

IN THE NOOKSACK TRIBAL COURT

MICHELLE JOAN ROBERTS, et al.,

Plaintiffs,

v.

ROBERT KELLY, Chairman of the Nooksack Tribal Council; RICK D. GEORGE, Vice-Chairman of the Nooksack Tribal Council; AGRIPINA SMITH, Treasurer of the Nooksack Tribal Council; BOB SOLOMON, Councilmember of the Nooksack Tribal Council; KATHERINE CANETE, Councilmember of the Nooksack Tribal Council and Nooksack General Services Executive; and AGRIPINA "LONA" JOHNSON, Councilmember of the Nooksack Tribal Council, in their official capacities,

Defendants.

Case No. 2013-CI-CL-003

MOTION FOR RECONSIDERATION
OF *SUA SPONTE* SEPTEMBER 6, 2013
ORDER

On Friday, September 6, 2013, the Court issued an Order Accepting Plaintiffs' First Amended Complaint For Equitable Relief ("Order"). The Court appropriately recognized that Plaintiffs' First Amended Complaint was filed and in effect on August 21, 2013, prior to the filing of Defendants' pending dismissal motion, yet unnecessarily "accepted" Plaintiffs' First Amended Complaint. FED. R. CIV. PROC. 15(a)(1). Still, the Court erred in concluding, *sua sponte*, without notice to the Parties or any opportunity for briefing, that the judicial and

MOTION FOR RECONSIDERATION OF
SUA SPONTE SEPTEMBER 6, 2013 ORDER - 1

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1 appellate code amendments passed by Defendants on August 30, 2013, apply retroactively “to all
2 matters pending before the Court.” Order, at 1.

3 In a brief filed on September 3, 2013, Plaintiffs explained: “The amended Titles 10 and
4 80 were passed illegally and are otherwise invalid. Plaintiffs hereby reserve all rights to
5 otherwise challenge these changes to Nooksack law and the Resolution under which they were
6 authorized.” Supplemental Reply Re: Second Motion For Temporary Restraining Order, at 2
7 n.1. This Court should now abate its Order to allow the Parties the opportunity to brief the
8 validity of Resolution 13-138 and its accompanying amendments to Title 10.

9 In particular, Plaintiffs should be allowed to brief how the latest in a long line of recently
10 promulgated Nooksack laws:

- 11 • Were passed by Defendants at a Special Meeting upon less than 24 hours notice,
12 in violation of Article II, Section 5 of the Nooksack Bylaws. *See* Fifth Declaration of
13 Michelle Roberts, Ex. A.
- 14 • Were passed by only those five Defendant Tribal Councilpersons who Defendant
15 Chairman Bob Kelly allowed to participate in the Special Meeting, in violation of Article
16 III, Sections 1 and 2 of the Nooksack Constitution. *See* Resolution No. 13-138
17 (conforming only five participants: by a “vote of 5 FOR, [0] OPPOSED, and 0
18 ABSTENTIONS”); Declaration of Robert Kelly; Fourth Declaration of Michelle Roberts;
19 Fifth Declaration of Michelle Roberts; Second Declaration of Rudy St. Germain;
20 Declaration of Former Nooksack Tribal Council Chairman Narcisco Cunanan
21 (appended).¹

22
23 ¹ “While I served as Chairman and called special meetings of the Tribal Council as required by the Constitution and
24 Bylaws, I never once failed to properly notify each of the other seven people on the Tribal Council that I was calling
a special meeting. I always made sure that each of the other seven Councilpersons received due notice of special

1 • Were passed by Defendants via teleconference rather in any way from the Tribal
2 Council Chambers in Deming², in violation of Article III of the Nooksack Bylaws and
3 Nooksack Custom Law. *Id.*

4 • Were passed by Defendants at a private meeting, in violation of Article III,
5 Section 6 of the Nooksack Bylaws. *Id.*

6 • Were targeted against Plaintiffs, in the face of an August 28, 2013 Motion For
7 Leave to Amend First Amended Complaint,³ in violation of Article IX, the “equal rights”
8 provision of the Nooksack Constitution, and the Due Process Clause of the federal Indian
9 Civil Rights Act as incorporated in the Nooksack Constitution. *Id.*

10 • Were drafted by lawyers whose employment and fees have not been approved by
11 the U.S. Secretary of the United States Department of the Interior, in violation of Article
12 VI, Section 1(d) of the Nooksack Constitution.⁴

13
14 meetings and of all other Tribal Council meetings, as is required by the Nooksack Constitution and Bylaws. Based
15 on my twelve-year experience on the Tribal Council and six years of services as the Tribal Council Chairman, I
believe that . . . any motions passed during a meeting that was not properly called with advance notice to the entire
Tribal Council, is null and void under the higher authority of those Nooksack Tribal Laws.” *Id.*, at 3-4.

16 ² Bob Kelly now only convenes Tribal Council meetings by conference call from his home office in Fairhaven. As
Plaintiff Councilperson Roberts explains: “During the Special Meeting that Bob Kelly did finally call at our request,
on the afternoon of August 27, 2013, he muted me and Secretary St. Germain during the call so we could not freely
speak, as we have been elected by the Nooksack People to do. He censored us.” Fifth Roberts Decl., at 3.

17 ³ Likewise, the amendments to Title 80, specifically to the automatic stay provision, are transparently targeted at
18 Plaintiffs-Appellants in this proceeding as well as in *Lomeli v. Kelly*, in Defendants’ desperate attempt to militate
against the recent Appeals Court’s orders staying Defendants’ “fast-tracked” disenrollment proceedings. *See*
19 *Scheduling Order On Defendants’ Motion to Dismiss*, at 1 (observing that Plaintiffs “may appeal and seek an
automatic stay from the Court of Appeals under Title 80, which may halt disenrollment proceedings.”); St. Germain
Decl., at 2 (“What Bob Kelly is doing is making untrue excuses about why he cut Councilwoman Michelle Roberts
and me out of his teleconference, so he and his Tribal Council faction could do what they were intent on doing:
20 amending Title 10 and Title 80 to gain litigation advantage against us in this lawsuit, the *Lomeli v. Kelly* lawsuit, and
the *Lomeli* appeal.”); Fourth Roberts Decl., at 4 (“While Bob Kelly and his followers continue to ostracize Secretary
21 St. Germain and me from the Tribal Council and to not share with us all available information regarding Council
decision-making, as they have deliberately done to us both since at least February 2013, their efforts to amend Title
80 is a transparent attempt to cause an end around the recent Tribal Court of Appeals stays of disenrollment
22 proceedings ‘now pending.’”).

23 ⁴ During oral argument before the Court on September 4, 2013, Thomas Schlosser admitted that he and his law firm,
Morriset, Schlosser, Jozwiak & Somerville, Grett Hurley, Esq. and Rickie Armstrong, Esq., and Connie Sue Martin,
Esq. and her firm, Schwabe, Williamson & Wyatt, are all working for Defendants without Secretarial approval.
24 Again, Plaintiffs reserve the right to pursue *qui tam* claims against said lawyers and law firms.

1 • Were passed by Defendants despite having yet to convene a Regular Meeting of
2 the Nooksack Membership on February 5, March 5, April 2, May 7, June 4, July 2,
3 August 6, or September 3, 2013, or any other form of public Tribal Council or
4 Membership meeting – for at least eight consecutive months – in violation of Article III
5 of the Nooksack Bylaws and Nooksack Custom Law. *Id.*

6 As the U.S. Supreme Court noted in the federal context, which reasoning should equally
7 apply at Nooksack:

8 [Congress] must comply with two key structural limitations in the Constitution
9 that ensure that the Federal Government does not amass too much power at the
10 expense of the States. The first structural limitation . . . is the Constitution's
11 conferral upon Congress of not all governmental powers, but only discrete,
12 enumerated ones. . . . The second structural limitation is the complex set of
13 procedures that Congress and the President must follow to enact “Laws of the
United States.” “[T]he Framers were acutely conscious that the bicameral
requirement and the Presentment Clauses would serve essential constitutional
functions,” by allowing the passage of legislation only after it has proceeded
through “a step-by-step, deliberate and deliberative process,” that was “finely
wrought and exhaustively considered” by the Framers.

14 *Wyeth v. Levine*, 555 U.S. 555, 585-86 (2009) (Thomas, J., concurring) (quoting *INS v. Chadha*,
15 462 U.S. 919, 945–59 (1983)); *see also* Michael P. Van Alstine, *Stare Decisis and Foreign*
16 *Affairs*, 61 DUKE L.J. 941, 1004 (2012) (“[T]he burden falls on Congress to overcome the
17 Constitution's procedural hurdles for the creation of federal statutory law. The complex set of
18 procedures that Congress and the president must follow to enact ‘Laws of the United States’ are
19 substantial, time-consuming, and politically costly. And this process must occur amid the
20 crowded agenda that generally strains the attention of the nation's legislators.”) (quotation
21 omitted).

22 At Nooksack, Tribal Constitutional requirements for, *inter alia*, monthly public Regular
23 Meetings of an eight-person Tribal Council in witness of the People, and public Special
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1 Meetings of the full Tribal Council, controlled by various protocols set forth in the Bylaws and
2 dictated by Nooksack Custom Law, establish a similar balance of powers to ensure that the
3 Tribal Council does not amass and wield too much power at the expense of the People. *See*
4 Cunanan Decl. At Nooksack, too, “a step-by-step, deliberate and deliberative process” is
5 required for the passage of new Nooksack laws, in order to ensure Constitutional behavior from
6 the Tribal Council. *Wyeth*, 555 U.S. at 585-86) (quoting *INS v. Chadha*, 462 U.S. at 945–59).

7 For reasons offered above, the validity of amended Titles 10 and 80 is questionable, at
8 best. These issues deserve to be fully briefed and adjudicated, rather than being hastily and
9 summarily decided by the Court *sua sponte*. *See e.g.* Scheduling Order On Defendants’ Motion
10 to Dismiss, at 1; Scheduling Order On Plaintiffs’ Second Emergency TRO, at 1 (“the Court will
11 not decide these issues hastily”).

12 Plaintiffs do not disagree with the Court’s observation that it “is bound to follow the law
13 of the Nooksack Tribe.” Order, at 1. But that includes the Nooksack Constitution, Bylaws, and
14 Bill of Rights. *See* NTC § 10.00.20 (The Nooksack Tribal Court shall “safeguard individual
15 rights”); NTC § 10.03.070 (“A judge shall respect and comply with tribal law and always
16 conduct herself or himself in such a way as to promote respect for the law.”). Also, it is the role
17 of this Indian Court to provide a check against unlawful Tribal Council rulemaking, rather than
18 to simply accept new or amended laws passed by the Tribal Council as gospel.⁵ *See Clark v.*

19 ⁵ Since February 2012, Defendants have relentlessly passed new or amended Nooksack laws – most certainly
20 making up the rules as they go – in order to hasten and ensure Plaintiffs’ disenrollment. On February 12, 2013, they
21 first **amended Title 10**, as well as **amended Title 60**, while commencing disenrollment proceedings against
22 Plaintiffs. Resolution Nos. 13-02, 13-03, 13-04. After entering into the March 20, 2013 Stipulation in *Lomeli*, by
23 Mr. Schlosser expressly bought Defendants time to “consider amendments to Title 60” (*id.*, at ¶3) – meaning, to
24 rescind the patently unlawful Resolution No. 13-04 – Defendants did so when they **re-amended Title 60** on March
25 26, 2013. Resolution No. 13-52. Also in March 2013, Defendants passed a **brand new Title 65, the Conflict of
Interest and Nepotism Code**, which was transparently targeted at Plaintiff-Tribal Councilpersons Rudy St.
Germain and Michelle Roberts, as well as a **new Resolution titled “Prohibition of Release of Records and
Violations of the Tribal Records Policy,”** against Plaintiff-Secretary St. Germain. Resolution No. 13-35. In
addition, pursuant to Resolution Nos. 13-38 and 13-53, Defendants carried out a (still-protested) Secretarial election

1 *Dine College*, 9 Am. Tribal Law 359, 364 (Navajo 2010) (tribal “sovereignty is strengthened by
2 a strong and independent judiciary”); *Office of Navajo Nation President and Vice-President v.*
3 *Navajo Nation Council*, 9 Am. Tribal Law 46, 63 (Navajo 2010) (“The separation of powers
4 doctrine requires that each branch of government be permitted to exercise its duties without
5 interference from the other two branches of government. Essential in the separation of powers
6 principle is an independent judiciary, able to freely critique government using full powers of
7 judicial review.”); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty*
8 *Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 447 n. 252 (1998) (“[A]n independent
9 judiciary was crucial to the development and acceptance of tribal courts by Indian people as well
10 as outsiders.”) (citing U.S. COMM’N ON CIVIL RIGHTS: THE INDIAN CIVIL RIGHTS ACT 44-51
11 (1991)).

12 DATED this 9th day of September, 2013.

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Anthony S. Broadman
Ryan D. Dreveskracht
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25 to **amend Article II, Section 1(H) of the Nooksack Constitution**, in order to eliminate membership criteria that
Plaintiffs fall within. And now, they have **further amended Title 10**, as well as **amended Title 80**, to further
prevent any form of level playing field for Plaintiffs. To say that these changes in law are drafted and passed in a
neutral manner – to, for instance, more accurately mirror the Federal Rules of Civil Procedure – would be to
erroneously turn a blind eye to reality. And, as noted by the Supreme Court in *McCreary County v. American Civil*
Liberties Union of Ky., “precedents sensibly forbid [courts] ‘to turn a blind eye to the context in which a policy
arose.’” 545 U.S. 844, 866(2005) (quoting *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 315 (2000));
see also Edwards v. Aguillard, 482 U.S. 578, 595 (1987) (enquiry looks to “the historical context of the statute . . .
and the specific sequence of events leading to [its] passage”).

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SUA SPONTE SEPTEMBER 6, 2013 ORDER - 6

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IN THE NOOKSACK TRIBAL COURT

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

Plaintiffs,

v.

ROBERT KELLY, Chairman of the Nooksack
Tribal Council; RICK D. GEORGE, Vice-
Chairman of the Nooksack Tribal Council;
AGRIPINA SMITH, Treasurer of the Nooksack
Tribal Council; BOB SOLOMON,
Councilmember of the Nooksack Tribal
Council; KATHERINE CANETE,
Councilmember of the Nooksack Tribal Council
and Nooksack General Services Executive;
LONA JOHNSON, Councilmember of the
Nooksack Tribal Council; JEWELL
JEFFERSON, Tribal Enrollment Officer of the
Nooksack Tribal Enrollment Office; and ROY
BAILEY, Tribal Enrollment Office official,

Defendants.

NO. 2013-CI-CL-001

DECLARATION OF FORMER
NOOKSACK TRIBAL COUNCIL
CHAIRMAN NARCISCO CUNANAN

I, Narcisco "Narz" Cunanan, say:

1. I am an enrolled member of the Nooksack Tribe and the immediate past Chairman
of the Nooksack Tribal Council. I am over eighteen years of age, I am competent to testify, and I

DECLARATION OF FORMER
NOOKSACK TRIBAL COUNCIL CHAIRMAN NARCISCO CUNANAN - 1

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1 have personal knowledge of the facts set forth herein.

2 2. I consecutively served on the Nooksack Tribal Council from about 1999 to 2010.
3 I served as the elected Vice Chairman of the Tribal Council from about 2002 to 2004. I served
4 as the elected Chairman of the Tribal Council from about 2004 to 2010. Altogether, I served
5 about twelve consecutive years on the Tribal Council.

6 3. The Nooksack Tribal Council carries out those powers delegated to the Council
7 by the Nooksack Constitution and Bylaws. In doing to, it is understood by the Tribal Council
8 that the Council must follow the Constitution and Bylaws, Ordinances and other codified laws of
9 the Tribe, as well as the traditions, customs and common understanding of the People of the
10 Nooksack Tribe. That is because once elected or appointed to the Tribal Council, every Tribal
11 Councilperson takes a sworn oath to faithfully uphold Nooksack Tribal Law.

12 4. During general or special meetings of the Tribal Council, since at least 1999, the
13 Council has adhered to a custom, tradition and understanding of following Robert's Rules of
14 Order although to my knowledge the Tribal Council has never formally adopted those Rules.

15 5. From those twelve years between 1999 and 2010 when I served on the Tribal
16 Council, in any instance where "nepotism" or "conflict of interest" issues were raised during the
17 Council's deliberations, not once was a Tribal Councilperson told to leave a Council meeting or
18 to refrain from voting on the matter.

19 6. I recall in 1999 or 2000, a Tribal Councilperson was accused of Tribal credit card
20 misuse. Even then, that Councilperson was not asked to leave the Council meeting regarding
21 allegations against her of Tribal credit card misuse. I recall times where the Council would
22 consider whether to hire a Councilperson's family member. In such instances, I recall some
23 Councilpersons abstaining from any vote on the matter but they were never directed to leave a
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25 DECLARATION OF FORMER
NOOKSACK TRIBAL COUNCIL CHAIRMAN NARCISCO CUNANAN - 2

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1 Council meeting or to refrain from voting on the hiring.

2 7. Based on my twelve-year experience on the Tribal Council and six years of
3 services as the Tribal Council Chairman, I believe that it is the custom, tradition and
4 understanding of the Nooksack Tribal Council – including that of following Robert’s Rules of
5 Order – that no Tribal Councilperson is or should be ever told to leave a Council general or
6 special meeting or to refrain from voting on any matter where “nepotism” or “conflict of
7 interest” issues are raised. Instead, that Tribal Councilperson is or should be allowed to stay in
8 the meeting and can decide for him or herself whether to vote or abstain on the matter. That is
9 especially consistent with Robert’s Rules of Order.

10 8. From those twelve years between 1999 and 2010 when I served on the Tribal
11 Council, I am not aware of one instance when all eight members of the Tribal Council were not
12 made aware of a general or special meeting of the Tribal Council. While I served as Chairman
13 and called special meetings of the Tribal Council as required by the Constitution and Bylaws, I
14 never once failed to properly notify each of the other seven people on the Tribal Council that I
15 was calling a special meeting. I always made sure that each of the other seven Councilpersons
16 received due notice of special meetings and of all other Tribal Council meetings, as is required
17 by the Nooksack Constitution and Bylaws.

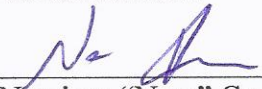
18 9. Based on my twelve-year experience on the Tribal Council and six years of
19 services as the Tribal Council Chairman, I believe that any motions passed during a Tribal
20 Council meeting in which any Councilperson is or has been asked to leave the meeting or forced
21 to refrain from voting or even abstaining from voting on any matter, are null and void under the
22 higher authority of law that is the Nooksack Constitution and Bylaws, Tribal Ordinances and
23 other codified laws, and/or the traditions, customs and common understanding of the People of
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25 DECLARATION OF FORMER
NOOKSACK TRIBAL COUNCIL CHAIRMAN NARCISCO CUNANAN - 3

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1 the Nooksack Tribe. Likewise, any motions passed during a meeting that was not properly
2 called with advance notice to the entire Tribal Council, is null and void under the higher
3 authority of those Nooksack Tribal Laws.

4 Signed at Deming, Washington this 26th day of March 2013.

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7 Narcisco "Narz" Cunanan
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1. I am over eighteen years of age and am competent to testify, and have personal knowledge of the facts set forth herein. I am counsel of record for Plaintiffs.

Grett Hurley
Rickie Armstrong
Tribal Attorney
Office of Tribal Attorney
Nooksack Indian Tribe
5047 Mt. Baker Hwy
P.O. Box 157
Deming, WA 98244

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

Attest:

MOTION FOR RECONSIDERATION OF
SUA SPONTE SEPTEMBER 6, 2013 ORDER - 8

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