Judge Coughenour

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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. C17-0219JCC

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR RECONSIDERATION

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INTRODUCTION

The Kelly Faction seeks reconsideration of an order granting defendants' motion to dismiss for lack of subject matter jurisdiction. In ruling in favor of defendants (hereafter collectively referred to as "the Secretary"), the Court concluded that because the Kelly Faction is not recognized by the Department of the Interior ("Interior") as the governing body of the Nooksack Indian Tribe ("Tribe"), it has no legal authority to file a lawsuit on the Tribe's behalf.

The Kelly Faction attacks the Court's decision as both "manifestly erroneous" and "manifestly unjust." According to the Kelly Faction, this Court failed to give adequate deference to "reasonable construction[s]" of Nooksack Tribal law by the Nooksack Tribal Court. Additionally, the Kelly Faction asserts manifest error by this Court because its decision leaves the Tribe without a recognized government.

Because the Kelly Faction's motion simply rehashes arguments that were unsuccessful in opposing dismissal and, in any event, demonstrates neither manifest error nor manifest injustice, no basis for reconsideration under Rule 59(e), F.R.Civ.P., has been shown.[1] Accordingly, the motion should be denied.[2]

ARGUMENT

I. A RULE 59(e) MOTION IS NOT INTENDED TO SERVE AS A VEHICLE FOR REARGUMENT BY A DISAPPOINTED PARTY

Rule 59(e), F.R.Civ.P., provides that a court may alter or amend a judgment after its entry. "The rule offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citation and internal quotation marks omitted). The court does not review *de novo* the legal basis for its earlier decision under Rule 59(e), but rather reviews only for clear error.

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1 The Kelly Faction's memorandum references Rule 60(b)(6), F.R.Civ.P., in passing, but makes no separate arguments under that rule. Notably, Rule 60(b)(6) motions are "construed harshly against the movant." *United Artists Corp. v. La Cage Aux Folles, Inc.*, 771 F.2d 1265, 1275 (9th Cir. 1985) (Wallace, J., concurring).

2 At various points in its memorandum, the Kelly Faction suggests that there is a need for "a trial on the merits." See *e.g.*, Dkt. # 45, p. 3, *ll*. 8-9. Never does it identify any genuinely disputed issue of material fact going to the merits that would necessitate a trial. Moreover, the place to demonstrate the existence of such issues was in its opposition to the Secretary's motion to dismiss.

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McDowell v. Calderon, 197 F.3d 1253, 1255 (9th Cir. 1999). Consequently, such motions should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or there is an intervening change in the controlling law. *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).[3] "A district court has considerable discretion when considering a motion to amend a judgment under Rule 59(e)." *Turner v. Burlington N. Santa Fe R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003).

"A Rule 59(e) motion may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation," *Kona Enters.*, 229 F.3d at 890 (emphasis in original). Conversely, such a motion is also properly denied where it presents only arguments that were already made to and rejected by the court. See *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

"Manifest error" cannot be shown merely through arguments reflecting that the movant *believes* the ruling was wrong. *McDowell v. Calderon*, *supra*, 197 F.3d at 1255 (raising a "debatable" legal question was not sufficient for relief under Rule 59(e)). Rather, the movant must show a "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). Where reconsideration is sought due to manifest injustice, the moving party can only prevail if it demonstrates "that the injustice from the case is 'apparent to the point of being indisputable.'" *Shirlington Limousine & Transp., Inc. v. United States*, 78 Fed.Cl. 27, 31 (2007) (quoting *Pacific Gas & Electric Co. v. United States*, 74 Fed.Cl. 779, 785 (2006), *aff'd in part, rev'd in part on other grounds*, 536 F.3d 1282 (Fed. Cir. 2008)).[4]

As set forth below, nothing in the Kelly Faction's motion demonstrates either manifest error or manifest injustice.

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3 The Kelly Faction's motion for reconsideration alleges neither the discovery of new evidence nor an intervening change in the controlling law.

4 Manifest Injustice: "A direct, obvious, and observable error in a trial court, such as a defendant's guilty plea that is involuntary or is based on a plea agreement that the prosecution has rescinded." Black's Law Dictionary (10th ed. 2014).

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II. THE COURT DID NOT COMMIT MANIFEST ERROR BY REFUSING THE KELLY FACTION'S INVITATION TO CONSTRUE NOOKSACK LAW AS SUPPORTING THE LEGITIMACY OF THE HOLDOVER COUNCIL

According to the Kelly Faction, this Court committed manifest error by failing to "defer to the Nooksack Tribal Court's reasonable construction of its own law regarding holdover council members . . ." Dkt. # 45, p. 2, *ll*. 5-9. The problems with this argument are numerous. First, the Court has already heard this argument. The Kelly Faction argued this point in opposition to the motion to dismiss. Dkt. # 36, p. 16, *l*. 9 - p. 17, *l.* 15 ("The Tribe's court, interpreting Nooksack law, has rejected the position adopted by the Federal Defendants regarding holding over, and this Court is required to defer to the Nooksack court's conclusion.").

Second, no authoritative ruling of any Nooksack Court on the relevant legal issues has ever been placed before this Court by the Kelly Faction. The Nooksack cases cited by the Kelly Faction are neither factually apposite nor authoritative rulings on the merits. Hence, a necessary prerequisite for the deference demanded by the Kelly Faction is absent.[5]

Third, while the Kelly Faction suggests that the relevant Nooksack law is clear and established concerning the legal status of the holdover council, its shifting legal position belies that notion. It should not be forgotten that the Kelly Faction first suggested to the Court that the legal precepts underlying its legal argument were entirely consistent with those applicable to non-Tribal governments. See Dkt. # 36, p. 16, *ll.* 16-18 ("[I]t has long been established in constitutional democracies that in situations where a constitution is silent on the status of a holdover elected official, that official continues to hold office until a successor is duly appointed and qualified.") After the Secretary demonstrated through reliance on more apposite case law that "constitutional democracies" apply a rule of law wholly contrary to the one proffered by the Kelly Faction, the Faction appears to have retreated from its earlier position and now seems to suggest, but fails to establish, that Nooksack law has a unique view of the legal status of *de facto* officers which differs from the rule applied by other "constitutional democracies."

Reduced to its essentials, the Kelly Faction's manifest error argument amounts to an

5 Moreover, in light of the Kelly Faction's subversion of the independent Nooksack judiciary as documented in the Secretary's April 24, 2017 memorandum (Dkt. # 26, p. 7, *l.* 6 - p. 8, *l.* 17), rulings of the Nooksack Tribal Court after March 28, 2016 and the Nooksack Court of Appeals after October 6, 2016 must be disregarded.

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assertion that the Nooksack law is what it says it is, and this Court is required to simply fall in line. *Id.* at p. 5, *l*. 21 – p. 6, *l.* 15. ("Robed with the sovereign power of Nooksack law, the current Council members, including the holdover members, are permitted to commence and maintain this litigation."). The Secretary disagrees. The Kelly Faction's representations about Nooksack law have been shown to be nothing more than a convenient litigating position to which no deference is required. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, ___, 132 S. Ct. 2156, 2166, 183 L. Ed. 2d 153 (2012)

Fourth, the argument is purely a straw man. It presupposes that the Court's holding rests in some measure upon a rejection of the Kelly Faction's rather expedient account of what Nooksack law provides under these unique circumstances. To the contrary, the Court expressly recognized in its opinion that it "cannot interpret tribal law," and it rejected the Kelly Faction's invitation to do so. Dkt. # 43, p. 10, *l.* 23 – p. 11, *l*. 2 (noting that the Kelly Faction "cannot have it both ways."). The Court's order unambiguously holds that the Kelly Faction has no authority to initiate a lawsuit on behalf of the Tribe because, as borne out by the record, Interior does not recognize the Kelly Faction as the Tribe's governing body. *Id.* at p. 10, *ll*. 1-10.

In summary, the Court cannot have committed manifest error by failing to give sufficient deference to a supposed principle of Nooksack law that was not to any degree determinative of the outcome of the motion to dismiss, as expressed in the Court's dispositive order. Rather, the Kelly Faction is simply rearguing points concerning the purported legitimacy of the holdover council under Nooksack law that were ultimately found to be immaterial.

III. THE COURT DID NOT COMMIT MANIFEST ERROR BY CONCLUDING THAT THE KELLY FACTION HAD NO LEGAL AUTHORITY TO FILE THIS LAWSUIT ON BEHALF OF THE NOOKSACK INDIAN TRIBE

Relying on *Cayuga Nation v. Tanner,* 824 F.3d 321, 327 (2nd Cir. 2016), the Kelly Faction argues that the Court committed manifest error by refusing to recognize it as the governing body of the Tribe with full authority to initiate this lawsuit on the Tribe's behalf. Nothing in *Cayuga Nation* evidences manifest error in this Court's ruling. In fact, this Court's ruling is based on a careful parsing of *Cayuga Nation* and is fully consistent with the Second Circuit's holding.

In *Cayuga Nation*, the Second Circuit held that "where the authority of the individual

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initiating litigation on behalf of a tribe has been called into dispute, the only question we must address is 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." *Id.* at 328 (emphasis added). The Court determined that there was sufficient evidence in the record to conclude that the "Halftown group" was the recognized governing body of the Cayuga Nation because BIA had already decided to recognize the Halftown group as a contract partner for purposes of administering the Tribe's ISDA contracts. *Id.* at 328-329. The Court concluded it could reasonably infer from this evidence alone that BIA recognized the Halftown group as the governing body of the Cayuga Nation and it could thus initiate litigation on the Cayuga Nation's behalf. *Id.* at 329-330.

Here, of course, the circumstances are dramatically different. The evidence in the record establishes unequivocally that the Kelly Faction is *unrecognized* by the Secretary. That should be the end of the story and, consistent with *Cayuga Nation*, this Court has already so ruled. Dkt. # 45, p. 11, *ll*. 9-15 (and cases cited).

Curiously, the Kelly Faction suggests that this Court committed manifest error by *refusing* to wade into the Tribe's internal affairs. The Kelly Faction argues that this Court should have construed Nooksack law in order to make a determination as to the holdover council's legitimacy and to confirm its status as the governing body of the Tribe with full authority to initiate this lawsuit on the Tribe's behalf.

Not only has the Kelly Faction failed to identify any manifest error in the Court's ruling, it encourages the Court to commit manifest error in at least two separate ways. First, as set forth in its order, the Court has concluded that it lacks jurisdiction to interpret Tribal law. Dkt. # 43, p. 11, *ll.* 1-2 (citing cases). Nevertheless, the Kelly Faction asks the Court to make a determination of its legitimacy under Nooksack law by construing inapposite decisions of Tribal courts. This, of course, the Court cannot do as a matter of Federal law.

Second, the Kelly Faction asks the Court to judicially declare that the Kelly Faction is the recognized governing body of the Tribe when the Secretary has expressly stated otherwise. The Court's order speaks to this point as well:

However, *Cayuga Nation* holds that where the BIA recognizes specific entities as the tribal

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> leadership, federal courts must do the same. Logically, therefore, the converse must be true: where the BIA refuses to recognize tribal leadership, federal courts must do the same.

Id. at p. 11, *ll*. 9-15 (citations omitted). The Kelly Faction's assertion that this conclusion is manifest error is purely *ipse dixit*. As has been noted, it is a well-accepted principle in the law that "the [United States] must speak with one voice" with respect to its government-to-government relationships, and that voice must emanate from the Executive. *Cayuga Nation*, *supra,* 824 F.3d at 328 (quoting *Zivotofsky ex rel. Zivotofsky v. Kerry*, ___U.S. ___, 135 S.Ct. 2076, 2086, 192 L.Ed.2d 83 (2015)). No contrary authority, controlling or otherwise, has been brought to the Court's attention by the Kelly Faction.

Lastly, quoting a passage from *Cayuga Nation* out of context, the Kelly Faction insists that this Court's ruling is inconsistent with the Second Circuit's opinion. The relevant passage, in full, states:

> 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. *Lacking jurisdiction to resolve the question of governmental authority under tribal law, and lacking the authority under federal law (not to mention the resources and expertise of the BIA) to question the decision of the Executive about whom the federal government should recognize as speaking for the Nation, the only practical and legal option is for the courts to consider the available evidence of the present position of the Executive and then defer to that position.*

Id. at 330 (emphasis added). While it was possible on the facts in *Cayuga Nation* for the Court to recognize the Halftown Group based on the available evidence without construing Tribal law or usurping the authority of the Secretary, it is not possible for the Court to recognize the Kelly Faction here. The notion underlying the Kelly Faction's contention, which it argued previously in opposition to the Secretary's motion to dismiss, see dkt. # 36, p. 12, *l*. 22 – p. 13, *l*. 5, is that "someone" must be recognized by the Secretary as the governing body of the Nooksack Tribe and, in the absence of some other obvious candidate, the Secretary is legally obligated to recognize the Kelly Faction, regardless of the insubstantiality of its claim to legitimacy and its demonstrated faithlessness to the Nooksack people in the judgment of the Secretary. That view is not supported by any case law cited to this Court by the Kelly Faction and, as this Court has already noted, the available case law points squarely in the opposite direction. Dkt. # 43, p. 11, *ll*. 13-15 (citing, *inter alia, Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 712-713 (2nd Cir. 1998)). The Kelly Faction has fallen far short of

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demonstrating manifest error in the Court's ruling.[6]

IV. NO MANIFEST INJUSTICE RESULTS FROM THE COURT'S RULING

Given the circumstances that have brought us to this place, it is ironic that the Kelly Faction decries the "manifest injustice" that purportedly results from the Court's ruling. This contention is asserted only in the most conclusory terms.

Although not well-defined in the law, it is evident that "'manifest injustice' must entail more than just a clear and certain prejudice to the moving party, but also a result that is fundamentally unfair in light of governing law." *Slate v. Am. Broad. Companies, Inc.*, 12 F. Supp. 3d 30, 35–36 (D.D.C. 2013). "[T]he moving party can only prevail if it demonstrates that the injustice from the case is 'apparent to the point of being indisputable.'" *Shirlington Limousine & Transp., Inc. v. United States*, 78 Fed.Cl. 27, 31 (2007) (quoting *Pacific Gas & Electric Co. v. United States*, 74 Fed.Cl. 779, 785 (2006), *aff'd in part, rev'd in part on other grounds*, 536 F.3d 1282 (Fed.Cir. 2008)).

No fundamental unfairness is present in the Court's judgment. To the contrary, the result is the natural consequence of the Kelly Faction's own actions. The Kelly Faction unilaterally discarded the representative form of government established by the Nooksack Constitution. It has acted without a quorum of duly elected councilmembers since March 2016 and has been "faithless to [its] own people and without integrity." See *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

The Kelly Faction brought these consequences upon itself. Having so willingly shed any pretense of legitimacy as the democratically-elected representatives of the Nooksack People, it is both just and right that the Kelly Faction has, as a direct consequence, lost its ability to file suit in the name of the Tribe or to represent the Tribe in its negotiations with the Secretary for federal benefits.

Lastly, the path forward to legitimacy, and recognition, is in its own hands. The Kelly

6 Contrary to the Kelly Faction's argument, *Goodface v. Grassrope,* 708 F.2d 335 (8th Cir. 1983), which is not controlling authority in this Circuit, is not to the contrary. In *Goodface*, two competing factions were vying for recognition. One of the two factions would ultimately emerge as the legitimate governing body of the Lower Brule Sioux Tribe once the Tribe resolved its internal disputes. The Court held that a BIA decision to recognize both factions on a *de facto* basis until the Tribe's internal dispute was resolved was an arbitrary decision. However, nothing in *Goodface* supports the proposition that, in the absence of any putatively legitimate faction, the Secretary *must* recognize "someone" as the governing body of a tribe, regardless of legitimacy.

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Faction must hold a free and fair election for Tribal council positions in which all members of the Tribe, not just a select few, have the right to vote. Underscoring its own illegitimacy and its evident lack of faith in the democratic process to determine the future course of the Tribe, the Kelly Faction would prefer to sue here for recognition rather than expose the Faction's members to a fair vote of the Nooksack People.

The judgment of the court was just and right, and the Kelly Faction's motion for reconsideration should be denied.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Kelly Faction's motion for reconsideration be denied.

DATED this 12th day of June, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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I further certify that on this date, I mailed, by United States Postal Service, the foregoing to the following non-CM/ECF participant(s), addressed as follows:

-0-

DATED this 12th day of June, 2017.

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