



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the General Counsel, Suite 1620
U.S. Department of Health and Human Services, Region 10
701 Fifth Avenue, Suite 1600, MS/10
Seattle, WA 98104
Voice 206 615-2268 Fax 206 615-2286

May 26, 2017

Via Facsimile Transmission (801) 524-5539

The Honorable Christopher D. Helms
Administrative Law Judge
Departmental Cases Hearings Division
Office of Hearings and Appeals
United States Department of Interior
351 South West Temple, Suite 6.300
Salt Lake City, UT 84101

Re: Nooksack Indian Tribe v. Director, Portland Area, Indian Health Service
IBIA 17-045

Dear Judge Helms:

Enclosed for filing is APPELLEE'S STATUS REPORT AND MOTION TO LIFT STAY OF PROCEEDINGS. A copy has been sent to Appellant's counsel and proposed Intervenor's counsel. Appellant's counsel and I are available next week for a status conference on May 31 in the morning or late afternoon or Friday, June 2.

Sincerely,

Jay L. Furtick

cc: Rickie Wayne Armstrong, Esq. (via U.S. First Class Mail & electronic transmission)
Office of the Tribal Attorney
Nooksack Indian Tribe
P.O. Box 63
Deming, WA 98244

Gabriel Galanda
Bree R. Black Horse
Galanda Broadman PLLC
P.O. Box 15416
8606 35th Avenue NE, Suite L1
Seattle, WA 98115

**UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
DEPARTMENTAL CASES HEARINGS DIVISION**

NOOKSACK INDIAN TRIBE,)	IBIA 17-045
)	
Appellant,)	
v.)	
)	
DIRECTOR, PORTLAND AREA,)	
INDIAN HEALTH SERVICE,)	
)	
Appellee.)	

APPELLEE’S STATUS REPORT AND MOTION TO LIFT STAY OF PROCEEDINGS

Appellee, Director, Portland Area Indian Health Service, in his official capacity and through undersigned counsel, hereby submits this status report and requests lifting the current stay in order to file a dispositive motion.¹

Both parties requested a stay in this matter because they agreed that a related case filed by Appellant in Federal Court, *Nooksack Indian Tribe v. Zinke, et al.*, Case No. 2:17-cv-00219 (W.D. Wa.) (*Nooksack Indian Tribe*) impacted the outcome of this appeal. Specifically, the Joint Motion to Stay Proceedings stated:

In that [federal court] case, Appellant is challenging [Department of Interior’s (DOI)] refusal to recognize the Nooksack Tribal Council since March 2016. [The Indian Health Service (IHS)] typically defers to DOI on tribal governance and election matters, and relied on this determination by initiating contract rescission and reassumption proceedings. A decision on the validity of Nooksack’s Tribal Council in the federal court case will help resolve the same question in this matter.

Joint Motion to Stay Proceedings at 2. On May 11, 2017, United States District Judge John C. Coughenour issued a decision in *Nooksack Indian Tribe*. See Exhibit 1. Judge Coughenour

granted Defendants' Motion to Dismiss. Relevant to this appeal, the decision stated the following:

[D]eference is owed to the DOI decisions and the holdover Council does not have the authority to bring this case against the federal government in the interim period where the tribal leadership is considered inadequate by the DOI

[T]he decisions taken and the leadership in place after March 24, 2016, are not valid at this time and on an interim basis because the DOI or [the Bureau of Indian Affairs] have not recognized *any* Nooksack tribal leadership.

Exhibit 1 at 10.

Based on this decision, Appellee notified Appellant on May 16, 2017, that the IHS must immediately reassume all programs operated by Appellant under their Indian Self-Determination and Education Assistance Act ("ISDEAA") contract because the holdover tribal council does not have the authority to act on behalf of the Nooksack Tribe, including the authority to contract under the ISDEAA. *See* Exhibit 2; *see also* 25 U.S.C. § 5321 (requiring the authorization of an Indian tribe for any contract under the ISDEAA). This is consistent with Appellee's reassumption letter, dated March 27, 2017.

With regard to this matter, Appellee requests lifting the stay so the Agency can file a Motion to Dismiss on jurisdictional grounds.² A continued stay is no longer needed because IHS has reassumed the underlying programs and the federal court case that **both** parties agreed impacted the outcome of this appeal, has been decided. That decision ruled that Appellant did

¹ The parties were unable to agree to a joint status report.

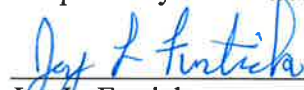
² It is worth noting that IHS' reassumption decision is **not** currently before the Interior Board of Indian Appeals ("IBIA"). The Agency's final reassumption decision was not issued until March 29, 2017, and Appellant filed the current appeal on February 24, 2017. Furthermore, the March 2, 2017, Order assigning this matter to an Administrative Law Judge, states that the basis for jurisdiction is the Agency's refusal to contract with the Tribe because the Tribal Council lacked sufficient authority.

not have standing to bring claims on behalf of the Nooksack Tribe. The decision has not been stayed or otherwise held in abeyance pending further reconsideration or appeal. Therefore, Appellee must act in accordance with that decision unless and until it is amended or overturned.

For the foregoing reasons, Appellee requests lifting the stay in this matter and setting a deadline for filing of dispositive motions.

Date: May 26, 2017

Respectfully Submitted,



Jay L. Furtick

Assistant Regional Counsel

U.S. Department of Health & Human Services

Office of the General Counsel

EXHIBIT 1

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE NOOKSACK INDIAN TRIBE,

Plaintiff,

v.

RYAN K. ZINKE, *et al.*,

Defendants.

CASE NO. C17-0219-JCC

ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS

This matter comes before the Court on Plaintiff the Nooksack Indian Tribe's motion for preliminary injunction (Dkt. No. 19) and Defendants' cross-motion to dismiss (Dkt. No. 26). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS Defendants' motion to dismiss and DENIES Plaintiff's motion for preliminary injunction as moot for the reasons explained herein.

I. BACKGROUND

This section summarizes the facts as set forth in Plaintiff's complaint, as is appropriate on a motion to dismiss. It also summarizes and cites declarations, affidavits, and other material properly before this Court, as appropriate on a motion to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(d); *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

Plaintiff the Nooksack Indian Tribe brought this action against Defendants, collectively the leadership of the Department of the Interior (DOI) and Bureau of Indian Affairs (BIA), on

1 February 13, 2017. This case arises out of the same set of facts as a related case also before this
2 Court, *Rabang v. Kelly*, C17-0088-JCC.

3 Since 2007, Plaintiff has been a party to 638 contracts with the DOI and BIA, entered
4 into pursuant to the Indian Self-Determination and Education Assistance Act. (Dkt. No. 1 at
5 ¶ 28.) Plaintiff alleges “under the terms of these contracts, the defendants fund the Tribe to
6 provide programs, functions, services, or activities of the [DOI] for the benefit of Indians
7 because of their status as Indians.” (*Id.*) Plaintiff brings this action partially “to compel the
8 defendants to fully fund contracts awarded to the Tribe under the Indian Self-Determination and
9 Education Assistance Act.” (*Id.* at ¶ 1.)

10 However, the purported disenrollment of hundreds of Nooksack tribe members in late
11 2016 and the recent tribal government changes, all completed when the Nooksack Indian Tribal
12 Council lacked a quorum, are fundamental underlying facts in this action. By way of
13 background, the Nooksack Indian Tribal Council is the governing body of the Tribe and is
14 composed of eight members. (Dkt. No. 20 at 10.) Five members constitute a quorum on the
15 Council. (*Id.* at 18.) In December 2012, the Chairman of the Nooksack Indian Tribal Council,
16 Robert Kelly, “became aware of the possibility of erroneous enrollments” in the Tribe. (Dkt. No.
17 30 at ¶ 6.) On June 21, 2013, Nooksack Indian voters approved a membership requirement
18 change to the Nooksack Constitution proposed by the Council. (Dkt. No. 1 at ¶ 31.) The change
19 makes membership more stringent, requiring “at least one-fourth (1/4) degree Indian blood.”
20 (Dkt. No. 20 at 8.) The change was challenged in the Nooksack tribal courts and upheld. (*See*
21 Dkt. No. 1 at ¶¶ 32–35.) However, the membership criteria change is currently before the DOI’s
22 Interior Board of Indian Appeals for approval. (*Id.* at ¶ 41.)

23 In March 2016, the Nooksack Indian Tribal Council scheduled a general election to fill
24 three council seats whose terms were set to expire on March 24, 2016. (*Id.* at ¶ 42.) However,
25 “the Tribe delayed the election, and the three Council members retained their seats as holdovers
26 pending the election of their replacements.” (*Id.*) Mr. Kelly alleges the Council postponed the

1 election “in the interest of providing stability to the Tribe’s government and previous security
 2 concerns and threats of violence associated with disenrollment protests.” (Dkt. No. 30 at ¶ 8.)
 3 Defendants allege the Council postponed the election for the three seats “until after
 4 disenrollment proceedings against the 306 prospective disenrollees were complete.” (Dkt. No. 26
 5 at 7.) Regardless of the reason for cancelling the 2016 election, as of March 24, 2016, only three
 6 of eight Council members occupy seats whose terms have *not* expired. (Dkt. No. 26 at 7 n.6.;
 7 Dkt. No. 20 at ¶ 9; Dkt. No. 38 at ¶ 14.) Therefore, Defendants allege the Council has been
 8 acting without a quorum since March 24, 2016. (Dkt. No. 26 at 3, 7.) The Court will refer to the
 9 Council group, as composed after March 24, 2016, as the holdover Council for clarity.

10 On March 28, 2016, the holdover Council terminated Nooksack Tribal Court Chief Judge
 11 Susan Alexander. (Dkt. No. 15 at ¶ 7; Dkt. No. 26 at 7.) Raymond Dodge, Plaintiff’s former in-
 12 house counsel, replaced Ms. Alexander. (*Id.*) Thereafter, the Nooksack Tribal Court allegedly
 13 began refusing to act on complaints challenging the legality of the holdover Council’s actions.
 14 (Dkt. No. 15 at ¶¶ 7–10.)

15 Conflict within the Nooksack tribal judiciary after March 24, 2016, is illustrated by the
 16 efforts of private law firms, including counsel for Intervenor 271 Nooksack Tribal Members,
 17 challenging their alleged disbarment from the Nooksack tribal courts. In an order dated
 18 September 21, 2016, the Nooksack Court of Appeals described as follows:

19 As is well-known to those familiar with this case, the Plaintiffs[, private law firms,]
 20 have sought a review of this [disbarment] process before the Tribal Court, but the
 21 court clerk returned their pleadings and refuses to accept any filings from them. . .
 22 . This Court has already issued a mandatory injunction that the court clerk accept
 23 their pleadings and other filings. Moreover, when this order was ignored, we issued
 24 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. . . . *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.*

25 (Dkt. No. 15 at 51) (emphasis added).

26 On August 8, 2016, Stanley Speaks, the Northwest Regional Director of the DOI, sent a

letter to Nooksack tribal members who had asked him to “intervene and conduct a supervised, in-person, in-secret election.” (Dkt. No. 21 at 13.) Director Speaks declined, and responded that the “Nooksack Constitution does not require the Secretary to conduct or approve tribal council elections. . . . The Tribe has existing forums for conducting tribal business: an election board (during an election), tribal police, tribal court, and an appellate court system.” (*Id.* at 13–14.)

On October 7, 2016, by Resolution 146a, the holdover Council purportedly created a new Nooksack Supreme Court. (Dkt. No. 15 at 69, ¶¶ 17–18.) Five members of the holdover Council filled the judicial positions. (*Id.*) On the petition of the “Nooksack Indian Tribe and its officers and Councilmembers,” the Nooksack Supreme Court vacated 12 prior orders of the Nooksack Court of Appeals as “null and void.” (*Id.* at 72–80.)

Between November 10, 2016, and November 22, 2016, Plaintiff and the holdover Council disenrolled “289 individuals who failed to demonstrate legally sufficient blood connections to the Tribe.” (Dkt. No. 1 at ¶ 43.) As such, “the Tribe carried out the disenrollment proceedings using the procedures that had been approved by both the Nooksack Tribal Court of Appeals and the Secretary” of the Interior. (*Id.*) Allegedly, these disenrollment hearings were conference calls that lasted no more than ten minutes in length. (Dkt. No. 26 at 9 n.10.)

On October 17, 2016, Lawrence S. Roberts, then the Principal Deputy Assistant Secretary–Indian Affairs of the DOI (PDAS), issued a decision¹ stating,

In rare situations where a tribal council does not maintain a quorum to take action pursuant to the Tribe’s Constitution, the [DOI] does not recognize actions taken by the tribe. This is one of those exceedingly rare situations. Accordingly, I am writing to inform you and the remaining Council members that the [DOI] *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 a lack of quorum.*

(Dkt. No. 21 at 15) (emphasis added). The decision continues that the “BIA stands ready to provide technical assistance and support to the Tribe to carry out elections open to ‘all enrolled

¹ By referring to these letters as “decisions,” the Court expresses no opinion as to whether these are final agency actions.

1 members of the Nooksack Tribe, eighteen years of age or over.” (*Id.* at 16.)

2 On November 14, 2016, PDAS Roberts issued a second decision to the holdover Council,
3 reiterating that pursuant to the

4 Nation-to-Nation relationship, the [DOI] will not recognize actions taken by you
5 and the current Tribal Council members without a quorum consistent with the
6 Nooksack Tribe’s Constitution. . . . Accordingly, until a Council is seated through
7 an election consistent with tribal law . . . , we will not recognize any “referendum
8 election” including the purported results posted on the Tribe’s Facebook page on
November 4, 2016, claiming to disenroll current tribal citizens. . . . This further
includes any election results from the Tribal Council Primary Election scheduled
for December 17, 2016, or the Tribal Council Regular Election scheduled for
January 21, 2017.

9 (Dkt. No. 15 at 11; *see* Dkt. No. 1 at ¶ 46.)

10 On December 23, 2016, PDAS Roberts issued a third decision to the holdover Council.
11 He reiterated the fact that the Nooksack Indian Tribal Council continues to operate without a
12 quorum and “therefore lacks authority to conduct business on behalf of the tribe.” (Dkt. No. 15 at
13 14; *see* Dkt. No. 1 at ¶ 46.) The decision continues,

14 As we previously notified you, the actions by you and two members who have
15 exceeded their term of office on the Tribal Council to anoint yourselves as the
16 Tribe’s Supreme Court were taken without a quorum and without holding a valid
17 election consistent with the Tribe’s constitution. . . . *Any actions taken by the Tribal
Court after March 24, 2016, including so-called tribal court actions and orders,
are not valid for purposes of Federal services and funding.*

18 (Dkt. No. 15 at 14) (emphasis added). Plaintiff alleges Defendants “failed or refused the Tribe’s
19 distribution of its previously-approved 638 contract funds” as a result of these three DOI
20 decisions. (Dkt. No. 1 at ¶ 45.)

21 On January 21, 2017, Plaintiff and the holdover Council allegedly conducted a general
22 election to fill the three seats held by the holdover Council members whose terms had expired.
23 (Dkt. No. 21 at 6.) There were no challenges to the election results. (*Id.*) The results were
24 “certified by the duly-appointed Election Superintended [sic], consistent with Nooksack law.”
25 (*Id.*) Still, there is no dispute that Plaintiff has not requested that government-to-government
26 relations between the DOI and Plaintiff be restored in light of this election. In his November and

1 December 2016 decisions, PDAS Roberts indicated he did not view the scheduled 2017 election
2 as legitimate. (Dkt. No. 15 at 11, 15.) Defendants maintain their disapproval of the holdover
3 Council in their briefing, calling its conduct “abusive,” and alleging the Council has “used its *de*
4 *facto* control to systematically abridge the rights of a disfavored group of tribal members,
5 thereby depriving them of their right to fully participate in and receive benefits under federal
6 programs.” (Dkt. No. 26 at 3.)

7 The holdover Council, on behalf of the Nooksack Indian Tribe, now moves the Court to
8 enter a preliminary injunction enjoining Defendants from “(1) taking further steps to reassume
9 responsibilities the Tribe performs for its enrolled members under its Public Law 638 contracts;
10 (2) taking further actions based on three opinion letters written by [PDAS Roberts]; and
11 (3) continuing to interfere with the Tribe’s self-governance by refusing to acknowledge that the
12 current, duly-elected members of the Nooksack Tribal Council are the Tribe’s governing body.”
13 (Dkt. No. 19 at 1–2.) Defendants opposed the motion, and filed a cross-motion to dismiss, or in
14 the alternative for summary judgment, arguing that the Court lacks jurisdiction over this case.
15 (Dkt. No. 26.) Because Defendants challenge the Court’s jurisdiction over this matter, the Court
16 will consider the motion to dismiss first.

17 **II. DISCUSSION**

18 **A. Motion to Dismiss Legal Standard**

19 Under Federal Rule of Civil Procedure 12(b)(1), a complaint must be dismissed if the
20 court lacks subject matter jurisdiction. Jurisdiction is a threshold separation of powers issue, and
21 may not be deferred until trial. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95
22 (1998). A motion to dismiss under Rule 12(b)(1) for lack of jurisdiction may be facial or factual.
23 See *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In reviewing a facial attack, the Court
24 assumes all material allegations in the complaint are true. *Thornhill Publ’g Co. v. General Tel.*
25 *Elec.*, 594 F.2d 730, 733 (9th Cir. 1979).

26 //

1 **B. Standing/Authority**

2 Defendants' primary argument is that absent recognition from the DOI and BIA, the
3 holdover Council lacks the authority to file and prosecute the action in this Court against the
4 Secretary in the name of, and on behalf of, the Nooksack Indian Tribe. (Dkt. No. 26 at 5.)
5 Plaintiff counters that Robert Kelly, the current Chairman of the holdover Council, has
6 "delegated authority" to prosecute the Tribe's claims. (Dkt. No. 29 at 3–4; Dkt. No. 36 at 17–18.)
7 Plaintiff also argues the three Councilmembers who retained their seats during the "period of
8 delayed general elections" validly continued to occupy their seats as holdovers in accordance
9 with Nooksack law. (Dkt. No. 29 at 4–9; Dkt. No. 36 at 16–17.) Essentially, Plaintiff argues this
10 is an intra-tribal dispute and it is not for the federal government to adjudicate disputed tribal
11 leadership. (Dkt. No. 36 at 12–15.)

12 The Supreme Court has "repeatedly recognized the Federal Government's longstanding
13 policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14
14 (1987). Unless surrendered by the tribe, or abrogated by Congress, tribes possess inherent and
15 exclusive power over matters of internal tribal governance. *See Nero v. Cherokee Nation*, 892
16 F.2d 1457, 1463 (10th Cir. 1989); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983);
17 *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1185 (E.D. Cal. 2009). However,
18 this is an exceedingly rare situation where the DOI and BIA have refused to recognize the
19 Nooksack tribal leadership and its actions taken since March 24, 2016, and no Nooksack tribal
20 leadership group is currently federally recognized.

21 The parties have framed the motion to dismiss issue as "standing." However, there is no
22 dispute that the Nooksack Indian Tribe, the named Plaintiff in this action, would have standing to
23 bring the claims asserted. The dispute is whether the group representing itself as the Tribe, the
24 holdover Council, is *authorized* to initiate the action on behalf of the Tribe. "Though not a
25 question of constitutional standing, that issue nonetheless implicates the subject matter
26 jurisdiction of this Court." *Cayuga Nation v. Tanner*, 824 F.3d 321, 327 (2d Cir. 2016).

1 Specifically, the issue before the Court is whether, given the DOI's refusal to recognize the
2 holdover Council's leadership, Plaintiff has the authority to bring this case on the Tribe's behalf.

3 A recent Second Circuit case is very instructive. In *Cayuga Nation*, two tribal groups vied
4 for tribal leadership and the BIA recognized one over the other. The court had to decide whether
5 this recognition affected the court's jurisdiction over claims brought by the recognized group.
6 824 F.3d at 325–27. The court acknowledged the tension between tribal sovereignty and BIA
7 recognition. It decided that it lacked “jurisdiction to resolve the question of whether this law suit
8 was properly authorized as a matter of *tribal law*.” *Id.* at 328. The court declined to interpret
9 tribal law and concluded “where the authority of the individual initiating the litigation on behalf
10 of a tribe has been called into dispute, the only question we must address is whether there is a
11 sufficient basis in the record to conclude, without resolving the disputes about tribal law, that the
12 individual may bring a lawsuit on behalf of the tribe.” *Id.*

13 The court then proceeded to address the BIA decisions in the record. Recognizing
14 “deference to the Executive Branch is appropriate,” the Second Circuit noted the “BIA has
15 special expertise in dealing with Indian affairs, and we have previously indicated that the BIA's
16 decision to recognize a tribal government” can be outcome determinative. *Cayuga Nation*, 824
17 F.3d at 328 (citing *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 938–39 (D.C. Cir. 2012)
18 (dismissing a lawsuit brought by one group on behalf of the tribe after the Executive Branch
19 recognized a different group as the tribe's governing body); *Shenandoah v. U.S. Dep't of*
20 *Interior*, 159 F.3d 708, 712–13 (2d Cir. 1998) (noting that the “BIA's determination that [an
21 individual] does not represent the Nation may well moot plaintiffs' claims”)). Ultimately, the
22 Second Circuit held “a recognition decision from the BIA is sufficient for us to find that the
23 recognized individual has the authority to initiate a lawsuit on behalf of a tribe.” *Cayuga Nation*,
24 824 F.3d at 328. The Second Circuit concluded that deference to a BIA decision was appropriate
25 and adopted the BIA decision's conclusion. *Id.* at 328–30. The Second Circuit also
26 acknowledged that a BIA decision recognizing a tribal government entity “could in many

1 situations prevent tribes from vindicating their rights in federal court.” *Id.* at 329–30. However,
2 “[l]ike the BIA, which must determine whom to recognize as a counterparty to administer
3 ongoing contracts on behalf of the Nation, the courts must recognize someone to act on behalf of
4 the Nation to institute, defend, or conduct litigation.” *Id.* at 330.

5 This holding is consistent with an Eighth Circuit decision where the court determined that
6 a BIA recognition and decision is made only on “an interim basis” and once “the dispute is
7 resolved through internal tribal mechanisms, the BIA must recognize the tribal leadership
8 embraced by the tribe itself.” *Attorney’s Process & Investigation Servs., Inc. v. Sac & Fox Tribe*
9 *of Miss. in Iowa*, 609 F.3d 927, 943 (8th Cir. 2010); *accord Winnemucca Indian Colony v. U.S.*
10 *ex rel. Dep’t of the Interior*, 837 F. Supp. 2d 1184, 1191 (D. Nev. 2011).

11 The Ninth Circuit’s limited jurisprudence on the specific issue before this Court is also
12 consistent with the cases above. *See Cloverdale Rancheria of Pomo Indians of Cal. v. Jewell*,
13 593 F. App’x 606, 609 (9th Cir. 2014) (holding, where plaintiffs were five members of a tribe
14 seeking recognition as the tribe’s leadership, that “Plaintiffs–Appellants are not entitled to act on
15 behalf of a federally recognized ‘Indian tribe,’ however, because they are not the Tribe’s
16 recognized governing body”); *see also Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1031 (E.D.
17 Cal. 2012) (“Deference to the BIA determination is the preferred course of action.”); *Winnemem*
18 *Wintu Tribe v. U.S. Dep’t of Interior*, 725 F. Supp. 2d 1119, 1133–34 (E.D. Cal. 2010) (holding
19 that an unrecognized tribe could not bring claims because the court lacked authority to adjudicate
20 entitlement to federal recognition).

21 These holdings reflect the guiding principle that, although the DOI must carefully
22 consider tribal sovereignty, it ultimately has the power to manage “*all* Indian affairs” and “*all*
23 *matters arising out of Indian relations.*” 25 U.S.C. § 2 (emphasis added). The BIA “has both the
24 authority and responsibility to interpret tribal law when necessary to carry out the government-
25 to-government relationship with the tribe.” *United Keetoowah Band of Cherokee Indians v.*
26 *Muskogee Area Director*, 22 IBIA 75, 80 (1992).

1 Based on this line of cases, the Court concludes deference is owed to the DOI decisions
2 and the holdover Council does not have authority to bring this case against the federal
3 government in the interim period where the tribal leadership is considered inadequate by the
4 DOI. There is a sufficient basis in the record to conclude this Plaintiff, the holdover Council,
5 may not bring a lawsuit on behalf of the Tribe. The DOI refused to recognize the actions taken
6 by the holdover Council since March 24, 2016. (Dkt. No. 15 at 8, 11, 15.) Moreover, the DOI has
7 not recognized the Nooksack Indian Tribal Council allegedly elected in January 2017. (*Id.* at 11,
8 16.) Therefore, the decisions taken and the leadership in place after March 24, 2016, are not valid
9 at this time and on an interim basis because the DOI or BIA have not recognized *any* Nooksack
10 tribal leadership.

11 This holding is consistent with the Court's conclusion it has subject matter jurisdiction
12 over the plaintiffs' claims in *Rabang v. Kelly*, C17-0088-JCC, Dkt. No. 62. There, the plaintiffs
13 are allegedly disenrolled Nooksack tribe members bringing an action against the Nooksack tribal
14 leadership, including the holdover Council members, in their individual capacities. *Rabang*, Dkt.
15 No. 1. The Court defers to the DOI decisions in each case, but the respective parties in each
16 informs the Court's subject matter jurisdiction. The plaintiffs in *Rabang* have authority to bring
17 their personal claims, and the DOI decisions confer jurisdiction over potentially intra-tribal
18 matters because the plaintiffs have a lack of adequate opportunity to challenge the Nooksack
19 tribal court's jurisdiction. *Rabang*, Dkt. No. 62 at 10–11. Here, however, the holdover Council
20 lacks authority to bring its claims on behalf of the Tribe because the DOI decisions decline to
21 recognize the holdover Council. Therefore, the Court does not have jurisdiction over claims
22 alleged by a party without authority to bring such claims.

23 The holdover Council's arguments why it has authority to bring its claims are curious.
24 Plaintiff seems simultaneously to ask the Court to interpret Nooksack tribal law to find Mr. Kelly
25 was delegated power and that Nooksack law recognizes the authority of holdover Councils,
26 while also arguing that the Court cannot intercede into internal tribal disputes. (*See e.g.*, Dkt. No.

36.) Plaintiff cannot have it both ways. Moreover, this federal court cannot interpret tribal law. *See Cayuga Nation*, 824 F.3d at 328; *Goodface*, 708 F.2d at 339.

Plaintiff also relies on Director Sparks's letter indicating that the "Nooksack Constitution does not require the Secretary [of the Interior] to conduct or approve tribal council elections." (Dkt. No. 21 at 13–14; *see* Dkt. No. 19 at 8.) Plaintiff claims this means PDAS Roberts acted improperly by refusing to recognize the holdover Council. (Dkt. No. 19 at 8.) However, even if this was true, as decided above, the Court does not have jurisdiction to review challenges to DOI decisions brought by parties without authority.

Plaintiff also cites *Cayuga Nation* for the proposition that allowing Defendants "to defeat the Tribe on standing grounds by arguing that they do not recognize the Council . . . must not be permitted." (Dkt. No. 29 at 9.) However, *Cayuga Nation* holds that where the BIA recognizes specific entities as the tribal leadership, federal courts must do the same. 824 F.3d at 330. Logically, therefore, the converse must also be true: where the BIA refuses to recognize tribal leadership, federal courts must do the same. *See also Shenandoah*, 159 F.3d at 712–13; *Cloverdale*, 593 F. App'x at 609.

For the foregoing reasons, Defendants' motion to dismiss (Dkt. No. 26) is GRANTED because the holdover Council does not have the authority to bring these claims on behalf of the Nooksack Indian Tribe. Therefore, this Court lacks jurisdiction.²

III. CONCLUSION

These are very rare circumstances. The DOI found that the Nooksack Indian Tribal Council, currently existing as the holdover Council, lacks authority due to a lack of quorum. The DOI decisions stand during the interim until the DOI and BIA recognize a newly elected Nooksack Indian Tribal Council. This Court's lack of jurisdiction is not permanent or inflexible.

² Plaintiff also argues that the DOI and BIA decisions are final agency actions that can be reviewed by this Court. However, the Court need not decide whether or not final agency actions were made because the holdover Council lacks authority to bring its claims at this time.

1 If the DOI and BIA recognize Nooksack tribal leadership after new elections and the nation-to-
2 nation relationship is resumed, the new tribal leadership would have authority to initiate an
3 action against the federal government. The Court also acknowledges that this is a situation
4 contemplated by *Cayuga Nation* where a BIA decision “prevent[s] tribes from vindicating their
5 rights in federal court.” 824 F.3d at 329–30. However, under this set of facts and with a clear
6 lack of recognition from the DOI and BIA, the Court must decline jurisdiction.

7 Defendants’ motion to dismiss for lack of subject matter jurisdiction (Dkt. No. 26) is
8 GRANTED. The holdover Council’s claims are DISMISSED with prejudice. Plaintiff’s motion
9 for preliminary injunction is DENIED as moot. The Court directs the Clerk to CLOSE this case.

10 DATED this 11th day of May 2017.

11
12
13 

14 John C. Coughenour
15 UNITED STATES DISTRICT JUDGE
16
17
18
19
20
21
22
23
24
25
26

EXHIBIT 2



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

MAY 16 2017

PORTLAND AREA
INDIAN HEALTH SERVICE
1414 NW NORTHURP, Suite 800
PORTLAND, OREGON 97209

Mr. Robert Kelly, Jr.
Chairman, Tribal Council
Nooksack Indian Tribe
P.O. Box 157
Deming, WA 98244

Dear Chairman Kelly:

I am writing to advise you that the Indian Health Service ("IHS" or "Agency") does not have the authority to move forward with the informal conference scheduled for May 18, 2017, and will reassume all programs, functions, services, and activities ("PFSAs") effective immediately. Although IHS originally scheduled an informal conference in response to the request received on April 27, 2017, IHS cannot engage in this manner with the Nooksack Indian Tribe as long as it is operating with a holdover council, for the same reasons that the Federal court ruled it did not have jurisdiction in *Nooksack Indian Tribe v. Zinke, et al.*, No. 2:17-cv-00219 (W.D. Wa. filed Feb. 13, 2017). The Parties agreed that the outcome of the above-referenced case would impact the reassumption matter, including the current appeal before the Interior Board of Indian Appeals ("IBIA").

On May 11, 2017, the district court issued a decision dismissing the lawsuit. Specifically, the Judge ruled that:

[D]eference is owed to the [Department of Interior ("DOI")] decisions and the holdover Council does not have authority to bring this case against the federal government in the interim period where the tribal leadership is considered inadequate by the DOI.

Nooksack Indian Tribe v. Zinke, et al., No. 2:17-cv-00219, slip op. at 10 (W.D. Wa. May 11, 2017) (order granting Defendants' motion to dismiss). The Judge further held that:

[T]he decisions taken and the leadership in place after March 24, 2016, are not valid at this time and on an interim basis because the DOI or [the Bureau of Indian Affairs] have not recognized any Nooksack tribal leadership.

Id. In accordance with this decision, the holdover council does not have standing to represent the Nooksack Indian Tribe.

Therefore, the holdover council also does not have any authority to request an informal conference or seek any further review of IHS's reassumption decision. Accordingly, IHS must fully rescind the contract and reassume all PFSAs pursuant to the March 27, 2017 reassumption letter issued by the contracting officer. Therefore, the reassumption is considered effective on April 29, 2017, and IHS will proceed to work toward an orderly transition to ensure continuity of patient care. The transition is expected to be completed by June 13, 2017.

IHS hereby requests the return of all remaining ISDEAA funds provided on May 12, 2017, and an accounting of all funds expended since that date. Payment, along with a copy of this letter, should be sent to the following address:

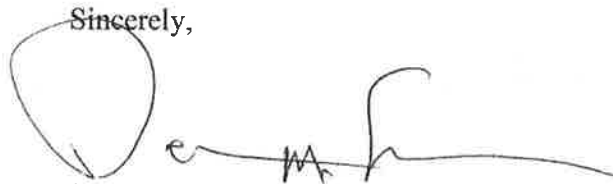
Portland Area Indian Health Service
Division of Finance Management
1414 NW Northrup St., Suite 800
Portland, OR 97209

As noted, the holdover council cannot challenge the Agency's actions when tribal leadership is considered inadequate by the DOI. As indicated in the district court's order, "the holdover Council lacks authority to bring its claims on behalf of the Tribe because the DOI decisions decline to recognize the holdover Council." *Id.* Accordingly, the DOI must recognize a newly elected Nooksack Indian Tribal Council before IHS can resume a government-to-government relationship.

The IHS does not take such action lightly, but the Agency must act promptly to carry out health services where there is not a recognized governing body as required for contracting under the Indian Self-Determination and Education Assistance Act ("ISDEAA"). Please be aware that any health services provided by the Tribe after June 13, 2017, are no longer considered covered services under the ISDEAA.

If you have questions regarding this letter or if you or your health care staff would like to meet to coordinate an orderly transition, please contact me by telephone at (503) 414-5558.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dean M. Seyler', with a large, stylized initial 'D' and a long horizontal stroke extending to the right.

Dean M. Seyler
Director

cc: Tribal Council members, Nooksack Indian Tribe
Charles N. Hurt, Jr. Senior Tribal Attorney, Nooksack Indian Tribe

CERTIFICATE OF SERVICE

I certify that on May 26, 2017, the foregoing APPELLEE'S STATUS REPORT
AND MOTION TO LIFT STAY OF PROCEEDINGS was served on the following
parties by U.S. First Class mail and electronic transmission at the address and e-mail
indicated below:

Rickie Wayne Armstrong, Esq.
Office of the Tribal Attorney
Nooksack Indian Tribe
P.O. Box 63
Deming, WA 98244
rarmstrong@nooksack-nsn.gov

Gabriel Galanda
Bree R. Black Horse
Galanda Broadman PLLC
P.O. Box 15416
8606 35th Avenue NE, Suite L1
Seattle, WA 98115
gabe@galandabroadman.com
bree@galandabroadman.com



Jay L. Furtick