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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

ROBERT DOUCETTE; BERNADINE
ROBERTS; SATURNINO JAVIER; TRESEA
DOUCETTE,

Plaintiffs,

v.

RYAN ZINKE, Secretary for the United States
Department of Interior, in his official capacity;
JOHN TAHSUDA III, Principal Deputy
Assistant Secretary—Indian Affairs, in his
official capacity; UNITED STATES
DEPARTMENT OF THE INTERIOR,

Defendants.

NO.

COMPLAINT FOR
EQUITABLE RELIEF

Plaintiffs allege as follows:

I. INTRODUCTION

1. Pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, Plaintiffs seek judicial review of the United States Department of Interior’s (“DOI,” “Interior,” or “Department”) departure from its established policy of interpreting Nooksack Tribal constitutional, statutory, and common law to determine whether the Nooksack Tribal Council (“Tribal Council”) was validly seated as the governing body of the Nooksack Tribe (“Tribe”) for

1 the purposes of the government-to-government relationship between the United States and the
2 Tribe. Interior's failure to distinguish its past practice, or even acknowledge a change in policy,
3 is a clear indication of a lack of reasoned articulation and responsibility, which vitiates any
4 deference otherwise entitled to Defendants. Beginning on October 17, 2016, the United States
5 demanded that the Tribe conduct a Tribal Council election in accordance with Tribal law so
6 Interior could satisfy its federal legal and fiduciary obligations to uphold and fund a government-
7 to-government relationship with the Tribe. Under Nooksack law, the Tribal Council election of
8 federal concern should have occurred on March 24, 2016. The Obama Administration repeated
9 its demand for a lawful election on November 14, 2016, and again on December 23, 2016.

9 2. With each demand, Interior interpreted Tribal law to declare the Tribe illegitimate
10 because the Tribal Council, its governing body, could not achieve a quorum and therefore could
11 not take action on behalf of the Tribe. With each demand, Interior also warned that it would not
12 recognize the results of any election inconsistent with Nooksack law. Each demand was
13 consistent: for the purpose of the government-to-government relationship between the United
14 States and the Tribe, Interior would interpret Nooksack law to determine if the Tribal Council was
15 validly seated as the Tribal governing body. Although the Nooksack Constitution does not require
16 the Secretary of the Interior ("Secretary") to approve election, Interior established and undertook
17 a policy that required Interior and its agencies to interpret Nooksack Tribal constitutional,
18 statutory, and common law for that purpose. *See Order Granting Defendants' Motion to Dismiss*
19 *at 11, Nooksack Indian Tribe v. Zinke, et al.*, No. 17-0219 (W.D. Wash. May 11, 2017), ECF No.
43.

1 3. Enter the Trump Administration. Starting on August 25, 2017, and culminating on
2 March 9, 2018, Interior ignored the rule of law in favor of simply accomplishing a Tribal Council
3 election that would allow it to extricate itself from legal controversy at Nooksack. This decision
4 was a sudden and unexplained departure from Interior’s established policy of interpreting
5 Nooksack law for the purpose of a legitimate government-to-government relationship between the
6 United States and the Tribe.

7 4. After having interpreted Nooksack Tribal constitutional, statutory, and common
8 law on at least six occasions and on various Tribal governance and election issues since October
9 17, 2016, Interior abruptly declined to “insert itself and interpret tribal law” in one pivotal instance:
10 in a December 2, 2017, special election funded and regulated by Interior, the Department refused
11 to consider whether 812 ballots were cast in accordance with Nooksack law. Interior refused to
12 consider whether—in an election in which “[v]oting shall be conducted entirely through the United
13 States Postal Service”—*any* of those ballots arrived in envelopes bearing postmarks or voter
14 signatures. Interior’s refusal to interpret Tribal law on that crucial election issue—in the face of
15 proof of election fraud—was a sudden, unexplained, and unlawful change in policy. It is therefore
16 arbitrary and capricious, an abuse of discretion, not in accordance with law, and unwarranted by
17 the facts.

18 5. Plaintiffs are aggrieved by this change in policy that resulted in final agency action.
19 Judicial review is available under the APA. 5 U.S.C. §§ 701-706.

II. JURISDICTION AND VENUE

1 6. This Court possesses jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702
2 for declaratory judgment and any further relief available.

1 7. The United States has waived Defendants’ immunity from this action for equitable
2 relief pursuant to 5 U.S.C. § 702. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b)
3 and (e) because a substantial part of the actions or omissions giving rise to the claims occurred in
4 this District.

5 8. Plaintiffs have exhausted any administrative remedy available from Interior.
6 Specifically, through the Office of Hearings and Appeals’ Interior Board of Indian Appeals
7 (“IBIA”), by appealing to the IBIA a March 7, 2018, Memorandum to PDAS Tahsuda, titled
8 “Endorsement of the Nooksack Indian Tribe Special Council Election,” issued by the Bureau of
9 Indian Affairs (“BIA”) Acting Northwest Regional Director issued to the Principal Deputy
10 Assistant Secretary—Indian Affairs, Defendant John Tahsuda III (“PDAS Tahsuda”). Order
11 Docketing and Dismissing Appeal, *Doucette, et al. v. Acting N.W. Reg’l Dir.*, IBIA No.18-046
12 (Bd. of Indian App. Apr. 17, 2018).

13 9. On April 17, 2018, the IBIA docketed Plaintiffs’ appeal of the March 7, 2018,
14 Memorandum but determined that it lacked jurisdiction due to a superseding March 9, 2018, letter
15 issued by PDAS Tahsuda, as discussed *infra. Id.* Quoting Plaintiffs’ appeal notice, the IBIA
16 observed that Plaintiffs expressly did “not appeal from the Principal Deputy’s [March 9, 2018,]
17 letter, asserting that it is ‘separate agency action to ‘recognize the validity of the Tribal Council,’
18 and that ‘to the extent such action is final, [it] is subject to direct appeal to the U.S. District Court.’”
19 *Id.* at 2 n.4

III. PLAINTIFFS

18 10. Plaintiffs ROBERT DOUCETTE, BERNADINE ROBERTS, SATURNINO
19 JAVIER, and TRESEA DOUCETTE are each members of the Nooksack Indian Tribe and citizens

1 of the United States and the State of Washington. Plaintiffs were each Tribal Council candidates
2 in the December 2, 2017, Nooksack Tribal Council special election that Interior funded and
3 regulated.

4 **IV. DEFENDANTS**

5 11. Defendant RYAN ZINKE is the Secretary for the United States Department of
6 Interior and is sued in his official capacity.

7 12. Defendant JOHN TAHSUDA III, is the Principal Deputy Assistant Secretary—
8 Indian Affairs (“PDAS”) for the United States Department of the Interior and is sued in his official
9 capacity.

10 13. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR is an agency
11 of the United States of America.

12 **V. FACTUAL ALLEGATIONS**

13 14. The Nooksack Indian Tribe is a federally recognized Indian Tribal government.
14 The United States recognized the Tribe in 1973. The Tribe has since operated pursuant to the
15 Nooksack Constitution and Bylaws, which were originally approved by DOI Deputy Assistant
16 Secretary W.L. Rogers on September 24, 1973.

17 15. The U.S. Department of the Interior has the power to manage “*all* Indian affairs”
18 and “all matters arising out of Indian relations.” 25 U.S.C. § 2. Under federal law, Interior’s duties
19 include ensuring that a valid government-to-government relationship exists between the United
States and a tribal government, particularly for federal self-determination funding purposes. *See*
Indian Self-Determination and Education Assistance Act (“ISDEAA”), 25 U.S.C. §§ 5301, *et seq.*
Interior funds Nooksack governmental operations pursuant to ISDEAA. *Id.*

1 16. According to Article III, Section 1 of the Nooksack Constitution: “The governing
2 body of the Nooksack Indian Tribe shall be known as the Nooksack Tribal Council and shall be
3 elected by the qualified voters of the tribe.” The Tribal Council is “composed of one (1) chairman;
4 one (1) vice-chairman; one (1) secretary, one (1) treasurer; and four councilmen.” Nooksack
5 Constitution, art. III, § 2. Each of the eight Council positions hold four-year terms. *Id.*, art. III,
6 §§ 3, 4. Those four-year terms are staggered, with the chairman, secretary, and two councilmen
7 positions established as one cohort; and the vice-chairman, treasurer, and two other councilmen
8 positions established as a second cohort. *Id.* As a result, every two years the Tribal Chairman
9 must convene a Tribal Council election by appointing and swearing in an Election Superintendent,
10 who in turn oversees the election. *Id.*, art. IV, § 4; Nooksack Tribal Code (“N.T.C.”) §
11 62.03.010(A).

12 17. Pursuant to Article IV, Section 1 of the Nooksack Constitution: “All enrolled
13 members of the Nooksack Indian Tribe, eighteen (18) years of age or over, shall have the right to
14 vote.” Other than being of adult age, there is no other Constitutional qualification for a Tribal
15 member to vote in a Tribal Council election.

16 18. On December 18, 2015, the former Tribal Council amended the Nooksack Election
17 Ordinance to cause Tribal Council elections to occur by mail for the first time in the Tribe’s history.
18 All prior Tribal Council elections were conducted in person, “by secret ballot” cast in “an enclosed
19 and private area.” By moving to a “mail out” system, that Tribal Council did away with
anonymous balloting. N.T.C. § 62.06.020.

 19. As of December 18, 2015: “Voting shall be conducted entirely through the United
States Postal Service,” with one limited exception. N.T.C. § 62.06.020(A). A voter can request

1 and cast replacement ballot “in person” if her “ballot is destroyed, spoiled, lost, or not received,”
2 within “ten (10) days before the Election Day.” N.T.C. § 62.04.020(B)(5).

3 20. Otherwise a qualified voter “shall mark the ballot” and place it in an “outer
4 envelope, seal it and complete the certificate [on that envelope] and mail it.” N.T.C. §
5 62.04.020(B)(5); *see also* N.T.C. § 62.04.020(B)(1) (requiring a voter to use a “larger envelope . .
6 . . . that is preaddressed to the Election Board with a certification”). In turn, the Election Board
7 “shall” process incoming ballots “postmarked at or before the close of the polls on Election Day.
8 . . .” N.T.C. § 62.04.020(B)(7)(b); *see also* N.T.C. § 62.04.020(B)(7)(c) (“Any ballot postmarked
9 after the close of the polls shall not be counted.”). The postmark on the front of the outer, larger
10 envelope containing a ballot, and the voter’s signed certification on the back of that envelope,
11 “determines the validity” of the ballot. *Id.*

12 21. By March 24, 2016, the Tribal Chairman refused to convene the constitutionally
13 required election for the cohort comprised of the vice-chairman, treasurer, and two other
14 councilperson positions. As of March 24, 2016, those four seats expired. But the four
15 councilpersons who held those seats since March 24, 2012, refused to vacate them after March 24,
16 2016.

17 22. As of March 24, 2016, the Tribal Council became defunct for lack of an ability to
18 achieve the quorum needed to take any action on behalf of the Tribe; the eight-person Tribal
19 Council fell into holdover status (“Holdover Council”). The Tribal Council would remain in
holdover status until at least March 9, 2018.

1 **A. Interior Establishes A Policy Of Interpreting Nooksack Tribal Law To Determine**
2 **The Status Of The Nooksack Tribal Council.**

3 23. On October 17, 2016, PDAS Lawrence Roberts issued a determination to the Tribal
4 Chairman to inform him and other members of the Holdover Council that “the Department will
5 only recognize those actions taken by the Council prior to March 24, 2016, when a quorum existed,
6 and will not recognize any actions taken since that time because of a lack of quorum.” Alluding
7 to the ISDEAA, this determination reflected Interior’s policy of interpreting Tribal constitutional,
8 statutory, and common law to determine whether the Tribal Council was validly seated as the
9 governing body of the Tribe for the purposes of the government-to-government relationship.

10 24. PDAS Roberts issued that determination on October 17, 2016, because, by then,
11 the Tribal Chairman had still refused to convene an election for four expired Council seats, thus
12 because the Tribal Council had lacked any ability to take action on behalf of the Tribe for lack of
13 quorum for almost seven months pursuant to Nooksack law. Based on its interpretation of Tribal
14 law, Interior was unable to carry out the “government-to-government relationship between the
15 United States and Nooksack Tribe” required by federal law. PDAS Roberts interpreted Article II,
16 Section 4 of the Nooksack Bylaws to declare that “the Council must have five duly elected officers
17 to take any action.”

18 25. In the October 17, 2016, determination, PDAS Roberts explained Interior’s policy
19 of interpreting Tribal constitutional, statutory, and common law to determine whether the Tribal
Council was validly seated as the governing body of the Tribe was implemented pursuant to federal
law and Interior’s “duty to ensure that tribal trust funds, Federal funds for the benefit of the Tribe,
and [Interior’s] day-to-day government-to-government relationship is with a full quorum of the
Council as plainly stated on the Tribe’s Constitution and Bylaws.”

1 26. PDAS Roberts pledged that Interior’s BIA “stands ready to provide technical
2 assistance and support to the Tribe to carry out elections open to ‘all enrolled members of the
3 Nooksack Tribe, eighteen years of age or over’ regardless of county residency, to vote to fill the
4 vacant Council seats.” PDAS Roberts interpreted Article IV, Section 1 of the Nooksack
5 Constitution to reject any geographic restrictions on voting that the Holdover Council was
6 attempting to impose in an election for the four vacant seats. PDAS Roberts warned: “elections
inconsistent with Nooksack law will not be recognized by the Department.”

7 27. On November 14, 2016, PDAS Roberts issued a second determination to the Tribal
8 Chairman, “reiterat[ing] that pursuant to the Nation-to-Nation relationship, the Department of the
9 Interior (Department) will not recognize actions by [Kelly] and the current Tribal Council
10 members without a quorum consistent with the Nooksack Tribe’s (Tribe) Constitution and
11 decisions issued by the Northwest Intertribal Court System.” (parentheticals in original). The
12 Northwest Intertribal Court System (“NICS”) then operated the Nooksack Tribal Court of Appeals
under a fee-for-service contract with the Tribe.

13 28. PDAS Roberts issued that second determination on November 14, 2016, because
14 the Tribal Chairman had still refused to convene the election for the four expired Tribal Council
15 seats. PDAS Roberts repeated “the Department will only recognize actions taken by the Tribal
16 Council prior to March 24, 2016, when a quorum existed, and will not recognize any actions taken
17 since that time because of a lack of a quorum,” once again interpreting Article II, Section 4 of the
18 Nooksack Bylaws. PDAS Roberts once again interpreted Article IV, Section 1 of the Nooksack
19 Constitution, declaring that Tribal Council elections must be “open to ‘all enrolled members of the
Nooksack Tribe, eighteen years or older,’ regardless of county residency. . . .” Interior’s second

1 determination was in accordance with its policy to interpret Tribal law to determine whether the
2 Tribal Council is validly seated as the governing body of the Tribe.

3 29. On December 23, 2016, PDAS Roberts issued a third determination to the Tribal
4 Chairman, citing Interior’s October 17, 2016, and November 14, 2016, determinations, to once
5 again “explain[] that, pursuant Nooksack Tribe’s (Tribe) constitution and laws, as of April 2016,
6 the Tribal Council is no longer operating with a quorum and therefore lacks authority to conduct
7 business on behalf of the Tribe.” PDAS Roberts continued: “the Department of the Interior
8 (Department) will recognize only those actions taken by the Council prior to March 24, 2016,
9 when a quorum existed.” (parentheticals in original).

10 30. PDAS Roberts issued that third determination on December 23, 2016, because
11 insofar as the Tribal Chairman had still refused to convene an election for the four expired Council
12 seats: “The lack of a quorum and inability to take official action put[] all Federal funding to the
13 Tribe at risk, as [DOI] can only contract Federal services with a duly authorized tribal council
14 pursuant to Federal law and a Tribe’s constitution.” Citing the ISDEAA, his third determination
15 again was in accordance with Interior’s policy to interpret Tribal law to determine whether the
16 Tribal Council is validly seated as the governing body of the Tribe.

17 31. PDAS Roberts further explained that Interior “would not recognize any subsequent
18 actions taken by the Tribal Council until a valid election, consistent with the Tribe’s constitution
19 and the decisions of the Tribe’s Court of Appeals . . . is held and a quorum of council members is
20 achieved.” PDAS Roberts repeated: “Elections or actions inconsistent with . . . Nooksack law will
21 not be recognized by the Department.”

1 32. By 2017, Interior had suspended funding under its contracts with the Tribe pursuant
2 to the ISDEAA, as PDAS Roberts first threatened in the October 17, 2016, determination. This
3 action was predicated on Interior’s policy of interpreting the Nooksack Tribal constitutional,
4 statutory, and common law to determine whether the Tribal Council is validly seated as the
5 governing body of the Tribe.

6 33. On January 19, 2017, PDAS Roberts left office along with the remaining Obama
7 Administration’s appointees.

8 34. On February 13, 2017, the Holdover Council, masquerading as “[t]he Nooksack
9 Indian Tribe,” sued Secretary Zinke and other DOI officials for, *inter alia*, “[a] money judgment
10 in the Tribe’s favor in an amount equal to . . . no less than \$13,669,965” and “[a] declaration that
11 the opinion of then-Principal Deputy Director Lawrence Roberts contained in his letters of October
12 17, 2016, November 14, 2016, and December 23, 2016 refusing to recognize the actions of the
13 Nooksack Tribal Council after March, 2016 constitutes an arbitrary and capricious action by the
14 defendants, in excess of the agencies’ authority and unsupported by law.” Complaint at 22,
15 *Nooksack Indian Tribe v. Zinke, et al.*, No. 17-0219 (W.D. Wash. Feb. 13, 2017), ECF No. 1.

16 35. On March 1, 2017, United States President Donald J. Trump appointed Defendant
17 Zinke as Interior Secretary.

18 36. On May 11, 2017, the U.S. District Court for the Western District of Washington
19 dismissed the Holdover Council’s lawsuit with prejudice for lack of standing. Order Granting
Defendants’ Motion to Dismiss at 12, *Nooksack Indian Tribe*, No. 17-0219 (W.D. Wash. Feb. 13,
2017), ECF No. 43.

1 37. On June 15, 2017, PDAS Roberts’ successor, Acting Assistant Secretary—Indian
2 Affairs (“AASIA”) Michael Black—an Obama Administration holdover—met with the Tribal
3 Chairman and commenced settlement negotiations. Those negotiations culminated in an August
4 25, 2017, Memorandum of Agreement (“MOA”) signed by AASIA Black and the Tribal
5 Chairman.

6 38. The MOA expressly affirmed PDAS Roberts’ October 17, 2016, November 14,
7 2016, and December 23, 2016, determinations. Through the MOA, AASIA Black also declared
8 that he “only recognizes actions taken by the NOOKSACK TRIBAL COUNCIL prior to March
9 24, 2016, when a quorum existed.” Like PDAS Roberts, AASIA Black interpreted Article II,
10 Section 4 of the Nooksack Bylaws to affirm the Tribal Council’s quorum requirement. AASIA
11 Black’s interpretation of the Tribal Constitution was consistent with Interior’s policy to interpret
12 Tribal law to determine whether the Tribal Council is validly seated as the governing body of the
13 Tribe.

14 39. Under the MOA, DOI “resume[d] funding” of its Indian Self-Determination and
15 Education Assistance Act contracts with the Tribe, in particular “for the purpose of holding a
16 special election.” In consideration, the Tribal Chairman agreed to conduct that election “in
17 accordance with the NOOKSACK CONSTITUTION, BYLAWS, AND TRIBAL LAWS and
18 ORDINANCES” (emphasis in original). The MOA, which also invoked specific provisions
19 of the ISDEAA, was consistent with Interior’s policy to interpret Tribal law to determine whether
20 the Tribal Council is validly seated as the governing body of the Tribe.

21 40. The MOA explained “[t]his election shall be seen as a special election to replace
22 the regular election that was to be held in March 2016. . . .,” and allowed AASIA to “have an

1 observer present at any time ballots are being handled, processed, or counted.” **But the BIA ended**
2 **up only monitoring ballot handling, processing, or counting on parts of three days—one day**
3 **and two nights—during the nine-week special election.**

4 41. The MOA outlined a specific procedure whereby Interior would recognize the
5 Tribal Council as the governing body of the Tribe in accordance with Nooksack law: “The
6 Nooksack Election Board shall certify and submit all results of the special election to the BIA
7 Regional Director of the Pacific Northwest Region, including a report demonstrating the above
8 mentioned conditions were satisfied [i.e.,] as set forth in NOOKSACK TRIBAL LAWS AND
9 ORDINANCES.” (emphasis in original). In turn, the BIA Regional Director would review the
10 “Election Board’s report to the Regional Director” and forward that report to the AASIA “along
11 with the Regional Director’s endorsement thereof, or an explanation for withholding the
12 endorsement.” Upon receipt of the Regional Director’s endorsement, the AASIA would “issue a
13 letter granting full recognition” of the Tribal Council as the governing body of the Tribe.

12 **B. Interior Suddenly Departs From Its Established Policy Of Interpreting Nooksack**
13 **Tribal Law; Turning A Blind Eye To Fraud In The Special Election.**

14 42. On August 30, 2017, the Tribal Chairman appointed Katrice Rodriguez (aka
15 Romero), the twin sister of Holdover Councilperson and special election “incumbent” candidate
16 Katherine Romero (aka Canete), to serve as the Nooksack Election Superintendent for the special
17 election. When appointed, Ms. Rodriguez was already a tribal employee, in violation of N.T.C. §
18 62.03.010(A) (“The Election Superintendent shall not already be an employee of the Tribe or its
19 entities.”). In turn, Ms. Rodriguez appointed other allies of Holdover Council to the Nooksack
Election Board, including Roswell “Ross” Cline who, in 2000, plead guilty to embezzling federal
housing monies from the Tribe in U.S. District Court for the Western District of Washington. *See*

1 Judgment In A Criminal Case, *USA v. Cline*, 2:99-cr-00425 (W.D. Wash. Sept. 12, 2000), ECF
2 No. 47.¹

3 43. On September 3, 2017, Secretary Zinke appointed PDAS Tahsuda.

4 44. On September 7, 2017, the BIA Acting Northwest Regional Director advised the
5 Tribal Chairman that the Tribal Council was out of compliance with the MOA in at least six ways.
6 Most notably, the BIA Acting Northwest Regional Director instructed the Tribal Chairman to:
7 “Appoint a new Election Superintendent,” explaining that his “appointment of the twin sister of
8 Katherine Canete, one of the so-called ‘holdover’ council members and the Tribe’s General
9 Manager . . . gives the appearance of skewing the election process At a minimum, the
10 appointed Election Superintendent should not have either a close personal or familial connection
11 to any sitting councilmember or any so-called holdover council member.” *See* N.T.C. §
12 62.03.010(A). This action confirms Interior’s intention to maintain its policy of interpreting
13 Nooksack Tribal constitutional, statutory, and common law in order to determine whether the
14 Tribal Council is validly seated as the governing body of the Tribe.

15 45. On September 8, 2017, the Tribal Chairman rebuffed Interior’s directive that he
16 appoint a new Election Superintendent, claiming: “Any conflicts (or potential conflicts) are either
17 addressed within tribal law, or precautions have been (or are being made) to ensure the Special
18 Election occurs without issue so that the Tribe can resume normal governance activities as soon
19 as possible.”

¹ In the most recent regular Tribal Council election, which culminated on May 5, 2018, Mr. Cline was purportedly elected Tribal Council Chairman. Ms. Rodriguez also served as Election Superintendent in that election.

1 46. Interior took the Tribal Chairman and his Election Superintendent at their word that
2 conflicts of interest would not skew the special election and refused to enforce its interpretation
3 that appointment of Ms. Canete as Election Superintendent was a violation of Nooksack Tribal
4 law. After a year of maintaining its policy of interpreting Nooksack Tribal constitutional,
5 statutory, and common law in order to determine whether the Tribal Council is validly seated as
6 the governing body of the Tribe, Interior suddenly and without explanation changed its policy,
7 refusing to take into account Plaintiffs' legitimate reliance on that policy.

8 47. Interior's change in policy is therefore arbitrary and capricious, an abuse of
9 discretion, not in accordance with law, and unwarranted by the facts. On October 2, 2017, the
10 Nooksack Election Board announced for purposes of the special election that "all ballots
11 *postmarked by the U.S. Postal Department* no later than the close of polls on Election Day will
12 be counted, NTC 62.06.020(B)(7)(b). The Ordinance makes clear it is the voter's responsibility
13 to ensure that his or her ballot **is mailed** in a timely fashion." (italicized bolding in original;
14 bolding added).

15 48. On October 6, 2017, the Nooksack Election Board mailed ballot packets to
16 Nooksack qualified voters. The BIA monitored the mail out that afternoon.

17 49. On November 2, 2017, two days before the special primary election, the Election
18 Board changed course, announcing instead: "voter ballots must be *received by the Election Board*
19 by the end of business in Election Day." (emphasis added). The Board further wrote: "Any voter
may call, write or appear **in person** to request a replacement ballot." (emphasis added). That mid-
election "rule" change—from a "postmarked" ballot-processing regime to "received in-person"
regime—foretold a fraudulent special election, in which ballots could not be validated by U.S.

1 Postal Service postmark or voter's signed certification as set forth in tribal law, N.T.C. §§
2 62.04.020(B)(7)(b) and 62.04.020(B)(7)(c), and thus as required by the MOA.

3 50. On November 4, 2017, Plaintiffs each advanced to the December 2, 2017, special
4 election.

5 51. On November 11, 2017, Plaintiffs' counsel notified the BIA:

6 First and foremost, despite Charles Hurt's letter to me dated October 2, 2017, the
7 Nooksack Election Board has decided to only process ballots received by 4 PM on
8 December 2, 2017, in the instance of the special General Election. On October 2,
9 2017, Mr. Hurt wrote: "all ballots **postmarked by the U.S. Postal Department** no
10 later than the close of polls on Election Day will be counted, N.T.C.
11 62.06.020(B)(7)(b)." But on November 2, 2017—in response to a letter I wrote him
12 a month earlier—he changed his client's position: "the Election Ordinance
13 repeatedly makes clear that voter ballots must be **received by the Election Board**
14 by the end of business in Election Day." *Id.* (emphasis added). In short, N.T.C. §
15 62.06.020(B)(7) requires the Board to process ballots that are postmarked by 4 PM
16 on Election Day, as Mr. Hurt admitted on October 2, 2017. Please consider
17 encouraging the Board to follow Nooksack law in this regard, as required by
18 Section B of the MOA (emphasis in original; citation omitted).

19 Citing Ms. Rodriguez's conflict of interest and Mr. Cline's federal criminal history, the BIA was
further notified that "the Special Election is being conducted by individuals who cannot be trusted
to honor Nooksack law or otherwise behave honorably." The BIA was requested to "keep the
Election Board under a microscope throughout the General Election, paying particular attention to
the four issues highlighted"—most notably the possibility that replacement ballots would be
accepted in person and processed without validation via postmark or voter signature. The BIA,
however, looked away as the Election Board stuffed the ballot box.

52. On November 21, 2017—eleven days before the special election—the BIA
attended a "Ballot Party," at which the Election Board received at least 16 ballots cast by Nooksack

1 voters in person. That was the second time during nine-week special election when the BIA was
2 present when ballots were being handled, processed, or counted.

3 53. On December 2, 2017, the Nooksack Election Board held the special election. For
4 the first time in Nooksack history, the Election Board counted ballots and tabulated the general
5 election results from behind closed doors; they purportedly processed 812 ballots in the general
6 election. BIA monitors arrived at 3:30 p.m., by which time the Election Board had already placed
7 the ballots into the ballot box.

8 54. That same day, according to a December 7, 2017, report by Ms. Rodriguez, she and
9 the Election Board: (a) retrieved a last round of “Ballot Packages” from the Deming Post Office
10 by 2:00 p.m.; (b) connected with the two BIA monitors by 3:30 p.m.; (c) “secured” and
11 “transported” the ballot box; (d) “recorded (audio and visual) the processing of the incoming
12 ballots”; (e) “tabulated the ballots received”; and then (f) “posted the unofficial results of the
13 General Election in accordance with Title 62.06.040.” More specifically, the Election Board filled
14 the ballot box between steps (a) and (b)—before BIA monitors arrived. **Pivotaly, absent from**
15 **Ms. Rodriguez’s detailed report—i.e., between steps (d) and (e)—is any mention of the**
16 **Election Board opening any “Ballot Packages”; or reviewing any outer envelopes for**
17 **postmarks or voter signatures as set forth in tribal law, N.T.C. §§ 62.04.020(B)(7)(b) and**
18 **62.04.020(B)(7)(c), and thus as required by the MOA.** Nor is there any “audio or visual”
19 recording or any other proof that those “Ballot Packages” were scrutinized for postmarks or
signatures before being opened, or before the ballots were removed from those outer envelopes
and placed into the ballot box.

1 55. According to purported “unofficial” special election results published by Ms.
2 Rodriguez and the Election Board during the late evening of December 2, 2017, or early morning
3 of December 3, 2017, Plaintiffs each lost their Tribal Council races.

4 56. On December 5, 2017, Plaintiffs filed an administrative special election protest with
5 the Election Board, which the Board denied and, in the process, admitted to having accepted
6 purported replacement ballots cast “in person.” Plaintiffs presented proof showing that third parties
7 like Ryawn Cline—Election Board member Ross Cline’s son—illegally retrieved and cast ballots
8 for voters in person. Ms. Rodriguez and Ross Cline personally witnessed or received such illegally
9 cast ballots on behalf of the Election Board. Plaintiffs also demonstrated how, without postmarked
10 and validated outer envelopes, “the entire vote count is illegal.”

11 57. That same day, December 5, 2017, the Election Board denied Plaintiffs’ appeal and
12 in turn certified the purported special election results, with Plaintiffs each losing their Tribal
13 Council races.

14 58. On December 11, 2017, Plaintiffs “lodge[d an] election protest with the BIA
15 pursuant to Section D of the MOA,” detailing how “[t]he Special Election was not ‘in accordance
16 with the Nooksack Constitution, Bylaws, and Tribal Laws and Ordinances,’ per Section B” of the
17 MOA.” Plaintiffs explained to the BIA that the Election Board’s

18 change in approach coincides with the Board’s apparent construction of N.T.C. §
19 62.04.020B(4) to allow voters to cast purported replacement ballots in-person, ten
 days before the General Election. Absent a predominance of postmarked and
 signed outer envelopes, we are confident the Board stuffed the ballot box with
 purported replacement ballots.
Telling the BIA exactly what to look for when investigating the special election in order to
determine whether to endorse or withhold endorsement of the results as required by the MOA—

1 *i.e.*, postmarked and signed outer envelopes—Plaintiffs observed that “[a]ny significantly higher
2 proportion of replacement ballots in the General Election as compared to the Primary Election,
3 according to the Replacement Ballot Logs for each election, should lead the BIA to conclude that
4 the ballot box was stuffed with non-postmarked and non-verified replacement ballots.”

5 59. On January 14, 2018, the BIA met with Ms. Rodriguez to investigate and verify a
6 missing sequence of ballot numbers for the special election. According to a January 30, 2018, BIA
7 Memorandum Re: Nooksack Election Meeting, which details the BIA’s interaction with Ms.
8 Rodriguez from 10:15 a.m. to 3:00 p.m. that day, the BIA did not consider whether postmarked
9 and signed outer envelopes existed for any of the 812 general election ballots processed by the
10 Election Board. It was arbitrary and capricious change in policy for the BIA to not review or verify
11 whether *any* such envelopes existed in accordance with Tribal law.

12 60. On January 16, 2018, in a letter to the Tribal Chairman that cited the ISDEAA,
13 PDAS Tahsuda affirmed “the three letters issued by Principal Deputy Assistant Secretary Roberts
14 in 2016.”

15 61. On March 7, 2018, the BIA Acting Northwest Regional Director issued a
16 Memorandum to PDAS Tahsuda, titled “Endorsement of the Nooksack Indian Tribe Special
17 Council Election” (“Endorsement Memorandum”), concluding “the special election was
18 conducted according to the Nooksack Constitution, Bylaws and Tribal Law Ordinances.” **On the**
19 **“serious” issue of “whether ballots could be received by hand or whether all ballots had to**
be postmarked” in order to be validated and in turn counted, however, the BIA “decline[d]
to insert itself and interpret tribal law in this instance.” Interior’s inaction reflected a sharp
departure from its policy of interpreting Nooksack Tribal constitutional, statutory, and common

1 law in order to determine whether the Tribal Council is validly seated as the governing body of
2 the Tribe. Interior provided no reasoning or explanation for its change in policy. Interior’s inaction
3 proved pivotal in the outcome of the special election.

4 62. Furthermore, elsewhere in the Endorsement Memorandum, the BIA did “insert
5 itself” and interpret Nooksack law in several other instances, specifically:

- 6 • Article II, Section 4 of the Nooksack Bylaws, to determine which version of “[t]he
7 Nooksack election ordinance (Title 62)” governed the special election, concluding: “Since
8 the ordinance was adopted in December 2015 (when the Council had quorum), the BIA
9 recognizes it as validly enacted.”
- 10 • Article IV, Section 4 of the Nooksack Constitution N.T.C. § 62.03.010(A), which “require
11 the Tribal Council Chairperson appoint and swear in an Election Superintendent,”
12 concluding, in an about-face, that “the BIA recognizes her as the valid Election
13 Superintendent bested with the powers to conduct and review this election.”
- 14 • N.T.C. § 62.070.010, concluding: “Title 62 provides that ay voter or candidate may
15 contest the election results . . .”

16 The BIA acted inconsistently with Interior’s policy of interpreting Nooksack Tribal constitutional,
17 statutory, and common law in order to determine whether the Tribal Council is validly seated as
18 the governing body of the Tribe. On one hand, the BIA interpreted Nooksack tribal law in several
19 ways in the Endorsement Memorandum; yet on the other hand, it declined to “interpret tribal law”
to determine whether any or all of the purported 812 ballots that were validated by postmark and
voter signature in accordance with Nooksack tribal law. This unexplained inconsistency in
applying Department policy constitutes an arbitrary and capricious change from agency practice.

1 63. Further, the BIA Acting Northwest Regional Director explained “the BIA observed
2 the primary [but not general] election ballots being sealed and mailed, the handling of ballots
3 received [but not postmarked], and the counting of ballots for the general election [but not opened
4 or validated].” As with Ms. Rodriguez’s December 7, 2017, report, the Endorsement
5 Memorandum includes no mention of the Election Board opening *any* “Ballot Packages”; or
6 reviewing *any* outer envelopes for postmarks or voter signatures as set forth in tribal law, N.T.C.
§§ 62.04.020(B)(7)(b) and 62.04.020(B)(7)(c), and thus as required by the MOA.

7 64. Suspiciously, after expressing concern about “the appearance of skewing the
8 election process” on September 7, 2017, the BIA Acting Northwest Regional Director somehow
9 concluded that “[f]rom the outset, the Tribe was transparent with the election process” on March
10 7, 2018. Upon information and belief, Interior officials in Washington, D.C., directed the BIA
Acting Northwest Regional Director regarding the Endorsement Memorandum.

11 65. On March 9, 2018, only two days after his receipt of the Endorsement
12 Memorandum and without any notice to the BIA Northwest Region or its Acting Northwest
13 Regional Director, PDAS Tahsuda wrote to the Tribal Chairman, “recogniz[ing] the validity of the
14 Tribal Council comprised of the four Tribal Council members elected in 2014 and the four Tribal
15 Council members elected in the Special Election[.]” PDAS Tahsuda failed to check the BIA
16 Acting Northwest Regional Director’s work, concluding the BIA “has not identified any reason to
17 reject the validity of the Special Election.” Relying upon the BIA’s arbitrary and capricious
18 decision, PDAS Tahsuda’s decision is therefore also arbitrary and capricious, an abuse of
19 discretion, not in accordance with law, and unwarranted by the facts.

VI. CAUSE OF ACTION

1
2 66. Although Interior must carefully consider tribal sovereignty, it ultimately has
3 the power to manage “all Indian affairs” and “all matters arising out of Indian relations.” 25
4 U.S.C. § 2. Interior “has both the authority and responsibility to interpret tribal law when
5 necessary to carry out the government-to-government relationship with the tribe.” *United*
6 *Keetoowah Band of Cherokee Indians v. Muskogee Area Dir.*, 22 IBIA 75, 80 (1992); *see also*
7 *ISDEAA*, 25 U.S.C. §§ 5301, *et seq.*

8 67. Under the APA, agency action “includes the whole or part of an agency rule,
9 order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C.
10 § 551(13); *see* 5 U.S.C. § 701(b)(2) (referring to section 551 for the definition of “agency
11 action”).

12 68. A rule is defined as “the whole of a part of an agency statement of general or
13 particular applicability and future effect designed to implement, interpret, or prescribe law or
14 policy” 5 U.S.C. § 551(4).

15 69. Federal agencies’ violation of policies, guidelines, and directives—published or
16 unpublished—gives rise to a cause of action under the APA. *Confederated Tribes & Bands of*
17 *Yakama Nation v. Holder*, No. 11-3028, 2011 WL 5835137, at *3 (E.D. Wash. Nov. 21, 2011).

18 70. Defendants, in their official capacity as managers of Indian affairs under 25
19 U.S.C. § 2, established an official policy to interpret Nooksack Tribal constitutional, statutory,
and common law to determine whether the Nooksack Tribal Council was validly seated as the
governing body of the Nooksack Tribe for the purposes of the government-to-government
relationship between the United States and the Tribe.

1 71. The establishment of this policy was an agency action and Interior affirmed
2 this policy numerous times.

3 72. This policy was a final agency action because it marked the consummation of
4 the agency's decision-making process and the definitive nature of this policy gave rise to
5 direct and appreciable legal consequences.

6 73. Interior suddenly, and without explanation, departed from its established
7 policy and refused to interpret Tribal law to determine whether the special election was held
8 in accordance with Tribal law and thus whether the Tribal Council is validly seated as the
9 governing body of the Tribe. This sudden and unexplained change in policy did not take into
10 account legitimate reliance on the prior policy and is therefore arbitrary and capricious and
11 unworthy of deference.

12 74. Interior failed to display awareness that it changed its established policy of
13 interpreting Tribal constitutional, statutory, and common law to determine whether the Tribal
14 Council was validly seated as the governing body of the Tribe for the purposes of the
15 government-to-government relationship between the United States and the Tribe. Interior
16 simply just disregarded its established policy.

17 75. Interior failed to show that its new policy was permissible under applicable
18 federal law and regulations.

19 76. Interior failed to demonstrate its belief that its new policy was better.

 77. Interior failed to demonstrate good reasons for its new policy. If Interior's new
policy rests upon factual findings that contradict those which underlay its prior policy, Interior

1 failed to include a reasonable explanation for disregarding facts and circumstances that
2 underlay or were endangered by the prior policy.

3 78. This unexplained departure from Interior policy is arbitrary and capricious and
4 unwarranted by the facts in violation of the APA.

5 79. Furthermore, this change in policy is contrary to Interior's own regulations and
6 in excess of authority in violation of the APA.

7 80. Plaintiffs have been, and continue to be, adversely affected and injured by
8 Defendants' actions.

9 81. Defendants' actions are illegal, arbitrary, capricious, and constitute an abuse
10 of discretion, and further constitute agency action for purposes the APA, 5 U.S.C. § 702.

11 **VII. RELIEF**

12 Plaintiffs respectfully request that this Court:

13 A. Issue a declaratory judgment, pursuant to 28 U.S.C. § 2201, that Defendants'
14 departure from Interior's established policy was arbitrary and capricious, an abuse of
15 discretion, and a failure to act in accordance with Interior's internal policies and procedures;

16 B. Hold unlawful, and set aside, Interior's change in policy as arbitrary and
17 capricious pursuant to 5 U.S.C. § 706(2)(A);

18 C. Issue equitable relief, pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 2202, and this
19 Court's equitable authority ordering Defendants to determine whether the special election was
held in accordance with Tribal law;

D. Issue all other appropriate injunctive or equitable relief necessary to provide
complete relief to Plaintiffs; and

1 E. Issue an award of costs and fees, including attorneys' fees, pursuant to the
2 Equal Access to Justice Act, 28 U.S.C. § 2412.

3 DATED this 13th day of June 2018.

4 s/Gabriel S. Galanda
Gabriel S. Galanda, WSBA #30331
5 s/Anthony S. Broadman
Anthony S. Broadman, WSBA #39508
6 s/Bree R. Black Horse
Bree R. Black Horse, WSBA #47803
7 s/Elisabeth J. Guard
Elisabeth J. Guard, WSBA #52634
8 Attorneys for Plaintiffs
GALANDA BROADMAN, PLLC
8606 35th Ave. NE, Ste. L1
9 P.O. Box 15146
Seattle, WA 98115
Ph: (206) 557-7509; Fax: (206) 299-7690
10 Email: gabe@galandabroadman.com
Email: anthony@galandabroadman.com
11 Email: bree@galandabroadman.com
Email: elisabeth@galandabroadman.com