

NOOKSACK TRIBAL COURT
NOOKSACK INDIAN TRIBE
SEP 30 2016
TIME: 2:10 AM/PM
FILED BY: [Signature] CLERK: [Signature]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

NOOKSACK INDIAN TRIBE,

Plaintiff,

v.

NORTHWEST INTERTRIBAL COURTS
SYSTEM, a Washington non-profit
corporation; and DAN KAMKOFF, its
Executive Director,

Defendants.

No. 2016-CI-CL-006

PLAINTIFF NOOKSACK
INDIAN TRIBE'S
EMERGENCY *EX PARTE*
EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION

COPY

I. INTRODUCTION

Plaintiff, the Nooksack Indian Tribe (the "Tribe"), seeks an *ex parte* preliminary injunction enjoining the Defendants from further breaches of the Parties' Appellate Services Agreement ("Agreement") and violations of Tribal law, including: (1) accepting pleadings as filings from third parties; (2) identifying itself as the location for original filings of the Nooksack Court of Appeals; (3) accepting filings as a court of original jurisdiction, which were not appealed from the Tribal Court; (4) assigning judges who are not presently appointed to hear

1 Nooksack appeals; and, (5) issuing orders as a court of original and general jurisdiction; and (6)
2 billing the Tribe for services in excess of the contract cap without prior approval.

3 During the course of the past six months, the Defendants have accepted pleadings from
4 third parties in violation of the Agreement and tribal law, and, issued no fewer than ten (10)
5 separate orders as a result of the Defendants' acceptance of said pleadings. Further, the orders
6 issued by Defendants, which bear the name of the Nooksack Court of Appeals, were issued by
7 judges not presently appointed by the Nooksack Indian Tribe in violation of the Agreement and
8 tribal law.

9 Most recently, on September 21, 2016, the Defendants issued an Order and Judgment
10 Awarding Costs against the Nooksack Chief of Police. Following this "order", the individual(s)
11 moving for judgment have taken additional actions, including the submission of additional
12 pleadings to the Defendants, in order to execute the Defendants' "order." The Defendants' past
13 violations of the Agreement and tribal law have caused irreparable harm, and pose a significant
14 risk of continued, irreparable harm unless immediately enjoined. The Tribe asks the Court to
15 enter this order ex parte, and to impose a preliminary injunction pending full and final resolution
16 of the Tribe' claims.

17
18 **II. RELEVANT FACTS**

19 The Nooksack Indian Tribe established a Tribal Court and a Court of Appeals as early as
20 1986. Although the Tribe has amended its Title 10 and Title 80 at various times, the Tribe has
21 maintained the existence of both courts, even with relatively few cases being forwarded to a
22 Court of Appeals. As a result of the relatively small appellate caseload, the Tribe contracted
23 with various parties in order to serve as a Court of Appeals. In 2013, in anticipation of new
24 cases being appealed, the Tribe began preparing for new appeals by adopting several resolutions.
25

1 First, on February 14, 2013, the Tribe adopted Resolution #13-24, which in large part, identified
2 eligibility requirements and an initial term limit of two (2) years for persons appointed to serve
3 as judges for the Nooksack Court of Appeals. Decl. of C. Bernard, Exh. B. Next, on or about
4 March 12, 2013, the Parties to this case entered into the Agreement with an expiration date of
5 December 31, 2016¹. Decl. of C. Bernard, Exh. C. The Agreement obligated the Defendants to
6 act in accordance with the identified Scope of Work. *Id.*

7 In accordance with Resolution #13-24 and the Agreement, the Defendants identified and
8 recommended various persons Defendants believed met the eligibility requirements identified in
9 #13-24 to be appointed as judges for a term or two (2) years for the Nooksack Court of Appeals.
10 Decl. of C. Bernard, Exh. D. The Tribe acted upon that recommendation, and adopted
11 Resolution #13-82, appointing a panel of seven persons, including the nomination of a Chief
12 Judge. *Id.*

13 Pursuant to the Agreement, the Defendants' staff is required to process notices of appeal
14 received from the Tribal Court, organize the record received from the Tribal Court, conduct an
15 assessment of the materials received from the Tribal Court, assemble the panel of judges
16 approved by the Tribe necessary to handle the appeal, and other such matters as identified in the
17 Agreement. Decl. of C. Bernard, Exh. C. Pursuant to the Agreement, the Defendants' judges act
18 as appellate judges only, to hear cases appealed from the Tribal Court. The judges agreed to
19 comply with Nooksack law all court rules. *Id.* Nothing in the Agreement authorized the
20 Defendants to act on behalf of, in concert with, or at the request of third-part(ies); rather, the
21

22 _____
23 ¹ The original Agreement limited compensation to only \$2,000.00 annually. Due to the General Manager's signing
24 authority limitations of contract under \$10,000.00, the Tribal Council, pursuant to Resolution #14-38, approved an
25 amendment on March 3, 2014, to increase the maximum annual compensation to no more than \$20,000.00 without
prior approval of the Tribe. Decl. of C. Bernard, Exh. E.

1 Agreement authorized Defendants to act following notice from the Trial Court. *Id.* Further, the
2 Defendants' obligations, specifically those obligations pertaining to processing appeals and other
3 pleadings received by the Tribal Court, were always subject to compliance with current
4 Nooksack law, including court rules. *Id.*

5 In late-March 2016, a third-party attempted to file pleadings with the Nooksack Tribal
6 Court. See Decl. of K. Canete, Exh. B. The Court Clerk rejected said pleadings as required by
7 tribal law, in part, for failure to pay the required filing fee. See *id.*; Decl. of E. Ames. On or
8 about April 6, 2016, the same third-party attempted to bypass the Nooksack Tribal Court and
9 directly file pleadings with the Defendants. See Decl. of K. Canete, Exh. C. On April 6, 2016,
10 the Tribal Court specifically notified the Defendants that the third-party filing was rejected due
11 to failure to comply with tribal law. See Decl. of K. Canete, Exh. D. Again, on April 14, 2016,
12 the Defendants accepted additional pleadings directly from the third-party. See Decl. of K.
13 Canete, Exh. E. On April 22, 2016, the third-party again emailed pleadings to the Defendants,
14 which were filed and accepted in violation of the Agreement and tribal law. See Decl. of K.
15 Canete, Exh. F. On or about April 25, 2016, the Defendants issued an "order" stemming from
16 the third-party direct filings to the Defendants. See Decl. of K. Canete, Exh. G.

17 On or about May 17, 2016, the same third-party began submitting a new round of
18 pleadings directly to the Defendants. See Decl. of K. Canete, Exh. H. On May 23, 2016, the
19 Defendants again accepted direct filings from the third-party in violation of the Agreement and
20 tribal law. See Decl. of K. Canete, Exh. I. On May 24, 2016, the Defendants issued another
21 order stemming from the same case, bearing the header of the Nooksack Court of Appeals, and
22 again issued by judges who had no current appointment as is required by the Agreement and
23 tribal law. See Decl. of K. Canete, Exh. J.
24
25

1 On May 25, 2016, the Defendants began receiving a third round of pleadings from the
2 third party, which the Defendants again accepted in violation of the Agreement and tribal law.
3 See Decl. of K. Canete, Exh. K. Based upon this latest batch of pleadings, on May 27, 2016, the
4 Defendants granted the third-parties' request and issued another order stemming from the same
5 case, bearing the header of the Nooksack Court of Appeals, and again issued by judges who had
6 no current appointment as is required by the Agreement and tribal law. See Decl. of K. Canete,
7 Exh. L.

8
9 From June 3-21, 2016, the Defendants continual acceptance of pleadings filed directly
10 from the same third-party, in violation of the Agreement and tribal law. See Decl. of K. Canete,
11 Exhs. M-P. On June 28, 2016, the latest batch of pleadings resulted in the Defendants issuing an
12 order finding the Court Clerk in contempt. See Decl. of K. Canete, Exh. Q. Similar to the
13 previously-issued "orders", this order stemmed from the same case, bore the header of the
14 Nooksack Court of Appeals, and again was issued by judges who had no current appointment as
15 is required by the Agreement and tribal law. See Decl. of K. Canete, Exh. Q.

16
17 In total, the Defendants have accepted nine (9) separate rounds of pleadings directly filed
18 with the Defendants in violation of the Agreement and tribal law. See Decl. of K. Canete, Exhs.
19 C-F, H-I, M-P, R-S, U, W-X, Z-AA. As a result, the Defendants have issued no fewer than ten
20 (10) "orders" under one caption and three (3) additional "orders" under another caption, all
21 bearing the name of the Nooksack Court of Appeals, all signed by judges without current
22 appointments to the Court of Appeals, and all in violation of the Agreement and tribal law. See
23 Decl. of K. Canete, Exhs. G, J, L, Q, T, V, Y, BB-CC.
24
25

1 Since March 2016, the Tribe has yet to receive a single filing fee for a single appeal.
2 Decl. of E. Ames. Further, the Defendants continue to invoice the Tribe for services performed
3 in violation of the Agreement. Decl. of E. Ames., Exh. D.

4 **III. EVIDENCE RELIED UPON**

5
6 This motion is based upon the Complaint and pleadings herein, and, the Declarations of
7 Charity Bernard, Elizabeth Ames, Katherine Canete, and Rory Gilliland, with exhibits, and the
8 official files of this Court.

9
10 **IV. AUTHORITY**

11 **A. An Injunction is necessary to ensure that a rogue contractor halts its continued use
12 of the Nooksack Court of Appeals “name”.**

13 The Tribal Court has “the power to use reasonable means to protect and carry out its
14 jurisdiction”, which include the “use [of] any appropriate procedure that is fair and consistent
15 with the spirit and intent of the tribal law being applied.” N.T.C. 10.03040(b). The Court’s
16 power includes the power to issue a preliminary injunction.

17 The standard for issuance of a preliminary injunction is familiar. “To obtain a preliminary
18 injunction, a plaintiff must show: ‘(1) a likelihood of success on the merits; (2) a likelihood that
19 the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance
20 of equities tips in the movant's favor; and (4) that the injunction is in the public's interest.’”

21 *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011) (*quoting Chamber of*
22 *Commerce v. Edmondson*, 594 F.3d 742, 764 (10th Cir. 2010)); *see Winter v. Natural Res. Def.*
23 *Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). A preliminary
24 injunction is an extraordinary remedy that is “designed to ‘preserve the relative positions of the
25

1 parties until a trial on the merits can be held.” *University of Tex. v. Camenisch*, 451 U.S. 390,
2 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)). Courts may apply a modified standard under
3 which, if a movant establishes that other requirements tip strongly in his favor, the movant “may
4 meet the requirement for showing success on the merits by showing that questions going to the
5 merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation
6 and deserving of more deliberate investigation.” *Greater Yellowstone Coal. v. Flowers*, 321 F.3d
7 1250, 1255-56 (10th Cir. 2003).

8
9 A. The Tribe is Likely to Succeed on its Breach of Contract Claim.

10 The first prong in the preliminary injunction analysis is that the Plaintiff must show its
11 likelihood of success on the merits or, alternatively, the court may apply a modified standard
12 under which, if a Plaintiff establishes that other requirements tip strongly in his favor, the
13 Plaintiff “may meet the requirement for showing success on the merits by showing that questions
14 going 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.” *Munaf v. Geren*, 553 U.S. 674, 128
16 S.Ct. 2207 (2008); *Flowers*, 321 F.3d at 1255-56. In this case, both standards are satisfied.

17
18 First, the Tribe’s complaint articulates a straightforward breach of contract. “[T]he
19 elements of a breach of contract claim are: (1) the existence of a valid contract; (2) the plaintiff’s
20 performance; (3) the Defendants’ breach of the contract; and (4) resulting damages to the
21 plaintiff. *Oasis West Realty, LLC v. Goldman*, 250 P.3d 1115, 1121 (Cal. 2011); see also 29
22 Wash. Prac., Wash. Elements of an Action §7.1 (2013-2014 ed.).

23 By definition, the Agreement is termed an “Appellate Services Agreement.” That,
24 together with N.T.C. Title 80, makes clear that the purpose for which the Tribe contracted with
25

1 Defendants, was to provide appellate services – not to create original jurisdiction by judicial fiat,
2 beyond the authority granted to the Court of Appeals by the Tribal Council.

3 Undoubtedly, the Parties had an Agreement that was being performed without issue until
4 2016. However, in 2016, the Defendants began their repeated and ongoing breaches of the
5 Agreement, which has resulted in damages to the Tribe and its employees.

6 The Agreement has a clear scope of work, which the Parties agreed that the Defendants
7 would only accept appeals sent from the Trial Court. But for this very specific contractual
8 obligation, the Defendants absolutely lack any power or authority to act on behalf of the Tribe.
9 Once a valid appeal is identified, files of the Tribal Court are to be transmitted to the Court of
10 Appeals. Then, the Defendants must empanel presently-appointed and qualified judges. In the
11 event there becomes a concern with court files or procedures, the Defendants shall assist the
12 Tribal Court Clerk with resolving the concern, consistent with tribal law. If a notice of appeal is
13 filed and sent to the Defendants, and the Defendants empanel presently-appointed and qualified
14 judges to hear the case, the judges must act as “appellate judges.” Here, the Defendants utterly
15 disregarded the terms of the Agreement and have masqueraded as the Nooksack Tribal Court of
16 Appeals, one in which the Court of Appeals has original and general jurisdiction.

17
18 The Agreement does not allow the filing of new cases directly with the Defendants. The
19 Agreement does not authorize the Defendants to address cases presented to the Defendants by a
20 nonparty to the Agreement. The Agreement does not authorize the Defendants to select the cases
21 it desires to hear. And, most importantly, the Agreement does not authorize the Defendants to
22 act as a court of original jurisdiction or as a court of general jurisdiction. The Tribe determines
23 who can perform these functions; not the Defendants. The Constitution of the Nooksack Indian
24 Tribe provides that the duty of the tribal council is to provide for the establishment of a court, not
25

1 the Defendants. Art. VI, Sec. 2(a)(1). The Tribe may elect to provide for a single court, or as
2 many courts as the Tribe sees fit. *Id.* The Tribe can delegate limited, or general, jurisdiction to
3 each of its courts. *Id.* The Tribe may elect to provide for a fulltime court of appeals, or contract
4 with an outside provider for certain services. *Id.* In the event that the Tribe contracts for judicial
5 services, as it did with the Defendants, the Tribe can elect to limit its Contractor's authority to
6 act. *Id.* If the Tribe limits the scope of work, as it did with the Defendants, the Contractor-
7 Defendants have no authority to act on behalf of the Tribe.

8 In this case, the Tribe contracted with the Defendants for a limited scope of services, one
9 in which the Defendants greatly exceeded, and continue to exceed. On numerous occasions, the
10 Defendants accepted pleadings filed in violation of tribal law, failing to ensure that the pleadings
11 were submitted from the Tribal Court, failing to ensure that the Tribe received proper payment
12 for said filings, and failing to ensure that the pleadings met format requirements established by
13 tribal law. Further, the Defendants failed to consider its scope of work, and tribal law when
14 processing the filings and issuing "orders" as a court of original and general jurisdiction, which it
15 was not empowered to do. Following the issuance of many of these "orders", the Defendants
16 invoiced the Tribe for the services provided in which the Tribe did not contract for. The
17 Defendants breached the Agreement.

18 Defendants agreed to provide recommended qualified judges for the Tribe's approval.
19 The terms of the judges who have been issuing orders in the matters described herein expired on
20 May 30, 2015. Defendants have disregarded the Defendant-judges original appointments and
21 failed to recommend that the Tribe re-appoint them for successive three-year terms. Following
22 expiration of the Defendants-judges terms of appointment, the Defendants failed to notify the
23 Tribe of the issue. That is a breach of the Agreement.
24
25

1 During the term in which the Defendants' judges had current appointments, the
2 Defendants' billing greatly exceeded the maximum compensation for the Agreement. The
3 Defendants took no action to ensure that it did not exceed the threshold. Defendants have failed
4 to comply with the contractual fee limit of \$20,000, and billed the Tribe more than \$25,000 in
5 2014, without obtaining prior approval from the Tribe to do so. That is a breach of the
6 Agreement.

7 The Tribe has established that it is likely to succeed on the merits of its breach of contract
8 claims. Even if that standard was not met, the Tribe has satisfied the modified standard of
9 showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to
10 make the issue ripe for litigation and deserving of more deliberate investigation." *Munaf*, 553
11 U.S. 674. The issues raised here go to fundamental aspects of the Tribe's sovereignty. The
12 Tribe created the Court of Appeals by legislation, and granted it limited, appellate, powers. The
13 Tribe also contracted with Defendants to provide those limited, appellate services. The acts
14 Defendants have engaged in and continue to engage in have breached the Agreement, caused
15 havoc in the Tribal Court and a flurry of frivolous filings, and caused several employees
16 unnecessary anguish and fear for their freedom and property. There is no reason to believe that
17 Defendants will cease and desist, and comply with Nooksack law and the terms of the
18 Agreement, without intervention of the Court.
19

20
21 B. Irreparable Harm is Underway and Will Continue if this Court
22 Does Not Enjoin the Defendants from Acting as a Court of
Original Jurisdiction and General Jurisdiction, in Violation of the
Agreement.

23 The second prong in the preliminary injunction analysis is that the Plaintiff must show a
24 likelihood that the it will suffer irreparable harm in the absence of preliminary relief. *Winter*,

1 555 U.S. at 22. The *Winter* Court reiterated the standard as requiring a plaintiff seeking
2 preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.
3 *Id.*; *Los Angeles v. Lyons*, 461 U.S. 95, 103, 103 S.Ct. 1660 (1983); *Granny Goose Foods, Inc. v.*
4 *Teamsters*, 415 U.S. 423, 441, 94 S.Ct. 1113 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 502, 94
5 S.Ct. 669 (1974); see also 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure
6 § 2948.1, p. 139 (2d ed. 1995) (hereinafter Wright & Miller) (applicant must demonstrate that in
7 the absence of a preliminary injunction, “the applicant is likely to suffer irreparable harm before
8 a decision on the merits can be rendered”). Issuing a preliminary injunction based only on a
9 possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an
10 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled
11 to such relief. *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865 (1997) (*per curiam*).
12

13 Irreparable injury has occurred, and is *likely* to continue, absent an injunction. Here, the
14 Tribe is involved in a highly-publicized, long-standing lawsuit with third-parties. The
15 Defendants have provided appellate services for several of the cases appealed between the Tribe
16 and these third-parties. The Defendants’ acceptance of pleadings outside the scope of services
17 identified in the Agreement resulted in no fewer than ten “orders” being issued by the
18 Defendants, all from judges whose appointments expired over a year earlier. Of the ten “orders”,
19 the Defendants: (1) threatened arrest of the Tribal Court Clerk; (2) imposed contempt upon both
20 the Tribal Court Clerk and the Chief of Police; (3) ordered arrest of the Tribal Court Clerk; (4)
21 imposed a fine of \$1,000.00 per day upon the Chief of Police; and (5) issued judgment for
22 \$2,790.15 against the Chief of Police and in favor of the third-parties. Each of these “orders”
23 resulted in: (1) a large amount of negative publicity, (2) emotional stress of several concerned
24
25

1 employees, namely the Chief of Police and the Tribal Court Clerk; (3) an unwarranted invoice in
2 excess of \$6,000.00 for services performed.

3 Further, the third-parties continue their efforts to enforce the “judgment” with recently
4 emailed pleadings accepted by the Defendants. Although these latest pleadings are not
5 contracted-for services pursuant to the Agreement, the Defendants have failed to abide by the
6 Agreement during the past six months and have shown little or no effort to halt the same
7 activities into the future. Because the activities impose the real threat that an individual
8 employee, namely the Chief of Police, will be subject to execution of judgment in the immediate
9 future, an injunction is necessary.
10

11 C. Enjoining the Defendants from Further Acting Outside the Scope
12 of the Agreement Does not Harm the Defendants while it Preserves
13 the Tribe’s Rights

14 The third prong in the preliminary injunction analysis is that the Plaintiff must show that
15 the balance of equities tips in the movant's favor. *Winter*, 555 U.S. at 24. A preliminary
16 injunction is an extraordinary remedy never awarded as of right. *Munaf v. Geren*, 553 U.S. 674,
17 689-690, 128 S.Ct. 2207, 2218–2219 (2008). In each case, courts “must balance the competing
18 claims of injury and must consider the effect on each party of the granting or withholding of the
19 requested relief.” *Amoco Production Co. v. Gambell*, 480 U.S. 531, at 542, 107 S.Ct. 1396
20 (1987). “In exercising their sound discretion, courts of equity should pay particular regard for the
21 public consequences in employing the extraordinary remedy of injunction.” *Weineberger v.*
22 *Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798 (1982).

23 Placing a check on the Defendants’ actions will not harm the Defendants. The
24 Defendants have no right to compensation for services not contracted. The Defendants have no
25

1 right to perform work for the Nooksack Indian Tribe that the Tribe did not authorize, especially a
2 right to work as a court of original, or, general jurisdiction. As such, an injunction will not cause
3 harm to the Defendants.

4 D. The Public Interest is Best Served by Ensuring Overbearing
5 Creditors Do not Misuse State Courts Processes by Obtaining
6 Orders Against Non-Parties

7 The final prong in the preliminary injunction analysis is that the Plaintiff must show that
8 the balance of equities tips in the Plaintiff's favor. *Winter*, 555 U.S. 7. Public trust in the
9 Nooksack government and its judicial system is imperative. Continued efforts by third-parties to
10 utilize the Defendants to meet the third-parties' needs, especially when the Defendants lack any
11 authority to act, does not serve the public interest. These efforts result in continued "orders", as
12 the Tribe has been first hand witness to over the past six months. These "orders" have resulted
13 in increasing negative publicity concerning the Nooksack government, and the Nooksack Tribal
14 Court. Both the Nooksack government, and its judicial system must maintain the public trust.
15 The relatively benign imposition of an injunction in this case will result in elimination of this
16 negative publicity and the increasing distrust in the tribal court system.

17
18 **CONCLUSION**

19
20 For the above stated reason, the Nooksack Indian Tribe prays this court issue a
21 preliminary injunction prohibiting:

- 22 1. An injunction preventing the Defendants from further breaches of the Agreement,
23 including:
24 a. accepting pleadings as filings from third parties;
25


- 1 b. accepting cases that are not appeals from decisions of the Tribal Court;
2 c. accepting filings as a court of original jurisdiction, which were not appealed
3 from the Tribal Court;
4 d. issuing orders as a court of original and general jurisdiction;
5 e. assigning judges who are not presently appointed to hear Nooksack appeals;
6 and,
7 f. billing the Tribe for services in excess of the contract cap without prior
8 approval;

9 2. An injunction preventing the Defendants from further violations of Nooksack law
10 including but not limited to:

- 11 a. Resolutions #13-24 and #13-82, and Title 10 and
12 b. Title 80, by accepting cases that are not appeals from decisions of the Tribal
13 Court and assigning judges who are not presently appointed to hear Nooksack
14 appeals.
15

16 RESPECTFULLY MOVED THIS 30th DAY OF SEPTEMBER 2016.

17
18 NOOKSACK INDIAN TRIBE
19 OFFICE OF TRIBAL ATTORNEY

20
21 
22 _____
23 Rickie Wayne Armstrong, WSBA # 34099
24 Tribal Attorney
25 P.O. Box 63
Deming, WA 98244