Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARGRETTY RABANG, et al.,

Plaintiffs,

v.

ROBERT KELLY, JR., et al.,

Defendants.

Case No.: 2:17-CV-00088-JCC

DEFENDANT CHIEF JUDGE RAYMOND G. DODGE, JR.'S RESPONSE TO ORDER TO SHOW CAUSE

I. INTRODUCTION

Chief Judge Dodge hereby responds to Plaintiffs' Brief regarding the Court's June 7, 2018 Order to show cause as to why their claims should not be dismissed for lack of subject matter jurisdiction in light of the Department of Interior's ("DOI") March 9, 2018 recognition decision. Dkt. # 159.

Plaintiffs have failed to show cause as to why this case should not be dismissed. As the Interior Board of Indian Appeals recently declared in a similar case brought by Plaintiffs' counsel, this case is "at its core, a tribal enrollment dispute." *Eleanor J. Belmont, et al. v. Acting Northwest Regional Director, Bureau of Indian Affairs*, 65 IBIA 283 (2018) (Dkt. #162-4 at 2); Dkt. #62 at 11. When initially exercising subject matter jurisdiction over this case, this Court recognized that its jurisdiction was "not permanent or inflexible" and that a decision by the DOI and the Bureau of Indian Affairs ("BIA") to recognize Nooksack Tribal leadership would divest

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

it of that jurisdiction. This very situation has now occurred: the Nooksack Indian Tribe has held Special and General Elections under the watchful eye of the BIA and DOI; the newly-validated Tribal Council has expressly ratified previous Tribal Council actions, including the appointment of Chief Judge Dodge in 2016; and both the BIA and DOI have expressly recognized the validity of the Tribal Council as it is comprised today. With the cloud over the Tribe removed, this Court's conditional subject matter jurisdiction over Plaintiffs' claims against Chief Judge Dodge has ended.

II. FACTUAL BACKGROUND

A. Elections and Recognition

On October 25, 2017, the Court ordered a stay following the issuance of a Memorandum of Agreement between Acting Assistant of Indian Affairs ("AS-IA") Michael Black and Defendant Kelly ("MOA"). Dkt. #130. The MOA called for a Special Election to fill four then-vacant seats, and required that all eligible Nooksack voters as of March 2016 be eligible to vote. The stay remained in effect through January 12, 2018 to allow for the outcome of the election to be known and to await a possible decision from the DOI to recognize the newly-elected Tribal Council. *Id.*

On December 2, 2017, the Tribe concluded the Special Election required by the MOA. The election was observed and verified by the BIA. Dkt. #162-1 at 7–10. On March 7, 2018, the BIA Acting Northwest Regional Director endorsed the Special Election, finding that it was conducted in accordance with the Tribe's Constitution, Bylaws, and Tribal Law and Ordinances.[1] On March 9, 2018, Principal Deputy Assistant Secretary ("PDAS") Tahsuda issued a decision "to recognize the validity of" the Tribal Council as it was comprised. Dkt. #145-1.

The Tribe's General Election was held on May 5, 2018. Dkt. #152, Exh. 1. The Tribe's Election Superintendent certified those election results and provided the certification to the BIA

[1] Despite Plaintiffs' claims of election fraud, the Acting Northwest Regional Director's March 7, 2018 memorandum endorsing the Special Election puts this issue to rest by finding, after investigation, that "[t]he evidence before the BIA indicates that the election was conducted in a proper manner and the BIA finds nothing to disturb the Board's conclusions." Dkt. #162-2 at 5.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

and DOI. On May 21, 2018, Acting Northwest Regional Director Tammie Poitra sent a letter to Tribal Council Chairman Roswell "Ross" Cline, stating her intent to "acknowledge and congratulate [him] as the Chairman of the Nooksack Indian Tribe." Ex. A to Dodge Decl. (filed herewith). On June 11, 2018, PDAS Tahsuda sent Chairman Cline a letter congratulating him on his recent election as Chairman of the Tribe and inviting Chairman Cline to meet.[2] Dkt. #160-1.

B. Ratification of Chief Judge Dodge's Appointment

On March 15, 2018, following DOI's March 9 decision to recognize the validity of the Tribal Council, the Tribal Council passed Resolution #18-15 to ratify the previous appointment of Chief Judge Dodge to the Nooksack Tribal Court. Dkt. #152-1. The stated purpose of the Resolution was to "eliminate all doubt and resolve the issue of the validity of Resolution #16-92 by adopting Resolution #16-92 as its own through this current ratification of the previous action." *Id.*

On May 29, 2018, the Nooksack Tribal Council ratified a number of phone polls which occurred between July 2017 and May 2018. Among the polls was Resolution #18-15, in which the current federally-recognized Tribal Council ratified Chief Judge Dodge's 2016 appointment to the Nooksack Tribal Court. Ex. B to Dodge Decl.

C. IBIA Appeals

On April 5, 2018, four unsuccessful candidates to the Special Election, represented by Plaintiffs' counsel, filed an appeal with the Interior Board of Indian Appeals seeking review of the BIA Regional Director's March 7, 2018 memorandum endorsing the validity of the Special Election. *Robert Doucette, Bernadine Roberts, Saturnino Javier, and Tresea Doucette v. Acting Northwest Regional Director*, *Bureau of Indian Affairs*, 65 IBIA 183 (2018) (Dkt. #162-3). The Board dismissed the appeal on April 17, 2018 for lack of jurisdiction. 65 IBIA at 185.

[2] Despite Plaintiffs' attempt to mischaracterize the evidence, PDAS Tahsuda never "'questioned whether respect for the rule of law' exists at Nooksack." He simply opined that Chairman Cline's appointment offered "an opportunity to forge a new relationship . . . that is centered on open dialogue, transparency, and respect for the rule of law." Dkt. #160-1.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Undaunted, on June 12, 2018, another group of Nooksack Tribal members, also represented by Plaintiffs' counsel, filed another appeal to the Interior Board of Indian Appeals, seeking review of the May 21, 2018 letter from the BIA acknowledging Chairman Cline claiming that they were unlawfully disqualified from voting in the May 5, 2018 General Election and that Regional Director Poitra's decision to recognize Chairman Cline was arbitrary and capricious. *Belmont*, 65 IBIA at 283 (Dkt. #162-4 at 2). The IBIA once again dismissed the appeal for lack of jurisdiction finding that the appeal was "at its core, a tribal enrollment dispute." *Id.*

III. ARGUMENT

A. Interior's Recognition of the Current Nooksack Tribal Council Divests This Court of Subject Matter Jurisdiction

1. Subject Matter Jurisdiction Must Exist Throughout the Case

Plaintiffs argue that "it is well settled law that subject matter jurisdiction is determined as of the time an action is filed." Dkt. #159 at 4. While admitting that most of the cases they cite in support of that assertion involve diversity jurisdiction, Plaintiffs nonetheless insist that the same rule applies to cases predicated upon a federal question.[3] *Id.* Despite their efforts to make the law fit their desired outcome, Plaintiffs cannot overcome what both the Court's earlier rulings and other cases make clear: subject matter jurisdiction must exist, and can be challenged, at any and all times during a case.

A court's ability to dismiss an action for lack of subject matter jurisdiction is addressed in Fed. R. Civ. P. 12(h)(3), which states: "If the court determines ***at any time*** that it lacks subject-matter jurisdiction, the court ***must*** dismiss the action." (emphasis added). Numerous decisions from the Ninth Circuit and elsewhere that echo this principle. *E.g., Leeson v. Transamerica*

[3] The first five cases cited by Plaintiffs in to support are indeed diversity jurisdiction cases which are inapposite. None of the six other cases cited directly hold that the time of filing rule applies to cases predicated upon a federal question such that a court cannot later determine that it lacks subject matter jurisdiction. Dkt. #159 at 4.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Disability Income Plan, 671 F.3d 969, 976 n. 12 (9th Cir. 2012) (holding subject matter jurisdiction "can never be forfeited or waived" and federal courts have a continuing "independent obligation to determine whether subject-matter jurisdiction exists...."); *Ogle v. Church of God*, 153 Fed. Appx. 371, 374 (6th Cir. 2005) (holding the existence of subject matter jurisdiction may be raised at any time, by any party, or even *sua sponte* by the court itself). Federal courts may consider subject matter jurisdiction claims at any time during litigation. *Scarfo v. Ginsberg*, 175 F.3d 957, 960 (11th Cir. 1999).

Try as Plaintiffs might to persuade the Court to ignore this blackletter law, this Court not only has the authority to dismiss this action, but under Rule 12(h)(3) is required to dismiss this case if it determines that it no longer has subject matter jurisdiction. Now is that time. Plaintiffs' contention that subject matter jurisdiction, once determined, cannot be divested by subsequent events is simply incorrect.

2. The Court's Exercise of Jurisdiction Has Always Been Conditional

This Court has explicitly and correctly acknowledged more than once that its jurisdiction in this case is subject to divestment upon a change of circumstances. DOI's recognition of the Tribal Council triggers that divestment. In its Order on Defendants' Motion to Dismiss, the Court stated:

> This Court's jurisdiction over this matter is not permanent or inflexible. For instance, the DOI decisions in this matter are being challenged in the related case, *Nooksack Indian Tribe v. Zinke*, C17-0219-JCC. If the Court there determines the DOI decisions were invalid, it is possible that this Court will not have jurisdiction over this matter. Moreover, if the DOI and BIA recognize tribal leadership after new elections, the Court will no longer have jurisdiction and the issues will be resolved internally.

Dkt. #62 at 11. It was only because of the "very rare circumstances" identified by the Court which existed as of April 2017—i.e., the BIA's determination that the Tribal Council had acted without a quorum—that the Court found that it had jurisdiction in the first place. *Id.* at 11–12.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

Indeed, the provisional nature of the Court's finding of jurisdiction is apparent from its determination that it had jurisdiction only "[u]nder this set of facts." *Id.* at 12.

Six months later, the Court again emphasized the impermanent nature of its jurisdiction and stayed the proceedings "to allow for the completion of the process outlined in the MOA and to await the DOI's recognition decision." Dkt. #130 at 5. These rulings discredit Plaintiffs' argument that the recognition decision "cannot divest this Court of its original subject matter jurisdiction" in this case. Dkt. 159 at 1. To the contrary, it can and it does.

3. The Court Previously Asserted Subject Matter Jurisdiction Based on a Narrow Exception, Which No Longer Applies

a. The Tribe Has Exclusive Authority Over Internal Disputes, Except in Rare Circumstances

Indian tribes possess inherent and exclusive power over matters of internal tribal governance. Dkt. #130 at 4; *see Nero v. Cherokee Nation*, 892 F.2d 1457, 1463 (10th Cir. 1989); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983); *Timbisha Shoshone Tribe v. Kennedy*, 687 F.Supp.2d 1171, 1185 (E.D. Cal. 2009). Tribes have the power to both make their own substantive law in internal matters and to enforce that law in their own forums. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978). Internal matters include the tribal membership determinations, domestic relations among members, rules of inheritance for members, and the power to punish tribal offenders. *Id* at 56; *Montana v. U. S.*, 450 U.S. 544, 564 (1981). Part of tribal self-government over internal matters requires that tribal remedies be exhausted before the question is addressed by federal district courts. *Johnson v. Gila River Indian Cmty.,* 174 F.3d 1032, 1035 (9th Cir. 1999).

As explained in the Court's earlier Order, there are only four exceptions to the tribal court remedy exhaustion requirement which allows a litigant to bypass tribal court for federal district court: 1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; 2) the action is patently violative of express jurisdictional prohibitions; 3) exhaustion would be futile because of the lack of adequate opportunity to challenge the tribal court's

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

jurisdiction; or 4) it is plain that no federal grant provides for tribal governance on nonmembers' conduct on land covered by *Montana's* main rule. Dkt. #62 at 8; *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.,* 715 F.3d 1196, 1200 (9th Cir. 2013).

Early on, the Court identified "[t]he issue at the heart of this case [to be] the legitimacy of the internal tribal actions taken by the Nooksack tribal leadership." Dkt. #62 at 7. It emphasized that it was "very aware and respects the fact that" issues such as Chief Judge Dodge's appointment and rulings on Ms. Rabang's and Ms. Oshiro's eviction proceedings "are intra-tribal matters and are generally not for federal courts to review or preside over." *Id.* at 9. Nonetheless, the Court found that the alleged actions, taken without a quorum, "could mean the Nooksack judiciary is non-functioning," which "could potentially be enough to find a lack of opportunity to challenge the tribal court's jurisdiction." *Id.* The Court therefore held that "DOI's decisions to invalidate actions taken by Defendants, namely those related to the Nooksack judiciary, indicate that Plaintiffs have a lack of adequate opportunity to challenge the tribal court's jurisdiction." *Id.* at 11.

The Court also noted, however, that "it has no place deciding how the Nooksack Indian Tribe determines tribal membership and the benefits that derive from membership" and that the DOI decisions would stand only "during the interim until the DOI and BIA recognize a newly elected Tribal Council or the DOI decision are invalidated."[4] *Id.* at 11–12. As the DOI and BIA have now recognized a newly elected Tribal Council, the previously-found exception to the Tribe's exclusive right to self-govern does not apply.

[4] The Court's use of the disjunctive "or" indicates that the DOI decisions would stand until ***either*** the newly-elected Council was recognized by DOI and BIA ***or*** the DOI decision was invalidated. Thus, Plaintiffs' argument that PDAS Tahsuda was required to expressly invalidate or withdraw DOI's prior determinations in order to divest this Court of jurisdiction is not consistent with the Court's earlier ruling. Dkt. #159 at 3.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

b. DOI's Recognition Decision Removes Any Doubt as to the Tribal Court's Functionality

Previously, this Court concluded that deference was owed to prior BIA decisions because "the BIA has special expertise in dealing with Indian affairs, and . . . the BIA's decision to recognize a tribal government can be outcome determinative."[5] Dkt. #62 at 10. The same level of deference is now owed to the recent decision by DOI to recognize the current Tribal Council.

The March 9, 2018 decision from PDAS Tahsuda confirms that DOI recognizes the validity of the Tribal Council as it is currently comprised. Dkt. #145-1. Shortly after this decision was issued, the Tribal Council ratified the 2016 appointment of Chief Judge Dodge, which was originally at issue in this litigation. Dkt. #152-1. On May 29, 2018, the Tribal Council again ratified certain phone polls which were conducted, including the Resolution ratifying Chief Judge Dodge's Appointment. Ex. C to Dodge Decl. (Resolution #18-36). The issues surrounding the previous Tribal Council and the appointment of Chief Judge Dodge have therefore been "resolved through internal tribal mechanisms" and the BIA now "recognize[s] the tribal leadership embraced by the tribe itself." Dkt. #62 at 10 (quoting *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa,* 609 F.3d 927, 943 (8th Cir. 2010)).

The United States' decisions, coupled with the Tribe's Resolutions, remove any doubt as to the authority of Chief Judge of the Nooksack Tribal Court. Thus, the previously-found exception to the requirement for exhaustion of tribal court remedies, which "applies narrowly to only the most extreme cases" is no longer in effect. Dkt. #62 at 8. Consistent with the Court's declaration that a decision to recognize new tribal leadership would mean that it would no longer

[5] Plaintiffs also argued for deference to the decisions in their opposition to Judge Dodge's motion to dismiss. Dkt. #46 at 4 ("Courts generally should not substitute their judgment for that of Interior.").

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

have jurisdiction because "the issues would be resolved internally," jurisdiction over this action should be restored to the Tribe.[6]

B. The Law of the Case Does Not Apply

Plaintiffs argue that the Kelly Defendants are estopped from re-litigating the jurisdictional issues they lost on appeal based on the "law of the case."[7] Dkt. #159 at 5. "Under the law of the case doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case" with limited exceptions. *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (internal quotations omitted). Plaintiffs' brief, however, addresses only the Kelly Defendants' interlocutory appeal to the Ninth Circuit with no discussion of any decisions which would bind Chief Judge Dodge to an earlier ruling by the Court as to subject matter jurisdiction. Plaintiffs' argument fails with respect to Chief Judge Dodge.

Given Fed. R. Civ. P. 12(h)(3), subject matter jurisdiction cannot be considered part of the law of the case. The well-settled principle that subject matter jurisdiction can be raised at any time voids any application of the doctrine. *E.g., United States v. Houser,* 804 F.2d 565 (9th Cir. 1986) (declining to apply law of the case to prior subject matter jurisdiction ruling). "It is elementary that a federal court cannot create jurisdiction where none exists." 5A Wright & Miller § 1350, at 204-05. For this reason, "questions of subject matter jurisdiction are generally

---

[6] DOI's validation of the Tribal Council and the Council's subsequent ratification of Judge's appointment also warrant dismissal of the claims against Judge Dodge because they affirm his entitlement to judicial immunity. As set forth in his Motion for Summary Judgment, the only exceptions to the doctrine of judicial immunity are where a judge takes actions outside of his judicial capacity or where the actions are taken in the complete absence of jurisdiction. Dkt. #66; *Mireles v. Waco*, 502 U.S. 9, 12 (1991). Each of the actions that Plaintiffs have alleged were taken by Chief Judge Dodge occurred in his role as a judge, and his 2016 appointment has since been ratified by the new Tribal Council. Thus, his actions cannot be said to have been taken in the complete absence of jurisdiction as required to abrogate his immunity. Plaintiffs' RICO claims against Chief Judge Dodge should also be dismissed on this basis.

[7] Plaintiffs correctly note that Chief Judge Dodge is not part of the "Kelly Defendants," but then cursorily assert that he is "also bound by the law of the case." Dkt. #159 at 5, n. 4.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

exempt from law of the case principles." *Id.* 18 § 4478 at 799 & n. 32. As the Supreme Court has explained, "it is a Court's obligation to dismiss a case whenever it becomes convinced that it has no proper jurisdiction, no matter how late that wisdom may arrive." *Wyoming v. Oklahoma*, 502 U.S. 437, 462 (1991) (Scalia, J., dissenting); *see also Messenger v. Anderson*, 225 U.S. 436, 444 (1912) ("In the absence of statute the phrase 'law of the case' merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."). Thus, the Court unequivocally has the authority to reconsider the issue of subject matter jurisdiction.

Even if the doctrine could apply, the Court has not made any ruling with respect to its subject matter jurisdiction over Chief Judge Dodge. The only decision the Court has issued which directly relates to its authority to hear the claims against Chief Judge Dodge is the Order granting Chief Judge Dodge's Motion to Dismiss on the basis of judicial immunity. Dkt. #63. Chief Judge Dodge did not participate in the Kelly Defendants' appeal of the Court's April 16, 2017 Order, and there have been no other jurisdictional determinations which would preclude him from challenging the Court's subject matter jurisdiction in light of the DOI's recognition decision. Despite Plaintiffs' attempt to group Chief Judge Dodge with the Kelly Defendants, he is a separate defendant in this litigation and he cannot be bound by litigation decisions to which he was not a party.[8]

Plaintiffs' law of the case argument is therefore without merit with respect to Chief Judge Dodge.

IV. CONCLUSION

For the foregoing reasons, Chief Judge Dodge respectfully requests that this case and the claims against him be dismissed with prejudice.

[8] Even assuming, *arguendo*, that the law of the case applied here, Chief Judge Dodge would not be precluded from challenging subject matter jurisdiction. A court may depart from the law of the case where, among other things, "other changed circumstances exist." *Alexander*, 106 F.3d at 876. The DOI decision is such an "other changed circumstances" for the purposes of establishing an exception which would allow the Court to depart from the existing law of the case.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

DATED this 13th day of July, 2018.

Kilpatrick, Townsend & Stockton LLP

By: */s/ Rob Roy Smith*
Rob Roy Smith, WSBA # 33798
Email: RRSmith@kilpatricktownsend.com
Rachel B. Saimons, WSBA # 46553
Email: RSaimons@kilpatricktownsend.com
Kilpatrick Townsend & Stockton LLP
1420 Fifth Ave, Suite 3700
Seattle, WA 98101
Telephone: (206) 467-9600
Fax: (206) 623-6793
Attorneys for Defendant Chief Judge Raymond G. Dodge, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2018, I served via email the forgoing **DEFENDANT CHIEF JUDGE RAYMOND G. DODGE, JR.'S RESPONSE TO ORDER TO SHOW CAUSE** to:

Gabe Galanda
gabe@galandabroadman.com
Galanda Broadman, PLLC
8606 35th Ave NE, Suite L1
PO Box 15146
Seattle, WA 98115

Connie Sue Martin, WSBA #26525
csmartin@schwabe.com
Christopher H. Howard, WSBA #11074
choward@schwabe.com
1420 Fifth Ave., Suite 3400
Seattle, WA 98101

DATED this 13th day of July 2018.

Kilpatrick Townsend & Stockton LLP

By: */s/ Rob Roy Smith*
Rob Roy Smith, WSBA # 33798
rrsmith@kilpatricktownsend.com
Attorneys for Defendant Chief Judge Raymond G. Dodge, Jr.

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600