Hon. Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RUDY ST. GERMAIN, MICHELLE ROBERTS, enrolled Nooksack Tribal members,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; SALLY JEWELL, Secretary of the Interior; KEVIN K. WASHBURN, Assistant Secretary of Indian Affairs; STANLEY SPEAKS, Northwest Regional Director; SCOTT AKIN, Acting Northwest Regional Director; JUDITH R. JOSEPH, Superintendent for the Puget Sound Agency,

Defendants.

NO. C13-945 RSM

REPLY RE: MOTION FOR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

Plaintiffs Rudy St. Germain and Michelle Roberts respectfully reiterate their request that the Court issue a Temporary Restraining Order ("TRO") enjoining Defendants from conducting the Secretarial Election set for June 21, 2013. The following serious questions going to the merits mandate the issuance of the requested TRO:

(1) Did Defendants refuse to honor requests for absentee ballots, in violation of 25 C.F.R. § 81.19 and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706?

(2) Did Defendants violate the APA and the Indian Reorganization Act ("IRA"), 25 U.S.C. § 476, when they failed to review the proposed constitution to determine if any provision therein was intended to disenroll members retroactively, in violation of applicable federal

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law?

(3) Did Defendants violate the APA when they set June 4, 2013, as the deadline for challenging omissions from the official Voter Registration List?

(4) Did Defendants violate the APA when they failed to respond to timely challenges by tribal members whose names were improperly omitted from the official eligible voter list?

(5) Did Defendants violate the APA by recognizing an unlawful tribal action?

In all, did Defendants unlawfully disenfranchise Nooksack voters and suppress the Nooksack electorate?

II. ARGUMENT

Plaintiffs have not engaged in "hyperbole" or "sandbagging." ECF No. 23 at 2, 7, 10. Despite Defendants' attempt to minimize the harm facing Plaintiffs, this is a grave matter. Further, Plaintiffs sought emergency injunctive relief within three working days of Defendant Superintendent Joseph's rejection of potential Nooksack voters' written challenges concerning her failure to include them on the Final Official List of Registered Voters. Declaration of Gabriel S. Galanda ("Galanda Decl."), Exs. F, H-I. Indeed, Plaintiffs and their constituents have done everything in their power to avoid having to seek the instant emergency relief. *See* Declaration of Brina Aldredge, Ex. A; Declaration of Karen Ahenakew, Ex. A; Declaration of Lance Campbell, Ex. A; Declaration of James Rapada, Ex. A; Galanda Decl., Exs. O, P. At this point, there is nowhere else to obtain the relief needed to restore electoral order to the Nooksack Reservation and the federal election.

A. Defendants violated the APA when they (1) refused to honor requests for absentee ballots, (2) set June 4, 2013 as the deadline for challenging omissions from the official Voter Registration List and, (3) failed to respond to timely challenges by tribal members whose names were improperly omitted from the official eligible voter list.

Defendants do not, and cannot, argue that they have complied with their own procedural regulations. Instead, citing to 25 C.F.R. § 81.22, Defendants argue that Plaintiffs should wait until the Secretarial Election is held, and then, at that point, request that the Secretary order a recount or new election. ECF No. 23 at 10. The APA does not require the Court to stay its hand

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while knowing violations of federal law and fundamental rights are taking place. If Plaintiffs are forced to wait until after the election, it will be too late.

Title 25 C.F.R. § 81.13 grants individual Indians ten days to present the reasons for voter eligibility to the election commission. Here, however, Defendants set the cutoff date a full eighteen days before the election, on June 4, 2013. In this instance, Plaintiffs challenge Defendants' decision to set the cutoff date a full eighteen days before the election – not Defendants' decision to hold a Secretarial Election. Plaintiffs also challenge Defendants' failure to respond to timely challenges by tribal members whose names were improperly omitted from the official eligible voter list and Defendants' refusal to honor certain requests for absentee ballots. These federal actions — separate and independent of Defendants' decision to hold a Secretarial Election — were taken in violation of 25 C.F.R. § 81.19's mandate that "requests for absentee ballots received less than ten days before an election will be promptly honored." These federal agency actions are not reviewable under 25 C.F.R. § 81.22, which merely allows a tribal member to "challenge the election results."

Defendants admit that "[t]here is a strong public interest in allowing every registered voter to vote freely." ECF No. 23 at 11 (quotation omitted). This is exactly Plaintiffs' point.

B. Defendants violated the APA when they failed to review the proposed constitution to determine if any provision therein was intended to disenroll members retroactively, in violation of applicable federal law.

Defendants argue that "the Secretary of the Interior is *required* to call and hold a 'Secretarial election' to vote on a proposal to amend a tribal constitution within 90 days." ECF No. 23 at 2 (emphasis in original). Be that as it may, Defendants are not excused from "review[ing] the final draft of the constitution and bylaws, or amendments thereto, to determine if

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any provision therein is contrary to applicable laws," 25 U.S.C. § 476(c)(2)(B),[1] or from "notifying the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws." 25 U.S.C. § 476(c)(3).

Defendants argue that they have reviewed the proposed amendment and have determined that it "violates no laws of which the Secretary is aware. The amendment . . . will result only in a *prospective* alteration of the Tribe's constitutional criteria for membership."[2] ECF No. 23 at 8 (emphasis in original). Although Defendants are correct that, on its face, the proposed amendment would only apply prospectively, it is clear that the amendment will effectively disenroll members retroactively, by design. The Tribal Council is currently disenrolling Nooksacks who meet the criteria of Article II, Section 1(H) of the Nooksack Constitution. The Tribal Council is disenrolling these Nooksacks because their application for membership has another box checked, or a different Section of Article II, Section 1, selected as their reason for membership. Defendants are aiding and abetting those efforts, as they have since January. Once Article II, Section 1(H), is removed — so the Tribal Council's plan goes — these Nooksacks will be permanently disenrolled, as they will no longer be able to reenroll under the provision that currently makes them eligible for tribal membership. Why else, the Secretary must ask, would the constitutional amendment and the disenrollment proceedings be completed in tandem?

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[1] Although Defendants are correct that the 1988 amendments did "narrow the Secretary's discretion" in some areas, ECF No. 23 at 7 n.5, this is not the case with the Secretary's discretion to review a proposed constitutional amendment. *See* S. REP. NO. 577, 100th Cong., 2d Sess. 36 (1988).

[2] Defendants argue that "federal agencies cannot be found to have acted 'contrary to law' under the APA based on deviations from internal handbooks." ECF No. 23 at 9. Defendants are mistaken. *See generally Oglala Sioux Tribe v. Andrus*, 603 F.2d 707 (8th Cir. 1979); *New England Tank Industries of New Hampshire, Inc. v. U.S.*, 861 F.2d 685, 693 (Fed. Cir. 1988); *Munnelly v. United States Postal Serv.*, 805 F.2d 295, 302 (8th Cir. 1986); *Wilkinson v. Legal Services Corp.*, 27 F.Supp.2d 32, 56 (D.D.C. 1998); *Piccone v. United States*, 407 F.2d 866, 877 (Ct. Cl. 1969); *U.S. v. Leichtfuss*, 331 F.Supp. 723 (D.C. Ill. 1971); *Winnebago Tribe of Nebraska v. Babbitt*, 915 F. Supp. 157 (D.S.D. 1996); *Yankton Sioux Tribe v. Kempthorne*, 442 F.Supp.2d 774 (D.S.D. 2006); *Lower Brule Sioux Tribe v. Deer*, 911 F.Supp. 395 (D.S.D. 1995); *Chen v. Slattery*, 862 F.Supp. 814 (E.D.N.Y. 1994); *Los Coyotes Band of Cahuilla & Cupeno Indians v. Salazar*, No. 10-1448, 2011 WL 5118733 (S.D. Cal. Oct. 28, 2011).

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IV. CONCLUSION

Plaintiffs have, at a minimum, raised "serious questions" going to the merits of their claim for injunctive relief.

DATED this 19th day of June, 2013.

s/Gabriel S. Galanda
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CERTIFICATE OF SERVICE

I, Gabriel S. Galanda, say:

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

2. On June 19, 2013, I caused to be filed I filed the foregoing document, which will provide service to the following via ECF:

Brian C Kipnis

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

Signed at Seattle, Washington, this 19th day of June, 2012.

s/Gabriel S. Galanda
Gabriel S. Galanda

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