HON. THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

ROBERT DOUCETTE; BERNADINE ROBERTS; SATURNINO JAVIER; TRESEA DOUCETTE, Plaintiffs, v. DAVID BERNHARDT, Acting Secretary for the United States Department of Interior, in his official capacity; TARA SWEENEY, Assistant Secretary—Indian Affairs, in her official capacity; JOHN TAHSUDA III, Principal Deputy Assistant Secretary—Indian Affairs, in his official capacity; UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants.	NO. C18-0859-TSZ PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT NOTE ON MOTION CALENDAR MAY 10, 2019

I. INTRODUCTION

Commencing by no later than October 17, 2016, and continuing until at least January 16, 2018, Defendants carried out a policy of interpreting Nooksack election law for the singular purpose of determining whether the Nooksack Tribal Council was validly seated as the governing body of the Tribe. Dkt. ## 23-2, 23-3, 23-4, 23-5, 23-10. Decisions reflecting that policy were rendered by or on behalf of the U.S. Department of the Interior Assistant Secretary—Indian

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Affairs ("Interior" or "Department") on October 17, 2016, November 14, 2016, December 23, 2016, August 23, 2017, and January 16, 2018—each after weeks to months of fact-finding. *Id.*

But on March 7, 2018, the Bureau of Indian Affairs ("BIA") Acting Northwest Regional Director ("Regional Director") suddenly and inexplicably "decline[d]" to "interpret tribal law"—in a single instance—regarding "whether ballots could be received by hand or whether all ballots had to be postmarked" in order to be counted in the special election. Dkt. # 23-12, at 4. By then both the BIA and Interior were well advised that "replacement ballots" that could not be validated by U.S. Postal Service postmark had been illicitly stuffed into the special election ballot box. Dkt. ## 23-8, at 5; 23-9, at 4; 23-10, at 1; 26-3, at 1.

They looked away.

No less than ten business hours after receiving the Regional Director's Endorsement Memorandum, and without any briefing or apparent deliberations (*see* Dkt. # 26-5), Interior's Principal Deputy Assistant Secretary ("PDAS") John Tahsuda rubber-stamped the special election results and issued his March 9, 2017, recognition decision. Dkt. # 23-18. PDAS Tahsuda did not display any awareness that he was deviating from Interior's policy of interpreting Nooksack election law to determine whether the Tribal Council was validly seated. *See id.* Nor did he offer any reason for departing from that Department policy. *See id.* PDAS Tahsuda's March 9, 2017, decision is arbitrary and capricious and therefore must be set aside.

II. FACTS

The events leading up to the special election are well documented in *Nooksack Indian Tribe v. Zinke,* No. 2:18-cv-00859TSZ (W.D. Wash.), and *Rabang v. Kelly*, No. 2:17-cv-00088-JCC (W.D. Wash.).

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A. Interior Establishes And Follows A Consistent Policy Of Interpreting Nooksack Law In Order To Recognize A Validly Seated Tribal Council.

On October 17, 2016, PDAS Lawrence Roberts issued the first of several determinations in which Interior interpreted Nooksack election law to determine whether the Tribal Council was legitimate. Dkt. # 23-2. In particular, he interpreted Article IV, Section 1 of the Nooksack Constitution[1] to reject any geographic restrictions on voting in an election for four vacant seats. *Id.* PDAS Roberts warned that if any election was "inconsistent with Nooksack law," according to Interior, the results "will not be recognized by the Department." *Id.*

On November 14, 2016, PDAS Roberts issued his second determination, again interpreting the Nooksack Constitution's Article IV, Section 1, as well as equal protection "decisions issued by the Northwest Intertribal Court System" (which then operated the Nooksack appeals court), to reject purported voting restrictions based on county residency. Dkt. # 23-3.

On December 23, 2016, PDAS Roberts issued his third determination, once again interpreting Nooksack election law to proclaim that DOI "would not recognize any subsequent actions taken by the Tribal Council until a valid election, consistent with the Tribe's constitution and the decisions of the Tribe's Court of Appeals . . . ." Dkt. # 23-4. PDAS Roberts repeated that if Interior determined any election to be "inconsistent with . . . Nooksack law," the results "will not be recognized by the Department." *Id.*

On August 25, 2017, Acting Assistant Secretary—Indian Affairs ("AASIA") Michael Black entered into a Memorandum of Agreement ("MOA") with the former Tribal Chairman, which set forth a process for a federally regulated and funded special election. Dkt. # 23-5. AASIA Black affirmed PDAS Roberts' October 17, 2016, November 14, 2016, December 23, 2016, decisions that each interpreted Nooksack election law. *Id.*, at 1.

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[1] *See* Dkt. #23-12, at 15. The Nooksack Constitution and Bylaws are available at Dkt. #23-12, at 12-20.

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1 Those parties agreed that the special election "shall" be conducted "in accordance with the 2 NOOKSACK CONSTITUTION, BYLAWS, AND TRIBAL LAWS and ORDINANCES . . . ." 3 (emphasis in original). *Id.*, at 1. The MOA provided that the BIA Regional Director would— 4 through BIA observation "at any time ballots are being handled, processed, or counted"—ensure 5 that the special election comported with "NOOKSACK TRIBAL LAWS AND ORDINANCES." *Id.*, at 2 (emphasis in original).[2] The Regional Director's efforts would culminate in the issuance 6 of either an "endorsement" of the election, "or an explanation for withholding the endorsement," 7 to Interior. *Id.* In the event of an endorsement, Interior would "issue a letter granting full 8 recognition" of the Tribal Council as the governing body of the Tribe by December 23, 2017. *Id.*

9 **B. An Unquantifiable Number Of Ballots Are Stuffed Into The Ballot Box Without Any Corresponding Proof Of Postmarks Or Voter Signatures.**

10 The special primary election occurred on November 4, 2017, followed by the December 2, 11 2017, special general election. *See* Dkt. #23-14. Nooksack's Election Ordinance, Title 62, 12 provides: "*Manner of Voting*. Voting shall be conducted entirely through the United States Postal 13 Service." Dkt. #23-12, at 27 (emphasis in original). Title 62 also provides: "Only ballots 14 postmarked at or before the close of the polls on Election Day shall be counted." *Id.*, at 28. 15 Replacement ballots can be obtained and cast if a voter's "ballot is destroyed, spoiled, lost, or not received by the voter." *Id.*, at 28.

16 On October 2, 2017, the Nooksack Election Board announced that "all ballots ***postmarked*** 17 ***by the U.S. Postal Department*** no later than the close of polls on Election Day will be counted . . 18 ." Dkt. #23-14, at 86 (emphasis in original). The Board explained that "the Ordinance makes 19 clear it is the voter's responsibility to ensure that his or her ballot is mailed in a timely fashion,"

[2] BIA observers only monitored ballot handling, processing, or counting on parts of four days—one day and three nights—during the nine-week special election. Dkt. #23-17, at 96-106. Pivotally, BIA observers never once witnessed the opening of any outer envelopes or the validation of any ballots by postmark or voter signature. *Id.*

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1 and that "[b]allots postmarked after the close of the polls will not be counted . . ." *Id.* (emphasis
2 added).
3 On November 2, 2017, the Election Board changed course, announcing instead: "voter
4 ballots must be ***received by the Election Board*** by the end of business in Election Day." *Id.*, at 87
5 (emphasis added). The Board also wrote: "Any voter may call, write or appear in person to
request a replacement ballot." *Id.* (emphasis added). The Board's mid-election "rule" change
6 foretold of a fraudulent special election, in which ballots would not be validated both by U.S.
7 Postal Service postmarks and voters' signed certifications[3] as required by Nooksack election law
8 and, thus, the MOA. Dkt. ## 23-14, at 27-28; 23-4, at 1.
9 As Plaintiffs' later spelled out for BIA and DOI: "the November 2, 2017 rule change
10 allowed the Board, on behalf of the Holdover Council, to compare voter signatures on incoming
outer envelopes with a General Election Eligible Voters List in order to (a) identify voters who
11 had not yet voted and either (b) lobby those voters to cast ballots, or ***(c) cast replacement ballots***
12 ***on their behalf***." Dkt. # 26-8, at 3 n.1 (emphasis added). That (c) is precisely what happened.
13 On November 9, 2017, Plaintiffs first notified both the BIA and Interior of obvious
14 "irregularities or illegalities" associated with the special general election, writing: "First and
15 foremost . . . the Nooksack Election Board has decided to only process ballots **received** by 4 PM
16 on December 2, 2017, in the instance of the special General Election." Dkt. # 26-2, at 2
(emphasis added). After contrasting the Election Board's October 2, 2017, and November 2,
17 2017, positions, Plaintiffs explained that Nooksack election law "requires the Board to process
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[3] As with Washington State mail-in voting, Nooksack voters' ballots are validated by (1) U.S. Postal Service postmark on or before election day, and (2) voter signature on an outer envelope. *See* Dkt. #23-12, at 27 ("*Envelopes, Declarations, and Instructions*.") (emphasis in original). A sample pre-addressed outer envelope, with the voter certification on the back of that envelope, is at Dkt. #23-13, at 82-83. In December 2015, the Holdover Council "amended Title 62 to cause mail-in Tribal Council election voting for the first time in tribal history," attempting to model that new law after "other jurisdictions" like Washington State "that allow mail in voting." Dkt. ## 26-8, at 3 n.1; 23-14, at 87.

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1 ballots that are **postmarked** by 4 PM on Election Day" and urged the BIA to "encourage[e] the
2 Board to follow Nooksack law in this regard, as required by Section B of the MOA." *Id.*

3 On November 28, 2018, a BIA observer attended a "Nooksack Tribal Election ballot
4 party," which was also attended by a U.S. Postal Service employee. Dkt. #23-17, at 105-106.
5 The observer's report of that event suggests the BIA knew prior to election day that valid special
6 election ballots required postmarks: "A staff member from USPS was on hand to accept ballots.
He stated to several inquiring tribal members that all of the ballots received would be postmarked
7 and processed as if they had been dropped in a USPS mailbox." *Id.*

8 On Saturday, December 2, 2017, the Election Board held the special election; 812 ballots
9 were allegedly cast—which would be the highest general election ballot count in Nooksack
history, by a margin of over 100 ballots. Dkt. ## 23-12; 26-8, at 4.

10 The polls closed at 4:00 p.m. Dkt. # 23-14, at 44. The BIA's two observers,
11 Superintendent Marcella Teters and Mr. Mitch Ferguson, did not arrive to Nooksack until 3:30
12 p.m., by which time the Election Board had already placed all of the ballots into the ballot box.
13 *Id.*, at 44. The BIA observers "examined" the Post Office Box for the election along with the
14 Election Superintendent but by that time "the postal box was empty." Dkt. # 23-17, at 102. They
15 then watched the Police Chief "pick up the ballot box" from Tribal Headquarters and transport it
to Northwood Casino, where it was opened. *Id.* "The ballot count started at 5:00 pm." *Id.*[4]

16 "[T]he BIA observed . . . the handling of ballots received, and the counting of ballots for
17 the general election," but not the opening of any envelopes, or the validation of any ballots via
18 postmarks or voter signatures on those envelopes. Dkt. # 23-12, a 4. That is because **BIA**
19 **observers did not review <u>any</u> of the 812 ballots before they were placed in the ballot box, to**

[4] For the first time in Nooksack's history, the Election Board decided to review the ballots and tally the votes in private. Dkt. # 23-15, at 43. "The BIA ha[d] been informed of this decision." *Id.*

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ascertain whether they corresponded to envelopes bearing postmarks or voters' signed certifications. *Id.*; *see also* Dkt. #23-17, at 102-103 (BIA Superintendent's report mentions that ballots were counted, "read," and tallied, but nothing of opened envelopes or validated ballots).

In fact, a 334-page, special election report from the Election Board Superintendent Katrice Rodriguez—"the twin sister of . . . one of the so-called 'holdover' council members," whose replacement the Regional Director unsuccessfully directed on September 7, 2017—makes no mention of either postmarked or signed envelopes. Dkt. ## 23-14, at 42 – 23-17, at 58. In an election that was to be conducted "entirely through the United States Postal Service"; in which "[o]nly ballots postmarked at or before the close of the polls on Election Day shall be counted"; in which the mode of voting was already in controversy, Ms. Rodriguez failed to devote a single word as to whether any of the 812 ballots were validated by postmarked or signed envelopes. *Id.*; Dkt. # 23-12, at 27-28. Because countless ballots were not validated.

At Dkt. # 23-14, at 44, is where one would expect Ms. Rodriguez to recount how, in transparency to BIA observers, hundreds of outer envelopes bearing postmarks and signatures were opened and, in turn, the ballots in those envelopes were validated as required by Nooksack law and, thus, the MOA. Nooksack law makes clear: "*Following the close of the polls on Election Day*, the Election Board *shall* open the outer envelopes, secure the outer envelopes, and tabulate the votes." Dkt. # 23-12, at 28 (emphasis added). But neither Ms. Rodriguez nor the Election Board opened any outer envelopes before the 4:00 p.m. close of the polls—in the days and hours before the BIA observers' arrival that Saturday at 3:30 p.m. *See* Dkt. # 23-14, at 44.

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1 On Monday, December 5, 2017, Plaintiffs filed a special election appeal with Ms.
2 Rodriguez and the Election Board, detailing various irregularities and illegalities.[5] Dkt. # 23-17,
3 at 60-94. That same day, Ms. Rodriguez and the Board denied the appeal and in turn certified the
4 purported special election results, with Plaintiffs each losing their races. *Id.*, at 44-46.

C. As Beltway Lobbyists Intercede, The BIA Looks Away From Election Fraud.

5 Also on December 5, 2017, the Tribal Chairman's Washington, D.C. lobbying firm
6 requested a 30-minute meeting with PDAS Tahsuda. Dkt. # 26-7.

7 On December 7, 2017, Plaintiffs wrote the BIA and Interior, wanting to bring things "into
8 focus." Dkt. # 26-3, at 1. Plaintiffs asked the BIA "to especially scrutinize (1) the outer
9 envelopes in the General Election for postmarks, and (2) the replacement ballot logs for both the
10 Primary and General Elections to ascertain the number of ballots cast in person, especially the
11 proportion cast in the General as compared to the Primary." *Id.*[6]

12 On December 11, 2017, Plaintiffs also "lodge[d an] election protest with the BIA pursuant
13 to Section D of the MOA" (*see* Dkt. # 23-5, at 2), detailing how "[t]he Special Election was not

14 [5] Plaintiffs also presented proof that the holdover Council, including Katherine Romero, Ms. Rodriguez's twin sister, procured votes by promising Nooksack voters that $1,000 would be available *per capita* after the holdover Council won the special election. Dkt. #23-17, at 84. Title 62 forbids "any bribe or reward for the purpose of procuring the election." Dkt. #23-12, at 29. $750 of the illegal $1,000 reward was federal dollars derived from the Tribe's $2.3 million settlement in the *Ramah* litigation against Interior. Dkt. #23-17, at 84, 86-87; Final Settlement Agreement, *Ramah Navajo Chapter, et al., v. Jewell*, No. 90-cv-00957 (D.N.M. Sept. 16, 2015), ECF No. 1306-1; *Updated Estimated Dollar Shares for Each Class Member,* RAMAH NAVAJO CHAPTER CLASS ACTION SETTLEMENT (January, 2016), http://www.rncsettlement.com/_press_release/Jan%206%20Tribal%20Share%20Amounts.pdf. This same proof was also presented to the BIA and DOI but they ignored it. Dkt. # 26-8, at 50-52.

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[6] Plaintiffs brought further focus to the issue of ballots that were not validated by either postmark or voter signature for PDAS Tahsuda himself on December 27, 2017, on January 5, 2018, and again on January 20, 2018. *See* Dkt. # 26-8, at 5 ("the holdover Council . . . stuffed the ballot box with the purported 'replacement ballots'—ballots that cannot be validated, as required by Nooksack law, by the U.S. Postal Service postmark—as detailed in our December 11, 2017, letter to [the BIA]."); Dkt. #26-9, at 4 ("the crux of the Special Election concerns **whether the 812 ballots counted in the Special Election (or at least the 756 non-replacement ballots) were validated according to postmarks on the outer envelopes in which they arrived to the Election Board**.") (emphasis in original); *id.* ("At minimum, please ensure that Superintendent Marcella Teters and Mitch Ferguson watched the Board scrutinize and open those 812 (or 756) envelopes in order to validate he ballots, after 3:30 PM that night."); Dkt. # 26-10, at 1 ("Pivotally, for everyone involved, we seek an answer to the following question: **Were the 812 ballots counted in the Special Election (or at least the 756 non- replacement ballots) validated in the presence of BIA observers, Superintendent Marcella Teters and Mitch Ferguson, according to postmarks and voter signatures on the outer envelopes in which they arrived to the Election Board?**") (emphasis in original).

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1 'in accordance with the Nooksack Constitution, Bylaws, and Tribal Laws and Ordinances,' per
2 Section B" of the MOA. Dkt. # 26-8, at 1. Plaintiffs explained the Election Board's "change in
3 approach . . . to allow voters to cast purported replacement ballots in-person." *Id.* In telling the
4 BIA exactly what to look for to determine whether or not to endorse the results—*i.e.*, postmarked
5 and signed outer envelopes—Plaintiffs observed that "[a]ny significantly higher proportion of
6 replacement ballots in the General Election as compared to the Primary Election, according to the
7 Replacement Ballot Logs for each election, should lead the BIA to conclude that the ballot box
was stuffed with non-postmarked and non-verified replacement ballots." *Id.*

8 On or about December 11, 2017, PDAS Tahsuda met with the Tribal Chairman and his
9 D.C. lobbyists "[t]o discuss the results of the recent Nooksack tribal election and plans for
10 moving forward . . . ." Dkt. # 26-7. By December 8, 2018, Interior Counselor Miles Janssen
11 furnished PDAS Tahsuda with a written "briefing for [his] upcoming meeting with Nooksack,"
12 which read, in part: "It is worth noting that two BIA representatives on site during the election
13 mentioned a number of concerns with the election process. However, they are waiting until this
process is complete before making a final determination." Dkt. ## 23-6, 23-7.

14 On January 16, 2018, PDAS Tahsuda issued Interior's fifth determination (including the
15 MOA) that interpreted Nooksack election law to determine whether the Tribal Council was
16 legitimate. Dkt. # 23-11. This latest interpretation was required because PDAS Tahsuda was
17 unable to make his "final agency decision as to whether the Tribe has elected a valid Tribal
18 Council" by December 23, 2017, as required by the MOA. *Id.*, at 1. Thus, "[i]t was important to
19 maintain the status quo pending the Department's review of the Special Election." *Id.* Like his
predecessors, PDAS Tahsuda interpreted Nooksack election law, while also affirming PDAS
Roberts "three letters" and calling the MOA a set of "valid expressions of tribal law." *Id.*, at 1-2.

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On January 24, 2018, Superintendent Teters and Mr. Ferguson met with Ms. Rodriguez to purportedly investigate a missing sequence of ballot numbers. Dkt. # 27-1, at 1-2. Despite Superintendent Teters and Mr. Ferguson having previously mentioned to Interior or Mr. Janssen that they had "a number of concerns with the election process," they only investigated the one concern of a missing sequence of ballot numbers. *Id.*; Dkt. # 23-7. Over the course of a five-hour meeting, they did not investigate whether any postmarked and signed outer envelopes existed. *Id.*

By January 24, 2018, it appears that Plaintiffs' repeated cries for investigation into that precise and pivotal question had fallen on deaf ears at Interior. Dkt. ## 26-3, at 1; 23-8, at 5; 23-9, at 4; 23-10, at 1. By then, Interior policy had inexplicitly shifted. By then, Interior and the BIA were no longer redressing concerns with the election process by looking to Nooksack election law. By then, the policy had shifted to willful blindness.[7]

C. Demurring On Pivotal Tribal Ballot Validation Legal Issue, PDAS Tahsuda Deviates From Interior's Policy.

On March 7, 2018, the Regional Director issued a four-page Memorandum to PDAS Tahsuda, titled "Endorsement of the Nooksack Indian Tribe Special Council Election" ("Endorsement Memorandum"), concluding "the special election was conducted according to the Nooksack Constitution, Bylaws and Tribal Law Ordinances." Dkt. # 23-12, at 1-5. Without reason, the BIA demurred on the "serious" issue of how Nooksack law requires the validation of ballots to be conducted: "Ultimately, the question of whether ballots could be received by hand or whether all ballots had to be postmarked is on of tribal law and the BIA declines to insert itself and interpret tribal law in this instance." *Id.*, at 4.

[7] Plaintiffs maintain that starting in late 2017, Interior officials in Washington, D.C. influenced the Regional Director in regard to what became her March 7, 2018, Endorsement Memorandum. Dkt. # 18, at 21.

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In several other instances in the Endorsement Memorandum, however, the BIA did insert itself and interpret Nooksack election law:

- "In reviewing the special election, we first review whether it was conducted in accordance with the Constitution, Bylaws and Ordinances" including "[t]he Nooksack election ordinance (Title 62). . . . Since the ordinance was adopted in December 2015 (when the Council had quorum), the BIA recognizes it as validly enacted." *Id.*, at 2.

- "The Nooksack Constitution and Title 62 require the Tribal Council Chairperson appoint and swear in an Election Superintendent," concluding—in an about-face since September 7, 2017—that "the BIA recognizes her as the valid Election Superintendent bested with the powers to conduct and review this election." *Id.*

- "Title 62 provides that any voter or candidate may contest the election results . . . See Title 62.07.010." *Id.*, at 3.

- "The BIA . . . finds that the Board conducted the election according to the requirements set forth in Title 62 and the Nooksack Constitution." *Id.*, at 2.

The Endorsement Memorandum was inconsistent: although the Regional Director interpreted Nooksack election law in several instances, she arbitrarily declined to "interpret tribal law" in the most pivotal instance in any election: the validation of ballots. *Id.,* at 2-4.

On March 9, 2018, at 11:07 a.m. EST—no more than ten business hours after his receipt of the Endorsement Memorandum—PDAS Tahsuda's "sigmac approval" was requested for a letter that "recognize[d] the validity of the Tribal Council comprised of the four Tribal Council members elected in 2014 and the four Tribal Council members elected in the Special Election." Dkt. # 23-18. PDAS Tahsuda's letter was only "surnamed"[8] to two Interior lawyers. Dkt. # 26-5. During those ten hours (or less), there was no briefing or deliberative process within Interior, as there was in December 2017. *See*, *e.g.*, Dkt. ## 23-6, 23-7. For example, Mr. Janssen, the author of the December 8, 2017, briefing for PDAS Tahsuda, was not consulted or asked to brief

[8] "In DOI and BIA, the 'surname process' is used to record official concurrence with the content of a variety of written documents, such as . . . correspondence . . . . This process is designed to ensure that written information is accurate *and that the organization provides consistent policy statements*." U.S. Dep't of the Interior - Indian Affairs, Indian Affairs Manual, Pt. 7, Ch. 2, https://www.bia.gov/sites/bia.gov/files/assets/public/raca/manual/pdf/idc-000336.pdf (last visited Mar. 6, 2019) (emphasis added).

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1 whether the BIA's previously stated, "numerous concerns" were alleviated. Dkt. ## 26-5, 23-7.
2 Nor was there any communication between PDAS Tahsuda and the Regional Director in that
3 short timespan. *See* Dkt. # 26-5.

4 PDAS Tahsuda failed to check (or even pretend to check) the Regional Director's work,
5 particularly her demurral on the "serious" issue of election ballot validation. *Id.* Instead PDAS
6 Tahsuda rubber-stamped the Regional Director's report, concluding the BIA "has not identified
7 any reason to reject the validity of the Special Election." Dkt. # 23-18. He too demurred.
8 PDAS Tahsuda failed to display any difficulty deviating from Interior's policy of interpreting
9 Nooksack election law to determine whether the Tribal Council was validly seated, or to offer
10 any reason for departing from that policy. *Id.* Despite Interior's repeated policy statements since
11 October 17, 2016, that "elections inconsistent with Nooksack law will not be recognized by the
12 Department," on March 9, 2018, PDAS Tahsuda recognized an election that was inconsistent
13 with Nooksack election law. *Id.*; Dkt. # 23-2, at 2. This was arbitrary and capricious.

III. LAW AND AUTHORITY

14 The APA directs a court to hold unlawful and set aside any agency action, findings, and
15 conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in
16 accordance with law." 5 U.S.C. § 706(2)(A). A change in agency policy[9] only complies "with

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[9] Plaintiffs expect Defendants to further "disagree with the fundamental premise of plaintiff's complaint" as to the existence of an "enforceable Department 'policy' under the APA." Dkt. # 9, at 5 n.4. To be sure, however, an administrative rule published in the Federal Register is not required to bind a federal agency—"gratuitous" self-imposed policy and procedure can be equally compulsory. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954); *see also Wilkinson v. Legal Services Corp.*, 27 F.Supp.2d 32, 56 (D.D.C. 1998) ("[An] agency can gratuitously supply 'law' that limits discretion sufficient to trigger judicial review . . . ."); *Confederated Tribes & Bands of Yakama Nation v. Holder*, No. 11-3028, 2011 WL 5835137, at *3 (E.D. Wash. Nov. 21, 2011) (citing *Alcaraz v. Immigration and Naturalization Serv.,* 384 F.3d 1150, 1162 (9th Cir. 2004)) ("The internal policies that can bind an agency and give rise to a cause of action under the APA are not limited to only those rules promulgated pursuant to notice and comment rule making."). "[T]he 'law' to which an agency will be bound are those rules to which it intended to be bound . . . can also include those rules implicit in an agency's course of conduct where that conduct gives rise to a 'common law' administrative rule." *Wilkinson*, 27 F.Supp.2d at 60-61 (quoting *Doe v. Hampton*, 566 F.2d 265, 281-82 (D.C. Cir. 1977)). Indeed, the "judicially evolved rule of administrative law"

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1 the APA if the agency (1) displays awareness that it is changing position, (2) shows that the new
2 policy is permissible under the statute,[10] (3) believes the new policy is better, and (4) provides
3 good reasons for the new policy." *Organized Village of Kake v. U.S. Dept. of Agric.*, 795 F.3d
4 956, 966 (9th Cir. 2015) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16
5 (2009)) (internal punctuation and quotation marks omitted; emphasis added). As to (4), "if the
6 new policy rests upon factual findings that contradict those which underlay its prior policy," the
7 agency "must include a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.*

8 Underscoring both (1) and (4), "[a]gencies are free to change their existing policies as
9 long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*,
10 136 S.Ct. 2117, 2125 (2016) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*,
11 545 U.S. 967, 981-82 (2005)). "When an agency changes its existing position, it 'need not always
12 provide a more detailed justification than what would suffice for a new policy created on a blank
13 slate.'" *Id.* (quoting *Fox*, 556 U.S. at 515). The agency must, however, "at least 'display
14 awareness that it is changing position' and 'show that there are good reasons for the new policy.'"
15 *Id.* Here, Interior failed to either display awareness or show any good reasons regarding the change in policy position demonstrated by PDAS Tahsuda's March 9, 2018, decision.

16 **A. Interior Failed To Display Awareness Of A Change In Policy.**

17 In PDAS Tahsuda's March 9, 2018, decision, Interior failed to recognize that it was
18 changing Interior policy. Dkt. # 23-18. Each of Interior's five preceding decisions cited and

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requiring that "he who takes the procedural sword shall perish with that sword," applies "even when the administrative action under review is discretionary in nature." *Vitarelli v. Seaton*, 359 U.S. 535, 546-47 (1959); *see also generally Service v. Dulles*, 354 U.S. 363, 372 (1957); *Morton v. Ruiz*, 415 U.S. 199 (1974); Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 25 J. Nat'l Ass'n Admin. L. Judges 49, 78-88 (2005).

[10] Plaintiffs appreciate that PDAS Tahsuda had statutory authority to render his March 9, 2018, decision. 25 U.S.C. § 2; 5 U.S.C. § 3345(a)(1). They maintain, however, it was, *inter alia*, arbitrary and capricious. Dkt. # 15, at 3 n.4.

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1 interpreted Nooksack election law to determine whether the Tribal Council was validly seated.
2 Dkt. ## 23-2, 23-3, 23-4, 23-5, 23-10. Each of Interior's November 14, 2016, December 23,
3 2016, August 23, 2017, and January 16, 2018, decisions cited or furthered its preceding
4 interpretation(s). Dkt. ## 23-3, 23-4, 23-5, 23-10. Most notably, both the August 23, 2017, MOA
5 and January 16, 2018, decision affirmed all of Interior's prior decisions. Dkt. ## 23-5, 23-10.

6 Taking all five prior decisions together, Interior formed agency policy—or "law" via
7 "rules implicit in an agency's course of conduct." *Wilkinson*, 27 F.Supp.2d at 60-61 (quoting
8 *Doe*, 566 F.2d at 281-82). But on March 9, 2018, Interior failed to display any awareness of its
9 policy, *i.e.,* the uniformity of those five prior decisions; or its change to that policy when
10 demurring on the pivotal issue of how to validate special election ballots. Dkt. # 23-18; *Encino Motorcars,* 136 S.Ct. at 2125.

11 **B. Interior Did Not Have Or Show Good Reason For Its New Policy.**

12 An agency switching policy must always "show that there are good reasons for the new
13 policy." *Fox*, 556 U.S. at 515. Any policy change must include "a reasoned explanation . . . for
14 disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*,
15 556 U.S. at 516. "'Unexplained inconsistency' between agency actions is 'a reason for holding
16 an interpretation to be an arbitrary and capricious change.'" *Organized Village of Kake*, 795 F.3d at 966 (quoting *Nat'l Cable & Telecomms.*, 545 U.S. at 981).

17 But in special circumstances, more is required. An agency needs to provide a more
18 detailed justification when "its prior policy has engendered serious reliance interest that must be
19 taken into account." *Fox*, 556 U.S. at 515; *see also Encino Motorcars*, 136 S.Ct. at 2126 ("an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account." (citing *Smiley v. Citibank (South Dakota), N.A.*, 517

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U.S. 735, 742 (1996)). "In such cases," the Supreme Court explains, "it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Encino Motorcars,* 136 S.Ct. at 2126 (quoting *Fox*, at 515-16).

Accordingly, the agency "'must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Id.*, at 2125 (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The explanation must be clear enough that its "path may reasonably be discerned." *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). Where the agency has failed to provide even that minimal level of analysis, however, "its action is arbitrary and capricious and so cannot carry the force of law." *Id.* (citing 5 U.S.C. § 706(2)(A); *State Farm*, 463 U.S. at 42-43).

Here, Interior engendered Plaintiffs' serious reliance on its policy dating back to October 17, 2016, that the agency would interpret Nooksack election law to ensure that the Tribal Council would be validly seated through the special election. In particular, Plaintiffs relied upon Interior's repeated promise that "elections inconsistent with Nooksack law will not be recognized by the Department." Dkt. ## 23-2, 23-4, 26-2, 26-8. Interior, however, offered no reasoned explanation—let alone detailed justification—for demurring on the pivotal issue of how to validate special election ballots. Dkt. # 23-18; *Fox*, 556 U.S. at 515; *Encino Motorcars*, 136 S.Ct. at 2126. PDAS Tahsuda's March 9, 2018, decision offers no analysis to support that demurral. *Cf. Encino Motorcars,* 136 S.Ct. at 2125. The decision fails to offer any rational connection between the facts presented—specifically, a ballot box stuffed with ballots that were not validated by postmark or voter signature—and the choice PDAS Tahsuda made to look away from the

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1 irregularity and illegality of the special election. *Id.* Nor does the decision offer a discernable
2 path away from Interior's preceding five prior decisions. *Id.*
3 PDAS Tahsuda's March 9, 2018, decision also lacks any good reason for Interior's
4 apparent new policy of forgoing Nooksack election law interpretation as needed to determine
5 whether the Tribal Council was validly seated. *Fox*, 556 U.S. at 515. In particular, the decision
6 ignores the facts and circumstances that underlay Interior's five prior decisions—it ignores all of
7 the election-related irregularity and illegality that plagued Nooksack from December 2015 to
8 December 2017. *Id.*, at 516; *see* Dkt. #15, at 3 n. 4 ("[D]efendants completely ignore the
9 sequence of events leading up to the 2017 election."). Lacking anything that resembles
10 explanation, justification, or analysis, PDAS Tahsuda's March 9, 2018, decision is arbitrary and
capricious and thus without the force of law. *Encino Motorcars,* 136 S.Ct. at 2125.

11 **IV. CONCLUSION**

12 Plaintiffs are entitled to a declaratory judgment or other order holding that Defendants'
departure from Interior's established policy was arbitrary and capricious. Dkt. # 18, a 24.

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1 DATED this 7th day of March 2019

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CERTIFICATE OF SERVICE

I, Wendy Foster, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Ste. L1, Seattle, WA 98115.

3. Today, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF System, which will send electronic notification of such filing to the following parties:

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The foregoing statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 7th day of March 2019.

s/Wendy Foster
Wendy Foster