SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF WHATCOM

RABANG, Plaintiff v. GILLILAND, et al., Defendants.	No. 17-2-00163-1 DEFENDANTS' RENEWED MOTION TO DISMISS

The Defendants Gilliland, Ashby, and Garcia ("Defendants"), by and through the Office of Tribal Attorney, provide their Renewed Motion to Dismiss[1] pursuant to CR 12(b)(1).

I. SUPPLEMENTAL FACTS

Prior to Plaintiffs' commencement of this action, the former Principal Deputy Assistant Secretary of Indian Affairs ("PDAS") Roberts issued a series of letters, wherein he refused to recognize the leadership of the Nooksack Indian Tribe as a result of the Tribe's decision to delay elections. *See* Dkt. No. 31, Exhs. A-C. During the relevant time, the Department of Interior ("DOI") halted funding due to the Tribe pursuant to the Tribe's previously awarded contracts. *See*

[1] Defendants originally filed their Motion on March 24, 2018. *See* Dkt. No. 21

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Nooksack Indian Tribe v. Zinke, 2017 WL 1957076 at 1 (2017). The Tribe then commenced litigation to compel the federal government to fully fund its 638 contracts[2] previously awarded, and to enjoin the federal government from taking actions in furtherance of the series of letters refusing to recognize the Tribe's leadership. *Id.*

In May of 2017, the U.S. District Court dismissed the Tribe's complaint, finding that the "holdover Council" lacked authority to prosecute the action during the time the DOI refused to recognize the holdover Council. *Id.* at 6. The Tribe sought reconsideration and while its motion was pending, the parties agreed to a stay of the federal proceedings in order to negotiate a Memorandum of Agreement (MOA). *See* Dkt. No. 59 at 2. Pursuant to the MOA, the parties agreed that the Tribe would hold a special election, the DOI would recommence funding its 638 contractual obligations, and the DOI would recognize the Tribal leadership following a special election. *See Rabang v. Kelly*, 2018 WL 3630295 at 1-2 (2018). Following expiration of the stay, and in the midst of the Tribe's special election, the District Court denied the Tribe's request for reconsideration and the order dismissing the case became final. *See Nooksack Indian Tribe v. Zinke*, 2017 WL 1957076.

In December of 2018, the Tribe concluded its special election in accordance with the terms of the MOA, seated its new councilpersons[3], and reported the same to DOI. *See Rabang v. Kelly*, 2018 WL 3630295 at 2. While the Tribe awaited the DOI's recognition, the Tribe entered into its 2018 election cycle. *Id.* On March 9, 2018, PDAS Tahsuda issued his letter recognizing the Tribal government following the special elections, and extended said recognition through the conclusion

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[2] The Indian Self Determination and Education Assistance Act, recodified at 25 U.S.C. §§ 5301 et. seq., authorized the federal and tribal governments to enter into contracts, termed "638 contracts", in reference to the underlying legislation, Public Law 93-638.

[3] https://nooksacktribe.org/wp-content/uploads/2018/06/June-2018.pdf at 4 (last visited Aug. 23, 2018).

of the 2018 elections[4]. *Id.* The Tribe then conducted its regular 2018 elections, certified the same, and forwarded the results to the DOI. *Id.* On May 21, 2018, the DOI's Acting Northwest Regional Director acknowledged the election results and congratulated the Tribe's Chairman on a successful election. *See* 65 IBIA 283 at 1 (2018). This recognition was followed on June 11, 2018 by the PDAS Tahsuda's recognition of the results. *See Rabang v. Kelly*, 2018 WL 3630295 at 2.

In early 2017, Plaintiffs filed this action, and Plaintiff Magretty Rabang (and others) commenced suit in federal court against various Tribal officials and employees, including one of the Defendants herein, Chief Judge Ray Dodge[5]. *See id.* at 1. The Plaintiff alleged that she was defrauded out of tribal benefits, including housing, as a result of her disenrollment, which was allegedly contrary to Tribal law. *Id.* Squarely before the District Court was whether it had jurisdiction to resolve what was an internal tribal dispute pled as a federal RICO complaint. *Id.* at 3.

At the outset, the District Court held that it had jurisdiction only for "the interim period where the tribal leadership is considered inadequate by the DOI." *Id.* at 2. Once the PDAS Tahsuda's recognized the Tribe's leadership, the District Court dismissed the case, finding that its "original basis for exercising jurisdiction under an exception to the tribal exhaustion rule no longer exist[ed]." *Id.* Resolution of the matters pled were required to be heard in a Tribal forum. *Id.* at

[4] Following DOI recognition, the Tribal Council recommenced business as usual. Of note, the Tribal Council approved numerous resolutions, including resolutions re-affirming Chief Judge Dodge's judicial appointment, re-affirming the disenrollment of the Plaintiff Magretty Rabang, and ratifying other Council resolutions approved during the term of non-recognition. https://nooksacktribe.org/.

[5] In an attempt to convolute and confuse the issues before both courts, Plaintiffs' counsel named numerous Plaintiffs and Defendants (in addition to those named herein), and blended various inconsistent claims. Of relevance here, the Plaintiff Magretty Rabang alleged damages in the federal RICO case as a result of the underlying Tribal Court writ of restitution.

6. Although the Plaintiffs and their attorney continue to fight the election results, and the DOI's recognition of those results, the DOI's recognition of the Tribal Council remains[6].

II. ARGUMENT

A. THIS COURT LACKS JURISDICTION TO ADJUDICATE INTERNAL TRIBAL DISPUTES.

The Plaintiffs' claims should be dismissed because this Court lacks subject matter jurisdiction. *State v. Barnes*, 146 Wash. 2d 74 (2002) (tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate). Here, the Court lacks jurisdiction because asserting jurisdiction over this matter would infringe on the rights of the tribe to make its own laws and be ruled by them; this is an internal tribal dispute. *Outsource Services Management*, at 276-77; *Williams v. Lee*, 358 U.S. 217, 223 (1959). Additionally, the Court lacks jurisdiction because Tribal sovereign immunity protects employees of the Tribal government acting in their official capacity. *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn.2d 108 (2006). This immunity is retained even when a plaintiff names a tribal law enforcement officer is his or her individual capacity. *See Pearson v. Director of Department of Licensing*, 2016 WL 3386798 at 4 (2016).

[6] Following the Tribe's successful elections and the DOI's repeated recognitions, the Plaintiffs fought valiantly to discredit the Tribal processes and the federal oversight of said processes. *See* 65 IBIA 283 (6/21/2018)(dismissing appeal of Rgl. Dir.'s acknowledgement of 2018 election); *see also Doucette v. Zinke*, No. 18-cv-00859 (W.D.Wa)(filed June 13, 2018). To date, DOI recognition remains and the Plaintiffs lack any affirmative relief.

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1. State Court resolution of this internal Tribal dispute infringes on the rights of the Tribe to make its own laws and be ruled by them.

Absent federal legislation to the contrary, Indian tribes retain jurisdiction over persons, property, and events in Indian country. *Worcester v. Georgia*, 31 U.S. 515, 555 (1832). Although the state of Washington assumed, **limited** nonconsensual jurisdiction some "over civil causes of action" "in the areas of Indian country" within Washington State, state courts lack jurisdiction over the regulation, use and ownership of Tribal Trust property. *See* R.C.W. 37.12.050-060. Further, state courts cannot assert jurisdiction over civil disputes in Indian Country when doing so would infringe on the rights of the tribe to "make their own laws and be ruled by them." *Outsource Services Management*, 181 Wn.2d at 276-277 (quoting *Williams v. Lee*, 358 U.S. at 200; *see also Tohono O'odham v. Schwartz*, 837 F.Supp. 1024 (D.C. Ariz. 1993).

Indian tribes retain "attributes of sovereignty over both their members and their territory," *United States v. Mazurie*, 419 U.S. 544, 557 (1975), to the extent that sovereignty has not been withdrawn by federal statute or treaty. The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute. "[Absent] governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. at 220.

The Plaintiffs originally claimed resolution of this dispute by the court would not implicate Nooksack self-government because: (1) resolution of the dispute was not within the province of the Tribal Court and (2) the dispute did not call into question the validity of a Tribal governmental action because the Tribe lacked a DOI-recognized governing body. The Plaintiffs are wrong on both counts.

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The former question was, and continues to be, a question for the Tribal Court (or other tribal forum) to resolve. The Plaintiffs' tort claims originate from: (1) the Plaintiffs' right (or lack thereof) to continued residency in Tribal Housing located on Tribal Trust Lands, (2) the Plaintiffs' right (or lack thereof) to continued Tribal membership and (3) the propriety of the Tribe's manner of evicting Plaintiffs from said housing[7]. The Plaintiffs' complaint freely concedes these underlying disputes are for the Tribal Court (or other Tribal forum) to resolve. *See* Compl. at 9-11. Further, this Court has previously answered this question when this Court dismissed Plaintiff's previous lawsuit alleging trespass upon the Tribal Trust property for lack of jurisdiction. *See Rabang v. Gilliland*, 16-2-02029-8, Order of Dismissal (Jan 27, 2017). This Court should dismiss the Plaintiffs' current incarnation of their complaint for lack of jurisdiction because this Court cannot resolve the underlying questions - the Plaintiffs' right (or lack thereof) to Tribal Housing, the Plaintiffs' right (or lack thereof) to continued Tribal membership, and the propriety of the Tribe's eventual eviction (including any alleged distress stemming from the eviction). The Plaintiffs' right (or lack thereof) to Tribal housing and the propriety of the Tribe's manner of eviction concern the regulation (use and right of possession) of the Tribe's Trust property, flatly prohibited by federal law and R.C.W. 37.12.060.

The Plaintiffs' other plea for this Court's exercise of jurisdiction is also without merit. The Tribe has a functioning and recognized Tribal government. The Tribe held its elections and the people spoke; the Tribal Elections Board certified the election, the councilmembers were sworn in, and the recognized Tribal Council ratified the prior Tribal actions, specifically the judicial appointment of Defendant Chief Judge Dodge. The PDAS has twice recognized the Tribal

[7] "Plaintiffs emotional distress caused by (a) refusing to convene Mrs. Rabang's lawsuit.. in Tribal Court." *See Compl.* at 9-11.

government and the DOI's Regional Director has done the same. The Plaintiffs' attempts to challenge said elections, and the recognition thereof, have failed. Recently, the District Court found that it lacked jurisdiction over the Plaintiffs' RICO claim because the issues underlying the Plaintiffs' claims were matters of internal tribal concern. "[I]t is for the Nooksack Tribe, not this Court, to resolve [these] claims. For the same reason that the federal court dismissed the parallel federal case, this Court should dismiss the current case; this Court lacks jurisdiction to resolve internal tribal disputes.

2. This Court must dismiss this action because the Defendants possess sovereign immunity.

The Nooksack Indian Tribe is a domestic dependent sovereign, possessed of all the sovereignty under American law not otherwise limited by federal law. Where Congress has not abrogated tribal authority, the United States Supreme Court has repeatedly recognized that Indian tribes "retain[ ] their original natural rights" as sovereign entities. *Worcester v. Georgia*, 31 U.S. at 559; *see also Holden v. Joy*, 84 U.S. (17 Wall.) 211, 242 (1872); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512-13 (1940). In keeping with their sovereign status, it is well settled that Indian tribes enjoy the common-law immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58. Whether tribal sovereign immunity applies is a question of federal law. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Absent the tribe's express waiver of immunity or congressional authorization, an Indian tribe may not be subjected to suit in state or federal courts. *Id.*

Sovereign immunity extends to tribal officials and employees acting within the scope of their authority. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *U.S.*

v. Yakima Tribal Court, 806 F.2d 853, 861(9th Cir. 1998); *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008); *Miller v. Wright*, 705 F.3d 919 (9th Cir. 2012). This case is no exception. The recent cloud created by DOI's past refusal to recognize the Tribal Council has now been removed. The continued existence of Tribal officials' and employees' immunity is now clear, remains intact, and this Court must dismiss this action.

The Plaintiffs' original claims that the Defendants lacked immunity because: (1) they acted outside the scope or their authority and (2) no sovereign existed as a result of DOI's refusal to recognize Tribal leadership, have both been dispelled. The Plaintiffs' first claim - whether a Tribal official acts within (or outside) the Tribe's granted authority - is a question of internal Tribal concern, not within this Court's jurisdiction. *See supra.* The Plaintiffs' attempt to collaterally estop the Defendants from contesting the issue in this forum by repeated references to the DOI's refusal to recognize Tribal leadership, is without merit, and is now moot.

Next, the Plaintiffs' claim that the Defendants lack immunity because the sovereign was no longer recognized is similarly without merit, and now moot. The DOI has spoken, Tribal leadership is recognized by its Tribal members and the federal government. The Tribal Council has ratified the previous relevant actions, and as such, deemed the actions within the scope of employ. As such, the Defendants retain and re-assert their immunity from suit[8]. Resultantly, this Court must dismiss the Plaintiffs' claims on sovereign immunity grounds.

[8] The Plaintiffs repeated attempts in Tribal, state and federal Court to simply name a defendant in his or her individual capacity as opposed to the office that he or she holds is insufficient to overcome sovereign immunity. *See Pearson v. Director of Department of Licensing*, 2016 WL 3386798 at 4 (2016); *See also Scott v. Doe,* 199 Wn.App. 1039 (Div. 1 2017)(affirmed dismissal order under CR 19 for failing to join necessary Tribe that possessed sovereign immunity).

V. CONCLUSION

The Defendants respectfully request dismissal with prejudice.

Respectfully submitted this 23rd day of August, 2018.

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United States District Court, W.D. Washington, at Seattle.

Margretty RABANG, et al., Plaintiffs,
v.
Robert KELLY, Jr., et al., Defendants.

CASE NO. C17-0088-JCC
|
Signed 07/31/2018

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ORDER

John C. Coughenour, UNITED STATES DISTRICT JUDGE

***1** This matter comes before the Court on Plaintiffs' response to the Court's order to show cause (Dkt. No. 159) and Defendants' responses[1] (Dkt. Nos. 161, 164). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DISMISSES Plaintiffs' complaint without prejudice and without leave to amend for the reasons explained herein.

I. BACKGROUND

This case arises out of the disenrollment of hundreds of members of the Nooksack Indian Tribe and subsequent Department of the Interior ("DOI") and Bureau of Indian Affairs ("BIA") decisions regarding the federal government's recognition of the Nooksack Tribal Council. The Court has provided a detailed factual background of this case in prior orders. (*See* Dkt. Nos. 62 at 1–6, 63 at 1–2, 130 at 1–4.) What follows is the relevant factual and procedural background leading to the Court's present decision.

Plaintiffs in this matter are "purportedly disenrolled" members of the Nooksack Indian Tribe.[2] (Dkt. No. 64 at 4.) Defendants are current and former members of the Nooksack Indian Tribal Council and other figures within the tribal government. (*Id.* at 4–6.) Plaintiffs bring suit against Defendants for alleged violations of the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 ("RICO"). (*Id.* at 1.) Plaintiffs allege that Defendants abused their positions within the tribal government to carry out a scheme to defraud them of money, property, and benefits "by depriving [them] of their tribal membership." (*Id.* at 7.) To carry out this scheme, Plaintiffs allege that Defendants, among other things, illegally postponed elections, took legislative action through the Tribal Council without a required quorum, and actively prevented Plaintiffs and their attorneys from challenging Defendants' actions in the Nooksack Tribal Court. (*See generally* Dkt. No. 64.) In response to these actions, the DOI issued a series of decisions declaring that it would not recognize the legislative or judicial actions taken by the Tribe until a special election was held in accordance with tribal law. (*Id.* at 17–22.)

The Court previously denied the Kelly Defendants' motion to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction and on sovereign immunity grounds. (Dkt. No. 63.) Notwithstanding the Kelly Defendants' characterization of Plaintiffs' claims as a non-reviewable intra-tribal dispute, the Court ruled that it had subject matter jurisdiction over the case during the period that DOI refused to recognize the actions taken by the Nooksack Tribal Council. (*Id.* at 11.) The Kelly Defendants timely filed an interlocutory appeal challenging the Court's decision. (Dkt. No. 69); *Rabang v. Kelly*, No. 17-35427 (9th Cir. 2018).

***2** On August 28, 2017, Defendant Kelly, in his capacity as Chairman of the Nooksack Tribal Council, entered into a Memorandum of Agreement ("MOA") with the Acting Assistant Secretary—Indian Affairs, on behalf of the DOI. (Dkt. No. 117-1 at 8–12.) Under the MOA, the DOI agreed to recognize the Nooksack Tribal Council as the governing body of the Nooksack Tribe, if the Tribe

conducted a special election within a specified period. (*Id.* at 8.) In light of the MOA, the Court ordered a stay of proceedings, as the DOI's recognition of the Tribal Council could represent an event of "jurisdictional significance." (Dkt. No. 130 at 8.)

Since the Court entered its stay, the Nooksack Tribe has conducted two elections. On December 2, 2017, the Tribe held a special election to fill four seats on the Tribal Council. (Dkt. No. 145-1.) On March 9, 2018, the DOI concluded that the election results were valid and, pursuant to the MOA, once again recognized the Tribal Council. (*Id.*; Dkt. No. 162-2 at 2–6.) On May 5, 2018, the Tribe held a general election to select a Chairman and fill three seats on the Tribal Council. (Dkt. No. 162-4 at 2.) On June 11, 2018, the DOI's Principal Deputy Assistant Secretary—Indian Affairs, wrote a letter to the Tribe's new Chairman acknowledging his election and the election of the new Tribal Council members. (Dkt. No. 160-1 at 2.)

Following the DOI's recognition decision, the Kelly Defendants asked the Court to issue an indicative ruling to the Ninth Circuit stating that if the Court of Appeals remanded the Defendants' interlocutory appeal, this Court would dismiss the case for lack of subject matter jurisdiction. (Dkt. No. 144 at 2.) The Court denied Defendants' motion, reasoning that the Court of Appeals was poised to render a decision on that very issue. (Dkt. No. 153 at 5.) In response, the Kelly Defendants filed a voluntarily dismissal of their interlocutory appeal, which the Ninth Circuit granted. (Dkt. No. 157); *See also Rabang v. Kelly*, No. 17-35427, Dkt. No. 36 (9th Cir. 2018).

The Court lifted its stay and ordered Plaintiffs to show cause why their complaint should not be dismissed for lack of subject matter jurisdiction pursuant to the DOI's recognition decision and the Court's prior rulings. (Dkt. No. 156.) Plaintiffs filed a response (Dkt. No. 161) and both the Kelly Defendants and Defendant Dodge submitted an answer (Dkt. Nos. 161, 164).

II. DISCUSSION

From the outset, the Court has made clear that its jurisdiction over this case "is not permanent or inflexible." (Dkt. No. 63 at 11.) In exercising jurisdiction, the Court drew an analogy to the tribal exhaustion rule, which holds that matters of internal tribal governance should not be adjudicated by federal courts unless and until tribal remedies have been exhausted. (*Id.* at 7–8); *see Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013). The Court relied on a narrow exception to the 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." *Grand Canyon Skywalk*, 715 F.3d at 1200.

The Court gave deference to the DOI decisions that refused to recognize actions taken by the Nooksack Tribal Council and Court, and concluded that Plaintiffs lacked an adequate opportunity to challenge the Tribal Court's jurisdiction. (Dkt. No. 63 at 11.) At the same time, the Court acknowledged that its exercise of jurisdiction was for "the interim period where the tribal leadership is considered inadequate by the DOI." (*Id.* at 10–11); *See Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 943 (8th Cir. 2010) (BIA's recognition decision between two competing tribal factions is made on an "interim basis" and once "the dispute is resolved through internal tribal mechanisms, the BIA must recognize the tribal leadership embraced by the tribe itself.")

***3** The Court previously stated that "if the DOI and BIA recognize tribal leadership after new elections, this Court will no longer have jurisdiction and the issues will be resolved internally." (Dkt. No. 63 at 11.) These circumstances have come to pass. The DOI recognized the Nooksack Tribal Council as the Tribe's governing body, following the agency's validation of the December 2017 special election. (Dkt. No. 145-1.) The Court's original basis for exercising jurisdiction under an exception to the tribal exhaustion rule no longer exists.

The Court concludes that it lacks subject matter jurisdiction over Plaintiffs' claims. In general, Indian tribes possess inherent and exclusive power over matters of internal tribal governance. *See Nero v. Cherokee Nation*, 892 F.2d 1457, 1463 (10th Cir. 1989); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). The determination of tribal membership has long been recognized as a matter of internal tribal governance to be determined by tribal authorities. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n.32 (1978) (holding that tribes are immune from federal court jurisdiction in disputes regarding challenges to tribal membership); *Williams v. Gover*, 490 F.3d 785, 790 (9th Cir. 2007) ("[the Tribe] had the power to squeeze the plaintiffs out, because it has the power to define its own membership. It did not need the BIA's permission and did not ask for it....").

At the heart of Plaintiffs' RICO claims is a dispute about

their membership in the Nooksack Indian Tribe and the actions taken by tribal leadership to renounce their membership. (Dkt. No. 64 at 7) (Defendants carried out "their scheme to defraud Plaintiffs of money, property, and benefits by depriving Plaintiffs of their Tribal membership...."). While Plaintiffs are correct that federal courts have jurisdiction over RICO claims, they refuse to acknowledge that resolution of their claims—whether on summary judgment or at a jury trial—would ultimately require the Court to render a decision about Plaintiffs' enrollment status. (Dkt. No. 48 at 3–4.) Plaintiffs cannot eliminate this inherent issue just by bringing their challenge as a civil RICO action. *See In re: Sac & Fox Tribe of the Miss. In Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 767 (8th Cir. 2003).

To resolve the enrollment dispute underlying Plaintiffs' claims, the Court would also have to interpret and make rulings regarding Nooksack Tribal law. The parties strenuously dispute whether Defendants' actions were taken in accordance with Tribal law and the Nooksack Constitution. (*Compare* Dkt. No. 34 at 12–13, *with* Dkt. No. 48 at 3–4.) To resolve these disputes, the Court would necessarily have to make rulings on tribal law that go beyond the scope of a district court's jurisdiction. *See, e.g., Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) ("disputes involving questions of interpretation of the tribal constitution and tribal law [are] not within the jurisdiction of the district court.")

The Court cannot avoid interpreting tribal law simply by relying on prior decisions by the DOI and Nooksack Tribal Court of Appeals. While the Court previously gave deference to DOI's opinions about the Tribal Council's actions, such deference was only warranted in regard to DOI's interim recognition decision. *See Cayuga Nation v. Tanner*, 824 F.3d 321, 328 (2d Cir. 2016) ("BIA 'has both the authority and responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe.' ") (quoting *United Keetoowah Band of Cherokee Indians*, 22 IBIA 75, 80 (1992)). It would be inappropriate, however, for the Court to adjudicate Plaintiffs' claims by using DOI's decisions as authoritative rulings on tribal law. *See Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d at 943 (whether tribal chairman "was properly removed from office and whether he had general authority to act on behalf of the Tribe in a governmental capacity are pure questions of tribal law, beyond the purview of the federal agencies and the federal courts.")

***4** Nor can the Court rely on prior tribal court opinions to resolve the parties' disputes regarding the legitimacy of Defendants' actions. (*See* Dkt. No. 34 at 12–13.) That is particularly true in light of actions taken by the Tribal Council since DOI's recognition decision. (*See* Dkt. No. 152-1) (resolution adopting all of the actions taken by the Chairman and Tribal Council during the period the DOI refused to recognize the Nooksack Tribal Council).

Plaintiffs have not provided the Court with sufficient reasons to find that it retains jurisdiction over their claims. Plaintiffs first assert that subject matter jurisdiction is determined at the time a lawsuit is filed. (Dkt. No. 159 at 4.) But the authority Plaintiffs cite in support of their position deals primarily with cases involving diversity jurisdiction. *See, e.g., Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991). None of the cases Plaintiffs cite deal with the facts presented by this case. Moreover, Plaintiffs' position is not supported by the directive contained in Federal Rule of Civil Procedure 12(h)(3) that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."

Plaintiffs next assert that the Court retains jurisdiction under the law of the case doctrine. "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.' " *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (quoting *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993)). Application of this doctrine does not preclude the Court from reconsidering its jurisdiction. In fact, the Court is bound to reconsider its ruling on subject matter jurisdiction based on its prior rulings.[3] (Dkt. No. 62 at 11) ("[I]f the DOI and BIA recognize tribal leadership after new elections, this Court will no longer have jurisdiction and the issues will be resolved internally."). The Court similarly disagrees with Plaintiffs' argument that the Kelly Defendants are judicially estopped from re-litigating the issue of subject matter jurisdiction because they voluntarily dismissed their interlocutory appeal, which addressed that very issue. (Dkt. No. 159 at 5–6.) The Court is *sua sponte* readdressing its jurisdiction based on a change in circumstances and its prior rulings—the Kelly Defendants' dismissal of their appeal has no bearing on the Court's inquiry.

Plaintiffs finally argue that their RICO claims deal with past fraudulent conduct that is unaffected by the DOI's recent recognition of the Tribal Council. (*Id.* at 7.) Plaintiffs assert that the DOI's recognition decision did not undue its previous opinions concluding that the Tribal Council and Tribal Court had acted without authority. (*Id.*) The Court disagrees. The relevant issue for assessing the Court's jurisdiction is whether the DOI recognizes the Tribal Council as the governing body of the Nooksack

Tribe. (*See* Dkt. No. 62 at 11.) In the absence of such recognition, the Court gave deference to the DOI's opinions and found it had jurisdiction for an interim period. (*Id.*) Pursuant to the MOA and the DOI's recent recognition decision, the DOI's past decisions no longer provide a basis for this Court to exercise jurisdiction.

***5** Although the Court concludes that it no longer has subject matter jurisdiction over this case, it does not at all think, as Defendants suggest, that "the cloud over the Tribe" has been removed. (Dkt. No. 164 at 2.) Plaintiffs' allegations against Defendants, which have been well documented in this lawsuit and elsewhere, are highly concerning. Nevertheless, it is for the Nooksack Tribe, not this Court, to resolve Plaintiffs' claims.

III. CONCLUSION

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3), the Court DISMISSES Plaintiffs' complaint without prejudice and without leave to amend. The Clerk is DIRECTED to close this case.

All Citations

Slip Copy, 2018 WL 3630295

Footnotes

1 Defendants Kelly, George, Smith, Solomon, Johnson, Canete, King George, Romero, Edwards, and Armstrong ("Kelly Defendants") filed a consolidated response (Dkt. No. 161). Defendant Raymond Dodge Jr. ("Dodge") filed a separate response. (Dkt. No. 164.)

2 As it has done throughout this case, the Court expresses no opinion on the validity of the disenrollments by referring to these Nooksack tribal members as "disenrolled."

3 The Court is also bound by Federal Rule of Civil Procedure 12(h)(3) to reconsider the question of subject matter jurisdiction. *See Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 976 (9th Cir. 2012) ("federal courts have a continuing independent obligation to determine whether subject-matter jurisdiction exists") (citation and internal quotations omitted).

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United States District Court,
W.D. Washington,
at Seattle.

The NOOKSACK INDIAN TRIBE, Plaintiff,
v.
Ryan K. ZINKE, et al., Defendants.

CASE NO. C17-0219-JCC
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Signed 05/11/2017

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ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

John C. Coughenour, UNITED STATES DISTRICT JUDGE

*1 This matter comes before the Court on Plaintiff the Nooksack Indian Tribe's motion for preliminary injunction (Dkt. No. 19) and Defendants' cross-motion to dismiss (Dkt. No. 26). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS Defendants' motion to dismiss and DENIES Plaintiff's motion for preliminary injunction as moot for the reasons explained herein.

I. BACKGROUND

This section summarizes the facts as set forth in Plaintiff's complaint, as is appropriate on a motion to dismiss. It also summarizes and cites declarations, affidavits, and other material properly before this Court, as appropriate on a motion to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(d); *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

Plaintiff the Nooksack Indian Tribe brought this action against Defendants, collectively the leadership of the Department of the Interior (DOI) and Bureau of Indian Affairs (BIA), on February 13, 2017. This case arises out of the same set of facts as a related case also before this Court, *Rabang v. Kelly*, C17-0088-JCC.

Since 2007, Plaintiff has been a party to 638 contracts with the DOI and BIA, entered into pursuant to the Indian Self-Determination and Education Assistance Act. (Dkt. No. 1 at ¶ 28.) Plaintiff alleges "under the terms of these contracts, the defendants fund the Tribe to provide programs, functions, services, or activities of the [DOI] for the benefit of Indians because of their status as Indians." (*Id.*) Plaintiff brings this action partially "to compel the defendants to fully fund contracts awarded to the Tribe under the Indian Self-Determination and Education Assistance Act." (*Id.* at ¶ 1.)

However, the purported disenrollment of hundreds of Nooksack tribe members in late 2016 and the recent tribal government changes, all completed when the Nooksack Indian Tribal Council lacked a quorum, are fundamental underlying facts in this action. By way of background, the Nooksack Indian Tribal Council is the governing body of the Tribe and is composed of eight members. (Dkt. No. 20 at 10.) Five members constitute a quorum on the Council. (*Id.* at 18.) In December 2012, the Chairman of the Nooksack Indian Tribal Council, Robert Kelly, "became aware of the possibility of erroneous enrollments" in the Tribe. (Dkt. No. 30 at ¶ 6.) On June 21, 2013, Nooksack Indian voters approved a membership requirement change to the Nooksack Constitution proposed by the Council. (Dkt. No. 1 at ¶ 31.). The change makes membership more stringent, requiring "at least one-fourth (1/4) degree Indian blood." (Dkt. No. 20 at 8.) The change was challenged in the Nooksack tribal courts and upheld. (*See* Dkt. No. 1 at ¶¶ 32–35.) However, the membership criteria change is currently before the DOI's Interior Board of Indian Appeals for approval. (*Id.* at ¶ 41.)

In March 2016, the Nooksack Indian Tribal Council scheduled a general election to fill three council seats whose terms were set to expire on March 24, 2016. (*Id.* at ¶ 42.) However, "the Tribe delayed the election, and the

three Council members retained their seats as holdovers pending the election of their replacements." (*Id.*) Mr. Kelly alleges the Council postponed the election "in the interest of providing stability to the Tribe's government and previous security concerns and threats of violence associated with disenrollment protests." (Dkt. No. 30 at ¶ 8.) Defendants allege the Council postponed the election for the three seats "until after disenrollment proceedings against the 306 prospective disenrollees were complete." (Dkt. No. 26 at 7.) Regardless of the reason for cancelling the 2016 election, as of March 24, 2016, only three of eight Council members occupy seats whose terms have *not* expired. (Dkt. No. 26 at 7 n.6.; Dkt. No. 20 at ¶ 9; Dkt. No. 38 at ¶ 14.) Therefore, Defendants allege the Council has been acting without a quorum since March 24, 2016. (Dkt. No. 26 at 3, 7.) The Court will refer to the Council group, as composed after March 24, 2016, as the holdover Council for clarity.

*2 On March 28, 2016, the holdover Council terminated Nooksack Tribal Court Chief Judge Susan Alexander. (Dkt. No. 15 at ¶ 7; Dkt. No. 26 at 7.) Raymond Dodge, Plaintiff's former in-house counsel, replaced Ms. Alexander. (*Id.*) Thereafter, the Nooksack Tribal Court allegedly began refusing to act on complaints challenging the legality of the holdover Council's actions. (Dkt. No. 15 at ¶¶ 7–10.)

Conflict within the Nooksack tribal judiciary after March 24, 2016, is illustrated by the efforts of private law firms, including counsel for Intervenors 271 Nooksack Tribal Members, challenging their alleged disbarment from the Nooksack tribal courts. In an order dated September 21, 2016, the Nooksack Court of Appeals described as follows:

> As is well-known to those familiar with this case, the Plaintiffs[, private law firms,] have sought a review of this [disbarment] process before the Tribal Court, but the court clerk returned their pleadings and refuses to accept any filings from them.... This Court has already issued a mandatory injunction that the court clerk accept their pleadings and other filings. Moreover, when this order was ignored, we issued an order finding the court clerk in contempt. When this contempt was not corrected, we ordered the Police Chief to arrest the court clerk. When the Police Chief refused to enforce the Court's order to arrest the court clerk, we held the Police Chief in contempt.... *Notwithstanding our efforts, the orders of this Court have been unlawfully ignored and the rule of law on the reservation, at least within the scope of this case, has completely broken down.*

(Dkt. No. 15 at 51) (emphasis added).

On August 8, 2016, Stanley Speaks, the Northwest Regional Director of the DOI, sent a letter to Nooksack tribal members who had asked him to "intervene and conduct a supervised, in-person, in-secret election." (Dkt. No. 21 at 13.) Director Speaks declined, and responded that the "Nooksack Constitution does not require the Secretary to conduct or approve tribal council elections.... The Tribe has existing forums for conducting tribal business: an election board (during an election), tribal police, tribal court, and an appellate court system." (*Id.* at 13–14.)

On October 7, 2016, by Resolution 146a, the holdover Council purportedly created a new Nooksack Supreme Court. (Dkt. No. 15 at 69, ¶¶ 17–18.) Five members of the holdover Council filled the judicial positions. (*Id.*) On the petition of the "Nooksack Indian Tribe and its officers and Councilmembers," the Nooksack Supreme Court vacated 12 prior orders of the Nooksack Court of Appeals as "null and void." (*Id.* at 72–80.)

Between November 10, 2016, and November 22, 2016, Plaintiff and the holdover Council disenrolled "289 individuals who failed to demonstrate legally sufficient blood connections to the Tribe." (Dkt. No. 1 at ¶ 43.) As such, "the Tribe carried out the disenrollment proceedings using the procedures that had been approved by both the Nooksack Tribal Court of Appeals and the Secretary" of the Interior. (*Id.*) Allegedly, these disenrollment hearings were conference calls that lasted no more than ten minutes in length. (Dkt. No. 26 at 9 n.10.)

On October 17, 2016, Lawrence S. Roberts, then the Principal Deputy Assistant Secretary—Indian Affairs of the DOI (PDAS), issued a decision[1] stating,

> In rare situations where a tribal council does not maintain a quorum to take action pursuant to the Tribe's Constitution, the [DOI] does not recognize actions taken by the tribe. This is one of those

> exceedingly rare situations. Accordingly, I am writing to inform you and the remaining Council members that the [DOI] *will only recognize those actions taken by the Council prior to March 24, 2016, when a quorum existed, and will not recognize any actions taken since that time because of a lack of quorum.*

*3 (Dkt. No. 21 at 15) (emphasis added). The decision continues that the "BIA stands ready to provide technical assistance and support to the Tribe to carry out elections open to 'all enrolled members of the Nooksack Tribe, eighteen years of age or over.' " (*Id.* at 16.)

On November 14, 2016, PDAS Roberts issued a second decision to the holdover Council, reiterating that pursuant to the

> Nation-to-Nation relationship, the [DOI] will not recognize actions taken by you and the current Tribal Council members without a quorum consistent with the Nooksack Tribe's Constitution.... Accordingly, until a Council is seated through an election consistent with tribal law ..., we will not recognize any "referendum election" including the purported results posted on the Tribe's Facebook page on November 4, 2016, claiming to disenroll current tribal citizens.... This further includes any election results from the Tribal Council Primary Election scheduled for December 17, 2016, or the Tribal Council Regular Election scheduled for January 21, 2017.

(Dkt. No. 15 at 11; *see* Dkt. No. 1 at ¶ 46.)

On December 23, 2016, PDAS Roberts issued a third decision to the holdover Council. He reiterated the fact that the Nooksack Indian Tribal Council continues to operate without a quorum and "therefore lacks authority to conduct business on behalf of the tribe." (Dkt. No. 15 at 14; *see* Dkt. No. 1 at ¶ 46.) The decision continues,

> As we previously notified you, the actions by you and two members who have exceeded their term of office on the Tribal Council to anoint yourselves as the Tribe's Supreme Court were taken without a quorum and without holding a valid election consistent with the Tribe's constitution.... *Any actions taken by the Tribal Court after March 24, 2016, including so-called tribal court actions and orders, are not valid for purposes of Federal services and funding.*

(Dkt. No. 15 at 14) (emphasis added). Plaintiff alleges Defendants "failed or refused the Tribe's distribution of its previously-approved 638 contract funds" as a result of these three DOI decisions. (Dkt. No. 1 at ¶ 45.)

On January 21, 2017, Plaintiff and the holdover Council allegedly conducted a general election to fill the three seats held by the holdover Council members whose terms had expired. (Dkt. No. 21 at 6.) There were no challenges to the election results. (*Id.*) The results were "certified by the duly-appointed Election Superintended [sic], consistent with Nooksack law." (*Id.*) Still, there is no dispute that Plaintiff has not requested that government-to-government relations between the DOI and Plaintiff be restored in light of this election. In his November and December 2016 decisions, PDAS Roberts indicated he did not view the scheduled 2017 election as legitimate. (Dkt. No. 15 at 11, 15.) Defendants maintain their disapproval of the holdover Council in their briefing, calling its conduct "abusive," and alleging the Council has "used its *de facto* control to systematically abridge the rights of a disfavored group of tribal members, thereby depriving them of their right to fully participate in and receive benefits under federal programs." (Dkt. No. 26 at 3.)

*4 The holdover Council, on behalf of the Nooksack Indian Tribe, now moves the Court to enter a preliminary injunction enjoining Defendants from "(1) taking further steps to reassume responsibilities the Tribe performs for its enrolled members under its Public Law 638 contracts; (2) taking further actions based on three opinion letters written by [PDAS Roberts]; and (3) continuing to interfere with the Tribe's self-governance by refusing to acknowledge that the current, duly-elected members of the Nooksack Tribal Council are the Tribe's governing body." (Dkt. No. 19 at 1–2.) Defendants opposed the motion, and filed a cross-motion to dismiss, or in the alternative for summary judgment, arguing that the Court lacks jurisdiction over this case. (Dkt. No. 26.) Because Defendants challenge the Court's jurisdiction over this

matter, the Court will consider the motion to dismiss first.

II. DISCUSSION

A. Motion to Dismiss Legal Standard

Under Federal Rule of Civil Procedure 12(b)(1), a complaint must be dismissed if the court lacks subject matter jurisdiction. Jurisdiction is a threshold separation of powers issue, and may not be deferred until trial. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). A motion to dismiss under Rule 12(b)(1) for lack of jurisdiction may be facial or factual. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In reviewing a facial attack, the Court assumes all material allegations in the complaint are true. *Thornhill Publ'g Co. v. General Tel. Elec.*, 594 F.2d 730, 733 (9th Cir. 1979).

B. Standing/Authority

Defendants' primary argument is that absent recognition from the DOI and BIA, the holdover Council lacks the authority to file and prosecute the action in this Court against the Secretary in the name of, and on behalf of, the Nooksack Indian Tribe. (Dkt. No. 26 at 5.) Plaintiff counters that Robert Kelly, the current Chairman of the holdover Council, has "delegated authority" to prosecute the Tribe's claims. (Dkt. No. 29 at 3–4; Dkt. No. 36 at 17–18.) Plaintiff also argues the three Councilmembers who retained their seats during the "period of delayed general elections" validly continued to occupy their seats as holdovers in accordance with Nooksack law. (Dkt. No. 29 at 4–9; Dkt. No. 36 at 16–17.) Essentially, Plaintiff argues this is an intra-tribal dispute and it is not for the federal government to adjudicate disputed tribal leadership. (Dkt. No. 36 at 12–15.)

The Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). Unless surrendered by the tribe, or abrogated by Congress, tribes possess inherent and exclusive power over matters of internal tribal governance. *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). However, this is an exceedingly rare situation where the DOI and BIA have refused to recognize the Nooksack tribal leadership and its actions taken since March 24, 2016, and no Nooksack tribal leadership group is currently federally recognized.

The parties have framed the motion to dismiss issue as "standing." However, there is no dispute that the Nooksack Indian Tribe, the named Plaintiff in this action, would have standing to bring the claims asserted. The dispute is whether the group representing itself as the Tribe, the holdover Council, is *authorized* to initiate the action on behalf of the Tribe. "Though not a question of constitutional standing, that issue nonetheless implicates the subject matter jurisdiction of this Court." *Cayuga Nation v. Tanner*, 824 F.3d 321, 327 (2d Cir. 2016). Specifically, the issue before the Court is whether, given the DOI's refusal to recognize the holdover Council's leadership, Plaintiff has the authority to bring this case on the Tribe's behalf.

***5** A recent Second Circuit case is very instructive. In *Cayuga Nation*, two tribal groups vied for tribal leadership and the BIA recognized one over the other. The court had to decide whether this recognition affected the court's jurisdiction over claims brought by the recognized group. 824 F.3d at 325–27. The court acknowledged the tension between tribal sovereignty and BIA recognition. It decided that it lacked "jurisdiction to resolve the question of whether this law suit was properly authorized as a matter of *tribal law*." *Id.* at 328. The court declined to interpret tribal law and concluded "where the authority of the individual initiating the 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 the disputes about tribal law, that the individual may bring a lawsuit on behalf of the tribe." *Id.*

The court then proceeded to address the BIA decisions in the record. Recognizing "deference to the Executive Branch is appropriate," the Second Circuit noted the "BIA has special expertise in dealing with Indian affairs, and we have previously indicated that the BIA's decision to recognize a tribal government" can be outcome determinative. *Cayuga Nation*, 824 F.3d at 328 (citing *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 938–39 (D.C. Cir. 2012) (dismissing a lawsuit brought by one group on behalf of the tribe after the Executive Branch recognized a different group as the tribe's governing body); *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 712–13 (2d Cir. 1998) (noting that the "BIA's determination that [an individual] does not represent the Nation may well moot plaintiffs' claims")).

Ultimately, the Second Circuit held "a recognition decision from the BIA is sufficient for us to find that the recognized individual has the authority to initiate a lawsuit on behalf of a tribe." *Cayuga Nation*, 824 F.3d at 328. The Second Circuit concluded that deference to a BIA decision was appropriate and adopted the BIA decision's conclusion. *Id.* at 328–30. The Second Circuit also acknowledged that a BIA decision recognizing a tribal government entity "could in many situations prevent tribes from vindicating their rights in federal court." *Id.* at 329–30. However, "[l]ike 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." *Id.* at 330.

This holding is consistent with an Eighth Circuit decision where the court determined that a BIA recognition and decision is made only on "an interim basis" and once "the dispute is resolved through internal tribal mechanisms, the BIA must recognize the tribal leadership embraced by the tribe itself." *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 943 (8th Cir. 2010); *accord Winnemucca Indian Colony v. U.S. ex rel. Dep't of the Interior*, 837 F. Supp. 2d 1184, 1191 (D. Nev. 2011).

The Ninth Circuit's limited jurisprudence on the specific issue before this Court is also consistent with the cases above. *See Cloverdale Rancheria of Pomo Indians of Cal. v. Jewell*, 593 Fed.Appx. 606, 609 (9th Cir. 2014) (holding, where plaintiffs were five members of a tribe seeking recognition as the tribe's leadership, that "Plaintiffs—Appellants are not entitled to act on behalf of a federally recognized 'Indian tribe,' however, because they are not the Tribe's recognized governing body"); *see also Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1031 (E.D. Cal. 2012) ("Deference to the BIA determination is the preferred course of action.");*Winnemem Wintu Tribe v. U.S. Dep't of Interior*, 725 F. Supp. 2d 1119, 1133–34 (E.D. Cal. 2010) (holding that an unrecognized tribe could not bring claims because the court lacked authority to adjudicate entitlement to federal recognition).

***6** These holdings reflect the guiding principle that, although the DOI must carefully consider tribal sovereignty, it ultimately has the power to manage "*all* Indian affairs" and "*all* matters *arising out of Indian relations*." 25 U.S.C. § 2 (emphasis added). The BIA "has both the authority and responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe." *United Keetoowah Band of Cherokee Indians v. Muskogee Area Director*, 22 IBIA 75, 80 (1992).

Based on this line of cases, the Court concludes deference is owed to the DOI decisions and the holdover Council does not have authority to bring this case against the federal government in the interim period where the tribal leadership is considered inadequate by the DOI. There is a sufficient basis in the record to conclude this Plaintiff, the holdover Council, may not bring a lawsuit on behalf of the Tribe. The DOI refused to recognize the actions taken by the holdover Council since March 24, 2016. (Dkt. No. 15 at 8, 11, 15.) Moreover, the DOI has not recognized the Nooksack Indian Tribal Council allegedly elected in January 2017. (*Id.* at 11, 16.) Therefore, the decisions taken and the leadership in place after March 24, 2016, are not valid at this time and on an interim basis because the DOI or BIA have not recognized *any* Nooksack tribal leadership.

This holding is consistent with the Court's conclusion it has subject matter jurisdiction over the plaintiffs' claims in *Rabang v. Kelly*, C17-0088-JCC, Dkt. No. 62. There, the plaintiffs are allegedly disenrolled Nooksack tribe members bringing an action against the Nooksack tribal leadership, including the holdover Council members, in their individual capacities. *Rabang*, Dkt. No. 1. The Court defers to the DOI decisions in each case, but the respective parties in each informs the Court's subject matter jurisdiction. The plaintiffs in *Rabang* have authority to bring their personal claims, and the DOI decisions confer jurisdiction over potentially intra-tribal matters because the plaintiffs have a lack of adequate opportunity to challenge the Nooksack tribal court's jurisdiction. *Rabang*, Dkt. No. 62 at 10–11. Here, however, the holdover Council lacks authority to bring its claims on behalf of the Tribe because the DOI decisions decline to recognize the holdover Council. Therefore, the Court does not have jurisdiction over claims alleged by a party without authority to bring such claims.

The holdover Council's arguments why it has authority to bring its claims are curious. Plaintiff seems simultaneously to ask the Court to interpret Nooksack tribal law to find Mr. Kelly was delegated power and that Nooksack law recognizes the authority of holdover Councils, while also arguing that the Court cannot intercede into internal tribal disputes. (*See e.g.*, Dkt. No. 36.) Plaintiff cannot have it both ways. Moreover, this federal court cannot interpret tribal law. *See Cayuga Nation*, 824 F.3d at 328; *Goodface*, 708 F.2d at 339.

Plaintiff also relies on Director Sparks's letter indicating that the "Nooksack Constitution does not require the Secretary [of the Interior] to conduct or approve tribal

council elections." (Dkt. No. 21 at 13–14; *see* Dkt. No. 19 at 8.) Plaintiff claims this means PDAS Roberts acted improperly by refusing to recognize the holdover Council. (Dkt. No. 19 at 8.) However, even if this was true, as decided above, the Court does not have jurisdiction to review challenges to DOI decisions brought by parties without authority.

*7 Plaintiff also cites *Cayuga Nation* for the proposition that allowing Defendants "to defeat the Tribe on standing grounds by arguing that they do not recognize the Council ... must not be permitted." (Dkt. No. 29 at 9.) However, *Cayuga Nation* holds that where the BIA recognizes specific entities as the tribal leadership, federal courts must do the same. 824 F.3d at 330. Logically, therefore, the converse must also be true: where the BIA refuses to recognize tribal leadership, federal courts must do the same. *See also Shenandoah*, 159 F.3d at 712–13; *Cloverdale*, 593 Fed.Appx. at 609.

For the foregoing reasons, Defendants' motion to dismiss (Dkt. No. 26) is GRANTED because the holdover Council does not have the authority to bring these claims on behalf of the Nooksack Indian Tribe.Therefore, this Court lacks jurisdiction.[2]

These are very rare circumstances. The DOI found that the Nooksack Indian Tribal Council, currently existing as the holdover Council, lacks authority due to a lack of quorum. The DOI decisions stand during the interim until the DOI and BIA recognize a newly elected Nooksack Indian Tribal Council. This Court's lack of jurisdiction is not permanent or inflexible. If 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. The Court also acknowledges that this is a situation contemplated by *Cayuga Nation* where a BIA decision "prevent[s] tribes from vindicating their rights in federal court." 824 F.3d at 329–30. However, under this set of facts and with a clear lack of recognition from the DOI and BIA, the Court must decline jurisdiction.

Defendants' motion to dismiss for lack of subject matter jurisdiction (Dkt. No. 26) is GRANTED. The holdover Council's claims are DISMISSED with prejudice. Plaintiff's motion for preliminary injunction is DENIED as moot. The Court directs the Clerk to CLOSE this case.

All Citations

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III. CONCLUSION

Footnotes

1 By referring to these letters as "decisions," the Court expresses no opinion as to whether these are final agency actions.

2 Plaintiff also argues that the DOI and BIA decisions are final agency actions that can be reviewed by this Court. However, the Court need not decide whether or not final agency actions were made because the holdover Council lacks authority to bring its claims at this time.

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