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

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO DISMISS

NOTED FOR HEARING: JUNE 16, 2017

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I. ARGUMENT

A. The Tribe Has Demonstrated Clear Error Warranting Reconsideration

"Rule 59(e) amendments are appropriate if the district court '(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.' *Dixon v. Wallowa Cty.*, 336 F.3d 1013, 1022 (9th Cir. 2003), *quoting School Dist. No. 1J, Multnomah County v. ACandS*, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

Courts have generally not defined "clear error" for purposes of Rule 59(e). *Teamsters Local 617 Pension & Welfare Funds v. Apollo Grp., Inc.*, 282 F.R.D. 216, 231 (D. Ariz. 2012). Courts within the Ninth Circuit have looked to Black's Law Dictionary for assistance, which provides that "[a] manifest error of fact or law must be one 'that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record.'" *Id.*, citing cases and quoting Black's Law Dictionary 563 (7th ed. 1999)).

The Tribe has met its burden of demonstrating that the dismissal of its claims was both clear error, because it completely disregarded the controlling Tribal law allowing for holdover council positions, and that the dismissal was manifestly unjust.

B. The Court Completely Disregarded Controlling Nooksack Law Allowing for Holdover Council Positions

The Nooksack Tribal Court's interpretation of Nooksack law is binding on this Court. *Hinshaw v. Mahler*, 42 F.3d 1178, 1180 (9th Cir. 1994). The Tribe did not, as the Defendants argue, invite the Court to "construe" Nooksack law, which was the same error the Court made in the Order for which the Tribe seeks reconsideration. Rather, the Tribe argued that the Court was required to defer to the Nooksack Tribal Court decision that interpreted Tribal law as providing for holdover council positions to allow for the orderly transition of government, and upholding the actions taken by the holdover council during the holdover period.

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The defendants argue that the Court should ignore *Campion v. Swanaset* because it does not present the same fact pattern. It would be exceedingly rare to have the exact same fact pattern from one case to another, but that is not required in order for applying precedent. "A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical ***or similar*** material facts and arising in the same court or a lower court in the judicial hierarchy." *United States IRS v. Osborne (In re Osborne)*, 76 F.3d 306, 309 (9th Cir. 1996), *quoting Allegheny General Hospital v. NLRB*, 608 F.2d 965, 969-970 (3rd Cir. 1979) (emphasis added).

The doctrine of stare decisis requires that once a court renders a decision, that same court and all courts that owe obedience to that court must follow that decision. *In re Rheuban*, 128 B.R. 551, 554 (Bankr. C.D. Cal. 1991), *citing* 1 B.J. Moore, J. Lucas & T. Currier, Moore's Federal Practice, para. 0.401 (2d Edition 1990).

> As every first-year law student knows, the doctrine of stare decisis is often the determining factor in deciding cases brought before any court. The doctrine of stare decisis is 'the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.' . . . The doctrine helps to ensure that 'bedrock principles are founded in the law rather than in the proclivities of individuals.' . . . Although stare decisis does not control the outcome of every case, the Supreme Court has noted that 'detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the Court has felt obliged "to bring its opinions into agreement with experience and with facts newly ascertained."' . . . When, as in this case, there are neither new factual circumstances nor a new legal landscape, stare decisis is an appropriate basis for our decision.

Or. Nat. Desert Ass'n v. United States Forest Serv., 550 F.3d 778, 785-86 (9th Cir. 2008) [citations omitted].

The Nooksack Tribal Court – which is the court of last resort for election appeals - is bound by *Campion v. Swanaset*, No. NOO-C-96-004 (April 7, 1997), and would follow that

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decision in deciding whether the Tribe lacked a quorum after March, 2016 because, at its heart, the quorum issue depends on whether Nooksack law allows for holdover council positions, which *Campion v. Swanaset* decided.

Campion v. Swanaset involved a challenge to the results of an election, brought by tribal members who contended that the Notice of Election for the 1996 election and an amendment to the Tribal Election Ordinance were unconstitutional. The tribal members asked the Nooksack Tribal Court (sitting as an appellate body reviewing the decision of the Election Board) to invalidate the results of an election, vacate the challenged Council seats pending a new election, and invalidate all actions taken by the Council between the invalidated election and the new election. *See* April 6, 1997 Order.

Although the *Campion* Court concluded that the Notice of Election was unconstitutional and a new election was therefore required, it refused to vacate the challenged Council seats or invalidate the actions taken by the Council during the holdover. The Tribal Court's decision, which was entered more than a year after the contested election, provided as follows:

> Now, therefore:
>
> 1. It is hereby adjudged, and decreed that the Notice of Election for 1996 Nooksack election was flawed and not grounded in the Nooksack Constitution.
>
> 2. It is further adjudged and decreed that the punitive measure found in the Nooksack Tribal Election Ordinance of 1996 Title 62A as amended and passed November 1, 1996 was flawed in the application as not All Nooksack tribal members were advised of their voting rights, and thus violated their due process rights.
>
> 3. It is further adjudged, and decreed that the positions of Vice-Chairperson,

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> Treasurer, and two Councilpersons (Position C and Position D)[1] described in the Election ordinance of 1996 be set for a new election within three months of this judgment.
>
> 4. Since the intent of the Nooksack tribal government was not with malice or ill will, the court decrees **the current tribal council shall stand until the orderly transition of power of government and the new election is completed**. The application of blind resolute justice would dictate the absolving of the Tribal government, however, **to preserve the peace and safekeeping of the tribe as a whole** as the court is bound by the same Constitutional language as the tribal council and election board is and embraces the Constitution.
>
> 5. In addition, **the court is not invalidating any actions taken by the current Tribal Council**, nor requiring any tribal council member elected to Tribal Council as a result of the election of 1996 to repay the Nooksack Tribe.

April 6, 1997 Order, at 2:29 – 3:3 [emphasis added].

The Defendants contend that when the Council terms expired in late March 2016 and the election was delayed, those Council members were stripped of power and the Nooksack Tribal government ceased to exist as a functioning body. After the election results were voided in *Campion*, there were four Council seats with expired terms and no election – the same facts as presented here. In order to preserve the peace and safekeeping of the tribe as a whole – the same reason the Chairman delayed the appointment of an Election Superintendent here – the *Campion* Court ordered that the four Council seats with expired terms would be occupied by the holdover Council members.

The Tribe's position is consistent with the Second Circuit's holding in *Cayuga Nation v. Tanner*, 824 F.3d 321 (2nd Cir. 2016), even though that case had two factions competing for

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[1] Three of these are the very same Council positions that were occupied by holdover Council members after March 2016, which the Defendants contend were automatically vacated, thereby allegedly destroying the quorum.

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recognition as the governing body, which we do not have here. The Second Circuit rejected the idea that the challenge under tribal law to the authority of one of the factions to litigate the tribe's claims denied the court the jurisdiction to hear the tribe's claims:

> To conclude that the case may go forward only if those who filed it were authorized to do so under tribal law either would require the court to answer disputed questions of tribal law — the very thing that federal courts are forbidden to do — or else would prevent the tribe from suing at all, thus rendering the tribe helpless to defend its rights in court. The Village's position would mean that whenever any faction within a tribe asserted a claim to leadership under tribal law that is inconsistent with the claim of authority made by those who filed the lawsuit, the resulting internal division would raise a question of tribal law that the district court would need to resolve to hear the suit, but that the court lacked jurisdiction to answer. That result would be convenient for litigants engaged in disputes with the tribe, but disastrous for the tribe's rights. We therefore hold that where the authority of the individual 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.

Cayuga Nation, 824 F.3d at 328 [emphasis added].

The Defendants' argue that the Court should defer to the Roberts conclusion that he would not recognize the Tribal Council, denying the Tribe of its day in court, because the Second Circuit deferred to the Secretary's recognition of the individual who brought suit in *Cayuga Nation* as the Tribe's representative, rather than the Village. That argument is weakened by the fact that the Defendants have not recognized a competing faction here, as there is none. If the Court deferred to Roberts' arbitrary and capricious failure to recognize ***any*** representative of the Tribe, it would effectively render the Defendants' actions unreviewable; which "would be convenient for litigants engaged in disputes with the tribe, but disastrous for the tribe's rights." *Cayuga Nation*, at 328.

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The Defendants have called the Council's authority to litigate on behalf of the Tribe into dispute. Under *Cayuga Nation*, the only question the Court must address is whether there is a sufficient basis in the record to conclude, without resolving disputes about tribal law, that the Council may bring a lawsuit on behalf of the tribe. The Defendants' argument that Campion does not apply here does not create a dispute regarding Tribal law, and, indeed, the Defendants have not cited any other Nooksack authority for the proposition that holdover council seats are not permitted.

Campion furnishes the rule for the determination of this case, which involves "identical ***or similar*** material facts and arising in the same court or a lower court in the judicial hierarchy." *In re Osborne*, 76 F.3d at 309. The Tribal Court's holding in *Campion* that Nooksack law provides for holdover Council positions is controlling authority that is binding on this Court, and the Court's complete disregard of the controlling law was clear error for which reconsideration is required. *Hinshaw*, 42 F.3d at 1180 (Tribal Court's interpretation of tribal law is binding on this Court); *Teamsters Local 617,* 282 F.R.D. at 231 (a complete disregard of the controlling law is clear error under Rule 59(e)).

C. <u>The Dismissal of the Tribe's Claims Was Manifestly Unjust</u>

The Court's decision was manifestly unjust, forming a second basis for granting reconsideration, because it perpetuated the Defendants' unlawful refusal to recognize ***any*** leadership, which had "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). *Goodface* is instructive because it involved the BIA's arbitrary and capricious "decision to recognize both tribal councils only on a de facto basis" which "amount[ed] to a recognition of neither." *Goodface*, at 338. The Eighth Circuit held

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that "[t]he 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 of the election dispute." *Id.*, at 339 [emphasis added]. The Defendants here have refused to recognize this Council, but have not recognized any other Tribal governing body – the exact same result as in *Goodface*.

This Court's decision, which endorses the Defendants' unlawful conduct, leaves the Tribe unable to assert its rights or defend itself in any litigation, the outcome condemned by the Second Circuit in *Cayuga Nation*. It also accelerated the Tribe's loss of federal funding described in the Declaration of Katherine Canete (Document # 21) that had been held in abeyance by the pendency of this suit. The dismissal of the Tribe's claims terminated essential governmental operations and services that are necessary to day-to-day operations on the reservation and critical for Tribal members. And, perhaps most important, it leaves the Tribe with no ability to take any actions that would lead to the Defendants' recognition of a governing body at Nooksack, to end the hiatus in tribal government created when the Defendants refused to recognize the holdover council members, or the results of the delayed election.

II. CONCLUSION

The Tribe has met its burden of establishing that the Court's Order dismissing its claims was clear error because it complete disregard the controlling Tribal law which recognizes the validity of holdover council positions to preserve the peace and safekeeping of the tribe as a whole, and to ensure the orderly transition of power of government until a new election is completed. Reconsideration is appropriate, and the Tribe's motion should be granted on that ground.

Reconsideration is also justified to prevent the manifest injustice that the Order has caused, and will continue to cause, by denying the Tribe any ability to end the "hiatus in tribal

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government" caused by the Defendants.

Dated this 16th day of June, 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 16th day of June, 2017, I arranged for service of the foregoing NOOKSACK INDIAN TRIBE'S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION to the parties via the Court's CM/ECF system as follows:

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