THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARGRETTY RABANG, OLIVE OSHIRO, DOMINADOR AURE, CHRISTINA PEATO, and ELIZABETH OSHIRO, Plaintiffs, v. ROBERT KELLY, JR., RICK D. GEORGE, AGRIPINA SMITH, BOB SOLOMON, LONA JOHNSON, KATHERINE CANETE, RAYMOND DODGE, ELIZABETH KING GEORGE, KATRICE ROMERO, DONIA EDWARDS, and RICKIE ARMSTRONG, Defendants.	Case No. 2:17-cv-00088-JCC RESPONSE OF KELLY DEFENDANTS TO ORDER TO SHOW CAUSE RE: DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION [DKT. NO. 156]

I. INTRODUCTION

More than a year ago, the Court concluded it would exercise subject matter jurisdiction over this matter only in the interim period where the tribal leadership is considered inadequate by DOI, but if DOI and BIA recognize tribal leadership after new elections, it would no longer have jurisdiction. Dkt. No. 62, at 10-11. Two elections have been completed since then. The results of both elections have been recognized by DOI and BIA. The Tribal Council has a full quorum, and DOI has invited the newly-elected Chairman, Roswell Cline, to engage in a government-to-government consultation to discuss the various issues that have, in recent years, affected the relationship between the United

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

States and the Tribe. There can be no question that the United States has recognized tribal leadership, and – at long last – Plaintiffs' challenge to their disenrollment (clothed as a RICO claim) must be dismissed for lack of jurisdiction.

The Court ordered Plaintiffs to show cause why it should not dismiss. They have not done so. Instead, Plaintiffs dodge the question by misconstruing both the Court's prior orders and the law. The Court should dismiss.

II. MATERIAL FACTS

The Special Election contemplated in the August 25, 2017 Memorandum of Agreement was conducted in December 2017, with BIA observers. *See* Observers' Reports, Exh.1, Martin Decl. After the unofficial results of the election were released, four losing candidates filed an unsuccessful challenge with the Election Board. The Election Board notified the challengers of their right to appeal to the Nooksack Tribal Court, pursuant to the Nooksack Tribal Code. *See* Dkt. No. 143-1, pgs. 17-24. The challengers did not pursue an appeal to Tribal Court, and the appeal period expired.

The Election Superintendent certified the results and forwarded them to DOI and BIA. The BIA thereafter conducted a nearly three-month long investigation of the election, in response to claims of election fraud by Plaintiffs' counsel. Dkt. No. 143 (Exh. A); Exh. 2, Martin Decl. As a consequence of DOI's delay in acknowledging the election results, the Tribe postponed the March 2018 regularly-scheduled election, and advised DOI that it would recommence the election process after DOI acted. Dkt. No. 152, ¶¶ 4-6 and Exh. 1 thereto.

By letter dated March 9, 2018, the date of the Kelly Defendants' oral argument before the 9th Circuit Court of Appeals, DOI finally formally recognized the Tribal Council elected in the December Special Election. DOI also expressly recognized as proper "holdover" Council

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

members those whose terms would otherwise have expired when the March election was delayed pending review of the Special Election results. Dkt. No. 141-1; Dkt. No. 152, ¶¶ 3-8. The long-delayed recognition was the change in circumstances that led the Kelly Defendants to seek the voluntary dismissal of their appeal. Martin Decl., ¶ 4.

On March 15, 2018, following DOI's full recognition of the Tribal Council, the Council passed a series of resolutions adopting, approving, ratifying, and confirming as valid and binding all actions taken by the holdover Council from March 24, 2016 through March 9, 2018, 9including the appointments of Tribal Chief Judge Dodge and pro tem Judge Milton Roland. Dkt. No. 152, ¶ 9 and Exhs. 2-4 thereto. The ratification retroactively validated all actions taken by the prior Council that DOI contended were invalid because of the alleged lack of a quorum.[1]

On April 5, 2018, Plaintiffs' counsel filed an appeal of the Acting Northwest Regional Director's March 7, 2018 endorsement of the Special Election results to the DOI Board of Indian Appeals (IBIA). The appeal made the same allegations of voter fraud that BIA had already investigated and determined lacked merit. *See* Exh. 2, Martin Decl. The IBIA dismissed the appeal. 65 IBIA 183, 185 (April 17, 2018). Exh. 3, Martin Decl.

The delayed March 2018 election was completed in May, 2018. The Election Superintendent certified the election results and provided the certification to the BIA and DOI.[2] By letter dated May 21, 2018 the Acting Regional Director of BIA acknowledged and

---

[1] *See*, *e.g., Purvis v. United States*, 501 F.2d 311, 314 (9th Cir. 1974) ("[T]he [Supreme] Court early recognized the power of Congress to ratify unauthorized Executive action taken in the area reserved to Congress, and thus retroactively to validate such action.").

[2] The Tribe provides the results of its elections to the BIA pursuant to Nooksack law, not because it is a requirement of federal law or was an ongoing obligation under the MOA.

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

congratulated newly-elected Chairman Cline. By letter dated June 11, 2018 the Acting Assistant Secretary of DOI also acknowledged and congratulated Chairman Cline on his election, and stated his desire that the transition would allow the Tribe and DOI to resolve past disputes and forge a new relationship.

On June 12, 2018, counsel for Plaintiffs filed yet another appeal, this time challenging the BIA's May 21, 2018 acknowledgement of Chairman Cline as the elected leader of the Tribe. On June 21, 2018 the IBIA issued an Order dismissing the appeal, piercing the appellants' allegations and concluding that the appeal "is, at its core, a tribal enrollment dispute, which the Board lacks authority to adjudicate." 65 IBIA 283. The IBIA held:

> To the extent that Appellants contend the appeal involves issues distinct from or additional to disenrollment, including violations of Federal and Nooksack Tribal law, voter eligibility, and the determination of the valid Tribal governing body for government-to-government relations, **it is evident that this case is essentially a tribal enrollment dispute**. *See, e.g.*, Notice of Appeal at 7 ("Appellants notified the [Regional Director] that despite the [Principle Deputy's January 16, 2018 letter] that 'all those purportedly disenrolled members since March 24, 2016 are entitled to vote in Tribal elections,' [Appellants] were wholly excluded from the electoral process. She again took no action."). . . **The crux of this appeal is a tribal enrollment dispute**, which pursuant to § 4.330(b)(1) we lack jurisdiction to adjudicate.

65 IBIA 287 [emphasis added]. Exh. 4, Martin Decl.[3]

Indeed, the requirement of DOI validation of the Special Election was an extraordinary interference in the Tribe's self-governance. Tribal elections are self-effectuating, and do not require DOI action to legitimize them. *See, e.g., Wheeler v. United States Dep't of Interior, Bureau of Indian Affairs*, 811 F.2d 549, 552 (10th Cir. 1987) ("Any election dispute can be resolved by . . . tribal forums, without any Department involvement. Once the . . . Tribal Election Board certifies an election result, the Department can carry out its statutory obligation to interact with the legal government, and does not need to reexamine the results of the tribal election."). *See, also, Garcia v. Western Regional Director*, 61 IBIA 45 (2015) (Tribal Council elections are recognized as sovereign tribal processes).

[3] On June 13, 2018, Plaintiffs' counsel also filed suit against DOI in federal court, *Doucette v. Zinke*, USDC WAWD Case 2:18-cv-00859-TSZ. They asserted that DOI's recognition of the Special Election results was a "sudden and unexplained departure from

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

The United States has endorsed the Tribe's elections and has fully recognized Chairman Cline and the Tribal Council as the valid governing body of the Nooksack Tribe. The Tribe's federal funding has been fully restored since the execution of the MOA. The United States took issue with the alleged absence of a quorum to conduct business after March 24, 2016, which has been addressed to DOI's satisfaction. The absence of any disclaimer of the Roberts letters by the Acting Assistant Secretary Tahsuda has no bearing on the validity or invalidity of those letters, or this Court's jurisdiction.

III. ARGUMENT

A. Plaintiffs have Failed to Show Cause Why This Matter Should Not Be Dismissed

Plaintiffs were ordered to show cause why their claims should not be dismissed, in light of DOI's recognition of the Nooksack Tribal Council and the Court's prior orders (Dkt. Nos. 62 and 130). Under those orders, the Court held that it would exercise jurisdiction by analogy to "a narrow exception to the tribal court exhaustion rule, which provides for jurisdiction where 'exhaustion would be futile because of the lack of adequate opportunity to challenge the [tribal] court's jurisdiction.'" Dkt. No. 130, at 4-5; *see also* Dkt. No. 62 at 8-9. The Court concluded that because of the alleged absence of a quorum, Plaintiffs lacked an adequate opportunity to challenge the tribal court's jurisdiction, requiring the Court to exercise jurisdiction. Dkt. No. 62 at 11; Dkt. No. 130 at 5.

The Court set forth the limits to its exercise of jurisdiction: it was to be for the interim period where the tribal leadership was considered inadequate by DOI; if DOI and BIA recognized tribal leadership after new elections, the Court would no longer have

---

Interior's established policy of interpreting Nooksack law for the purpose of a legitimate government-to-government relationship between the United States and the Tribe." Case No. 18-00859 Dkt. No. 1 at ¶ 3.

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

jurisdiction. Dkt. No. 62 at 10-11; Dkt. No. 130 at 5. Plaintiffs have made no effort to show cause why the factors described by the Court in its earlier orders do not require dismissal now that DOI and BIA have fully recognized tribal leadership. Instead, Plaintiffs' primary argument is that the Court has already made a final, binding determination that it has subject matter jurisdiction and cannot revisit that determination due to the doctrine of law of the case. That argument misconstrues the Court's prior rulings and the Court's authority.

B. Dismissal is Warranted, Even Under the Law of the Case

Plaintiffs argue that the law of the case binds the Court to its earlier holding regarding subject matter jurisdiction. Plaintiffs fail to apprehend the Court's prior determination that it could exercise its subject matter jurisdiction on an interim basis, explicitly subject to revision following recognition of the Tribal Council by DOI and BIA. Indeed, the decision that would bind the Court is that the Court will no longer have jurisdiction after DOI and BIA recognize tribal leadership following new elections. Dkt. No. 62 at 11; Dkt. No. 130 at 8.

Plaintiffs also misconstrue the purpose of the doctrine. The law of the case directs a court's discretion, it does not limit the tribunal's power. *Arizona v. California*, 460 U.S. 605, 618 75 L. Ed. 2d 318, 103 S. Ct. 1382 (1983). It expresses the practice of courts generally to refuse to reopen questions formerly decided, and is not a limitation of their power. *Messenger v. Anderson*, 225 U.S. 436, 444, 56 L. Ed. 1152, 32 S. Ct. 739 (1912); *United States v. Fullard-Leo*, 156 F.2d 756, 757 (9th Cir. 1946) (en banc), *aff'd*, 331 U.S. 256, 91 L. Ed. 1474, 67 S. Ct. 1287 (1947). The doctrine "is not an inexorable command." *Estate of Domingo v. Republic of Philippines*, 694 F. Supp. 782, 785-86 (W.D. Wash. 1988), citing *Handi Inv. Co. v. Mobil Oil Corp.,* 653 F.2d 391, 392 (9th Cir. 1981).

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

Even if the Court had not itself concluded that it would exercise jurisdiction on an interim basis, the lack of subject matter jurisdiction can be raised at any time, even by the court, and doctrines of waiver, estoppel, and equitable tolling do not apply to subject matter jurisdiction requirements. *Intercontinental Travel Marketing, Inc. v. FDIC*, 45 F.3d 1278, 1286 (9th Cir. 1994). If the court finds at any time that it lacks subject matter jurisdiction, then it must dismiss the action. Fed. R. Civ. P. 12(h)(3). *See, also, Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir. 2011) and Fed. R. Civ. P. 12(b)(1).

The cases cited by Plaintiffs regarding the time-of-filing rule for diversity jurisdiction affirm the rule that subject matter jurisdiction may be challenged at any time:

> This time-of-filing rule is hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure. **It measures all challenges to subject-matter jurisdiction premised upon diversity of citizenship against the state of facts that existed at the time of filing**--whether the challenge be brought shortly after filing, after the trial, or even for the first time on appeal. (**Challenges to subject-matter jurisdiction can of course be raised at any time prior to final judgment**.

Grupo Dataflux v. Atlas Glob. Grp., L.P., 541 U.S. 567, 570-71 (2004) [emphasis added].

The other cases cited by Plaintiffs, *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428, (1991), *Wichita R.R. & Light Co. v. Pub. Util. Comm'n of Kan.*, 260 U.S. 48, 54 (1922); *In re Canion*, 196 F.3d 579 (5th Cir. 1999), and *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938), are all diversity jurisdiction cases. Plaintiffs' string citation to them "highlights the hazards of taking broad judicial statements out of context." *Sino Sports & Entm't, Inc. v. Champ Car World Series LLC*, 2008 U.S. Dist. LEXIS 74541, at *8-9 n.3 (S.D. Ind. 2008).

For example, *Wichita R.R.* recognized that intervention by a non-diverse party whose presence is essential to the controversy between the original parties could defeat diversity

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

jurisdiction, which is contrary to the assertion that diversity jurisdiction, once obtained, can never be lost. The Seventh Circuit has also recognized limitations on the holding of *Freeport-McMoRan*, concluding that the joinder of non-diverse defendants destroyed complete diversity notwithstanding *Freeport-McMoRan*, which "looked at a limited part of diversity in which there was a substitution of parties." *Estate of Alvarez*, 213 F.3d 993, 994-95 (7th Cir. 2000).[4]

C. The Kelly Defendants Have Not Waived Their Arguments

The Kelly Defendants voluntarily dismissed their appeal. Dkt. No. 154. In doing so, they have not waived any claims on appeal, or arguments to this Court regarding subject matter jurisdiction and sovereign immunity, because the dismissal was without prejudice. *Id.*, *See, also, NLRB v. Brooke Indus., Inc.*, 873 F.2d 165, 166 (7th Cir. 1989) (court can attach conditions to a voluntary dismissal under Rule 42(b); making the dismissal with

---

[4] None of the six cases cited by Plaintiffs as authority for the applicability of the time-of-filing rule to this case actually support that proposition. *See Keene Corp. v. United States*, 508 U.S. 200 (1993)(Court of Federal Claims does not have jurisdiction over a claim if, at the time of filing, there is a suit on that claim ending in another court); *Rosado v. Wyman*, 397 U.S. 397, 402-03, 90 S. Ct. 1207, 1212-13, 25 L.Ed.2d 442, 450 (1970) (where constitutional claim was declared moot prior to decision by the three-judge court, court retained jurisdiction to hear the pendant claim initially lodged with it); *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1381 (9th Cir. 1988) (court must examine original complaint to determine whether the claim alleged therein was one over which the district court had jurisdiction; if jurisdiction was lacking at the time of filing, the court's various orders were nullities); *Aamodt v. United States*, 22 Cl. Ct. 716, 720 (1991) (employment and bargaining unit status at the time aggrieved determines whether employee is covered by bargaining agreement and grievance procedure, not employee's status at the time of filing suit); *Rosa v. Resolution Tr. Corp.*, 938 F.2d 383, 392 and n. 12 (3rd Cir. 1991) (applicability of statutory claims bar evaluated as of the time of filing); *Schoenberg v. Shapolsky Publrs., Inc.*, 916 F. Supp. 333, 335-36 and n. 6 (S.D.N.Y. 1996) (motion to dismiss granted and motion to amend complaint denied as futile where plaintiff conceded that jurisdiction was lacking at the time the complaint was filed). *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), also cited by Plaintiffs, addressed state court jurisdiction, not federal court jurisdiction.

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

prejudice is one such condition). The only condition applied to the Kelly Defendants' dismissal was the payment of Plaintiffs' reasonable attorneys' fees and costs of appeal, the determination of which has been referred to a Special Master.

Similarly, in the Order of dismissal in *Nooksack Indian Tribe v. Zinke*, the Court itself recognized that "[i]f the DOI and BIA recognize Nooksack tribal leadership after new elections and the nation-to-nation relationship is resumed, the new tribal leadership would have authority to initiate an action against the federal government." Dkt. No. 43 at 12. The Tribe is thus free to refile its claims against the United States based upon the Roberts letters.

D. The Roberts Letters Did Not Affect the Tribe's Sovereignty or Federal Recognition

The Tribe has at all times remained a federally recognized Indian Tribe with all its inherent powers and authority as a sovereign government, despite DOI's extraordinary and unusual interference with its self-governance. *See* Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, Fed. Reg. Vol. 81, Page 5019, 5022 (January 29, 2016); Vol. 82, Page 4915, 4917 (January 17, 2017); Vol. 83, Page 4235, 4237 (January 30, 2018). DOI has the power to manage all Indian affairs and all matters arising out of Indian relations as the Court previously has noted, Dkt. No. 62 at 10, but only Congress can abrogate tribal sovereignty. *United States v. Lara*, 541 U.S. 193, 196, 124 S. Ct. 1628, 158 L.Ed.2d 420 (2004).

The Roberts letters caused the Tribe significant injury by disrupting its funding, harming its government-to-government relationships, and effectively creating a hiatus in tribal government which jeopardized the continuation of necessary day-to-day services on the reservation, but had no power to affect the Tribe's sovereignty or its federal recognition.

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

E. The Recognized Tribal Council Has Ratified All Actions of the Prior Council

The Roberts letters are not binding on the Tribe and the Tribe does not require action by DOI to invalidate, reverse, or withdraw them. While the agency asserted that it did not *recognize* the legislative and judicial actions of the Tribe after March 24, 2016, the agency has no power to *invalidate* those actions. *See, e.g., Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 943 (8th Cir. 2010) (BIA's recognition of member or faction not binding on tribe because it is matter of tribal law).

The effects of the Roberts letters were limited in scope to issues related to "tribal trust funds, Federal funds for the benefit of the Tribe, and [the] day-to-day government-to-government relationship" between the Tribe and the United States.[5] *See Cayuga Nation v. Tanner*, 824 F.3d 321, 329 (2nd Cir. 2016) (recognized official "for purposes of the ISDA contract modifications and related drawdown requests"); *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 937 (Dist. D.C. 2012) (recognized one faction for limited purpose of conducting government-to-government relations and tribal election).

The Roberts letters are irrelevant to the issue now before the Court: its consideration of its jurisdiction.

---

[5] October 17, 2016 Roberts letter, at 2; *see, also,* November 14, 2016 Roberts letter at 1 and December 23, 2016 Roberts letter at 1-2; and MOA, at C ("Immediately upon execution of this Memorandum, the Assistant Secretary shall recognize Robert Kelly as a person of authority within the Nooksack Tribe, through whom the Assistant Secretary will maintain government-to-government relations with the Tribe for such time as this MOA is in effect, for the purpose of the Nooksack Tribe holding a special election and receiving funding under the Indian Self-Determination and Education Assistance Act."). The IBIA recognized the limited effect of the Roberts letters in its interpretation of the MOA as establishing "a process whereby the Assistant Secretary might recognize a Tribal Council as the governing body of the Tribe and resume funding under the Indian Self-Determination and Education Assistance Act. . ." *Belmont*, 65 IBIA 284.

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

IV. CONCLUSION

This Court retained interim jurisdiction because it concluded there was doubt about the functioning of the Nooksack Tribal Court in light of changes made while the Tribal Council was not recognized by DOI. The current Tribal Council has been recognized by DOI. Following acknowledgement and recognition of the Special Election results by DOI, the Tribal Council ratified the actions of the prior Tribal Council, including those related to the Tribal Court. There can be no doubt about the authority of the Nooksack Tribal Court, and the availability to the Plaintiffs of an appropriate venue in which to raise the dispute that is improperly before this Court.

The basis of the Court's interim jurisdiction as described in its previous orders no longer exists, and the Court's exercise of jurisdiction is no longer warranted. Plaintiffs have failed to show an independent basis for the Court's continuing jurisdiction, and thus have failed to show cause why this Court should not dismiss their claims for lack of subject matter jurisdiction. The Court should dismiss.

Dated this 2nd day of July, 2018.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ *Connie Sue Martin*
Connie Sue Martin, WSBA #26525
Email: csmartin@schwabe.com
Christopher H. Howard, WSBA #11074
Email: choward@schwabe.com
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

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 2nd day of July, 2018, I electronically filed the foregoing RESPONSE OF KELLY DEFENDANTS TO ORDER TO PLAINTIFFS TO SHOW CAUSE RE: DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Gabriel S. Galanda
Anthony S. Broadman
Ryan D. Dreveskracht
Bree R. Black Horse
Galanda Broadman, PLLC
P.O. .Box 15146
8606 35th Avenue NE, Suite L1
Seattle, WA 98115

Rob Roy Smith
Rachel Saimons
Kilpatrick Townsend & Stockton LLP
1420 5th Avenue, Suite 3700
Seattle, WA 98101

/s/ Connie Sue Martin
Connie Sue Martin

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206-622-1711