THE HONORABLE JOHN C. COUGHENOUR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

MARGRETTY RABANG, *et al.*,

Plaintiffs,

v.

ROBERT KELLY, JR., *et al.*,

Defendants.

Case No. 2:17-CV-00088-JCC

PLAINTIFFS' SUPPLEMENTAL BRIEFING RE: JUDICIAL IMMUNITY

In response to this Court's April 4, 2017, request for supplemental briefing, Dkt. # 55, Defendant Dodge contends that he is categorically entitled to judicial immunity because Assistant Secretary—Indian Affairs ("AS-IA") Lawrence Roberts' Decision to invalidate all decisions of the holdover Nooksack Tribal Counsel constitute "neither a statue nor case law." Dkt. # 58 at 2. In so arguing, Defendant Dodge inappropriately elevates form over substance. Clearly, AS-IA Roberts' Decision is not, strictly speaking, a statute or case law. The Court's order, however, unambiguously instructed the Parties to address whether AS-IA Roberts' October 17, 2016 Decision "*rises to the level* of a statute or case law." Dkt. # 55 at 2 (emphasis added).

Contrary to Defendant Dodge's scarecrow argument, AS-IA Roberts' Decision does indeed rise to the level of a statute or case law, for at least two reasons. First, AS-IA Roberts' Decision is a final agency action with "legally binding consequences." *Nat'l Wildlife Fed'n v.*

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U.S. E.P.A., 945 F. Supp. 2d 39, 46 (D.D.C. 2013). Second, the decision carries the force of a federal statute, particularly 25 U.S.C. § 2, which vests AS-IA Roberts with exclusive authority to manage "all Indian affairs and of all matters arising out of Indian relations" with the Nooksack Tribe and its Judiciary. Defendant Dodge is not entitled to the cloak of judicial immunity.

A. AS-IA Roberts' Decision Is A Final Agency Action Of Binding Consequence.

Decisions of the AS-IA constitute "final" agency action for the Department of the Interior. 25 C.F.R. § 2.6(c); *Comanche Nation, Okla. v. United States*, 393 F. Supp. 2d 1196, 1206 (W.D. Okla. 2005). "A final agency action is one that marks the consummation of the agency's decisionmaking process and that establishes rights and obligations or creates binding legal consequences." *Nat. Res. Def. Council v. E.P.A.*, 706 F.3d 428, 432 (D.C. Cir. 2013) (quoting *Natural Res. Def. Council v. E.P.A.*, 559 F.3d 561, 564 (D.C. Cir. 2009); citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997))). Thus, final agency actions are the functional equivalent to generally binding statutes, except where the agency has surpassed the authority granted to it in promulgating said action. *Wiener v. E. Ark. Planting Co.*, 975 F.2d 1350, 1355 (8th Cir. 1992) (citing *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984)).

Here, as discussed below, there can be no question that in promulgating 25 U.S.C. § 2, Congress clearly granted AS-IA Roberts the authority to issue decisions such as his October 17, 2016 Decision; and that decision "establishes rights and obligations [and] creates binding legal consequences" for Defendant Dodge. *Nat. Res. Def. Council*, 706 F.3d at 432. In that first of AS-IA Roberts' three determinations—all of which address the Nooksack Tribal Court's defunct status—AS-IA Roberts explained that the United States would only "recognize judicial decisions issued by the [Northwest Intertribal Court System]," operating as the Nooksack Court of Appeals. AS-IA Roberts thereby clearly disclaimed the authority of Defendant Dodge as "Chief Judge,"

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and did so in a final agency Decision with "binding legal consequences." *Nat. Res. Def. Council*, 706 F.3d at 432.

B. AS-IA Roberts' Carries The Force Of A Clearly Valid Federal Statute.

Indian tribes are "domestic dependent nations" subject to plenary control by Congress. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014). In 1832, Congress specifically vested the Secretary of Indian Affairs with the authority to manage "*all* Indian affairs and of *all* matters arising out of Indian relations." 25 U.S.C. § 2 (emphasis added); *see also Seminole Nation of Okla. v. Norton*, 223 F.Supp.2d 122, 139 (D.D.C. 2002). This exclusive Congressional grant of authority furnishes the AS-IA with broad power to carry out the Federal Government's unique responsibilities with respect to Indians tribes. *United States v. Eberhardt*, 789 F.2d 1354, 1359-60 (9th Cir. 1986)); *Udall v. Littell*, 366 F.2d 668 (D.C. Cir. 1966); *Stuart v. United States ex rel. Dep't of Interior*, 109 F.3d 1380, 1387 (9th Cir. 1997).

Recognizing Congress' plenary legislative power over Indian affairs and the discretionary authority delegated by Congress to the AS-IA relating to Indian affairs, "[c]ourts cannot substitute their judgment for that of those working with Indians, empowered to exercise discretion." *Sohappy v. Hodel*, 911 F.2d 1312, 1329 (9th Cir. 1990) (quotation omitted). "In no event should a court direct the manner in which discretionary arts are to be performed, nor may it direct or influence the exercise of discretion in making that decision." *Nat'l Indian Youth Council, Intermountain Indian Sch. Chapter*, 485 F.2d 97, 100 (10th Cir. 1973).

Here, AS-IA Roberts acted in his official capacity as manager of *all* Indian affairs and relations under 25 U.S.C. § 2. Considering his clear, exclusive authority pursuant to that federal statute, AS-IA Roberts' October 17, 2016 Decision regarding the United States' relationship with the Tribe and defunct trial court *rises to the level of* clearly valid federal statute or case law—

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depriving Defendant Dodge of any purported judicial immunity.

C. Defendant Dodge Knew AS-IA Roberts' Decision Divested Him Of Jurisdiction.

Judicial immunity also is lost where a judge knows he lacks jurisdiction. *Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir. 1980), *overruled on other grounds by Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986). Here, Defendant Dodge maintained a very close relationship with the Holdover Tribal Council as their immediate past in-house attorney. Dkt. # 7 at ¶ 17. The Holdover Council unlawfully appointed Defendant Dodge as "Chief Judge" on or about June 13, 2016. *Id.* at ¶ 39. Plaintiffs allege that Defendant Dodge willfully prepared court papers he knew were fraudulent because his appointment was invalid and unlawful. *Id.* at ¶ 91. Whether or not Defendant Dodge actually possessed this knowledge is ultimately a jury question,[1] but Plaintiff is confident that the usual discovery tools, including deposition testimony, will clearly establish Defendant Dodge's subjective knowledge of AS-IA Roberts' October 17, 2016 Decision.

When deciding a dismissal motion for lack of subject matter jurisdiction per Rule 12(b)(1), the Court may permit and limit discovery to determine whether it possesses jurisdiction.

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[1] On October 18, 2016, Plaintiffs provided AS-IA Roberts' October 17, 2016 Decision to Defendant Dodge via his "Court Clerk." Brief Re: State of Nooksack Tribal Judiciary And Emergency Motion For Misc., Relief, at Appendix A, *Belmont v. Kelly*, No. 2014-CI-CL-007; *Tageant v. Kelly,* No. 2016-CI-CL-003; *Alexander v. Kelly,* No. 2016-CI-CL-004; *Rabang v. Romero,* No. 2016-CI-CL-007, *available at* Michigan State University College of Law's Turtle Talk Blog, https://turtletalk.files.wordpress.com/2016/10/belmont-v-kelly-etc-brief-re-state-of-nooksack-tribal-judiciary-and-emergency-motion-for-misc-relief.pdf. Plaintiffs plainly wrote:

> Interior's decision—**which operates as binding, non-IBIA appealable federal law** . . . —also invalidates the Holdover Council's actions after March 24, 2016 to:
>
> 1. Terminate Tribal Court Chief Judge Susan Alexander on March 28, 2016 [and]
> 2. Appoint Ray Dodge to replace her as 'Chief Judge" by June 13, 2016 . . . .
>
> Mr. Dodge . . . lack[s] authority to serve as Nooksack Tribal Court Judge, having not been appointed by a legal quorum of the Tribal Council.

Id. at 3 (emphasis added). Defendant Dodge was on *actual* notice of AS-IA Roberts' October 17, 2016 Decision, and his lack of jurisdiction under said federal law, by the very next day, October 18, 2017. *Id.* But nonetheless he continued to masquerade as a "judge," in order to facilitate Defendants' fraudulent scheme. Dkt. #7 at ¶¶ 53, 67-68. In addition to issuing the eviction orders in dispute in this case, as the United States has explained to this Court, on Defendant Dodge's watch "the Nooksack Tribal Court began refusing to act on complaints challenging the legality of the Kelly Faction's actions." *Nooksack Tribe v. Zinke*, No. 17-219, Dkt. # 26 at 7 (W.D. Wash. Apr. 3, 2017).

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Data Disc, Inc. v. Sys. Tech. Assoc., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977). Discovery is necessary where it is possible that the plaintiff can demonstrate the requisite jurisdictional facts if afforded that opportunity. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

Here, the alleged facts indicate that Defendant Dodge, based on his immediate past relationship with the Holdover Tribal Council as Tribal Attorney and his intimate involvement in the alleged scheme to defraud Plaintiffs as both lawyer and "Chief Judge,"[2] certainly knew about AS-IA Roberts' October 17, 2016 Decision depriving him of jurisdiction. Plaintiffs therefore request that this Court grant limited discovery on that subject.

DATED this 19th day of April, 2017.

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[2] Defendant Dodge arrived to Nooksack as counsel in the fall 2015, at which time: (a) Plaintiffs' disenrollment was stayed by operation of federal and tribal law, *Belmont v. Kelly*, No. 2014-CI-CL-007 (Nooksack Tribal Ct. Feb. 26, 2015) (per 25 C.F.R. § 2.6, enjoining Defendants from initiating disenrollment proceedings until a decision in *St. Germain v. Acting N.W. Reg'l Dir.*, IBIA No.16-022); (b) Plaintiffs were represented by undersigned counsel and secure in their homes and other properties and benefits; (c) Chief Judge Alexander presided over the Tribal Court; and (d) Tribal Council elections were set to commence in December 2015, with a view towards the seating of a new Council by March 24, 2016. *See generally Nooksack Tribe v. Zinke*, No. 17-219, Dkt. # 26 at 7. It is no coincidence that within weeks of his arrival, starting in December 2015: (a) the Tribal Council election was cancelled; (b) undersigned counsel was disbarred; (c) the Chief Judge was fired and replaced by him; and in turn (d) Plaintiffs were purportedly disenrolled, evicted from their homes, and denied benefits of monetary value. *See generally id.*; Dkt. #7 at ¶ 2 ("RICO Defendants' acts and omissions were deliberate and part of a scheme that began by December 2015 to defraud Plaintiffs of money, property, and benefits of monetary value by depriving them of Tribal citizenship through false pretenses and representations.").

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CERTIFICATE OF SERVICE

On April 19, 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF System, which will send electronic notification of such filing to the following parties:

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Signed under penalty of perjury and under the laws of the United States this 19th day of April, 2017.

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