

**IN THE NOOKSACK TRIBAL COURT OF APPEALS  
NOOKSACK INDIAN TRIBE  
DEMING, WASHINGTON**

**SONIA LOMELI; TERRY ST. GERMAIN;  
NORMA ALDREDGE; RAENNA  
RABANG; ROBLEY CARR, individually  
on behalf of his minor son, LEE CARR,  
enrolled member of the Nooksack Indian  
Tribe,**

Plaintiffs/Appellants,

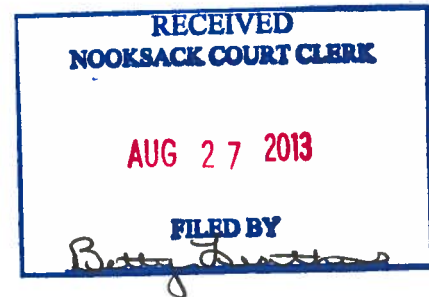
v.

**ROBERT KELLY, RICK D. GEORGE,  
AGRIPINA SMITH, BOB SOLOMON,  
KATHERINE CANETE, LONA  
JOHNSON, JEWELL JEFFERSON, AND  
ROY BAILEY,**

Defendants/Appellees.

NO. 2013-CI-CL-001

ORDER EXTENDING STAY



PROCEDURAL POSTURE

On August 14, 2013, this Court issued its Order Accepting Appellate Review and Staying Proceedings (hereinafter Order Staying Proceedings) in this matter. On August 19, 2013, Appellees filed a Motion for Clarification or Relief from Stay of Proceedings (hereinafter Motion for Clarification). Thereupon, this Court, on August 20, 2013, issued an Order on Motion for Clarification or Relief from Stay of Proceedings (hereinafter Order on Motion for Clarification). Our Order on Motion for Clarification stated

This Court agrees with Appellees that there is no basis for this Court to prevent the Tribe from proceeding with disenrollment proceedings in regards to any Tribal member who is not a plaintiff in this suit. The Court's August 14 Order was intended to apply only to the named Plaintiffs/Appellants.

Our Order on Motion for Clarification also granted Appellants the opportunity to respond to Appellee's Motion for Clarification no later than Wednesday, August 28, 2013. On August 21,

2013, Appellants filed an Interim Response Regarding Appellees' Motion for Clarification or Relief from Stay of Proceedings (hereinafter Interim Response).

#### ISSUES PRESENTED <sup>1</sup>

This Court's August 14 Order Staying Proceedings stated "disenrollment proceedings authorized by the order and judgment shall be stayed pending this Court's final decision." Appellees' Motion for Clarification argues this language was unclear, overly broad and in error because (1) "the sole Appellants before the trial court and this Court are five Nooksack tribal members subject to disenrollment proceedings;" (2) the Tribal Council, not the Tribal Court, "authorized" the disenrollment proceedings, and thus an automatic stay under NTC 80.06.010 "is limited to reviving the lawsuit and does not stay the disenrollment proceedings;" and (3) a stay that enjoins the disenrollment proceedings would in effect constitute an injunction, the Court of Appeals lacks the authority to issue injunctions, and even if the Court had authority to issue injunctions, doing so here "is unwarranted under the standard for granting injunctive relief articulated by the federal courts." Appellees' Motion for Clarification included a lengthy footnote arguing that this is not a class action. Appellants having "neither sought class certification, nor alleged sufficient facts to proceed as a class," and that the five named Appellants "are seeking relief for themselves alone."

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<sup>1</sup> The pleadings filed by counsel for both parties have obfuscated rather than shed light on the issues before us. We caution counsel that the submission of documents that are not part of the trial court record, citing to the trial court's rulings out of context, the practice of filing "emergency" motions with this Court when the parties have failed to make an adequate record below, the failure to address relevant parts of the record, and a general lack of candor in pleadings filed with this Court will result in the imposition of sanctions. Counsel is further cautioned that we will not scour the entire record to find support for counsel's arguments. It is counsel's duty to direct our attention to those parts of the record that support or fail to support counsel's arguments. Although it should be unnecessary, given the pleadings filed to date we are compelled to remind counsel the outcome of this litigation is of the utmost importance to the parties and they deserve that their legal representatives conduct this litigation with professionalism.

Based on the representations in Appellees' Motion for Clarification, this Court issued its August 20 Order On Motion for Clarification clarifying that its August 14 Order Staying Proceedings applied only to the named Plaintiffs/Appellants, and setting the time for Appellants response to Appellees' Motion for Clarification.

Appellants' Interim Response asks this Court issue an interim order deferring any ruling on Appellees' Motion for Clarification until (1) all issues can be adequately briefed; (2) all parties to the appeal can be properly identified to ensure that the appropriate stay is entered; and (3) the Court can issue a complete order defining exactly what is stayed.

Significantly, in the midst of much chaff, Appellants' Interim Response brings for the first time this Court's attention to a stipulation filed by the parties with the trial court on March 20, 2013, assertedly based on comments made by counsel in open court on March 18, 2013,<sup>2</sup> and approved and incorporated by reference in an Order of the trial court filed on March 28, 2013.<sup>3</sup> The stipulation provides, among other things, that (1) counsel for Appellants "will furnish a list of those individuals for whom they are then authorized to act in this matter and in the related proceedings regarding disenrollment of certain Nooksack Tribal members . . ."; and (2) [n]o person will be disenrolled prior to completion of the meetings before the Tribal Council, regardless of whether that individual has requested a meeting with the Tribal Council."

On April 15, 2013, the Nooksack Office of Tribal Attorney received an April 12 letter from Counsel for Appellants conveying the list anticipated by the stipulation. While asserting that the letter and list did not limit the representation to "anything less than all 306 or whatever

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<sup>2</sup> The Court of Appeals did not receive the complete documentary record of this proceeding until August 26, 2013. The Court has yet to receive transcripts or audio recordings of any of the hearings, and does not intend to request the hearing transcripts or audio recordings absent a compelling reason to do so.

<sup>3</sup> Counsel for Appellees included the stipulation as an Exhibit to a declaration that accompanied their Motion for Clarification. However, we can find no reference to the stipulation or to the exhibit number in the body or even in a footnote to Appellees' Motion for Clarification.

other number of those enrolled Nooksack Tribal members who are the subject of the Disenrollment Proceedings,” the April 12 letter states, among other things

We hereby furnish a list of those individuals we are authorized to represent in *Lomeli v. Kelly* and in the Disenrollment Proceedings. In *Lomeli*, we represent the six enrolled Nooksack member plaintiffs . . . as well as those similarly situated. See First Amended Complaint . . . . To be equally clear to the Tribal Council as we have been to the Tribal Court, *Lomeli* is a distinct matter from the Disenrollment Proceedings.

In the Disenrollment Proceedings, we represent the 271 enrolled Nooksack members disclosed on the attached Representation List.

Although this Court has not had sufficient time to determine whether it is part of the record in this proceeding, we will take judicial notice of a letter on the letterhead of the Nooksack Office of Tribal Attorney (OTA) dated April 19, 2013, addressed to counsel for Appellants, in regards to the April 12 letter and representation list submitted to the OTA by counsel for Appellants.<sup>4</sup> That letter begins by stating

The Tribal Council is in receipt of your representation list of 271 names attached to your seven page letter. Per the March 20, 2013 Stipulation, the list represents those persons for whom you are authorized to act in the litigation before the Nooksack Tribal Court as well as the disenrollment proceedings.

#### ANALYSIS

The second paragraph of NTC 80.06.010 expressly provides that “[e]ither party may petition the court to be heard on the issue of staying the orders and judgments of the trial court prior to the case being heard on appeal under § 80.08.050.” Here, both parties have petitioned this Court to be heard on the issue of staying the order and judgment of the trial court: first

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<sup>4</sup> This letter was included with pleadings filed by counsel for Appellants in a Notice and Emergency Motion for Permission to Appeal in the related case of *Roberts et al. v. Kelly et al.*, No. 2013-CI-CL-003. It does not bear the official stamp of the Tribal Court Clerk, and therefore may not actually be part of the record in either the *Lomeli* or the *Roberts* proceedings. For these reasons, we do not find the letter dispositive in regards to any issue before the Court at this time.

Appellants by filing an Emergency Motion for Stay on August 14; and then Appellees by filing their Motion for Clarification. The grant of authority set forth in the second paragraph of § 80.06.010 to hear and decide petitions concerning a stay would be without meaning or effect if the Court did not have corresponding authority to fashion a stay that preserves the status of the matter in controversy while the Court reviews the petitions. *See, e.g., Ferris v. Hoopa Valley Tribe*, 8 NICS App. 1, 5-6 (Hoopa Valley Tribal Ct. App. 2007) (the interpretation of any code must start with its plain language and ordinary meaning, and courts have a duty to give effect to every provision in the code). Based on the foregoing, we hold that § 80.06.010 grants this Court the authority to fashion a stay that prevents the basis for the appeal from being mooted while the Court reviews the respective stay petitions. Indeed, § 80.06.010 not only grants this Court the authority to fashion a stay that preserves the relationships amongst the parties when we receive a petition on the issue of a stay, it *requires* us to do so. Because we find this authority in NTC 80.06.010, we need not, at this stage of the proceedings, address Appellees' arguments concerning the authority of this Court to issue injunctions or the standards that might be applicable to such an exercise of authority.

We agree with Appellees that the *automatic* stay provided for in NTC 80.06.010, by staying the trial court's dismissal of the trial court's dismissal of the underlying suit, revives that suit. In reviving that suit, the § 80.06.010 stay also revives each order of the trial court that was in effect at the time of the dismissal of the underlying suit. Here, that includes the trial court's March 23, 2013 Order from Scheduling Hearing, which expressly approved and incorporated by reference the March 20, 2013 stipulation between the parties. Thus, pending further ruling by this Court, the March 20, 2013 stipulation remains in full force and effect.

The key issue that remains to be resolved before this Court issues a final ruling concerning the scope of any stay is who, precisely, are the parties to the suit. In their original complaint, and in each amended complaint, the named Appellants state that they “bring this action both on their own behalf and on behalf of those similarly situated.” However, as noted by Appellees, no class has been certified, and the named Appellants offer no legal grounds supporting their contention that they may bring a suit “on behalf of those similarly situated” absent class certification or a statutory provision expressly allowing suits on behalf of those similarly situated absent class certification.

The March 20 stipulation sheds little light on this issue. The provision allowing counsel for Appellants to provide “a list of those individuals for whom they are then authorized to act in this matter and in related proceedings regarding disenrollment” is ambiguous. It leaves open the possibility counsel for Appellants would be authorized to act on behalf of only some individuals on the list in the pending litigation while being authorized to act on behalf of other individuals on the list only in the related proceedings regarding disenrollment, while being authorized by yet others (or all) on the list to act on their behalf in both the litigation and the related disenrollment proceedings.

The April 12 letter from Appellants’ counsel submitting the list to Appellees in furtherance of the stipulation is similarly ambiguous. At one point, it claims representation of 306 tribal members threatened with disenrollment, without specifying the forum or scope of representation. Later, the letter uses language suffering the same ambiguity as that in the stipulation, claiming to represent the 271 persons named on an attached list in *Lomeli v. Kelly* and in the Disenrollment Proceedings. The next sentence then reverts to the language used in the complaint, stating that in *Lomeli*, the Plaintiffs are the six named in the caption and “those



similarly situated,” and the sentence after that further confuses things by stating “. . . *Lomeli* is a distinct matter from the Disenrollment Proceedings.” The letter then goes on to state that “[i]n the Disenrollment Proceedings, we represent the 271 enrolled Nooksack members disclosed on the attached Representation List.” raising the question of why there is not a corresponding express statement that counsel for Appellants also represent all 271 in *Lomeli*.

On the other side, we have Appellees’ Motion for Clarification arguing strenuously that the “sole Appellants” are the five plaintiffs named in the caption, despite the April 19 letter from counsel for Appellees (the Office of Tribal Attorney), conceding that per the March 20 stipulation, the April 12 list of 271 names submitted by counsel for Appellants “represents those persons for *whom you are authorized to act in the litigation before the Nooksack Tribal Court*<sup>5</sup> as well as the disenrollment proceedings.” (Emphasis added.)

This Court will not issue a final decision on a stay in this matter without complete certainty who the parties are that will be affected by any stay. Who the parties are is a mixed question of fact and law that must first be decided by the trial court.

#### CONDUCT OF THE PARTIES AND RESPECT FOR THE JUDICIAL PROCESS

As noted in footnote 1, *supra*, the parties and their counsel on both sides of this case have displayed a disturbing lack of candor and respect for the judicial process and acted in ways that undermine this Court’s ability to perform the duties assigned to it under Nooksack law. For example, the Court is concerned that counsel for Appellees failed to directly inform the Court of the March 20 stipulation or acknowledge that other filings or communications between counsel

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<sup>5</sup> This Court is not aware of any litigation pending before the Tribal Court on April 19 involving these actors besides *Lomeli v. Kelly*, and so we must presume that the litigation referenced in the April 19 letter from OTA is *Lomeli v. Kelly*.



may have established that the Plaintiffs to this suit are not limited to those named in the caption, or at the very least created grounds for detrimental reliance by the Appellants. Appellees' Motion for Clarification repeatedly criticizes Appellants for making unsupported assertions in their pleadings, but then makes the tenuous and completely unsupported assertion that the potential disenrollees who have requested meetings with the Council have done so because of a "very strong interest in allowing that process to continue." And by fast-tracking the disenrollment proceedings at nearly every turn (as best as we can tell from the limited time we have had to review the record and the pleadings), the Appellees have created a situation where Appellants' only option is to file emergency pleadings, forcing this Court to issue rulings without sufficient time to review the record<sup>6</sup> and deliberate.<sup>7</sup>

For their part, counsel for Appellants have filed pleadings that characterize issues that are totally irrelevant to this appeal as "emergencies" requiring this Court's attention (e.g., the denial of education funds described in Appellants' Interim Response). Counsel for Appellants have also filed declarations raising issues and seeking to introduce facts that are wholly irrelevant to this appeal and appear designed primarily to prompt an emotional response from this Court rather than one based on the record and the law (e.g., the August 23, 2013 declaration of Michelle Joan Roberts, which raises a potential wrongful termination claim that is totally irrelevant to this appeal, is comprised largely of legal argument rather a declaration of facts, and

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<sup>6</sup> Indeed, because NTC 80.07.010 does not require the Tribal Court Clerk to transmit the record to the Court of Appeals until ten days after the Court formally accepts the appeal, Appellees' scheduling decisions in regards to the disenrollment proceedings have forced this Court to review multiple motions and issue orders without even the benefit of the full record.

<sup>7</sup> While the Court appreciates that delaying the disenrollment proceedings will result in incremental additional costs to the Tribe regarding administration of the disenrollment process and additional benefits to persons who may not be entitled to those benefits, this Court is not convinced that the Tribe will suffer significant harm from delaying the disenrollment proceedings to allow sufficient time for an orderly review of this appeal. By proceeding with haste such that results in emergency motions, increased legal and judicial costs, and stays and other disruptions to the disenrollment process, Appellees' will also incur costs to the Tribe that might be avoided by delaying the disenrollment proceedings to allow sufficient time for the orderly review of this appeal.

includes a thinly veiled attempt to influence this Court by arguing the merits of disenrollment rather than addressing the issue on appeal, which is the Tribal Court's jurisdiction). Similarly, counsel for Appellants have sought to place before this Court the procedures for disenrollment meetings adopted by the Tribal Council on August 8, 2013, even though that document is not part of the trial court record and relates to issues that are not before the Court in this case. Counsel for Appellants have also drawn this Court's attention to the disenrollment of four persons in potential violation of the stipulation. If counsel believes there has been a violation of the stipulation the remedy is back in the trial court – it is not here. Counsel for Appellants trot out a parade of horrors in the apparent hope that this Court will decide this appeal on emotion rather than logic, the record, and the law. This we will not do.

This Court expects the parties to focus on the issues properly before this Court and to refrain from obfuscating the issues by presenting argument and evidence that are not germane to the issues. The Court intends to strike all pleadings and declarations or any parts thereof asserting factual matters that occurred after the trial court issued its August 9 judgment. We warn counsel for both sides that any additional filings that do not strictly comply with appellate rule 80.08.070 may result in sanctions against both counsel and the responsible party(ies).

#### CONCLUSION AND ORDER


1. The August 23, 2013 declaration of Michelle Joan Roberts and all pleadings and declarations, or any parts thereof, asserting factual matters or introducing evidence that is not part of the trial court record are stricken.
2. This matter is hereby remanded in part to the trial court for the sole purpose of issuing findings of fact and conclusions of law as to the effect of the May 20 stipulation, and who

are the plaintiffs to this suit.. The trial court may exercise its own discretion as to whether it will base its findings and conclusions on evidence and argument already presented by the parties, or whether the trial court will solicit additional evidence or briefing.

3. The trial court shall issue an order including findings of fact and conclusions of law referenced in paragraph 2 above no later than Monday, September 30, 2013. This Court will not entertain any motions from the parties to modify this schedule. This Court will entertain a petition from the trial court to modify this schedule for good cause.
4. All disenrollment proceedings before the Tribal Council involving those persons named in the April 12, 2013 list submitted by counsel for Appellants are hereby stayed until such time as the trial court enters its findings of fact and conclusions of law and we can complete our review of the petitions on the issue of staying the orders and judgments of the trial court as provided for in NTC 80.06.010.

Having consulted with the Associate Judges on this panel<sup>8</sup>, it is so ordered this 22 day of August, 2013, for the panel:

Douglas Nash, Associate Judge,  
Mark W. Pouley, Associate Judge,

  
Eric Nielsen, Chief Judge

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<sup>8</sup> Per NTC 80.08.010, the Chief Judge may rule on motions alone or after consulting with the Associate Judges on the panel.