

NOOKSACK TRIBAL COURT NOOKSACK INDIAN TRIBE	
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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

ORDER GRANTING
PLAINTIFF NOOKSACK
INDIAN TRIBE'S *EX PARTE*
EMERGENCY MOTION FOR
TEMPORARY RESTRAINING
ORDER, ORDERING
DEFENDANTS TO APPEAR
AND SHOW CAUSE, AND
OTHER RELIEF

This matter came before the Court upon the Tribe's *ex parte* Emergency Motion for Preliminary Injunction enjoining the Defendants from further breaches of the Parties' Appellate Services Agreement ("Agreement") and violations of Tribal law. Present in the courtroom were the Tribal Attorney, Rickie Armstrong, and during the hearing, Philip Buri entered the courtroom. He did not appear, because he applied for a business license this morning and it has not been granted yet, but he did agree to consult with the court regarding timing of the Orders entered herein, and the hearing ordered below.

I. PRELIMINARY MATTERS

The Nooksack Tribe is sovereign, within those limits specifically provided by federal

1 law. The Nooksack Tribe is entitled, by virtue of that sovereignty, to decide for itself how its
2 judicial power is to be delegated. It did so, in its Constitution, Article VI.

3 There has been no delegation of “the judicial power” to a supreme court, or to a Tribal
4 Court and such other courts as the Tribal Council shall from time to time create. The federal
5 model is not copied by the Nooksack Tribe. The Tribal Council has power (and the duty) to
6 provide by ordinance “for the establishment of a tribal court.” Const., Art. VI, § 2(a)(1).

7 Contrast U.S. Const., Art. III.¹ The differences are striking.

8 This court has “jurisdiction over all civil matters concerning members of the Nooksack
9 Indian Tribe” and “over all matters concerning the establishment and functions of the tribal
10 government, *provided that nothing herein shall be construed as a waiver of sovereign immunity*
11 *by the tribal government.*” Nooksack Const., Art. VI, § 2(a)(1) (emphasis supplied.). I see
12 nothing in Article VI that would give any Nooksack court the power to order an official jailed, as
13 a coercive contempt remedy. I see nothing in Article VI that would grant me the authority to
14 punish a recalcitrant witness (considered a matter within the “inherent authority” of a federal
15 court), or to exercise powers other than those powers provided for by ordinance by the Nooksack
16 Tribal Council. The Nooksack Tribal Council has the power to provide for a court of appeals,
17 and it has exercised that power by entering into a contract with Northwest Intertribal Court
18 System.
19

20 In the same vein, it would be a mistake to conclude that the phrase “sovereign immunity”
21 in the Nooksack Constitution is to be given an identical meaning as the phrase “sovereign
22 immunity” is given by the federal courts for purposes of 42 U.S.C. 1983, or the Eleventh
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24 ¹ “The judicial Power of the United States, shall be vested in one supreme Court, and in such
25 inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the
supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated
Times, receive for their Services, a Compensation, which shall not be diminished during their
Continuance in Office.”

1 Amendment. In other words, while the Supreme Court has decided that, for cases or
2 controversies in the federal system, sovereign immunity is not implicated by an order to a
3 government official in his or her individual capacity, that does not mean that such an order
4 would be consistent with *Nooksack* sovereign immunity. To my knowledge, no court, Nooksack
5 or otherwise, has given an authoritative definition of the phrase as it pertains to the Nooksack
6 Indian Tribe.

7 It would also be a mistake to conclude that a Nooksack Tribal Court, or a contracted-for
8 appellate panel, has all inherent powers necessary to put the orders issues or judgments entered
9 into effect. I have examined Title X of the Nooksack Code, and the contract documents and
10 ordinances (and resolutions) provided by Tribal attorney

11 Orders of a court are not to be collaterally attacked lightly. Nor are they to be ignored
12 lightly. Yet even in the federal system, in which the lead case is *Walker v. City of Birmingham*,
13 388 U.S. 307 (1967), an order that is “transparently invalid” is not a proper subject of the
14 contempt power. 388 U.S., at 315. A person may disregard a “transparently invalid” order of a
15 United States District Court without fear of jail time, or heavy fines. We may have such a
16 transparently invalid series of orders here. Plaintiff has made a prima facie showing to that
17 effect, and defendants will have the opportunity, on November 1, to demonstrate why plaintiff is
18 incorrect, if it is.

19
20 It is not clear that the contempt power has been delegated to the court of appeals; plaintiff
21 has made a prima facie showing that, at minimum, no one can sit as a judge on the Nooksack
22 court of appeals without a current appointment; the appellate court cannot accept a case *except*
23 through the Nooksack system; and payment of a filing fee is a prerequisite to the exercise of
24 appellate jurisdiction. I see nothing in the ordinances or contract that would grant the court of
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1 appeals original jurisdiction over *any* case, no matter how sympathetic the cause or the appellant
2 may appear to the appellate court. *Contrast* United State Const., Art. III, § 2.

3 It is clear that the court of appeals has only such authority as it was provided by contract,
4 and approved upon vote by the Nooksack Council. This is an attribute of sovereignty; a
5 sovereign people decides for itself, by appropriate vote, under what conditions a judge may
6 serve, the extent of the judge's powers, and the conditions under which the judge may exercise
7 those powers.

8 Prior to hearing, I was provided with the Complaint For Breach Of Contract, Injunctive
9 Relief And Specific Performance, the Motion for Order Shortenening Time (which I granted),
10 006 Plaintiff Nooksack Indian Tribe's Emergency Ex Parte Emergency Motion For Preliminary
11 Injunction, the Declaration Of Katherine Canete, As Acting Court Administrator, Declaration Of
12 Rory Gilliland, Chief Of Police For The Nooksack Indian Tribe, Declaration Of Elizabeth Ames,
13 Accounting Department Records Custodian, Declaration Of Charity Bernard, As Records
14 Custodian For Tribal Council And Office Of General Manager, and an email confirmation of
15 service. A second Declaration of Katherine Canete was provided during the hearing. I relied
16 upon no other records.
17

18 II. FACTUAL FINDINGS

19 2.1 The Tribe alleged, with declarations and exhibits in support, that Defendants
20 Northwest Intertribal Court System ("NICS") and NICS's Executive Director, Dan Kamkoff,
21 have breached the terms of the Agreement and Nooksack law, including: (1) accepting pleadings
22 filed directly by third parties to the Court of Appeals; (2) identifying itself as the location for
23 original filings of the Nooksack Court of Appeals; (3) accepting filings as a court of original
24 jurisdiction, not as a court of limited, appellate jurisdiction; (4) assigning judges who are not
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1 presently appointed to hear Nooksack appeals; (5) issuing orders as a court of original and
2 general jurisdiction; and (6) billing the Tribe for unauthorized services, and in excess of the
3 contract cap without prior approval.

4 2.2 Under the terms of the Agreement, Defendants' staff is required to provide appellate
5 services by processing notices of appeal received from the Tribal Court, organizing the record
6 received from the Tribal Court, conducting an assessment of the materials received from the
7 Tribal Court, assembling the panel of judges qualified to serve as Nooksack Court of Appeals
8 judges and approved by the Tribe upon Defendants' recommendation.

9 2.3 Pursuant to both the scope of the Agreement and Nooksack Tribal Code Title 80,
10 Court of Appeals judges act as appellate judges only, to hear cases appealed from the Tribal
11 Court. The judges agreed to comply with Nooksack law and all court rules.

12 2.4 Resolution #13-24 (February 14, 2013) and Resolution #13-82 (May 30, 2013)
13 govern the eligibility requirements and appointments of Nooksack Tribal Court of Appeals
14 judges. Defendants are required to nominate qualified judges to the Nooksack Court of Appeals.
15 Resolution #13-24. At the time of the nomination, NICS must submit each judge's resume,
16 credentials, examples of relevant work product, and a letter of support to the Tribal Council. The
17 Tribal Council was required to approve or deny an initial appointment 2-year term. After the
18 initial 2-year term, the Tribal Council may, upon review and recommendation by NICS,
19 reappoint the judge for successive 3-year terms. *Id.*

20 2.5 The Tribe alleges that Defendants failed to identify new judges qualified to serve, or
21 recommend reappointment of the existing panel to successive three-year terms, upon the
22 expiration of the initial two-year terms on May 30, 2015. As a result, the Tribe contends, judges
23 without current appointments, who therefore have no authority to act as Court of Appeals judges,
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1 have been issuing orders.

2 2.6 The Tribe further alleges that for approximately six months, Defendants have
3 accepted pleadings for filing that are not appeals of Tribal Court decisions, have accepted
4 pleadings filed directly with the Defendants, and have failed to verify that Nooksack law and
5 court rules have been complied with – including payment of filing fees, a mandatory pre-
6 requisite to filing. The Tribe has submitted evidence demonstrating that the Defendants have
7 accepted nine rounds of pleadings filed directly (and electronically) with the Court of Appeals
8 that were not, in fact, appeals of Tribal Court decisions; and that the Defendants have issued nine
9 orders on those pleadings, purporting to grant such relief as: ordering the Court Clerk to accept
10 pleadings for filing where to do so would violate Nooksack law; finding the Court Clerk in
11 contempt; ordering the arrest of the Court Clerk by the Tribal Police Chief; finding the Police
12 Chief in contempt; and awarding costs against the Police Chief.

13
14 2.7 The Tribe has submitted testimony demonstrating that no filing fees were paid for the
15 documents the Defendants accepted for filing directly (and electronically). The Tribe has also
16 submitted testimony and evidence demonstrating that the appointments to the Court of Appeals
17 of the judges who issued the orders in question expired on May 30, 2015, and that those judges
18 have not been re-appointed by the Tribe.

19 2.8 Finally, the Tribe has submitted evidence that the Defendants have invoiced the
20 Tribe more than \$6,000 for this work that the Tribe contends is unauthorized, and issued invoices
21 in 2014 that exceeded the \$20,000 cap on contract costs incurred, without prior approval of the
22 Tribe.

23 2.9 In its Complaint, the Tribe seeks damages for breach of the Agreement, an injunction
24 against the Defendants prohibiting further breaches of the Agreement and Nooksack Tribal law,
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1 and an order compelling the Defendants to specifically perform the Agreement as written.

2 2.10 The present motion seeks a temporary restraining order, and an order to appear and
3 show cause why a preliminary injunction that will restrain the Defendants from further breaches
4 of the Agreement pending further action by this Court should not be entered.

5 2.11 A preliminary injunction is an extraordinary remedy designed to preserve the
6 relative positions of the parties until a trial on the merits can be held. *University of Tex. v.*
7 *Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981).

8 2.12 To obtain a preliminary injunction, the Tribe must show: (1) a likelihood of success
9 on the merits; (2) a likelihood that the Tribe will suffer irreparable harm in the absence of
10 preliminary relief; (3) that the balance of equities tips in the Tribe's favor; and (4) that the
11 injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129
12 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

13 2.13 For the reasons described below, the Court finds that the Tribe has met its burden,
14 and a temporary restraining order should issue, together with an order requiring defendants to
15 appear and show cause why a preliminary or permanent injunction should not be entered.
16

17 **III. CONCLUSIONS OF LAW AND DECISION**

18 **1. Success on the Merits**

19 The claims asserted by the Tribe for which it must establish a likelihood of success on the
20 merits arise from the construction and interpretation of the Agreement and Title 80. In order to
21 prevail, the Tribe must establish the existence of a valid contract, breach, and resultant injury.

22 **a. The Agreement is a valid contract.**

23 The Court finds that on its face, the Agreement is a valid contract. It was executed by
24 Defendant Kamkoff as Executive Director, and by Katherine Canete as the General Manager.
25

1 The execution of the Contract was approved by resolution of the Tribal Council. The Agreement
2 is for professional services that Defendant NICS was created to provide.

3 **b. The Defendants are in breach.**

4 The Agreement is an "Appellate Services Agreement." When construed consistent with
5 N.T.C. Title 80, it is clear that the purpose for which the Tribe contracted with Defendants, was
6 to provide appellate services consistent with the authority granted to the Court of Appeals by the
7 Tribal Council: appeals from decisions of this Court. The series of pleadings that the Defendants
8 accepted electronically for direct filing with the Court of Appeals were not appeals from
9 decisions of this Court.

10 The Agreement does not authorize the Defendants to select the types of cases it will hear
11 – the scope of the Court of Appeals' jurisdiction is articulated in Title 80, and the scope of
12 services Defendants are authorized to perform is articulated in the Agreement. Neither Title 80
13 nor the Agreement authorizes the Defendants to act as a court of general or original jurisdiction.
14 That authority was not granted to the Defendants by the Tribal Council.

15
16 Defendants agreed under the Agreement to provide recommended qualified judges for the
17 Tribe's approval. The terms of the judges who issued the orders described herein expired on
18 May 30, 2015, and the testimony and evidence provided by the Tribe demonstrate that the
19 Defendants have not made recommendations regarding reappointment of qualified judges for
20 consideration by the Tribe, and the Tribe has not re-appointed any judges following the
21 expiration of the initial terms. The Defendants have not provided qualified judges to decide
22 matters under the Agreement.

23 The Agreement contains a cost cap of \$20,000 (increased by resolution from \$2,000) that
24 the Defendants are not permitted to exceed without prior approval by the Tribe. The Tribe has
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1 submitted evidence and testimony demonstrating that the Defendants billed the Tribe more than
2 \$25,000 in 2014, without obtaining prior approval from the Tribe to do so. In addition, the Court
3 finds that the Defendants have invoiced the Tribe for matters that exceed the scope of work
4 authorized under the Agreement, because the Defendants have invoiced the Tribe for work done
5 by unauthorized judges, and for non-appellate matters.

6 **c. Damages**

7 The Tribe has provided evidence of excessive and unauthorized billing, causing injury in
8 the form of money damages. The Tribe has also provided testimony demonstrating additional
9 economic and non-economic injury including (1) emotional stress of several Tribal employees,
10 including the fear by the Tribal Court Clerk of arrest for acting in the scope of her employment
11 and rejecting pleadings that failed to comply with Nooksack law; (2) contempt sanctions against
12 both the Tribal Court Clerk and the Chief of Police, which have disrupted the offices of the Court
13 Clerk and the Chief of Police; and (3) the issuance of fines and judgments.
14

15 The Court finds that the Tribe has met its burden of establishing a likelihood of success
16 on the merits.

17 **2. Irreparable Harm**

18 The second prong in the preliminary injunction analysis is that the Plaintiff must show a
19 likelihood that the it will suffer irreparable harm in the absence of preliminary relief. *Winter*,
20 555 U.S. at 22; *see also* 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §
21 2948.1, p. 139 (2d ed. 1995) (applicant must demonstrate that in the absence of a preliminary
22 injunction, “the applicant is likely to suffer irreparable harm before a decision on the merits can
23 be rendered”).
24
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1 The Tribe has submitted evidence and testimony to demonstrate that it has suffered
2 irreparable injury and that such injury is likely to recur absent a preliminary injunction. The acts
3 and omissions of the Defendants have caused (or has the potential to cause) significant injury to
4 the Tribe's reputation and to the integrity of the Tribal Courts. The orders issued by
5 unauthorized judges exceeded the scope of authority granted to the Defendants under the
6 Agreement, and to the Court of Appeals under Title 80. The orders purport to create Nooksack
7 common law, without foundation or jurisdiction, or authority of the signators. The orders have
8 imposed significant burdens on the Tribal Court, the Court Clerk, and other Tribal employees,
9 and subjected them to public ridicule.

10 The orders have, among other things, created a false impression that Tribal Courts accept
11 electronic filing and service of pleadings, contrary to the court rules, that lawyers who are neither
12 admitted to the Nooksack Courts nor properly licensed to do business on Nooksack tribal lands
13 are permitted to file pleadings (contrary to the court rules and the business licensing ordinance),
14 and that pleadings may be filed without paying the requisite filing fees contrary to the court
15 rules. The court further finds that irreparable harm in the form of adverse publicity and harm to
16 Tribal sovereignty are not susceptible of quantification in a damages remedy.

18 The Court finds that the Tribe has met its burden of establishing that it will suffer
19 irreparable harm in the absence of a preliminary injunction.

20 **3. The Balance of Equities**

21 The third element the Tribe must establish is that the balance of equities tips in the
22 Tribe's favor. *Winter*, 555 U.S. at 24. The Court agrees with the Tribe that enjoining the
23 Defendants until this matter can be decided on the merits will not cause harm to the defendants,
24 and that the weight of the equities is in the Tribe's favor. The Defendants' rights derive from the
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1 Agreement. The Defendants have no right to perform work for the Nooksack Indian Tribe that
2 the Tribe did not authorize, nor do the Defendants have a right to violate Nooksack law. The
3 defendants' only potential harm is the requirement that they demonstrate that they are, indeed,
4 performing the contract as written. On balance, the equities heavily favor the plaintiff.

5 **4. Public Interest**

6 The final element the Tribe must meet is that an injunction is in the public's interest.
7 Public trust in the Nooksack government and its judicial system is imperative. Orders issued by
8 judges who are not authorized to act as the Court of Appeals have created negative publicity and
9 denigration of the Tribal government, its courts, and its employees. The orders, purporting to
10 create Nooksack common law, are also damaging to the Nooksack Tribe and its courts. And,
11 finally, the orders have imposed significant burdens on this Court that continue to be felt,
12 impacting the Tribe's resources as well as other litigants trying to make use of the Tribal Court
13 system. That is not in the public interest. Nor is it in the public interest to permit further (and
14 ever-expanding) violations of Nooksack law and the court rules.
15

16 The Court finds that the Tribe has met its burden of establishing that a preliminary
17 injunction is in the public interest.

18 **ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER**

19 The Court hereby GRANTS the Tribe's Motion for Temporary Restraining Order. The
20 Defendants are enjoined from further breaches of the Agreement and Nooksack law, pending
21 further order of this court, as follows:

- 22 1. The Defendants may not accept cases that are not appeals from decisions of the
23 Tribal Court;
- 24 2. The Defendants may not accept or process cases filed electronically, or cases filed
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1 directly with the Defendants;

2 3. The Defendants may not empanel judges who are not presently or currently
3 appointed to hear Nooksack appeals;

4 4. The Defendants may not bill the Tribe for services in excess of the contract cap
5 without prior approval;

6 5. The Defendants are enjoined from further violations of Nooksack law including
7 but not limited to Resolutions #13-24 and #13-82, Nooksack Tribal Code Title 10, and Title 80,
8 by accepting cases that are not appeals from decisions of the Tribal Court and assigning judges
9 who are not presently appointed to hear Nooksack appeals.

10 6. No steps shall be taken to enforce any pending orders of the court of appeals, on
11 cases in which powers related to alleged contempt are asserted, pending further order of this
12 court.

13
14 This Order is entered without bond, and shall remain in effect pending further action of
15 the Court.

16 **ORDER TO APPEAR AND SHOW CAUSE WHY INJUNCTION SHOULD NOT ENTER**

17 Defendants shall appear, on November 1, 2016, at 10:00 a.m., in Nooksack court, and
18 show cause why an injunction should not enter. Defendants are given until close of business on
19 Friday, October 21, 2016, to file papers in response to the motion and/or this Order. Close of
20 business is 3:30 p.m. Filing must be in person, not via email. Plaintiff has one week from that
21 date in which to file reply papers, if any.
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23
24
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Done in Open Court this 7 day of October, 2016.

A handwritten signature in cursive script, appearing to read "Milton G. Rowland", written over a horizontal line.

Milton G. Rowland, Judge Pro Tempore
Nooksack Tribal Court