



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

NOOKSACK INDIAN TRIBE,

No. 2016-CI-CL-006

Plaintiff,

ORDER GRANTING IN PART,  
DENYING IN PART,  
PLAINTIFF NOOKSACK  
INDIAN TRIBE'S MOTION  
FOR EQUITABLE RELIEF

v.

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

Defendants.

This is a case about sovereignty. The question is whether the Nooksack Indian Tribe has the power and the right to prescribe its own forms of action, its own forms of appellate jurisdiction, and its own form of sovereign immunity. Concluding that the Nooksack Indian Tribe does have such powers and right, and that those rights would be impinged upon by an appellate panel exercising the powers that it purported to exercise in the manner taken, this court grants a limited form of the relief requested.

**Decision**

This matter came on regularly for hearing on November 1, 2016, on the motion of the Nooksack Indian Tribe ("NIT") for a preliminary injunction against Northwest Intertribal Court

1 System ("NICS"). This court's Order of October 7, 2016 ("the 10/7/16 Order") stayed  
2 proceedings involving various Court of Appeals orders until the hearing. At the hearing, the  
3 court orally advised counsel, on the record, of its decision, and promised a written order in due  
4 course. This is that order.

5 As a preliminary matter, the court must say that it is impressed with the quality of the  
6 judges on the NICS Court of Appeals, known to the undersigned by reputation, and the quality of  
7 services provided by NICS. The court has read a number of the decisions of that body and finds  
8 them uniformly excellent. Nothing in the current Order should be taken as a disparagement  
9 either of the defendant or of the court of appeals judges providing services to NIT via a number  
10 of contract documents and NIT resolutions and ordinances. The court is also impressed by the  
11 lawyers appearing for both parties in this matter.

### 12 **I. Relief Sought by NIT**

13 The NIT sought relief on the basis of contract. The NIT's position is that nothing in the  
14 contract documents provide NICS or an NICS-engaged appellate panel authorization from NIT  
15 (1) to accept filings directly from third parties, as opposed to filings through the NIT Clerk; (2)  
16 to assert original jurisdiction in matters involving the NIT; (3) to issue orders as a court of  
17 original jurisdiction; (4) to assign judges who are not presently appointed to hear Nooksack  
18 appeals; or (5) to bill the NIT over the contract amount.

### 19 **II. Holding of the Court**

20 The court finds that there are questions of material fact precluding judgment as a matter  
21 of law regarding issues (4) and (5). Additionally, matters (1)-(3) are not so clear as a matter of  
22 *contract* law that an injunction is proper. However, as a matter of conflicts of laws, and as a  
23 matter of separation of powers, matters (1) – (3) are appropriate subjects of declaratory remedies.  
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1 It is not believed that defendant will have to be enjoined, strictly speaking. But declaratory relief  
2 is necessary to protect those involved from financial and other hardships stemming from orders  
3 that are transparently invalid and ultra vires. See *Walker v. City of Birmingham*, 388 U.S. 307,  
4 315 (1967).

5 However, further equitable proceedings will be granted if defendant NICS is unwilling to  
6 accept voluntarily the declaratory judgment of this court, and an injunction proves necessary.  
7 Out of comity, and out of respect for a higher tribunal, consisting of excellent lawyers and judges  
8 of good faith, high regard, and understandable frustration with the wheels of tribal justice, which  
9 appeared to the appellate tribunal (rightly or wrongly) potentially unfair and slow, no “judgment”  
10 purporting to “enjoin” these fine lawyers and judges will be issued at this time. There is simply  
11 no reason to anticipate imminent threat of harm.

### 12 **III. Background, part (1): the underlying case**

13 The present dispute appears to be one of several surrounding a disenrollment effort by the  
14 NIT. Much has been written, as a general proposition, regarding disenrollment proceedings, but  
15 their importance cannot be gainsaid. Both the self-identification of the Tribe as a whole, and the  
16 self-identification of (and benefits for) the potentially disenrolled are at issue. The emotional,  
17 and potentially other, stakes in the outcome are quite high, often shedding more heat than light  
18 on processes at issue.<sup>1</sup> Cf. *Lomeli v. Kelly*, 12 NICS App. 1, 2 (2013).

19 The persons subject to disenrollment are being asked to prove by official records that  
20 they are descended from the founders of the Nooksack Indian Tribe as that body interacts with  
21 the Bureau of Indian Affairs. Their lawyer became the subject of controversy. This court makes  
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23 <sup>1</sup> Cf. Rubio, *Reclaiming Indian Civil Rights: the Application of International Human Rights Law*  
24 *to Tribal Disenrollment Actions*, 11 Or.Rev.Int'l Law 1 (2009); Diamond, *Who Controls Tribal*  
25 *Membership? The Legal Background of Disenrollment and Tribal Membership Litigation*,  
Aspatore, 2013 WL 5293043 (October 2013); Galanda and Dreveskracht, *Curing the Tribal*  
*Disenrollment Epidemic: In Search of a Remedy*, 57 Ariz. L. Rev. 383 (2015).

1 no comment on the merits of that controversy, not having heard the evidence, or heard the  
2 attorney's side of the story.

3 It further appears that the NIT issued official Council determinations that disbarred this  
4 attorney from further setting foot on NIT property or from representing others before its court.  
5 The lawyer, in turn, claims that he was not provided any opportunity for hearing, or, alternatively  
6 (from the records provided me) that he was not given the opportunity for a *fair* hearing. As the  
7 undersigned understands it, the disbarment order involved allegations of (1) nonpayment of  
8 business license fees and nonsubmittal of a business license application, and (2) other actions  
9 unknown to the undersigned. The court makes no comment on the process or the underlying  
10 substance of this controversy, and only recites these facts to give context to the present Order.

11 Finally, it appears that the involved attorney tried to file a case with the Tribal Clerk, but  
12 the Clerk was uncertain whether she could accept the case, inasmuch as the attorney purported,  
13 in the filings, to represent someone other than himself; this was not, from the Clerk's  
14 perspective, purely a *pro se* case. The Clerk in turn sought guidance from the Council, and the  
15 lawyer apparently lost patience with the process and went directly to the court of appeals.  
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17 That court in turn accepted a direct filing, without (as far as can be determined on this  
18 record) requiring a filing fee or a record certified or otherwise organized and created by the  
19 Clerk, and without verification that the Tribe waived its sovereign immunity for purposes of the  
20 filing.

## 21 **V. Background, part (2): the appeal**

22 A part of this controversy appears to reflect a belief that the Tribe did not respond in a  
23 timely manner to the court of appeals. Indeed, it appears from at least one of the orders that the  
24 court of appeals' decisions (at least some of them) are based upon the understanding that the  
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1 Tribe did not respond at all. From the limited record before me, that does not appear to be the  
2 case.

3 The NIT did *not* ignore the case filed by the attorney in the court of appeals, but the case,  
4 and its procedures, were without precedent. In a word, it was unheard-of for the Nooksack  
5 Indian Tribe to be ordered by its contracted-for court of appeals to respond to a case filed outside  
6 the usual processes, to receive orders from that court to which it did not consent, and to take the  
7 other steps taken by the appellate panel when the NIT did not immediately respond. So the NIT  
8 response may have been late. But the NIT *did* respond, and NICS does not deny that NIT *did*  
9 file responsive pleadings outlining its position, which is essentially unchanged here.

10 The court of appeals determined that it *must* have jurisdiction to issue orders in aid of its  
11 own powers,<sup>2</sup> and issued a series of orders that were unprecedented in the NIT's collective  
12 experience: first, ordering the Clerk to accept a case that appeared to her to be in violation of the  
13 Council's disbarment order and instructions from the Council; second, ordering the Sheriff to  
14 arrest the Clerk for noncompliance with the first order; and third, imposing hefty daily fines on  
15 the Sheriff for failing to comply with the second order.  
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17 This was a snowball gathering momentum as it rolled downhill, each order leading  
18 inexorably to another, causing bad publicity to the NIT and damage to its officials. In the  
19 meantime, the attorney claiming that he was improperly disbarred did *not* have a "day in court."

20 But all of the court of appeals procedures are unwound if that court did not (1) have

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21 <sup>2</sup> In *Lomeli, supra*, 12 NICS App. at p. 10, the Court of Appeals decided that it must have  
22 jurisdiction in order to effectuate the Nooksack Constitution. A key turning point, analytically, in  
23 that decision, is found at p. 9, in which the court found that "Tribal members must have a forum  
24 to compel their elected officials [to] do what the Nooksack Constitution requires or these  
25 constitutional provisions cease to be requirements and become mere aspirations." The court  
perfectly identifies the problem presented by immunity and the related problem of sovereignty;  
what entity will protect Tribal members from legislative excesses, if any? This court can find no  
basis for a claim of "inherent authority" so as to trump immunity, in the Nooksack Code or  
Constitution, whatever this court's philosophical agreement with the quoted statement.

jurisdiction to accept the filing in the first place; (2) have power to assert original jurisdiction; (3) have jurisdiction to issue orders to the NIT and/or its officers in their appointive positions, without the consent of the Tribe; or (4) have jurisdiction to exercise contempt powers against the body that hired and empowered it in the first place.

The 10/7/16 order required NICS to appear and show cause why injunctive remedies should not be entered against it. This order thus required NICS to show the court that the court of appeals actually *had* the claimed powers. It was unable to do so, and the following orders are entered hereby.

#### **VI. The judicial power in the Nooksack Constitution; sovereign immunity**

The Nooksack Constitution, adopted effective August 2, 2013, is an elegant and brief document. Article VI, § 2 of the Constitution requires the Council to provide for a tribal court; it grants the tribal court subject matter jurisdiction, *inter alia*, “over all civil matters concerning members of the Nooksack Indian Tribe,” and “over all matters concerning the establishment and functions of the tribal government, provided that nothing herein shall be construed as a waiver of sovereign immunity by the tribal government.” Article VI, § 2(a)(3).

This court finds that it has exclusive original jurisdiction over “all matters in which the Nooksack Indian Tribe or its officers or employees are parties in their official capacities.” Nooksack Code, Title 10, § 10.00.050. However, even this court is reminded, by that section, that NIT does not waive its sovereign immunity without an express waiver of the same. *Id.*

#### **VII. Construction of powers and elevation of substance over form**

Additionally, Title 10 provides several other admonitions to a court purporting to exercise powers over the Tribe: (1) Remedies against the Tribe are strictly limited. Code, § 10.00.090. (2) The Court must “interpret tribal ordinances, resolutions, and policies in order that

1 the substantive intent of the Tribal Council is ensured.” Code, § 10.01.020. (3) Technical,  
2 formalistic or “legalistic” interpretations are disfavored, to achieve the purposes of “treating all  
3 parties fairly and without prejudice, securing simplicity in proceedings,” and thus substance is  
4 favored over form.

5 Declaratory remedies are granted herein because such remedies are the *least* potent and  
6 affect the defendant in the most minimal way necessary to stabilize the situation between the  
7 parties and effect justice between them.

#### 8 **VIII. Grounds for Relief Granted**

9 The fact findings and legal conclusions set forth in the 10/7/16 Order are incorporated  
10 herein by this reference, except as otherwise stated herein. The principal fact findings and legal  
11 conclusions are set forth above and in the 10/7/16 Order.

12 The NIT Constitution does not contain the kind of separation of powers Washington  
13 attorneys are accustomed to in federal and state governments. *See* Wash. Const., Art. 4, § 1,  
14 vesting the judicial power in the supreme court of the state. As noted above, the Nooksack Code  
15 provides that the *Council* creates and empowers the courts. Nooksack courts have no inherent  
16 powers, because they were not “vested” with “the judicial power.” Contrast, for example,  
17 decisions in such cases as *Chambers v. Nasco*, 501 U.S. 1269 (1991), in which the Supreme  
18 Court discusses inherent powers as a subset of “the judicial power.”

19 The NIT Constitution and Code outline a form of sovereign immunity presently unknown  
20 in most jurisdictions: sovereign immunity has been waived in Washington, for example, in tort  
21 claims. RCW 4.92.010 et seq.; RCW 4.96.010; the United States has a more limited form of  
22 immunity waiver in its tort claims act. *See* 28 U.S.C. 1346.

23 In the federal system, the requirement that the judiciary be authorized and empowered for  
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1 every exercise of its jurisdiction is well known to any practitioner. *See, e.g., Erie R. Co. v.*  
2 *Tompkins*, 304 U.S. 64 (1938), discussing the Federal Judiciary Act, and *Hanna v. Plumer*, 380  
3 U.S. 460 (1965), discussing the Rules Enabling Act, 28 U.S.C. 2072. Simply put, if a power is  
4 not vested in a judiciary, that power may not be exercised by the judiciary.

5 Defendant does not demonstrate, through evidence or citation to authority, that its  
6 appellate panel has been delegated the specific powers at issue, or that it has been delegated a  
7 sufficient quantum of “judicial power” that its court of appeals panel has the *inherent* power to  
8 take the actions at issue. Therefore, the procedures must be unwound.

9 It appears that a substantial worry of the court of appeals panel had to do with delayed  
10 Tribal elections. This court has no knowledge of the delays, the reasons for them, or evidence  
11 related to those elections, but simply notes that the elections are now proceeding in December  
12 2016 and January 2017. It thus appears that the principal issue facing the court of appeals is now  
13 at least somewhat mooted, and it is hoped that NIT legislative authority will become more  
14 regular in appearances to those of us who do not possess sufficient information to comment upon  
15 its procedures; those with insufficient information apparently include one or more officials in the  
16 Department of the Interior.

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18 It appears that the contract dispute between these parties cannot be fully unraveled on  
19 motion. NICS appears to have good reason to believe that it has billed only as authorized, for  
20 example. I advised the parties at oral argument that I would not issue an “obey the law” or  
21 “perform the contract” equitable order; the parties need to work out their differences in good  
22 faith, and if they cannot, this lawsuit provides a forum for resolving factual disputes in trial.

23 That does not mean, however, that NIT should be left without a remedy. There are  
24 ongoing consequences to the arrest and contempt orders. These orders were entered *ultra vires*  
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1 and cannot be enforced.

2 **VIII. DECLARATORY JUDGMENT IN FAVOR OF NIT; VACATING**  
3 **CONTEMPT ORDERS AND DECLARING THE SAME TO BE**  
4 **UNENFORCEABLE.**

5 Mindful that this court does not have the power to review actions of the court of appeals,  
6 but only the power to decide issues properly before it, then, the question is whether this case  
7 presents a true contract matter in which an equitable remedy is available, provided that the  
8 plaintiff demonstrates the usual grounds for injunctive relief, or whether this is a separation of  
9 powers issue appropriate for declaratory relief. Mindful, also, of the Title 10 requirement that  
10 “legalistic” solutions are disfavored and the intent of the Council is to be determined in the most  
11 fair manner possible, then, this court reaches the following determinations:

12 1. There is no reason to believe that the NICS panel will simply disregard this Order.  
13 Therefore, at present, the elements to injunctive relief are unmet. That is, the NIT does not show  
14 (a) a clear equitable right, (b) *a well-grounded fear of immediate invasion of that right*, and (c)  
15 actual and substantial injury as a result. *Seiu Healthcare 775NW v. State*, 193 Wn.App. 377, 377  
16 P.3d 214 (April 2016). However, the parties are advised that, if the NICS panel does not give  
17 appropriate effect to this decision, a further hearing may be requested;

18 2. The sought-for injunction regarding payment of contract fees appears to be disputed  
19 appropriately. I cannot decide on motion whether the alleged overbilling for 2015 is more  
20 accurately accounted as a matter spanning two billing years. Similarly, the question of  
21 empaneling appears to be clouded; it is unclear, on motion, whether the NIT was required to  
22 provide information to NICS or the other way around, to start the appointment process. The  
23 court makes no comment on the outcome of that issue, and believes the parties can successfully  
24 resolve it *inter se*;

1 3. Nothing in the contract documents provide NICS or an NICS-engaged appellate panel  
2 authorization (a) to NICS to accept filings directly from third parties, as opposed to filings  
3 through the NIT Clerk; (b) to assert original jurisdiction in matters involving the NIT; (c) to issue  
4 orders as a court of original jurisdiction or (d) to issue contempt-related monetary sanctions  
5 against an NIT officer acting in his or her official capacity. Nothing in the Code or Constitution  
6 appears to grant these powers. It is therefore declared that court of appeals orders issued  
7 throughout much of 2016 requiring the Clerk to accept filings, and the sheriff to arrest her and  
8 pay daily penalties for each day he does not, cannot be enforced. This court declares such orders  
9 to be invalid, unenforceable, and, to the extent that a lower court can direct vacation of an order  
10 of a higher court, vacated.

11 While there is no reason to anticipate NICS will ignore this Order, any collection effort  
12 under way against the Tribe or any of its officials must cease and desist forthwith. No person  
13 may collect on any order related to the subject matter of this Order, against NIT or any of its  
14 officers, agents or employees. There was no waiver of sovereign immunity, and the issuing court  
15 lacked jurisdiction to make such orders. The orders holding the Nooksack Sheriff liable for daily  
16 penalties or holding the Nooksack Indian Tribe liable for monetary penalties or costs, if any, are  
17 unenforceable.

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19 The parties are welcome to seek clarification or reconsideration of specific issues  
20 addressed herein.

21 Done in open court this 17 day of November, 2016.

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24 Milton G. Rowland, Judge Pro Tempore  
25 Nooksack Tribal Court