appertains thereto.

The Tribe has established that this relief is necessary to protect the Tribe and its members from ongoing irreparable harm, and is overwhelmingly in the public interest. The Tribe and its members have a significant interest in undoing the "hiatus in tribal government which jeopardize[s] the continuation of necessary day-to-day services on the reservation" that the Federal Defendants have created. The Tribe, its members, the Federal Defendants, and the public have a significant interest in a functioning government at the Nooksack Tribe, and the continued enforcement of the Roberts letters stating that the Federal Defendants will not recognize any actions taken by the Tribal Council after March 24, 2016, and the refusal of state and federal agencies to recognize the Tribal Council's authority is a significant threat to a functioning government.

The Tribe has also established that it has standing – acting through Chairman Kelly, exercising the authority to prosecute the Tribe's claims that was delegated to him by the Tribal Council in 2012. The Tribe has also established that this Court has jurisdiction to entertain the Tribe's lawsuit because the Roberts letters, and the acts and omissions of the Federal Defendants taken in reliance on those letters, constitute final agency action for which the United States has waived its sovereign immunity and consented to suit.

The Federal Defendants have failed to meet their burdens under CR 12(b)(1), 12(b)(6), and 56. Their Cross-Motion should be denied.

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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 24th day of April, 2017, I arranged for service of the foregoing NOOKSACK INDIAN TRIBE'S RESPONSE IN OPPOSITION TO FEDERAL DEFENDANTS' CROSS-MOTION TO DISMISS OR FOR SUMMARY JUDGMENT to the parties via the Court's CM/ECF system as follows:

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