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5 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 ROBERT DOUCETTE; BERNADINE
8 ROBERTS; SATURNINO JAVIER; and
TRESEA DOUCETTE,

9 Plaintiffs,

10 v.

11 DAVID BERNHARDT, Secretary of
United States Department of the Interior;
12 TARA SWEENEY, Assistant Secretary
– Indian Affairs; JOHN TAHSUDA III,
13 Principal Deputy Assistant Secretary –
Indian Affairs; and UNITED STATES
14 DEPARTMENT OF THE INTERIOR,

15 Defendants.

C18-859 TSZ

ORDER

16 THIS MATTER comes before the Court on (i) a motion for summary judgment,
17 docket no. 28, brought by plaintiffs Robert Doucette, Bernadine Roberts, Saturnino
18 Javier, and Tresea Doucette, and (ii) a cross-motion for summary judgment, docket
19 no. 31, brought by defendants United States Department of the Interior (“Interior”),
20 Interior Secretary David Bernhardt, Assistant Secretary Tara Sweeney, and Principal
21 Deputy Assistant Secretary (“PDAS”) John Tahsuda III. Having reviewed all papers
22 filed in support of, and in opposition to, the motions, the Court enters the following order.
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1 Background

2 Plaintiffs were unsuccessful candidates for four open positions on the Nooksack
3 Tribal Council, the governing body of the Nooksack Indian Tribe of Washington (the
4 “Nooksack Tribe” or “Tribe”). They allege that, prior to the most recent change in
5 presidential administrations, Interior had established a policy of “interpreting Tribal
6 constitutional, statutory, and common law to determine whether the Tribal Council was
7 validly seated as the governing body of the Tribe” for purposes of government-to-
8 government relations. *See* Am. Compl. at ¶¶ 1-4, 24, 29, 31, 33, 39-40, 45, 47, 60-63
9 (docket no. 18). According to plaintiffs, in endorsing the results of primary and general
10 elections conducted in the fall of 2017, defendants departed from Interior’s previous
11 policy.

12 Plaintiffs assert a claim under the Administrative Procedure Act (“APA”) over
13 which the Court has jurisdiction pursuant to 28 U.S.C. § 1331. *See Alto v. Black*, 738
14 F.3d 1111, 1124 (9th Cir. 2013); *Goodface v. Grassrope*, 708 F.2d 335, 338 (8th Cir.
15 1983). They seek a declaratory judgment, pursuant to 28 U.S.C. § 2201, that Interior’s
16 alleged “change in policy” was “arbitrary, capricious, an abuse of discretion, or otherwise
17 not in accordance with law.” *See* 5 U.S.C. § 706(2)(A); *see also* Am. Compl. at § VII.A
18 (docket no. 18). Plaintiffs ask the Court to require defendants to determine anew whether
19 the elections at issue were held in compliance with the laws of the Nooksack Tribe. *See*
20 Am. Compl. at §§ VII.B-C (docket no. 18). Although plaintiffs have standing to pursue
21 such remedy, *see Chinook Indian Nation v. Zinke*, 326 F. Supp. 3d 1128, 1140 (W.D.
22 Wash. 2018), the Court concludes that plaintiffs are not, as a matter of law, entitled to
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1 such relief because Interior never adopted a policy of construing Nooksack law with
2 respect to how Nooksack Tribal Council elections should be conducted, and defendants
3 could not have behaved inconsistently with a non-existent policy.

4 In refusing, for a period of time before the 2017 elections, to recognize actions
5 taken by the Nooksack Tribal Council, Interior did not purport to interpret Nooksack law
6 concerning the manner in which elections must be administered, but rather effectuated
7 the consequences to the Tribe of having failed to even hold an election before the terms
8 of half of the council members expired. Moreover, during the course of and subsequent
9 to the 2017 elections, Interior admirably balanced the deference it owes the Tribe, as a
10 sovereign entity, with its responsibility to ensure that it deals only with a duly constituted
11 governing body for the Tribe. Plaintiffs have not made the requisite showing to survive
12 summary judgment, and their APA claim and this action are therefore DISMISSED with
13 prejudice.

14 **A. Composition of the Nooksack Tribal Council**

15 The Nooksack Tribe has been federally recognized since 1973. Am. Compl. at
16 ¶ 15 (docket no. 18). According to its Constitution, the Tribe's governing body is the
17 Nooksack Tribal Council, which has eight seats, consisting of a chair, a vice-chair, a
18 secretary, a treasurer, and four positions lettered A through D. *See* Nooksack Const.
19 art. III, § 2, Ex. N to Galanda Decl. (docket no. 12-14). The term of each council
20 member is four years, with the tenure of the chair, secretary, and positions A and B
21 staggered by two years from the tenure of the vice-chair, treasurer, and positions C and
22 D. *Id.* at art. III, § 3. Thus, every other year, four positions on the Nooksack Tribal
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1 Council are up for election. At least five members of the Nooksack Tribal Council must
2 be present at a meeting to constitute a quorum for transacting business. See Nooksack
3 Bylaws art. II, § 4, Ex. N to Galanda Decl. (docket no. 12-14).

4 On March 24, 2016, the terms of the vice-chair, treasurer, and positions C and D
5 expired without an election having been conducted to select persons to fill those seats.
6 See Am. Compl. at ¶ 22 (docket no. 18). These “holdover” council members continued
7 to take actions on behalf of the Tribe, including attempts to disenroll certain individuals
8 from the Tribe. See Order at 1-6 (docket no. 62), Rabang v. Kelly, No. C17-88-JCC
9 (W.D. Wash. Apr. 26, 2017).¹ On October 17, 2016, Lawrence S. Roberts, then Principal
10 Deputy Assistant Secretary – Indian Affairs, wrote to Robert Kelly, Jr., then chair of the
11 Nooksack Tribal Council (“Chairman Kelly”), and indicated that Interior “will only
12 recognize those actions taken by the Council prior to March 24, 2016, when a quorum
13 existed, and will not recognize any actions taken since that time because of the lack of a
14 quorum.” AR 1. PDAS Roberts reiterated this message in a letter dated November 14,
15 2016, stating that Interior will not recognize elections or actions that are inconsistent

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18 ¹ Five purportedly disenrolled individuals filed suit in this district, alleging that six of the eight
19 members of the Nooksack Tribal Council and other tribal personnel violated the Racketeer
20 Influenced and Corrupt Organizations Act (“RICO”) in fraudulently depriving them of their
21 tribal membership. See Compl. (docket no. 1) & Am. Compl. (docket no. 7), Rabang v. Kelly,
22 No. C17-88-JCC (W.D. Wash.). The RICO claims in Rabang were eventually dismissed, see
23 Order (docket no. 166), Rabang v. Kelly, No. C17-88-JCC (W.D. Wash. July 31, 2018), and the
former tribal members sought review. The appeal in Rabang has been stayed by the Ninth
Circuit pending a decision in this matter. See Order, Rabang v. Kelly, No. 18-35711 (9th Cir.
June 13, 2019).

1 with Nooksack law or the tribal court decisions in *Belmont v. Kelly*.² *See* AR 3-4. In
2 correspondence sent on December 23, 2016, PDAS Roberts warned that the “lack of a
3 quorum and inability to take official action puts all Federal funding to the Tribe at risk.”
4 AR 5. PDAS Roberts further observed that Chairman Kelly and two “holdover” council
5 members had attempted to “anoint” themselves as the Tribe’s supreme court, but had
6 taken such action without a quorum and in the absence of a valid election, so Interior
7 would continue to recognize only the decisions of the Northwest Intertribal Court
8 System, which then operated the Nooksack Tribal Court of Appeals. *See id.*

9 **B. Memorandum of Agreement**

10 On August 25, 2017, Michael S. Black, then Acting Assistant Secretary – Indian
11 Affairs, entered into a Memorandum of Agreement (“MOA”) with Chairman Kelly, the
12 purpose of which was “to provide and to outline a procedure whereby” the Assistant
13 Secretary (on behalf of Interior) would recognize a tribal council as the governing body
14 of the Nooksack Tribe. *See* AR 7-12. The MOA indicated, however, that it was “not
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17 ² In *Belmont v. Kelly*, 272 then-enrolled members of the Nooksack Tribe brought suit in
18 Nooksack Tribal Court on behalf of themselves and their minor children to challenge efforts to
19 disenroll them. On March 22, 2016, the Nooksack Tribal Court of Appeals refused to permit the
20 *Belmont* defendants, which included Chairman Kelly, to file an interlocutory appeal from the
21 trial court’s denial of a preliminary injunction that would have precluded the *Belmont* plaintiffs
22 from voting in upcoming elections. *Belmont v. Kelly*, No. 2016-CI-APL-001 (Nooksack Ct.
23 App. Mar. 22, 2016). The Nooksack Tribal Court of Appeals reasoned that (i) “[u]nder the
Nooksack Constitution, an enrolled member of the Tribe is eligible to vote in elections,”
(ii) although the *Belmont* plaintiffs might “eventually face disenrollment proceedings -- they are
currently enrolled members,” and (iii) “[n]either the Constitution nor the Nooksack election code
prohibits an enrolled member from voting even where the member is the target of disenrollment
proceedings.” *See* AR 6.

1 intended by the parties to be either binding or enforceable upon either party, nor
2 enforceable through an administrative process or in a court of law.” AR 10. Under the
3 MOA, Acting Assistant Secretary Black provided interim recognition of Chairman Kelly
4 as “a person of authority within the Nooksack Tribe, through whom the Assistant
5 Secretary will maintain government-to-government relations with the Tribe for such time
6 as this MOA is in effect, for the purpose of the Nooksack Tribe holding a special election
7 and receiving funding under the Indian Self-Determination and Education Assistance
8 Act.” AR 8. The interim recognition was to remain in effect until one of the following
9 three events occurred: (i) the four vacant seats on the Nooksack Tribal Council were
10 filled via a valid election; (ii) the MOA was terminated for cause; or (iii) 120 days
11 elapsed after execution of the MOA. *Id.*

12 In the MOA, Chairman Kelly committed to conduct an election within 120 days.
13 AR 7. The election was to be held in accordance with the Nooksack Constitution and
14 Bylaws, as well as tribal laws and ordinances, and all eligible Nooksack voters would be
15 allowed to participate, regardless of county residency. *Id.* For purposes of the MOA,
16 eligible voters included individuals who were purportedly disenrolled since March 24,
17 2016. AR 8-9. The MOA provided that, if the Regional Director for the Northwest
18 Region of the Bureau of Indian Affairs (“BIA”) endorsed the special election results, the
19 Assistant Secretary “shall issue a letter granting full recognition” of the Nooksack Tribal
20 Council as the “valid governing body” of the Tribe. AR 8.

1 The Nooksack Tribe conducted a primary election on November 4, 2017, and a
 2 general election on December 2, 2017, AR 86, resulting in the Nooksack Tribal Council
 3 being composed of the following individuals:

4	Robert Kelly	Chairman
5	Richard “Rick” D. George	Vice-Chairman
6	Agripina “Abbie” Smith	Treasurer
7	Nadene Rapada	Secretary
8	Robert “Bob” Solomon	Position A
9	Carmen Tageant	Position B
10	Roy Bailey	Position C
11	Katherine Rose Romero	Position D

12 AR 668 (modified to show the newly elected members in bold font).

13 **C. Recognition of Nooksack Tribal Council**

14 Shortly after the MOA was signed, Interior itself had significant turnover. In
 15 September 2017, PDAS Roberts, the author of three letters sent to Chairman Kelly in
 16 2016, which plaintiffs contend established Interior’s policy concerning the upcoming
 17 Nooksack Tribal Council elections, was replaced by defendant John Tahsuda III as
 18 Principal Deputy Assistant Secretary – Indian Affairs. *See* Am. Compl. at ¶ 44 (docket
 19 no. 18). In October 2017, Acting Assistant Secretary Black, who had executed the MOA
 20 on behalf of Interior, moved to the Bureau of Reclamation, and for some period of time
 21 thereafter, PDAS Tahsuda served as Acting Assistant Secretary – Indian Affairs.
 22 Defendant Tara Sweeney assumed the position of Assistant Secretary – Indian Affairs in
 23 August 2018. *Id.* at ¶ 67. Ryan Zinke, who appointed PDAS Tahsuda, resigned as
 Interior Secretary in January 2019 and was succeeded by defendant David Bernhardt, the
 current Secretary of the Department of the Interior. *See id.* at ¶ 68.

1 On March 7, 2018, Twyla Stange, Acting Regional Director (“Acting RD”) for the
2 Northwest Region of the BIA, sent a memorandum to PDAS Tahsuda, in his capacity as
3 Acting Assistant Secretary, endorsing the primary and general elections conducted on
4 November 4, 2017, and December 2, 2017, respectively. AR 86-90. Acting RD Stange
5 reported that the BIA had reviewed the declarations of Katrice Rodriguez (aka Romero),
6 the Election Superintendent³ for the Nooksack Tribe, dated September 7, October 7,
7 November 21, and December 11, 2017, and January 16, 2018,⁴ and concluded that the
8 elections were conducted in accordance with the requirements set forth in the Nooksack
9 Constitution and Title 62 of the Nooksack Tribal Code. AR 87 & 89-90.

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14 ³ According to the Nooksack Constitution, prior to an election, the chair of the Nooksack Tribal
15 Council must appoint a superintendent for the election, who may select two ballot clerks.
16 Nooksack Const. art. IV, § 4, Ex. N to Galanda Decl. (docket no. 12-14). The superintendent
17 and ballot clerks constitute the election board, which has the duty of supervising and certifying
18 the election and resolving all election disputes. *Id.* For the primary and general elections at
19 issue, Chairman Kelly appointed as superintendent Katrice Rodriguez (aka Romero), who is the
20 twin sister of Katherine Romero (aka Canete), one of the candidates who ran in the race at issue.
In her March 2018 memorandum to PDAS Tahsuda, Acting RD Stange noted that the Nooksack
Tribal Code did not prohibit a family relationship between the Election Superintendent and a
candidate (who was also the Tribe’s general manager), AR 88, and she indicated that the BIA
recognized Katrice Rodriguez as “the valid Election Superintendent vested with the powers to
conduct and review this election,” AR 87. Although plaintiffs previously raised concerns about
Katrice Rodriguez serving as Election Superintendent, *see* AR 88, 612, & 644, and about the
qualifications of one of the two ballot clerks, *see* AR 673, they do not pursue any claim in this
litigation relating to the composition of the election board.

21 ⁴ The Election Superintendent’s declarations are appended to Acting RD Stange’s March 2018
22 memorandum as Attachments 1 (AR 93-189), 2 (AR 191-223), 3 (AR 225-73), 4 (AR 275-609),
and 13 (AR 662-64).

1 In her March 2018 memorandum to PDAS Tahsuda, Acting RD Stange also
2 addressed specific challenges to the election,⁵ only one of which plaintiffs continue to
3 advance in this case, namely that ballots were improperly cast in person, rather than by
4 mail. On this subject, Acting RD Stange offered the following analysis:

5 A complaint was raised to the BIA alleging the ballot box was “stuffed”
6 with illegal ballots cast in-person. . . . The BIA was involved throughout
7 the entire special election and closely inspected the election process. . . .
8 [T]he BIA has reconciled the voters list and accounted for all ballots
9 printed for the election. The BIA inspected the ballot identification
numbers of received ballots and determined they match up to the list of
returned ballots. There is neither evidence that ballots were cast by
deceased individuals or people voting more than once, nor evidence that
vote totals were altered.

10 AR 88-89. Acting RD Stange, however, ultimately concluded that the question of
11 whether ballots could be submitted by hand or had to be postmarked is “one of tribal law
12 and the BIA declines to insert itself and interpret tribal law in this instance.” AR 89.

13 Acting RD Stange’s unwillingness to interpret tribal law forms the basis of
14 plaintiffs’ claim for declaratory relief under the Administrative Procedure Act.

15 According to plaintiffs, Acting RD Stange’s refusal to interpret tribal law constitutes an
16 unexplained, and therefore arbitrary and capricious, departure from Interior’s prior

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18 ⁵ Acting RD Stange concluded that (i) individuals who reached the age of 18 after March 2016
19 were appropriately excluded because they would not have been eligible to vote when the election
20 should have been held; (ii) the number of allegedly illegal votes (17) was less than the margin in
21 the closest race (26), and therefore had no effect on the outcome of the election; (iii) despite
22 assertions to the contrary, ballots were mailed to all eligible voters; (iv) no evidence supported
23 the accusation that votes were procured through bribery; and (v) the Nooksack Tribal Code did
not require that the tallying of votes be performed in public. *See* AR 87-88. In the matter now
before the Court, plaintiffs make no contention that these determinations were arbitrary,
capricious, an abuse of discretion, or inconsistent with Interior’s policies and procedures.

1 policies, which were set forth in former PDAS Roberts’s three letters to Chairman Kelly
2 in 2016, the MOA executed in August 2017, and a letter sent to Chairman Kelly in
3 September 2017 by Bodie Shaw, who preceded Twyla Stange as Acting Regional
4 Director for the Northwest Region of the BIA.⁶

5 On March 9, 2018, PDAS Tahsuda, exercising the authority of the Assistant
6 Secretary – Indian Affairs, signed a letter to Chairman Kelly, in which he recognized the
7 Nooksack Tribal Council. AR 668. PDAS Tahsuda indicated that the recognition would
8 extend until the results for the election originally scheduled for March 17, 2018, were
9 certified. *Id.* On June 11, 2018, PDAS Tahsuda, again exercising the authority of the
10 Assistant Secretary, authored a letter to Roswell Cline, Sr., congratulating him on his
11 election as chair of the Nooksack Tribal Council and inviting him to participate in
12 “government-to-government consultation” regarding issues affecting the relationship
13 between the United States and the Tribe. AR 669. In their operative pleading, plaintiffs
14 allude to Chairman Cline’s criminal history, *see* Am. Compl. at ¶ 43 & n.3 (docket
15 no. 18), but they make no argument in this action that the election pursuant to which he
16 became chair was not properly conducted.

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18 ⁶ The parties have not included Acting RD Shaw’s correspondence in the Administrative Record,
19 but it was previously filed in response to defendants’ unsuccessful motion to dismiss. *See* Ex. E
20 to Galanda Decl. (docket no. 12-5). In the September 2017 letter, Acting RD Shaw outlined a
21 number of measures that needed to be implemented to conduct a valid election, including the
22 appointment of a new Election Superintendent who did not have “a close personal or familial
23 connection to any sitting councilmember or any so-called holdover council member.” *Id.*
Although plaintiffs no longer contest the installation of Katrice Rodriguez as Election
Superintendent, they have referred to Acting RD Shaw’s letter as evidence of Interior’s earlier
policies concerning the interpretation of tribal law.

1 **Discussion**

2 **A. Applicable Standards**

3 The Administrative Procedure Act requires the Court to “hold unlawful and set
4 aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an
5 abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

6 The scope of review under § 706(2)(A) is, however, narrow, and the Court must refrain
7 from substituting its judgment for that of the agency. *Cal. Valley Miwok Tribe v. Jewell*
8 [hereinafter *Miwok*], 5 F. Supp. 3d 86, 96 (D.D.C. 2013) (citing *Motor Vehicle Mfrs.*
9 *Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Agency
10 action may be deemed “arbitrary, capricious, an abuse of discretion, or otherwise not in
11 accordance with law” when (i) the agency has failed to provide a reasoned explanation,
12 (ii) the record belies the agency’s conclusion, (iii) the agency’s rationale is “so
13 implausible that it could not be ascribed to a difference in view or the product of agency
14 expertise,” or (iv) the agency has inexplicably acted inconsistently with its prior
15 decisions. *See Organized Vill. of Kake v. U.S. Dep’t of Agric.* [hereinafter *Kake*], 795
16 F.3d 956, 966 (9th Cir. 2015) (en banc); *see also Miwok*, 5 F. Supp. 3d at 96; *Seminole*
17 *Nation of Okla. v. Norton*, 223 F. Supp. 2d 122, 131 (D.D.C. 2002).

18 Plaintiffs allege that, in recognizing the Nooksack Tribal Council as constituted
19 after the November and December 2017 primary and general elections, Interior departed
20 from its “established policy” of “interpreting Tribal constitutional, statutory, and common
21 law to determine whether the Tribal Council was validly seated as the governing body of
22 the Tribe” for purposes of government-to-government relations. *See* Am. Compl. at ¶¶ 1
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1 & 24 (docket no. 18).⁷ Defendants respond that Interior never adopted the policy
2 described by plaintiffs and that, even if Interior had such policy, defendants did not act
3 inconsistently with it.

4 Summary judgment should be granted if no genuine dispute of material fact exists
5 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).
6 The adverse party's evidence "is to be believed" and all "justifiable inferences" are to be
7 drawn in such party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).
8 When the record taken as a whole could not, however, lead a rational trier of fact to find
9 for the non-moving party, summary judgment is warranted. *See Beard v. Banks*, 548 U.S.
10 521, 529 (2006); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587
11 (1986); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

12 **B. Interior's Policies**

13 The concept of tribal sovereignty and self-determination dates back to at least the
14 framing of the Constitution itself. *See* U.S. Const. art. I, § 8, cl. 3; *see also Ransom v.*
15 *Babbitt*, 69 F. Supp. 2d 141, 149 (D.D.C. 1999). Congress has repeatedly articulated a
16 federal policy of promoting tribal self-sufficiency and economic development, and the
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18 ⁷ Plaintiffs do not contend that an agency may never alter its policies, but rather that, with respect
19 to any modification, the agency must (i) manifest its awareness about the change in position,
20 (ii) show that the new policy is permitted under the applicable statute, (iii) "believe" that the new
21 policy is better, and (iv) provide "good reasons" for the new policy. *See Kake*, 795 F.3d at 966
22 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)); *see also Cayuga*
23 *Nation v. Bernhardt*, 374 F. Supp. 3d 1, 15 (D.D.C. 2019). Plaintiffs assert that defendants have
not met this four-part test. Because the Court concludes that Interior did not establish the policy
outlined by plaintiffs, it need not address whether defendants satisfied the criteria for changing
course.

1 courts generally construe federal law in a manner that will preserve tribal sovereignty and
2 encourage tribal independence. *See White Mountain Apache Tribe v. Bracker*, 448 U.S.
3 136, 143-44 (1980). When the federal government must determine, for purposes of its
4 own interactions with a tribe, who or which entity it will recognize as having authority to
5 act on behalf of the tribe, it must do so “in harmony with the principles of tribal self-
6 determination.” *Ransom*, 69 F. Supp. 2d at 150. Although the BIA must occasionally
7 interpret tribal law to address this issue, such efforts should “effect as little disruption as
8 possible” to tribal sovereignty and self-determination. *Id.* at 151.

9 Interior must also bear in mind the unique trust relationship between the United
10 States and Native American tribes. *See Miwok*, 5 F. Supp. 3d at 96-97. The BIA has a
11 “strict and heavy burden” to administer federal funds to be distributed to tribal members
12 in a manner that is consistent with the “highest fiduciary standards.” *Seminole Nation*,
13 223 F. Supp. 2d at 137-38. The Interior Secretary has a duty to protect not only the tribe,
14 but also individual tribal members, *id.* at 137, and must therefore ensure that the federal
15 government deals only with “a duly constituted government that represents the tribe as a
16 whole,” *Miwok*, 5 F. Supp. 3d at 97; *see also Seminole Nation v. United States*, 316 U.S.
17 286, 296-97 (1942) (recognizing “the distinctive obligation of trust incumbent upon the
18 Government in its dealings with these dependent and sometimes exploited people,” and
19 observing that “[p]ayment of funds at the request of a tribal council which . . . was
20 [known to be] composed of representatives faithless to their own people and without
21 integrity would be a clear breach of the Government’s fiduciary obligation”).

1 With respect to the Nooksack Tribe, defendants and their predecessors have
2 attempted to balance the deference due under principles of tribal sovereignty with the
3 scrutiny required to fulfill their fiduciary responsibilities. Indeed, in his letter dated
4 October 17, 2016, former PDAS Roberts wrote:

5 I want to be clear that the Department is not interpreting the Tribe's
6 Constitution or interfering in internal tribal matters. The Department fully
7 respects tribal sovereignty and tribal law. Rather, we are underscoring that
8 pursuant to our government-to-government relationship between the United
9 States and the Nooksack Tribe, we will only recognize action taken in
10 accordance with the Tribe's Constitution and Bylaws.

11 Under Federal law, the United States has a duty to ensure that tribal trust
12 funds, Federal funds for the benefit of the Tribe, and our day-to-day
13 government-to-government relationship is with a full quorum of the
14 Council as plainly stated in the Tribe's Constitution and Bylaws.

15 AR 1-2. In reiterating this position in his letters dated November 14, 2016, and
16 December 23, 2016, PDAS Roberts quoted from the order issued on March 22, 2016, by
17 the Nooksack Court of Appeals, which addressed attempts to preclude certain tribal
18 members from voting before they had been legitimately disenrolled. AR 3-4; AR 5-6.
19 By relying on the decision of the Nooksack Court of Appeals, rather than his own
20 understanding of tribal law, PDAS Roberts exhibited the requisite regard for tribal
21 sovereignty, while making clear that continued efforts to circumvent the tribal courts'
22 rulings and the legal prerequisites to disenrollment proceedings, including a proper
23 quorum of the Nooksack Tribal Council, could result in a loss of federal funding and the
BIA's resumption of law enforcement services on the reservation. *See* AR 5-6.

Similarly, the MOA does not purport to interpret Nooksack law, but rather refers
to the decision of the Nooksack Court of Appeals in *Belmont v. Kelly*. AR 8. In the

1 MOA, Chairman Kelly, on behalf of himself and the Tribe, accepted the binding effect of
2 the order entered by the Nooksack Court of Appeals on March 22, 2016. *Id.* Chairman
3 Kelly and the Tribe further agreed that all tribal members purportedly disenrolled since
4 March 24, 2016, were still members of the Nooksack Tribe and were entitled to vote in
5 tribal elections, run for tribal office, and receive the benefits of tribal membership unless
6 and until they were disenrolled by a mechanism that accorded due process and was
7 consistent with Nooksack law. AR 8-9.

8 In contrast to PDAS Roberts's correspondence and the MOA, Acting RD Shaw's
9 letter dated September 7, 2017, displayed minimal deference to Chairman Kelly and the
10 Nooksack Tribe, and instead set forth six directives aimed at conducting an election with
11 results that Acting RD Shaw could endorse. Ex. E to Galanda Decl. (docket no. 12-5).
12 None of Acting RD Shaw's directives, however, were derived from tribal law. Rather,
13 they involved (i) issues addressed in the MOA, for example, the purported recall of
14 council member Carmen Tageant, *see* AR 7, and Acting RD Shaw's directive to reinstate
15 her within seven days, Ex. E to Galanda Decl. (docket no. 12-5 at 2, ¶ 1), and the "actual"
16 provision of tribal benefits to purported disenrollees, *see id.* at 2, ¶ 4; (ii) logistics, for
17 example, notifying purported disenrollees of their rights and a schedule for announcing
18 the availability of and disbursing candidate packets, *see id.* at 2-3, ¶¶ 2, 3, & 5; and
19 (iii) the appearance of unfairness associated with the appointment of Katrice Rodriguez
20 as the Election Superintendent, *id.* at 3, ¶ 6. With regard to the last topic, Acting RD
21 Shaw cited no provision of the Nooksack Constitution, Bylaws, or Tribal Code requiring
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1 the selection of a different Election Superintendent, and he did not in any way suggest
2 that his directive was premised on an interpretation of tribal law.

3 In sum, none of the materials on which plaintiffs rely, namely the correspondence
4 of former PDAS Roberts, the MOA signed by former Acting Assistant Secretary Black,
5 and the letter sent by former Acting RD Shaw, articulated a policy of “interpreting Tribal
6 constitutional, statutory, and common law to determine whether the Tribal Council was
7 validly seated as the governing body of the Tribe.” To the contrary, PDAS Roberts
8 explicitly disclaimed any attempt to interpret the Tribe’s Constitution or interfere in its
9 internal affairs. See AR 1. Moreover, even if Interior had operated under a policy of
10 interpreting tribal law, any such policy related only to substantive matters, *i.e.*, who may
11 vote, as opposed to how they may vote, and who may take action on behalf of the Tribe.
12 See United States v. One 1985 Mercedes, 917 F.2d 415, 423 (9th Cir. 1990) (holding that,
13 to prevail on a claim that an agency “impermissibly departed from its own policy,” an
14 aggrieved party must show *inter alia* that the policy at issue prescribed a substantive rule,
15 and not an interpretive, organizational, or procedural rule); see also Seminole Nation, 223
16 F. Supp. 2d at 141 (to constitute “final agency action” for purposes of judicial review
17 under the APA, the action “must be one by which ‘rights or obligations have been
18 determined,’ or from which ‘legal consequences will flow’”). Because Interior did not
19 establish a policy of construing the Nooksack Constitution, Bylaws, and/or Tribal Code
20 with respect to how Nooksack Tribal Council elections should be conducted, Acting
21 RD Stange’s subsequent refusal to “interpret tribal law” with regard to whether ballots
22 could be submitted by hand or had to be postmarked, see AR 89, was not inconsistent
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1 with Interior's prior policies. Plaintiffs' contention that Acting RD Stange's endorsement
2 of the 2017 election results and PDAS Tahsuda's recognition in March 2018 of the
3 Nooksack Tribal Council flowed from an improper "change in policy" lacks merit.

4 **C. Interior's Supervision of the 2017 Elections**

5 Contrary to plaintiff's assertions, Interior appears to have "stayed the course"
6 throughout the election process. While showing respect for the Tribe and its election
7 officials, the BIA closely monitored the situation. On three separate occasions, Richard
8 Ferguson, Acting Realty Officer for the BIA Puget Sound Agency, traveled to Deming,
9 Washington to observe activities related to the primary election held on November 4,
10 2017. *See* AR 647, 649, & 651. On his first visit on October 6, 2017, while working
11 with Katrice Rodriguez, Nooksack's Election Superintendent, Officer Ferguson
12 personally sealed approximately 95% of the outgoing primary ballots, and he witnessed
13 the sealing of the other 5% and the verification of 100% of the ballots. AR 647. He also
14 personally carried all of the ballots to the post office for mailing. *Id.* On his second and
15 third trips, on October 26 and November 2, 2017, respectively, Officer Ferguson met
16 with Election Superintendent Rodriguez and Nooksack Tribal Police Chief Michael Alby,
17 accompanied them to the post office to collect the ballots received that day, witnessed the
18 recording of such ballots in the election database, and viewed the evidence vault where
19 ballots that had been cast were being secured until the date of the primary election.
20 AR 649 & 651.

21 Officer Ferguson made another journey to Deming on November 28, 2017, during
22 the general election process. AR 656-57. He observed five tribal members receive
23

1 replacement ballots from Election Superintendent Rodriguez. AR 656. Replacement
2 ballots were available to tribal members whose ballots had been lost or otherwise spoiled
3 or had been returned to the Tribe as undeliverable. *Id.*; *see also* AR 156 (Nooksack
4 Tribal Code § 62.06.020(B)(4)). With respect to lost or spoiled ballots, the tribal member
5 was given the option of mailing the replacement ballot at his or her own expense or
6 handing it to Police Chief Alby to carry to the evidence vault. AR 656. If the original
7 ballot had been returned as undeliverable, the tribal member was instructed to mail the
8 replacement ballot using the postage paid envelope included in the replacement packet.
9 *Id.* A total of 56 replacement ballots were issued. Ex. C to Rodriguez Decl., AR 302-11;
10 *see also* Rodriguez Decl. at ¶ 10, AR 663. Ballots for the general election were
11 sequentially numbered, and a log was kept of which ballot was mailed to each tribal
12 member eligible to vote and of any replacement ballot issued to a tribal member. *See*
13 Ex. B to Rodriguez Decl., AR 287-300.

14 During his visit on November 28, 2017, Officer Ferguson attended a “ballot party”
15 at the Nooksack community center in Everson, Washington. AR 656-57. A United
16 States Postal Service (“USPS”) staff member was also at the “ballot party,” and Officer
17 Ferguson saw the postal worker collect between 12 and 16 ballots, indicating that they
18 would be processed as though they had been deposited into a USPS mailbox. *Id.*
19 According to Officer Ferguson, Election Superintendent Rodriguez disavowed any
20 connection between the “ballot party” and the election board. AR 656.

21 On the date of the general election, December 2, 2017, Officer Ferguson and
22 Marcella Teters, Superintendent of the BIA Puget Sound Agency, traveled to Deming to
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1 monitor the tallying of the ballots. AR 653. Of the 1,536 ballots originally mailed, for
2 which 56 replacements were issued, a total of 812 ballots were cast. See id. & AR 663.
3 According to Superintendent Teters, the ballots were opened in her presence, the
4 identifying numbers were cut off the ballots, and the ballots were stacked. AR 653. Of
5 the ballots received, 17 were deemed spoiled, 15 had not been placed in the provided
6 secrecy envelope, and 2 were found in the same envelope. Id. The envelopes, as well as
7 the numbers cut from the corners of the ballots, were retained. Id. The votes were then
8 counted, and the ballots, along with the tally sheets, were transported to the Nooksack
9 Tribal Police Department for safe keeping. AR 654.

10 After the BIA had reviewed the log of ballots for the 2017 general election, then
11 Acting RD Shaw wrote to Chairman Kelly to inquire about unexplained gaps in the
12 numerical sequence of ballot numbers. AR 659-60. Election Superintendent Rodriguez
13 clarified that two typographical errors had been made on the log (1721 should have been
14 721, and 3196 should have been 316), that 44 ballots with the numbers 1535-1562 and
15 1603-1618 had not been used, that the ballot numbered 1637 was watermarked as a
16 sample, and that no ballots were numbered above 1637. AR 663-64. On January 24,
17 2018, Superintendent Teters and Officer Ferguson went to Deming, retrieved the
18 materials stored in the police vault, and verified (with a few exceptions) the information
19 supplied by Election Superintendent Rodriguez. See AR 666-67, Praeipice (docket
20 no. 27-1). The 44 unused ballots and 56 replacement ballots were confirmed, as well as
21 all but one of the ballots returned as undeliverable, which appears to have been
22 misplaced. AR 666. The numbers cut from the corners of the ballots were analyzed,
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1 with the following discrepancies identified: (i) two items were numbered 253; (ii) the
2 corner of ballot number 1020 was discovered, but it had not been logged, and was likely
3 mistakenly inputted as 120, which appeared twice on the list; and (iii) nine numbers were
4 missing, which was consistent with receiving ballots from which the voters had already
5 cut off the numbers. AR 667.

6 Given the amount of scrutiny and involvement the BIA had in the election process,
7 the Court is persuaded that Interior more than satisfactorily discharged its duty to ensure
8 that the Nooksack Tribal Council recognized by PDAS Tahsuda, in his role as Acting
9 Assistant Secretary, was “duly constituted” and represented the Tribe “as a whole.” *See*
10 *Miwok*, 5 F. Supp. 3d at 97. Plaintiffs have speculated that, by accepting ballots in
11 person rather than strictly by mail, Election Superintendent Rodriguez either enabled or
12 engaged in ballot box “stuffing,” and they accuse defendants of being dilatory for not
13 insisting on ballots being returned via post and for not having a representative physically
14 present when ballots were removed from their exterior envelopes. Plaintiffs, however,
15 have had unfettered access to the logs of ballots for both the primary and general
16 elections, which list, by tribal member and ballot number, the ballots that were mailed,
17 the ballots that were returned as undeliverable, the ballots that were issued as
18 replacements, and the ballots that were cast, but they have offered no evidence that any
19 person assigned to a ballot that was counted did not in fact vote. Plaintiffs have not made
20 any showing that defendants’ actions were “arbitrary, capricious, an abuse of discretion,
21 or otherwise not in accordance with law,” and defendants are entitled to judgment in their
22 favor as a matter of law.

1 **Conclusion**

2 For the foregoing reasons, the Court ORDERS:

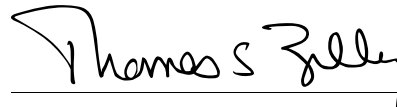
3 (1) Plaintiffs’ motion for summary judgment, docket no. 28, is DENIED, and
4 defendants’ cross-motion for summary judgment, docket no. 31, is GRANTED.

5 (2) Plaintiffs’ APA claim and this action are DISMISSED with prejudice.

6 (3) The Clerk is directed to enter judgment consistent with this Order, to send a
7 copy of this Order and the judgment to all counsel of record and to the United States
8 Court of Appeals for the Ninth Circuit (re: Rabang v. Kelly, COA No. 18-35711), and to
9 CLOSE this case.

10 IT IS SO ORDERED.

11 Dated this 9th day of August, 2019.

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14 Thomas S. Zilly
15 United States District Judge
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