THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

THE NOOKSACK INDIAN TRIBE,

Plaintiff,

v.

RYAN K. ZINKE, in his official capacity as Secretary of the Interior; the U.S. DEPARTMENT OF THE INTERIOR; MICHAEL S. BLACK, in his official capacity as Acting Assistant Secretary - Indian Affairs; WELDON "BRUCE" LOUDERMILK, in his official capacity as Director, Bureau of Indian Affairs, Department of the Interior; STANLEY M. SPEAKS, in his official capacity as Regional Director, Northwest Region, Bureau of Indian Affairs; MARCELLA L. TETERS, in her official capacity as Superintendent, Puget Sound Agency, Bureau of Indian Affairs; TIMOTHY BROWN, in his official capacity as Senior Regional Awarding Official for the Bureau of Indian Affairs, Northwest Region; and THE UNITED STATES OF AMERICA,

Defendants.

Case No. 2:17-cv-00219-JCC

MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO DISMISS

NOTED FOR HEARING: MAY 25, 2017

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I. INTRODUCTION

By granting Defendants' Motion for Summary Judgment ("Order"), the Court held that the Chairman of the Nooksack Indian Tribe and the seven current members of the Tribal Council are not recognized as the Tribe's governing body, and therefore have no standing to prosecute the Tribe's claims as asserted in this lawsuit. In doing so, the Court failed to defer to the Nooksack Tribal Court's reasonable construction of its own law regarding holdover council members, as required by *Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004) (federal court defers to tribal court's interpretation of tribal law), and inappropriately deferred to the Department of Interior's decisions arbitrarily refusing to recognize any governing body at the Nooksack Tribe.

The Tribe urges the Court to reconsider, alter, or amend its Order, pursuant to CR 59(e), 60(b)(6), and LCR 7(h), and vacate the summary judgment entered in the Defendants' favor, to correct a manifest error in its prior ruling and prevent the manifest injustice that will occur if the doors of the courthouse are closed to the Tribe.[1]

II. ARGUMENT

A. Standards for Granting Reconsideration

A motion to alter or amend a judgment under Rule 59(e) seeks "a substantive change of mind by the court." *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983). A Rule 59(e) motion is a proper vehicle for seeking reconsideration of a summary judgment ruling. *Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 811 (9th Cir. 1981), *overruled on other grounds*, *Puchall v. Houghton, Cluck, Coughlin & Riley (In re Washington Pub.*

[1] This motion does not seek to vacate the Court's order denying Plaintiff's Motion for a Preliminary Injunction.

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Power Supply Sys. Sec. Lit.), 823 F.2d 1349 (9th Cir. 1987) (en banc); *Mir v. Fosburg*, 646 F.2d 342 at 344, (9th Cir. 1980) (a Rule 59(e) motion is the proper vehicle for seeking reconsideration of an order granting dismissal without leave to amend); 6 Moore Federal Practice, p. 56-1549, P 56.26-1 (2nd ed. 1976).

The Court's decision is clear error and manifestly unjust because it has created a lapse in tribal government terminating essential services that are necessary to day-to-day operations on the reservation. Such a significant deviation from prior precedent and alarming impact on tribal self-government must be determined after a trial on the merits.

B. The Court was Required to Defer to the Tribe's Reasonable Interpretation of Its Own Law

The Supreme Court has repeatedly recognized Congress's commitment to a "policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985); *see also Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1986). Consistent with this policy, the Supreme Court has determined that "tribal courts are best qualified to interpret and apply tribal law." *Iowa Mutual*, 480 U.S. at 16.

For that reason, federal courts are required to "defer to the tribal courts' interpretation" of tribal law, just as the courts defer to interpretations of state law by the highest court of a state. *See Hinshaw v. Mahler*, 42 F.3d 1178, 1180 (9th Cir. 1994) ("The Tribal Court's interpretation of tribal law is binding on this court."); *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988) (same); *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 945 (8th Cir. 2010) ("The district court properly deferred to the tribal courts' determination that the June 2003 agreement between Walker and API did not bind the Tribe."); *Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004) (federal court defers to tribal court's interpretation of tribal law); *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th

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Cir. 1994) ("The Tribal Court's determinations of federal law should be reviewed de novo while determinations of Tribal law should be accorded more deference."), *cert. denied*, 513 U.S. 1103, 130 L. Ed. 2d 673, 115 S. Ct. 779 (1995); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (8th Cir. 1993) (deferring to tribal court's decision that the tribal constitution gave the tribal court personal jurisdiction over non-Indians), *cert. denied*, 512 U.S. 1236, 129 L. Ed. 2d 861, 114 S. Ct. 2741 (1994).

The Court failed to defer to the Tribal Court's determinations that Nooksack law allowed for holdover council positions in 1997 and again in 2016. In the 1997 opinion, the Nooksack Tribal Court upheld the holdover of Council members for more than a year during an election dispute, and refused to invalidate Council action taken during that time in order to provide for "the orderly transition of power of the government." April 7, 1997 Order, *Campion v. Swanaset*, No. NOO-C-96-004, at 2-3. In 2016, in a breach of contract suit brought by the Tribe against the organization that formerly provided its appellate court services, the Nooksack Tribal Court, acting through a *pro tem* judge affirmed *sub silentio* the validity of the Council members' holdover terms. *Nooksack Indian Tribe v. Northwest Intertribal Court System*, Case No. 2016-CI-CL-006, (10/7/2016 TRO, 11/17/2016 preliminary injunction in Tribe's favor, over defendant's objection that the holdover Tribal Council had no standing to initiate litigation because of Roberts letter, alleged lack of quorum).

The Court here characterized the Tribe's argument as requesting this Court to construe Tribal law in order to allow for holdover council positions, yet asserting that the Court lacked subject jurisdiction to construe Tribal law. The Court's characterization is inaccurate. The Tribe did not ask the Court to construe Nooksack law, the Tribe provided the Nooksack Tribal Court decisions permitting holdover council positions and the federal authority deferring to

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such decisions of tribal law, and argued here that the Court was required to defer to those Tribal Court decisions. If the Court had done so, as required by *Hinshaw*, 42 F.3d at 1180, *Sanders*, 864 F.2d at 633, *Prescott*, 387 F.3d at 756, *City of Timber Lake*, 10 F.3d at 559, and *Duncan Energy*, 27 F.3d at 1300, it would have concluded that the Tribal Court, construing Tribal law, has allowed for holdover council positions, and this Court must follow suit.

The Nooksack Tribal Court has concluded that Tribal law allows for holdover council members, which means that there has at all times been a quorum and the current Tribal Council members prosecuting this case along with the Chairman have standing and authority to proceed as the duly elected governing body.

C. The Court Cannot Defer to the Department of Interior's Interpretation of Tribal Law

The Court concluded in its Order that the *Cayuga Nation v. Tanner*, 824 F.3d 321, 327 (2nd Cir. 2016) case supported its deference to the Department of Interior's decisions. That conclusion was error, because *Cayuga* actually authorizes the Court to proceed to determine "whether there is a sufficient basis in the record to conclude, without resolving disputes about tribal law, that the individual may bring a lawsuit on behalf of the tribe." *Cayuga Nation*, 824 F.3d at 328. Here, there is a sufficient basis in the record – including the Tribal Court's decisions in *Campion v. Swanaset*[2] and *Nooksack Indian Tribe v. Northwest Intertribal Court System*,[3] which allow for holdover council positions. *See also* (Dkt# 30, p. 3:22-25) ("After

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[2] (Dkt# 20, p. 26:38-44) ("the court decrees that the current [holdover] tribal council shall stand until the orderly transition of power of government and the new election is completed."); see also (Dkt#37, p. 95) (holdover "incumbents lost their council seats in the November 1, 1997 Nooksack Tribal Election.").

[3] (Dkt# 20, p. 51:9-17) ("the elections are now proceeding in December 2016 and January 2017. It thus appears that the principal issue facing the court of appeals is now at least

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satisfying myself that Nooksack law allowed for holdover of Council positions until an election could safely be conducted, I did not appoint an Election Superintendent in December, as I otherwise would have done for a March general election."); (Dkt# 38, p. 5:5-10) ("After the Chairman satisfied himself that the Nooksack law allowed for holdover of Council positions until an election could be conducted, and with the support of Council, the Chairman postposed [sic] the elections and did not appoint an Election Superintendent."); (Dkt# 37, p. 77)("the [holdover] Tribal Council will deny the seating of candidates elected in the March 2004 election and so directs that a re-polling commence."); (Dkt# 30, p. 32) ("it is up to the Nooksack Tribe through its own internal processes and operating through its own internal forums to carry out this inherently sovereign function."). Robed with the sovereign power of Nooksack law, the current Council members, including the holdover members, are permitted to commence and maintain this litigation. Even if a factual dispute exists, it is not appropriate to resolve that dispute absent a trial on the merits.

And, as the Court noted at page 9 of its Order, quoting *Cayuga Nation*: "Like the BIA, which must determine whom to recognize as a counterparty to administer ongoing contracts on behalf of the Nation, the courts ***must*** recognize someone to act on behalf of the Nation to institute, defend, or conduct litigation." *Cayuga Nation*, at 330. [emphasis added].

None of the Ninth Circuit cases cited by the Court support the refusal to recognize this Council. In fact, the first two cases cited in the Court's decision both involved two groups competing for recognition by the BIA or the Court, in contrast to the single group seeking relief here. *See Cloverdale Rancheria of Pomo Indians v. Salazar*, No. 5:10-cv-1605-JF, 2012

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somewhat mooted;").

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U.S. Dist. LEXIS 66474, at *2 (N.D. Cal. May 11, 2012) ("Plaintiffs claim that they are members of the Tribe's rightful governing body, that Defendants improperly have refused to deal with them, and that instead Defendants have ***dealt with a competing governing body*** that lacks authority to act on behalf of the Tribe.")[emphasis added], affirmed, *Cloverdale Rancheria of Pomo Indians of Cal. v. Jewell*, 593 F. App'x 606, 608 (9th Cir. 2014).

The other two cases are inapplicable because they involve tribes that were not federally recognized, whereas there is no dispute that the Nooksack Tribe is federally recognized. *David Laughing Horse Robinson v. Salazar*, 838 F. Supp. 2d 1006 (E.D. Cal. 2012) (not a federally recognized tribe); *Winnemem Wintu Tribe v. United States DOI*, 725 F. Supp. 2d 1119 (E.D. Cal. 2010) (not a federally recognized tribe).

While ordinarily the Department's decision regarding which leadership to acknowledge is entitled to deference, it is not the case here, where the refusal to recognize ***any*** leadership impermissibly "created a hiatus in tribal government which jeopardize[s] the continuation of necessary day-to-day services on the reservation." *Goodface v. Grassrope*, 708 F.2d 335, 338-39 (8th Cir. 1983) (concluding BIA acted arbitrarily and capriciously by effectively refusing to recognize any tribal council until an election dispute could be resolved through tribal court). The facts in the record here reflect the financial impact on day-to-day services necessary for effective administration of tribal business such as tribal health services, salmon recovery, and housing. (Dkt# 21, pp. 4-5). On these facts, it is arbitrary for the Department to refuse recognition of any government. Further, it is manifestly unjust for this Court to permit such misfeasance to continue with appreciable impacts to the health and safety of the tribal members. *Goodface*, 708 F.2d at 338. Again, even the facts are in dispute, those facts cannot

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be resolved summarily on motion practice but rather must be decided on the merits.

"Deference is undoubtedly inappropriate . . . when the agency's interpretation is 'plainly erroneous or inconsistent with the regulation,'" or "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Vietnam Veterans of Am. v. CIA*, No. C 09-0037 CW, 2013 U.S. Dist. LEXIS 164699, at *50 (N.D. Cal. Nov. 19, 2013) (citations omitted). "This might occur when the agency's interpretation conflicts with a prior interpretation, . . . or when it appears that the interpretation is nothing more than a convenient litigating position, . . . or a post hoc rationalization advanced by an agency seeking to defend past agency action against attack." *Id.* at *51 (internal quotation marks, citations and formatting omitted).

D. The Roberts Letters Are Not Entitled to Deference

Just as the Court was required to defer to the Tribe's reasonable interpretation of its own laws, so is the Department of Interior. *Tabor v. Acting Southern Plains Regional Director*, 39 IBIA 144, 151 (2003) (Department must defer to tribal governing body's reasonable interpretation of its own laws); *Wadena v. Acting Minneapolis Area Director*, 30 IBIA 130 (1996) (In the interest of promoting tribal sovereignty, the Department will defer to a Tribe's reasonable interpretation of its own laws).

The Court concluded that it would defer to the Department of Interior's determination that the Tribal Council lacked a quorum and the Council lacked standing and authority to bring this suit, because Interior has the power to manage all Indian affairs. However, although a federal agency's interpretation of a statute or regulation is entitled to great deference by reviewing courts, *e.g., Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 2445, 57 L. Ed. 2d 337 (1978); *Columbia Basin Land Protection Ass'n v. Schlesinger,* 643 F.2d 585, 599-600 (9th Cir. 1981), this rule applies only if the agency interpretation is

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reasonable and not clearly outside the agency's statutory authority. *Id.*; *Am. Motorcyclist Asso. v. Watt*, 534 F. Supp. 923, 934 (C.D. Cal. 1981). According to the Eighth Circuit, the Agency's refusal to recognize any government at Nooksack is arbitrary and capricious because it has eliminated services on the reservation that are necessary for day-to-day operations. As a result, Interior's letters are unreasonable, manifestly unjust, and not entitled to deference. *Goodface*, 708 F.2d at 338-339 (concluding BIA acted arbitrarily and capriciously by refusing to recognize the tribal council until an election dispute could be resolved through tribal court).

III. CONCLUSION

The Tribe respectfully requests that the Court reconsider, alter, or amend its May 11, 2017 Order Granting Defendants' Motion to Dismiss, and enter an Order denying the Defendants' motion and vacating the summary judgment entered in the Defendants' favor.

Dated this 25th day of May, 2017.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 25th day of May, 2017, I arranged for service of the foregoing NOOKSACK INDIAN TRIBE'S MOTION FOR RECONSIDERATION to the parties via the Court's CM/ECF system as follows:

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