

1 THE HONORABLE THOMAS S. ZILLY  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

9 THE NOOKSACK INDIAN TRIBE,

10 Plaintiff,

11 v.

12 KEVIN "JACK" HAUGRUD, in his official  
13 capacity as Acting Secretary of the Interior;  
the U.S. DEPARTMENT OF THE  
14 INTERIOR; MICHAEL S. BLACK, in his  
official capacity as Acting Assistant Secretary  
- Indian Affairs; WELDON "BRUCE"  
15 LOUDERMILK, in his official capacity as  
Director, Bureau of Indian Affairs,  
16 Department of the Interior; STANLEY M.  
SPEAKS, in his official capacity as Regional  
17 Director, Northwest Region, Bureau of Indian  
Affairs; MARCELLA L. TETERS, in her  
18 official capacity as Superintendent, Puget  
Sound Agency, Bureau of Indian Affairs;  
19 TIMOTHY BROWN, in his official capacity  
as Senior Regional Awarding Official for the  
Bureau of Indian Affairs, Northwest Region;  
20 and THE UNITED STATES OF AMERICA,  
21

22 Defendants.

Case No. 2:17-cv-00219-TSZ

NOOKSACK INDIAN TRIBE'S  
MOTION FOR PRELIMINARY  
INJUNCTION

**NOTED FOR HEARING: April 7, 2017**

**Oral Argument Requested**

23 **I. INTRODUCTION AND REQUEST FOR RELIEF**

24 Plaintiff Nooksack Indian Tribe (Tribe) seeks a preliminary injunction enjoining the  
25 defendants from (1) taking further steps to reassume responsibilities the Tribe performs for  
26 its enrolled members under its Public Law 638 contracts; (2) taking further actions based on

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1 three opinion letters written by former Principle Deputy Assistant Secretary of Interior  
 2 Lawrence Roberts Roberts); and (3) continuing to interfere with the Tribe's self-governance  
 3 by refusing to acknowledge that the current, duly-elected members of the Nooksack Tribal  
 4 Council are the Tribe's governing body with all authority that appertains thereto. This relief  
 5 is necessary to protect the Tribe and its members from ongoing irreparable harm, and is  
 6 overwhelmingly in the public interest.

7 The Tribe's motion is based on 5 U.S.C.S. § 705, which provides that “[o]n such  
 8 conditions as may be required and to the extent necessary to prevent irreparable injury, the  
 9 reviewing court . . . may issue all necessary and appropriate process to postpone the effective  
 10 date of an agency action or to preserve status or rights pending conclusion of the review  
 11 proceedings.”

12 **II. MATERIAL FACTS**

13 The Tribe is a federally recognized Indian tribe, organized under the Indian  
 14 Reorganization Act of June 18, 1934 and the Constitution and By-Laws of the Tribe. The  
 15 Tribal Council is the governing body of the Tribe, duly elected pursuant to Tribal law and  
 16 authorized under the Tribe's Constitution to prosecute claims on the Tribe's behalf. Art. VI,  
 17 Sec. 1(c).

18 Since at least 2007, the Tribe has been a party to a number of Indian Self-  
 19 Determination and Education Assistance Act (ISDA) self-determination or so-called 638  
 20 contracts. Under the ISDA, “a tribe may request the Secretary of Interior to enter into a self-  
 21 determination contract ‘to plan, conduct, and administer programs or portions thereof,  
 22 including construction programs.’” *Arizona Dept. of Revenue v. Blaze Const. Co., Inc.*, 526  
 23 U.S. 32, 38, 119 S. Ct. 957, 143 L. Ed. 2d 27 (1999) (quoting ISDA, 25 U.S.C. § 450f(a)(1),  
 24 transferred to 28 U.S.C. §5321(a)(1)). “Where a tribe enters into such a contract, it assumes  
 25 greater responsibility over the management of the federal funds and the operation of certain  
 26 federal programs.” *Id.*

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1        In approximately June, 2016, the Department, acting through defendant Brown, and  
 2 without notice to the Tribe or an opportunity for the Tribe to be heard, failed or refused to  
 3 fund the Tribe's distribution of its previously-approved 638 contract funds. Declaration of  
 4 Katherine Canete (Canete Decl.), ¶1(H). In a series of letters dated October 17, 2016,  
 5 November 14, 2016, and December 23, 2016 by then-Principal Deputy Assistant Secretary  
 6 Roberts, the then-ranking executive official of the Bureau of Indian Affairs, Roberts  
 7 erroneously asserted, on behalf of the United States, that the Tribal Council then in office  
 8 lacked a quorum under Nooksack law to conduct Tribal business. Canete Decl., ¶¶1(F), (G)  
 9 and (I) and Exhibits A, B, and C.

10       The Roberts letters failed to acknowledge that the BIA had already wrongfully  
 11 withheld previously-authorized 638 contract funds, in violation of the ISDA and its  
 12 implementing regulations. The Roberts letters asserted that the Department of Interior would  
 13 only recognize those actions taken by the Tribal Council prior to March 2016 (more than 6  
 14 months prior to the date of his letter), the last point at which he incorrectly contended that a  
 15 quorum existed, and would not recognize any actions taken since that time because of the  
 16 alleged lack of a quorum.

17       The Roberts letters also asserted that "until a Council is seated through an election  
 18 consistent with tribal law and the decisions of the Northwest Intertribal Court System," the  
 19 Department of Interior would not recognize the Tribe's primary and general tribal election to  
 20 fill the very seats Roberts erroneously claimed were vacant.

21       The Roberts letters were apparently issued as a result of a purely intra-tribal matter –  
 22 the disenrollment of 289 individuals<sup>1</sup> who failed to satisfy the constitutional basis for  
 23 membership in the Tribe. Canete Decl., ¶ 1(E).

24       The legal opinions expressed in the Roberts letters that the Tribal Council lacked a

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 26       <sup>1</sup> Including the 271 individuals who moved to intervene in this proceeding. Doc. No.  
 14. The Tribe opposes their intervention, and will timely file its Response.

1 quorum are contrary to established Nooksack Law. Under Nooksack law, the Nooksack  
 2 Tribal Council had authority to act and had a quorum from March, 2016 to the January 21,  
 3 2017 election and swearing in of new Council members filling all seats.

4 On January 21, 2017 a general election was conducted in which all enrolled  
 5 Nooksack tribal members over the age of 18 years, who were therefore qualified to vote  
 6 under the Nooksack Constitution, voted to fill the seats held by the holdover Council  
 7 members. Canete Decl., ¶ 1(S). There were no challenges to the election results. *Id.* The  
 8 results were certified by the duly-appointed Election Superintended, consistent with  
 9 Nooksack law. *Id.* The new Council members were sworn in, and notice of the election  
 10 results was timely provided to the Bureau of Indian Affairs. *Id.* Yet, defendants have failed  
 11 or refused to acknowledge the Council or accept the certified election results, effectively  
 12 creating a hiatus in tribal government which threatens the Tribe's sovereignty and  
 13 jeopardizes the continuation of necessary day-to-day services on the reservation. *Id.*

14 Nor have the defendants rescinded the Roberts letters, and the Tribe has been  
 15 significantly detrimentally impacted as a result of their ongoing enforcement. The Tribe has  
 16 been forced to operate without a significant portion of its 638 contract funds. Canete Decl.,  
 17 ¶¶ 1(L), (M), (O), (P). The Indian Health Service refused to enter into a new Annual  
 18 Funding Agreement for \$2,4 million, and continues to threaten re-assumption of the Parties'  
 19 Self-Determination Agreement. Canete Decl., ¶ 1(M) and Exhibit D. The Department of  
 20 Housing and Urban Development denied approval of the Tribe's Indian Housing Plan, a  
 21 prerequisite for its grant funding of \$850,000. Canete Decl., ¶ 1(O) and Exhibit F. The  
 22 Washington Recreation and Conservation Office informed the Tribe that it cannot enter into  
 23 its standard Grant Agreement for funding of Salmon Recovery projects in an amount of \$5.5  
 24 million. Canete Decl., ¶ 1(N).

25 The defendants' continued enforcement of the Roberts letters, their failure to  
 26 recognize the duly-elected Tribal Council, and their furtherance of re-assumption of federal

1 programs are causing irreparable harm to the Tribe. The Tribe seeks a preliminary injunction  
 2 to return the parties to the status quo that existed prior to the issuance of the Roberts letters  
 3 pending resolution of the merits of the Tribes' claims.

4 **III. LAW AND ARGUMENT**

5 The purpose of a preliminary injunction is to "preserve the status quo and the rights  
 6 of the parties until a final judgment issues in the cause." *U.S. Philips Corp. v. KBC Bank*  
 7 N.V.

8 590 F.3d 1091, 1094 (9<sup>th</sup> Cir. 2010) (*citing Univ. of Tex. v. Camenisch*, 451 U.S. 390,  
 9 395 (1981)). "A mandatory injunction orders a responsible party to take action," while "[a]  
 10 prohibitory injunction prohibits a party from taking action and preserves the status quo  
 11 pending a determination of the action on the merits." *Ariz. Dream Act Coal. v. Brewer*, 757  
 12 F.3d 1053, 1060-61 (9<sup>th</sup> Cir. 2014), *quoting Marlyn Nutraceuticals, Inc. v. Mucos Pharma*  
 13 *GmbH & Co.*, 571 F.3d 873, 878-79 (9<sup>th</sup> Cir. 2009).

14 The relevant status quo is that "between the parties pending a resolution of a case on  
 15 the merits." *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9<sup>th</sup> Cir. 2012). The "status  
 16 quo" refers to the legally relevant relationship between the parties before the controversy  
 17 arose. *Ariz. Dream Act Coal.*, 757 F.3d at 1061; *McCormack*, at 1020.

19 To obtain a preliminary injunction, the Tribe must establish (1) a likelihood of  
 20 success on the merits; (2) that irreparable harm is likely in the absence of preliminary relief;  
 21 (3) that the balance of equities tips in the Tribe's favor; and (4) that an injunction is in the  
 22 public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L.  
 23 Ed. 2d 249 (2008); Fed. R. Civ. P. 65(b)(1); *Stuhlbarg Int'l Sales Co. v. John D. Brush &*  
 24 *Co.*, 240 F.3d 832, 839 n. 7 (9<sup>th</sup> Cir. 2001). The Tribe has met its burden here.

1           **A.     The Tribe is Likely to Prevail on the Merits**

2           The Court's determination of how strong a claim on the merits is enough for  
 3 injunctive relief "depends on the balance of harms: the more net harm an injunction can  
 4 prevent, the weaker the plaintiff's claim on the merits can be while still supporting some  
 5 preliminary relief." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1133 (9<sup>th</sup> Cir. 2011)  
 6 (*quoting Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d  
 7 721, 725 (7<sup>th</sup> Cir. 2009)).

8           A likelihood of success per se is not an absolute requirement. *All. for the Wild*  
 9 *Rockies*, 632 F.3d at 1131–32. Rather, courts apply a sliding scale, where "'serious  
 10 questions going to the merits' and a hardship balance that tips sharply toward the plaintiff  
 11 can support issuance of an injunction, assuming the other two elements of the Winter test are  
 12 also met." *Id.* at 1132; *see also, Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1255–  
 13 56 (10<sup>th</sup> Cir. 2003) (success on the merits element satisfied by showing that questions going  
 14 to the merits are "so serious, substantial, difficult, and doubtful as to make the issue ripe for  
 15 litigation and deserving of more deliberate investigation").

16           Regardless of which standard the Court applies, the Tribe meets it. The Roberts  
 17 letters refusing to recognize the Tribal Council are contrary to Nooksack law (which  
 18 recognizes holdover council members) and contrary to federal law because Roberts failed to  
 19 provide a reasoned explanation, and the record belies his conclusion. *See Petroleum*  
 20 *Comms., Inc. v. F.C.C.*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (*citing American Tel. & Tel.*  
 21 *Co. v. F.C.C.*, 974 F.2d 1351 (D.C. Cir. 1992)).

22           The defendants' continued reliance on, and enforcement of the Roberts letters for

1 withholding already-awarded FY 2016 funds, denying FY 2017 funding, taking steps to re-  
 2 assume federal programs, and refusing to accept the certified results of the Tribal election is  
 3 arbitrary, capricious, and an abuse of discretion.

4       The governing body of the Nooksack Indian Tribe is the Tribal Council, elected by  
 5 the voters. Nooksack Constitution, Art. III, Sec. 1, Const.<sup>2</sup> The Council is composed of  
 6 eight (8) persons. Art. III, Sec. 2. All Council members govern for four year terms, but the  
 7 actual commencement and expiration dates of the terms are not identified within the  
 8 Constitution. Art. III, Sec. 4. In the event of an expiration of a four (4) year term, no explicit  
 9 provision exists as to the status of a council seat – whether it becomes vacant or whether the  
 10 previously seated member becomes a holdover. *Id.*

12       Since 1997, The Nooksack Tribal Court has concluded that Nooksack tribal law  
 13 recognized “holdover” status of councilmembers pending an election. Numerous times in  
 14 Nooksack history, councilmembers have continued to hold an elected office in “holdover”  
 15 status, while an election was held, an election result was challenged, or while the new  
 16 councilmember waited to be sworn in. *See generally, Campion v. Swanaset, Nooksack*  
 17 *Tribal Court Case No. NOO-C-96-004.*

19       The composition of the Nooksack Tribal governing body is a matter of internal tribal  
 20 concern and an inherent and exclusive power held by the Tribe. Federal interference over  
 21 matters of internal tribal concern is generally prohibited. It is IBIA policy that “under the  
 22 doctrines of tribal sovereignty and self-determination, a tribe has the right initially to  
 23 interpret its own governing documents in resolving internal disputes, and the Department

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25       <sup>2</sup> All Tribal authority and IBIA opinions cited herein are attached as exhibits to the  
 26 Declaration of Connie Sue Martin.

1 must give deference to a tribe's reasonable interpretation of its own laws." *United*  
 2 *Keetoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director*, 22 IBIA 75,  
 3 80 (June 4, 1992).

4 In the event of an election contest, or a dispute over a councilmember's "holdover"  
 5 status, the Department of Interior lacks any authority and must defer to the determination of  
 6 Nooksack law made by the Nooksack Tribal Court, which has recognized holdover Council  
 7 positions generally, and the holdover Council specifically at issue in the Roberts letters.

8 *Campion*, at 2-3; *Nooksack Indian Tribe v. Northwest Intertribal Court System*, 2016-CI-CL-  
 9 006, Order Granting in part, Denying in Part, Plaintiff Nooksack Indian Tribe's Motion for  
 10 Equitable Relief (November 17, 2016).

11 Indeed, defendant Stanley Speaks confirmed in an August, 2016 letter that neither the  
 12 Nooksack Constitution nor federal law authorized the Secretary of the Interior **to conduct or**  
 13 **approve Tribal Council elections.** *Canete Decl., Exhibit \_\_\_*. As Mr. Speaks noted, "Tribal  
 14 Council elections are recognized as sovereign tribal processes. *Garcia v. Western Regional*  
 15 *Director*, 61 IBIA 45 (2015). Absent any constitutional authority specifically instructing the  
 16 Secretary to conduct a tribal election, it is up to the Nooksack Tribe through its own internal  
 17 processes and operating through its own internal forums to carry out this inherently  
 18 sovereign function." *Id.*, at 1-2. The corollary must also be true – the Secretary is not  
 19 authorized under the Nooksack Constitution or federal law to **compel** Tribal Council  
 20 elections.

21 The defendants' ongoing refusal to acknowledge the Tribal Council as the  
 22 governing body of the Tribe is arbitrary and capricious, and the Tribe is likely to prevail on  
 23

1 its claim to set aside the Roberts letters and compel the Tribal Council's recognition.

2 The defendants' refusal to recognize the Tribal Council has interfered with the  
3 Tribe's ability to govern, and to provide essential public services for its members, conduct  
4 that the Eighth Circuit Court has held is arbitrary, capricious, and an abuse of discretion:

5 The final BIA action subject to judicial review is its decision to recognize  
6 both tribal councils only on a de facto basis. Such a recognition of both  
7 councils amounts to a recognition of neither. Thus, the district court  
8 correctly found that the BIA acted arbitrarily and capriciously by  
9 effectively creating a hiatus in tribal government which jeopardized the  
10 continuation of necessary day-to-day services on the reservation. The  
11 BIA, in its responsibility for carrying on government relations with the  
12 Tribe, is obligated to recognize and deal with some tribal governing body  
13 in the interim before resolution of the election dispute. We commend the  
14 BIA for its reluctance to intervene in the election dispute, but it was an  
abuse of discretion for the BIA to refuse to recognize one council or the  
other until such time as Indian contestants could resolve the dispute  
themselves. We conclude that, for the time being, the BIA should be  
required to deal with the 1982 council as the certified and sworn winners  
of the tribal election.

15 *Goodface v. Grassrope*, 708 F.2d 335, 338-39 (8<sup>th</sup> Cir. 1983); *see, also, Tarbell v. DOI*, 307  
16 F. Supp. 2d 409, 430 (N.D.N.Y. 2004) (“I cannot overlook the BIA's stark failure to conduct  
17 a meaningful review and determine for itself whether to recognize the Constitutional  
18 Government, or instead the traditional Three Chiefs regime, and thus feel constrained to  
19 strike down the four agency actions now under challenge.”).

20 Once the Tribal Election Board certifies an election result, defendants can carry out  
21 their statutory obligation to interact with the legal government, and need not reexamine the  
22 results of the tribal election. *Wheeler v. United States Dep't of Interior, Bureau of Indian*  
23 *Affairs*, 811 F.2d 549, 552 (10<sup>th</sup> Cir. 1987). The Tribe has provided certified election results  
24 to the defendants, and defendants may not contest those results. *Wheeler*, at 552.

25 It is “a bedrock principle of federal Indian law that every tribe is capable of managing

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1 its own affairs and governing itself.” *Cal. Valley Miwok Tribe v. United States*, 515 F.3d  
 2 1262, 1263, 380 U.S. App. D.C. 39 (D.C. Cir. 2008) (internal quotation marks omitted). The  
 3 BIA has the authority to make recognition decisions regarding tribal leadership “only when  
 4 the situation [has] deteriorated to the point that recognition of some government was  
 5 essential for Federal purposes.” *Cayuga Nation v. Tanner*, 824 F.3d 321, 327-28 (2<sup>nd</sup> Cir.  
 6 2016), quoting *Wadena v. v. Acting Minneapolis Area Director, Bureau of Indian Affairs*, 30  
 7 IBIA 130, 145 (1996). Internal dysfunction or paralysis within tribal governance standing  
 8 alone, however, does not permit the BIA to decide who constitutes the legitimate leadership  
 9 of a tribe. *Cayuga*, 824 F.3d at 327-28; *Cf. Goodface*, 708 F.2d at 338-39 (8<sup>th</sup> Cir. 1983);  
 10 *Alturas Indian Rancheria v. Pacific Regional Director, Bureau of Indian Affairs*, 54 IBIA  
 11 138, 143-44 (2011).

12 Because tribal governance disputes are controlled by tribal law, they fall within the  
 13 exclusive jurisdiction of tribal institutions and the BIA’s recognition of a member or faction  
 14 is not binding on a tribe. *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609  
 15 F.3d 927, 943 (8<sup>th</sup> Cir. 2010), citing *Goodface*, 708 F.2d at 339. While the BIA may at times  
 16 be obliged to recognize one side or another in a dispute as part of its responsibility for  
 17 carrying on government relations with the Tribe, as the *Goodface* court noted, once the  
 18 dispute is resolved through internal tribal mechanisms, the BIA must recognize the tribal  
 19 leadership embraced by the tribe itself. *Id.*; see also *Wheeler v. U.S. Dep't of the Interior*,  
 20 *Bureau of Indian Affairs*, 811 F.2d 549, 552-53 (10<sup>th</sup> Cir. 1987). In situations of federal-  
 21 tribal government interaction where the federal government must decide what tribal entity to  
 22 recognize as the government, it must do so in harmony with the principles of tribal self-  
 23

1 determination. *See Wheeler*, 811 F.2d 549 at 552. The defendants have failed to do that, and  
 2 that failure is arbitrary, capricious, and abuse of discretion, and contrary to law.

3       **B. The Tribe Will Suffer Irreparable Harm if Injunctive Relief is Not**  
 4       **Granted**

5       Irreparable harm is harm “for which there is no adequate legal remedy, such as an  
 6 award of damages.” *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9<sup>th</sup> Cir. 2014).  
 7 Because intangible injuries generally lack an adequate legal remedy, “intangible injuries  
 8 [may] qualify as irreparable harm.” *Id.*, quoting *Rent-A-Ctr., Inc. v. Canyon Television &  
 9 *Appliance Rental, Inc.*, 944 F.2d 597, 603 (9<sup>th</sup> Cir. 1991). The 9<sup>th</sup> Circuit has recognized  
 10 such intangible injuries in the non-tribal context as damage to a university’s ongoing  
 11 recruitment efforts and goodwill (*Regents of Univ. of Cal. v. American Broadcasting Cos.*,  
 12 747 F.2d 511, 519-20 (9<sup>th</sup> Cir. 1984)); acts which limit an individual’s professional  
 13 opportunities (*Ariz. Dream Act Coal.*, 757 F.3d at 1068); and injury to one’s reputation  
 14 (*Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 838 (9<sup>th</sup> Cir. 2001)).*

15       Irreparable injury is presumed when a sovereign is prevented from enforcing statutes  
 16 enacted by its elected officials. *Maryland v. King*, 133 S. Ct. 1, 3, 183 L. Ed. 2d 667 (2012)  
 17 (Roberts, C.J., in chambers) (“any time a State is enjoined by a court from effectuating  
 18 statutes enacted by the representatives of its people, it suffers a form of irreparable injury.”).

19       In a series of cases involving Indian tribes, the 10<sup>th</sup> Circuit has held that interference  
 20 with tribal self-government constitutes irreparable injury warranting preliminary injunctive  
 21 relief. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10<sup>th</sup> Cir. 2001)  
 22 (preliminary injunction granted where threatened loss of revenue and jobs caused by state’s  
 23 conduct created prospect of significant interference with tribal self-government); *Kiowa*  
 24

25       NOOKSACK INDIAN TRIBE’S MOTION FOR  
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1 *Indian Tribe of Okla. v Hoover*, 150 F.3d 1163, 1171-72 (10th Cir. 1998) (tribe demonstrated  
 2 irreparable harm as a matter of law where seizure of tribal assets and prohibition against full  
 3 enforcement of tribal laws significantly interferes with the tribe's self-government); *Seneca-  
 4 Cayuga Tribe v. Oklahoma*, 874 F.2d 709, 716 (10<sup>th</sup> Cir. 1989) ("Without the preliminary  
 5 injunction, the Tribes would face the prospect of significant interference with their self-  
 6 government.").

8 Here, the declaration of Tribal Council Member and General Manager Katherine  
 9 Canete clearly establishes the irreparable harm that has resulted and will continue to result as  
 10 a result of the failure to rescind the Roberts letters, to recognize the Tribal Council, and to  
 11 cease re-assumption efforts. The defendants have "effectively creat[ed] a hiatus in tribal  
 12 government which jeopardize[s] the continuation of necessary day-to-day services on the  
 13 reservation" and which cannot be solved unless the Tribe unconstitutionally surrenders its  
 14 sovereignty and submits to a Department-supervised election for Tribal Council members.

16 The defendants' refusal to recognize the legislative acts of the Tribe undertaken since  
 17 March 24, 2016 is a significant interference with the Tribe's self-governance and its ability  
 18 to enforce Tribal law. The Tribe has met its burden of establishing irreparable harm.

19 **C. The Balance of Equities Tips in the Tribe's Favor and an**  
**Injunction is in the Public Interest**

21 The Court "must balance the competing claims of injury and must consider the effect  
 22 on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24.  
 23 These two factors merge when the government is opposing party. *Nken v. Holder*, 556 U.S.  
 24 418, 435, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009) (noting factors three and four "merge  
 25 when the Government is the opposing party"); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d  
 26

1073, 1092 (9<sup>th</sup> Cir. 2013) (because the case involves the government, the balance of equities  
 2 factor merges with the fourth factor, public interest).

3       The Tribe and its members have a significant interest in undoing the “hiatus in tribal  
 4 government which jeopardize[s] the continuation of necessary day-to-day services on the  
 5 reservation” that the defendants have created. The Tribe, its members, defendants, and the  
 6 public have a significant interest in a functioning government at the Nooksack Tribe, and the  
 7 continued enforcement of the Roberts letter stating that the defendants will not recognize any  
 8 actions taken by the Tribal Council after March 24, 2016, and the refusal of state and federal  
 9 agencies to recognize the Tribal Council’s authority is a significant threat to a functioning  
 10 government.

12       It is unclear what, if any, interest the defendants have in their continued refusal to  
 13 recognize the Nooksack Tribal Council. This is not a case where there is another Council  
 14 seeking recognition by the defendants – this is the only Tribal Council, and they were elected  
 15 in an election that has been certified pursuant to Nooksack law. Nor is it clear what, if any,  
 16 interest the defendants have in their continued enforcement of a series of flawed legal  
 17 opinion letters issued by an appointed official in the waning hours of an outgoing  
 18 administration.

20       Because the Tribe is likely to prevail in showing that its’ right to self-governance is  
 21 being violated by defendants, and there is no legitimate interest that the defendants can  
 22 articulate in allowing such violations to persist, the balance of the equities and the public  
 23 interest weigh heavily in favor of granting the Tribe’s requested injunction. *See Grace v.*  
 24 *District of Columbia*, 187 F. Supp. 3d 124, 150 (D. D.C. 2016).

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1 Dated this 16th day of March, 2017.  
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5 SCHWABE, WILLIAMSON & WYATT, P.C.  
6  
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**CERTIFICATE OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 16<sup>th</sup> day of March, 2017, I arranged for service of the foregoing NOOKSACK INDIAN TRIBE'S MOTION FOR PRELIMINARY INJUNCTION to the parties via the Court's CM/ECF system as follows:

<p>Brian C. Kipnis U.S. Attorney's Office (SEA) 700 Stewart St., Ste. 5220 Seattle, WA 98101-1271 Phone: 206-553-7970 <a href="mailto:Brian.Kipnis@usdoj.gov">Brian.Kipnis@usdoj.gov</a></p> <p>Attorney for Defendant United States of America</p>	<p>Bree R. Black Horse Galanda Broadman PLLC P.O. Box 15146 Seattle, WA 98115 Phone: 206-557-7509 <a href="mailto:bree@galandabroadman.com">bree@galandabroadman.com</a></p> <p>Attorney for parties requesting Intervenor Status</p> <p>271 Nooksack Tribal Members</p>
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/s/ Connie Sue Martin  
Connie Sue Martin, WSBA # 26525

**CERTIFICATE OF SERVICE-  
CASE NO: C17-0219-TSZ - 1**

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