

IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE
NOOKSACK INDIAN TRIBE

BELMONT, *et al.*,

Plaintiffs,

v.

KELLY, *et al.*,

Defendants.

Case No. 2014-CI-CL-007

RESPONSE TO MOTION FOR
JUDICIAL NOTICE

COPY

Defendants request that this Court deny Plaintiffs' Motion for Judicial Notice. The Motion is premature due to Ms. Roberts' failure to follow the Nooksack Indian Tribe's "Tribal Records Policy". Also, the motion requests the Court to take judicial notice of legislative facts, not adjudicative facts which is not the subject of judicial notice under either applicable federal or state rules of evidence.¹

I. JUDICIAL NOTICE

Plaintiffs are requesting the Court to "take judicial notice of any Nooksack Resolutions, Tribal Code Titles or other laws that have been recently passed by Tribal Council Defendants, and to have Court staff make those available to Plaintiffs."

While Plaintiff Robert's motion fails to cite any legal authority, Federal Rule of Evidence 201 (a) allows a federal court to take "judicial notice of an adjudicative fact only, not a legislative fact. "It is clear that the reach of rule 201 extends only to adjudicative, not legislative, facts. Fed.R.Ev. 201(a)." *U. S. v. Gould*, 536 F.3d 216, 219 (8th Cir. 1976).

¹ Defendants have been informed that Ms. Roberts' already has access to the current versions of Title 10 and Title 60.

1 The precise line of demarcation between adjudicative facts and legislative facts is
2 not always easily identified. Adjudicative facts have been described as follows:
3 When a court * * * finds facts concerning the immediate parties who did what,
4 where, when, how, and with what motive or intent the court * * * is performing
5 an adjudicative function, and the facts are conveniently called adjudicative facts.
6 * *

7 Stated in other terms, the adjudicative facts are those to which the law is applied
8 in the process of adjudication. They are the facts that normally go to the jury in a
9 jury case. They relate to the parties, their activities, their properties, their
10 businesses.

11 2 K. Davis, *Administrative Law Treatise* s 15.03, at 353 (1958).

12 *Id.* at 219.

13 A trial court may take judicial notice of facts “if requested by a party and supplied with
14 the necessary information.” Fed. R. Ev. 201(d).

15 Washington has a very similar rule governing judicial notice. Like the federal rule,
16 Washington Rule of Evidence 201 “governs only judicial notice of adjudicative facts.”

17 But “[l]egislative facts are ‘established truths, facts or pronouncements that do not
18 change from case to case but [are applied] universally, while adjudicative facts
19 are those developed in a particular case.’ ... [H]istorical facts, commercial
20 practices and social standards are frequently noticed in the form of legislative
21 facts.” *Korematsu*, 584 F.Supp. at 1414 (quoting *United States v. Gould*, 536 F.2d
22 216, 220 (8th Cir.1976)); see also John Monahan & Laurens Walker, *Social
23 Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U.
24 PA. L.REV. 477, 482–84 (1986).

25 *State v. Grayson*, 154 Wash.2d 333, 340 (2005).

Like it’s federal counterpart, under Wa. R. Ev. 210 (d) [a] court shall take judicial notice
if requested by a party and supplied with the necessary information.”

Ms. Robert’s motion for the Court to take judicial notice of Title 10 and Title 60 and any
accompanying resolutions must be denied for two reasons. Here, Ms. Roberts is asking the
Court to take judicial notice of legislative facts, not adjudicative facts. In addition, she has not
proffered any document from which the court may take judicial notice. As such, Ms. Roberts’
motion should be denied.

Ms. Roberts’ claim is more akin to a tribal records request or a discovery request. She is
seeking to obtain certain documents that she has not made a proper request for in accordance
with tribal law. Because Ms. Roberts has not made such a request, this claim is not yet ripe for

1 the Court's consideration. Simply put, a motion for judicial notice is not the appropriate process
2 for obtaining the documents Ms. Roberts seeks.

3 **I. TRIBAL RECORDS POLICY**

4 In 2003, long before the current Tribal Council took office, the Tribe adopted the Tribal
5 Records Policy. "Tribal records are private records." Declaration of Charity Bernard, Exhibit A.
6 "Nooksack tribal members shall have access..." "All requests for disclosure must be in writing."
7 In accordance with this Policy, the Tribe established a form, found at the Tribal Council office,
8 whereby any person can review and complete the form. Members, in accordance with the
9 Policy, will be granted access to the tribal record, once the request is reviewed, approved, and the
10 record is made available. *Id.* Failure to comply with the Policy, subjects employees to
11 discipline. *Id.* Over the past thirteen years, Tribal Councils have adopted numerous ordinances,
12 agreements, and resolutions, which specifically authorized a disclosure of certain tribal records
13 in certain instances; however, the Tribal Council has not rescinded the Tribal Records Policy
14 from 2003, nor has the Council amended the policy. Declaration of Charity Bernard. Thus, the
15 Policy is the current law governing disclosure (or non-disclosure) of tribal records.

16 While "under the common law, the public has a right of access to a "public record"
17 unless the "government's interest in keeping the document secret" outweighs "the public's
18 interest in disclosure," the Nooksack Indian Tribe has no such common law. In fact, it is
19 universally accepted that Indian tribes, as sovereigns, have the inherent right to enact laws as
20 they deem fit. *Merrion v. Jicarilla*, 455 US 130 (1982). The power to enact ordinances is
21 squarely vested in the Nooksack Tribal Council by the *Constitution and Bylaws of the Nooksack*
22 *Indian Tribe of Washington*, Art. VI - Powers of the Tribal Council, Section 1(h).

23 The Nooksack Indian Tribe is a sovereign Indian Tribe, vested with all the rights of a
24 sovereign. *Indian Entities Recognized and Eligible to Receive Services from the United States*
25 *Bureau of Indian Affairs*, 81 Fed. Reg. 5019 (Jan. 29, 2016). As such, the Tribe, acting through
its Tribal Council, determines tribal law, subject only to federal divestiture of this power, and the
Tribe's foundational document(s). Tribal records are not subject to the Public Records Act in
Washington, nor are they subject to the Freedom of Information Act. *West v. Department of*
Licensing, 182 Wash. App. 500, 331 P.3d 72 (2014), *review denied* 339 P.3d 634 (tribal
agreements held by a state agency held exempt from disclosure).

Ms. Roberts has not made a request to date under the records policy for the documents
she seeks from the Court. As a result, her motion must be denied.

II. SOVEREIGN IMMUNITY

Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe. *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754, (1998). Waiver of sovereign immunity by a tribe may not be implied and must be expressed unequivocally. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir.1994); *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir.1989). A tribe's immunity extends to suits for declaratory and injunctive relief. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir.1991). In this instance, Ms. Roberts is seeking documents that belong to a sovereign that has not consented to suit. Therefore, her "Motion for Judicial Notice" must be denied.

III. INDIAN CIVIL RIGHTS ACT ISSUE

The Court has requested that Defendants "submit an affidavit describing the due process afforded Mr. Galanda and other attorneys in the Galanda Broadman law firm in connection with enactment by the Tribal Counsel of Resolution #16-28." Defendants submit a declaration with several documents, many of which are court documents, bearing on the issue. See Declaration of Sue Gearhart.

The ICRA, as it applies to this matter, does not provide an independent cause of action in tribal or federal court. The "Constitution and Bylaws of the Nooksack Indian Tribe of Washington", Art. IX – Bill of Rights" states as follows:

All members of the Nooksack Indian Tribe shall be accorded equal rights pursuant to tribal law. The protection guaranteed to persons by Title II of the Civil Rights Act of 1968 (82 Stat. 77) against actions of the Nooksack Indian Tribe in the exercise of its powers of self-governance **shall apply to the members** of the Nooksack Indian Tribe. (Emphasis added).

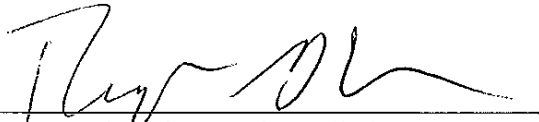
From its very wording, the constitution places a limitation on the availability of civil rights to only members of the Nooksack Indian Tribe. This is bolstered by the United States Supreme Court ruling that "suits against the Tribe under ICRA are barred by its sovereign immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). *See also, Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980).

IV. CONCLUSION

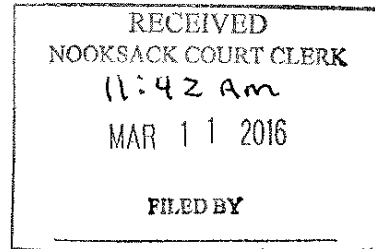
For the reasons stated above, Ms. Roberts Motion for Judicial Review must be denied. Her request seeks records that are not subject to judicial notice. She has not availed herself of access to the records in question under the Nooksack Tribal Records Policy. The information she seeks belongs to the Nooksack Indian Tribe which enjoys sovereign immunity.

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Respectfully submitted this 11th day of March, 2016.



Raymond Dodge, Senior Tribal Attorney
Rickie Armstrong, Tribal Attorney
Attorneys for Defendants
Office of Tribal Attorney, Nooksack Indian Tribe



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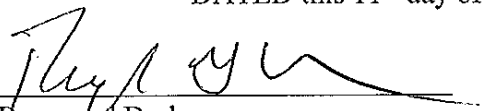
THIRD DECLARATION OF RAYMOND
DODGE

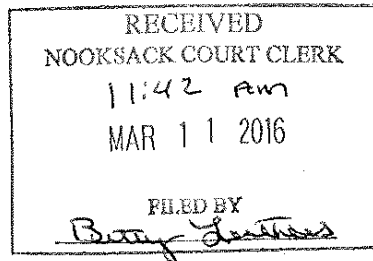
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13
14 I, RAYMOND DODGE, declare under penalty of perjury that the following is true and
15 correct to the best of my knowledge:

- 16 1. I am over the age of 18, competent to testify about the matters stated in this
17 Declaration, and I make this Declaration of my personal knowledge.
18 2. I am co-counsel of record for Defendants in the above captioned case.
19 3. I presented a resolution to the Nooksack Tribal Council at a meeting held on
20 March 2, 2016 seeking authorization to release copies of current Titles 10 and 60
21 to Plaintiffs' council. That request was denied.

22 DATED this 11th day of March, 2016, at Deming, Washington.

23 
Raymond Dodge



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DECLARATION OF THOMAS P.
SCHLOSSER

COPY

15
16 I, THOMAS P. SCHLOSSER, declare under penalty of perjury that the following is true
17 and correct to the best of my knowledge:

18 1. I am over the age of 18, competent to testify about the matters stated in this

19 Declaration, and I make this Declaration of my personal knowledge.

20 2. I am co-counsel of record for Defendants in the above captioned case.

21 3. I received a copy of Resolution No. 16-27 and the corresponding amended Title

22 10 on March 4, 2016 at 1:40 PM. I had not seen Resolution No. 16-27 or the
23 amended Title 10 prior to that time.

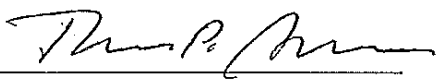
24 4. I received a copy of the amended Title 60 (dated February 17, 2016) on March 4,

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2016 at 1:40 PM. I had not seen the amended Title 60 prior to that time.

5. On March 4, 2016, I emailed Plaintiffs' counsel, Gabe Galanda, with copies of
Resolution No. 16-27, the corresponding amended Title 10, and amended Title
60 at 1:46 PM.

DATED this 10th day of March, 2016, at Seattle, Washington.


Thomas P. Schlosser

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rj:3/10/16

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