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7 INTERIOR BOARD OF INDIAN APPEALS
8 OFFICE OF HEARINGS AND APPEALS

9 NOOKSACK INDIAN TRIBE,

No. 17-

10 Appellants/Interested Party,

NOTICE OF APPEAL

11 v.

12 DIRECTOR, PORTLAND AREA
13 OFFICE, INDIAN HEALTH SERVICE

14 Appellee.

15
16 **I. NOTICE OF APPEAL**

17 Pursuant to 25 U.S.C. § 5330 and 25 C.F.R. §§ 900.150(e) and 900.158, the Nooksack
18 Indian Tribe ("the Tribe") hereby submits this Notice of Appeal. The Tribe appeals the
19 Department of Health & Human Services ("DHHS"), Indian Health Service ("IHS") Notice of
20 Non-Emergency Reassumption of Contract No. 248-96-0025, as detailed in a March 27, 2017
21 letter ("the Decision") from Mr. Dean Seyler, Director of the Portland Area, Indian Health
22 Service. This Notice of Appeal is filed and served in accordance with 25 C.F.R. § 900.158; a
23 certificate of service follows.
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2 **II. THE REASSUMPTION IS IN ERROR.**

3 The Decision is in error because the Secretary may reassume a contract with an Indian
4 tribe only on narrow grounds set forth in the Indian Self-Determination and Education
5 Assistance Act ("the ISDEAA"), 25 U.S.C. §§ 450 *et seq.* Reassumption is available only when
6 the Secretary finds:

7 that the *tribal organization's performance* under such contract or grant agreement
8 involves (1) the violation of the rights or endangerment of the health, safety, or
9 welfare of any persons; or (2) gross negligence or mismanagement in the handling
10 or use of funds provided to the tribal organization pursuant to such contract or
grant agreement, or in the management of trust fund, trust lands or interests in
such lands pursuant to such contract or grant agreement ...

11 25 U.S.C. § 5330 (emphasis added). The implementing regulations do not contain additional
12 grounds for non-emergency reassumption, *see* 25 CFR §§ 900.246 – 900.256. However, 25 CFR
13 900.247 does clarify that a failure to fulfill the contract must form the basis for either type of
14 reassumption. It reads in pertinent part:

- 15 (a) A reassumption is considered an emergency reassumption if an Indian tribe or
16 tribal organization fails to fulfill the requirements of the contract and this failure
poses:
- 17 (1) An immediate threat of imminent harm to the safety of any person; or
 - 18 (2) Imminent substantial and irreparable harm to trust funds, trust lands, or
interest in such lands.
- 19 (b) A reassumption is considered a non-emergency reassumption if there
has been:
- 20 (1) A violation of the rights or endangerment of the health, safety, or
welfare of any person; or
 - 21 (2) Gross negligence or mismanagement in the handling or use of:
 - 22 (i) Contract funds;
 - 23 (ii) Trust funds;
 - 24 (iii) Trust lands; or
 - 25 (iv) Interests in trust lands under the contract.

1 25 CFR § 900.247. Here, the Decision fails even to allege, much less to establish, any failure to
2 fulfill the requirements of the contract nor does it allege endangerment, gross negligence or
3 mismanagement. Accordingly, the Decision must be overturned.

4 **III. STATEMENT OF ISSUES**

5 The following issues are presented in this Appeal:

6 A. THE DECISION WAS NOT BASED ON GROUNDS FOR REASSUMPTION
7 UNDER THE ISDEAA.

8 B. THE DECISION VIOLATES TRIBAL SOVEREIGNTY AND FEDERAL LAW.
9

10 **IV. STATEMENT OF FACTS**

11 In 1996, the Tribe and the IHS entered into a Self-Determination Contract, IHS Contract No.
12 248-96-0025 ("Contract"). Decl. of C. Bernard, Exh. A. The Contract, entered into pursuant to
13 the ISDEAA, transferred a number of IHS programs, functions, services, activities and (PFSAs)
14 to the Tribe. *Id.* In consideration for the transfer of PFSAs, the Secretary of DHHS agreed to
15 make funds available under an Annual Funding Agreement ("AFA"), which was incorporated into
16 the Parties' Contract. *Id.* Over the course of years, the Parties entered into a number of AFAs.
17 Decl. of C. Bernard at 2.

18 In 2016, the Parties negotiated mutually agreeable terms for the next AFA. Decl. of J. Mace
19 at 2. The Parties agreed in principal to the monetary amounts and in late September 2016, agreed
20 to the Scope of Work and other terms. *Id.* The proposed AFA was substantially the same as the
21 prior AFA with the exception of funding increases. Decl. of J. Mace, Exh. A.
22

23 While the Parties negotiated the terms of the proposed AFA, the Tribe was involved in a
24 lengthy process of disenrolling approximately 300 individuals who were erroneously or
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1 fraudulently enrolled into the Tribe. Decl. of C. Bernard, Exh. C. During the disenrollment
2 process, serious public safety issues arose and strained the resources of the Tribe, in particular, its
3 law enforcement services. Decl. of C. Bernard, Exh. D. Given these safety concerns, the Tribe
4 temporarily delayed its 2016 election cycle. *Id.* The previously-elected Tribal Councilmembers
5 holding seats scheduled for the 2016 election would remain in office as “holdover”
6 councilmembers, consistent with tribal law and previous Nooksack Tribal Court decisions, until
7 such time as the safety concerns subsided and the regular elections could safely be held¹. *Id.*

8 However, before rescheduled elections could be held, the former Principal Deputy Assistant
9 Secretary of the Indian Affairs issued a letter to the Tribal Council Chairman that he opined the
10 Nooksack Tribal Council lacked a quorum to conduct business because of the delayed elections.
11 Decl. of C. Bernard, Exh. E. Further, the former Principal Deputy Assistant Secretary indicated
12 that he would not recognize any Nooksack Tribal Council actions until an election was held. *Id.*

13 While the former Principal Deputy Assistant Secretary was drafting opinion letters, tribal
14 business continued, and the duly elected Nooksack Tribal Council continued holding meetings in
15 accordance with Nooksack Tribal law. The only bases for the IHS’s Decision that the Nooksack
16 Tribal Council lacked a quorum were conclusory letters from the Department of Interior and earlier
17 letters from the IHS, both lacking supporting evidence and jurisdiction. *Id.* None of the IHS
18 correspondence has included any evidentiary support. *Id.* Further, the Decision also lacked any
19 legal or factual support that a Tribal Election required “certification” from the Department of
20 Interior, Bureau of Indian Affairs, as not even the Department of Interior has made such an
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25 ¹ The Tribe ultimately held its General Elections in January 2017. Decl. of C. Bernard.

1 unsupportable claim. *Id.* Lastly, and most significantly, the Decision failed to contain a specific
2 finding of any of the required bases for reassumption, as required by 25 U.S.C. § 5330. *Id.*

3 **V. MEMORANDUM OF POINTS AND AUTHORITIES**

4 The ISDEAA, as amended, directs the IHS to award "self-determination" contracts to tribal
5 organizations to provide programs, functions, services, and activities (PFSAs) for the benefit of
6 Indians that had previously been provided by IHS Section 102 of the ISDA. 25 U.S.C. § 450(f) et
7 seq. (recodified at 25 U.S.C. § 5321).

8 **A. DECISION NOT BASED ON GROUNDS FOR**
9 **REASSUMPTION UNDER ISDEAA.**

10 Section 5330 allows the Secretary to reassume a tribe's self-determination contract only for
11 certain specified failures. It reads in pertinent part:

12 Each contract or grant agreement entered into ... shall provide that in any case
13 where the appropriate Secretary determines that the *tribal organization's*
14 *performance* under such contract or grant agreement involves (1) the violation of
15 the rights or endangerment of the health, safety, or welfare of any persons; or (2)
16 gross negligence or mismanagement in the handling or use of funds provided to the
17 tribal organization pursuant to such contract or grant agreement, or in the
18 management of trust fund, trust lands or interests in such lands pursuant to such
19 contract or grant agreement, such Secretary may, under regulations prescribed by
20 him and after providing notice and a hearing on the record to such tribal
21 organization, rescind such contract or grant agreement, in whole or in part, and
22 assume or resume control or operation of the program, activity, or service involved
23 ...

24 In any hearing or appeal provided for under this section, the Secretary shall have
25 the burden of proof to establish, by clearly demonstrating the validity of the grounds
for rescinding, assuming, or reassuming the contract that is the subject of the
hearing. ...

25 U.S.C. § 5330 (emphasis added). ² "Tribal organization" is defined as:

... the recognized governing body of any Indian tribe; any legally established
organization of Indians which is controlled, sanctioned, or chartered by such
governing body or which is democratically elected by the adult members of the

² The omitted portions of the statutory section concern only emergency reassumption, not at issue in this Appeal.

Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities ...

25 U.S.C. § 5404(I). *See also* 25 CFR § 900.6 (same).

Thus, the only grounds for nonemergency reassumption concern certain types of failure to *perform* the contract. Where there is no question of *performance*, there are no grounds for reassumption. Further, since the IHS issued the Decision, it has yet to provide any further written explanation or any further documentation that the Secretary relied upon.

Although the term “recognized governing body” is not defined in the regulations, federal law makes clear that *federal* authorities have no role in determining tribal governance. *See Goodface v. Grassrope*, 708 F.2d 335, 338 (8th Cir. 1983). Instead, this is a question uniquely of tribal authority. The Decision provides no analysis of tribal law for the conclusion that the Tribal Council lacks a quorum, nor is such an analysis within the Secretary’s purview. Furthermore, the Regional Director has the burden to prove by clear and convincing of a failure of performance. This he simply cannot do. Because, the Decision is not based on permissible statutory grounds, this Board must reverse it.

B. DECISION VIOLATES TRIBAL SOVEREIGNTY AND FEDERAL LAW.

The Decision notified the Tribe that the sole reason the IHS would reassume the Contract was because “... the Tribal Council [does not] have a quorum.” Letter at p. 3. Aside from the fact that such a determination is not grounds for reassumption, it is beyond the IHS’s purview and violates federal and tribal law.

Nowhere does the legislation establishing the IHS or its implementing regulations authorize it to determine the legitimacy of tribal elections, of tribal enrollment disputes or of the legal authority of tribal councils. Indeed, even federal district courts lack authority to decide such

1 issues, which authority is reserved to the tribes themselves. *See Goodface v. Grassrope, supra*, at
2 339.

3 Both *Goodface, supra*, and *Wheeler v. U.S. Dept. of Interior*, 811 F.2d 549 (10th Cir. 1987),
4 concern federal recognition of disputed tribal elections. In *Goodface*, the newly elected tribal
5 council brought suit against the Bureau of Indian Affairs for recognizing both its authority and that
6 of its predecessor council, based on the claim by the predecessor tribal council that the tribal
7 election was invalid. The district court ordered BIA to recognize the new tribal council, and the
8 former council members appealed to the Eighth Circuit. The Court of Appeals held that BIA
9 abused its authority, saying:

10 The final BIA action subject to judicial review is its decision to recognize both
11 tribal councils only on a de facto basis. Such a recognition of both councils amounts
12 to a recognition of neither. Thus, the district court correctly found that the BIA
13 acted arbitrarily and capriciously by effectively creating a hiatus in tribal
14 government which jeopardized the continuation of necessary day-to-day services
on the reservation. The BIA, in its responsibility for carrying on government
relations with the Tribe, is obligated to recognize and deal with some tribal
governing body in the interim before resolution in the election dispute.

15 708 F.2d at 338-39. Further, appeal, the Court of Appeals went on to chasten the trial court for
16 dealing with the merits of the tribal election and held that "... the district court should not have
17 addressed the merits of the election dispute ..." 708 F.2d at 339. Thus, *Goodface* stands for the
18 proposition that federal authorities cannot shirk their obligations simply because someone disputes
19 the validity of a tribal election, but neither can those same authorities decide the internal tribal
20 issues.
21

22 The other leading case in this area, *Wheeler, supra*, involved a claim by an unsuccessful
23 candidate for tribal chief who sought federal intervention to overturn the election results. The
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1 district court denied his request to order BIA to decertify the election, and he appealed. On appeal,
2 the Court examined the tribal law on elections and said:

3 ... without deciding whether the Department should become involved when a tribal
4 forum is not available, we hold that when a tribal forum exists for resolving a tribal
5 election dispute, the Department must respect the tribe's right to self-government
6 and, thus, has no authority to interfere.

7 811 F.2d at 553 (citing *Goodface*, 708 F.2d at 339). The Court therefore affirmed dismissal of the
8 case.

9 *Goodface* and *Wheeler* make clear that, absent specific, limited exceptions, federal
10 authorities have no power to decide tribal election issues. In this case, none of the exceptions
11 apply. IHS's Decision relies on a Department of Interior letter that lacks any legal authority or
12 jurisdiction. Such reliance is by definition arbitrary and capricious and must be overturned.

13 VI. HEARING REQUESTED

14 Pursuant to 25 C.F.R. § 900.158(c)(3), the Tribe requests a hearing.

15 VII. IDENTIFICATION OF PARTIES

16 All pleadings and other correspondences regarding this case should be directed to:

17 Office of Tribal Attorney
18 Nooksack Indian Tribe
19 P.O. Box 63
20 Deming, WA 98244
(360) 592-4158

21 Identification of all additional interested parties:

22
23 Dean Seyler,
24 Director
25 Indian Health
Service

1414 NW Northrup,
Ste. 800
Portland, OR 97209

1 Imogene M. Ingawanup
2 Contracting Officer
3 Indian Health Service
4 1414 NW Northrup,
5 Ste. 800
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24
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Portland, OR 97209

And to:

RADM Michael Weahkee
Acting Director
Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

SUBMITTED THIS 26 DAY OF June 2017.



Charles N. Hurt, Jr., WSBA # 46217
Attorney for Appellant/Interested Party
Senior Tribal Attorney
Office of Tribal Attorney
Nooksack Indian Tribe
P.O. Box 63
Deming, WA 98244

CERTIFICATE OF SERVICE

I, Sue Gearhart, declare as follows:

I am over eighteen years of age and am competent to testify, and have personal knowledge of the facts set forth herein. I am employed with the Nooksack Indian Tribe, Office of Tribal Attorney, counsel of record for the Appellants.

On 26 day of June, 2017 I mailed the following documents:

Notice of Appeal w/ attached Decision;
Declaration of C. Bernard w/ exhibits;
Declaration of J. Mace w/exhibits.

To the following, via certified mail, U.S. Mail, postage prepaid and return receipt requested:

NOTICE OF APPEAL
PAGE 9 of 14

NOOKSACK INDIAN TRIBE
OFFICE OF TRIBAL ATTORNEY
P.O. BOX 63
DEMING, WA 98244
PH: (360) 592-4158 FAX: (360) 592-2227

1 For Filing

2 Interior Board of Indian Appeals
3 Office of Hearings and Appeals
4 U.S. Dept. of Interior
5 801 N. Quincy St., Ste. 300
6 Arlington, VA 22203

7 For Service

8 Dean Seyler, Director
9 Indian Health Service
10 1414 NW Northrup, Ste. 800
11 Portland, OR 97209

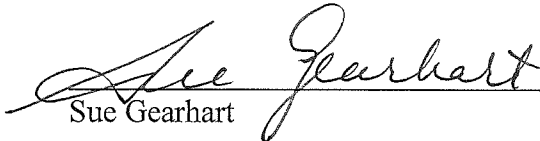
12 Imogene M. Ingawanup
13 Contracting Officer
14 Indian Health Service
15 1414 NW Northrup, Ste. 800
16 Portland, OR 97209

17 And to:

18 RADM Michael Weahkee
19 Acting Director
20 Indian Health Service
21 5600 Fishers Lane
22 Rockville, MD 20857

23 The foregoing statement is made under penalty of perjury under the laws of the state of
24 Washington and the Nooksack Indian Tribe and is true and correct.

25 DATED this 26th day of June, 2017.


Sue Gearhart