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DISTRICT COURT

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR COUNTY OF WHATCOM

STATE OF WASHINGTON,
Plaintiff,

v.

MICHAEL J. RABANG,

Defendant.

Co-Defendants:

LISA MARIE RABANG, C00094696
JAMES VICTOREO RABANG, C0094697
FRANCISCO J. RABANG, C00094699

NO. C00094698

CrRLJ 8.3(c) MOTION TO DISMISS

Defendant Michael J. Rabang, a Nooksack Tribal member, is charged with violating RCW 77.15.380, for subsistence clamming on the Semiahmoo Spit without a state recreational shellfish license. Declaration of Gabriel S. Galanda (“Galanda Decl.”), Ex. A. The State appears to charge him with violation of RCW 77.15.380(1), which requires that a non-Indian “purchase[] the appropriate fishing or shellfishing license and catch record card issued to Washington residents,” in order to harvest shellfish. Because Defendant is a Nooksack Tribal member, however, federal law makes clear that he does not need a state-issued recreational shellfish license to harvest clams at Semiahmoo—a usual and accustomed Nooksack fishing place pursuant to the Point Elliott Treaty. 12 Stat. 927 (Jan. 22, 1855), Art. V; *U.S. v. Washington*, 384 F. Supp. 312, 333 (W.D. Wash. 1974); *id.*, Ex. B.

CrRLJ 8.3(c) MOTION TO DISMISS - 1

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1 I. STATEMENT OF FACTS

2 In 1855, the Nooksack Tribe signed the Point Elliott Treaty, which guaranteed Nooksack
3 Indians “the right of taking fish at usual and accustomed grounds.” 12 Stat. 927, Art. V.
4 Washington State recognizes Semiahmoo Spit as one of several usual and accustomed Nooksack
5 fishing areas. Galanda Decl., Ex. B, Attachment 1 at 4.

6 Defendant Michael J. Rabang was enrolled as a member of the Nooksack Tribe on
7 November 1, 1983. Galanda Decl., Ex. C. He has been continuously enrolled ever since.

8 The Nooksack Tribe proposed that Defendant be disenrolled on February 13, 2013. *Id.*,
9 Ex. D. A holdover group of Nooksack Tribal Councilpersons (“holdover Council”) purported to
10 disenroll Defendant in November of 2016. *See id.*, Ex. E.

11 On November 14 and December 23, 2016, U.S. Department of the Interior Principal
12 Deputy Assistant Secretary of Indian Affairs (“PDAS”) Lawrence Roberts invalidated
13 Defendant’s purported disenrollment. *Id.*, Exs. E, F. Exercising the power vested in his office
14 by 2 U.S.C. 25 to manage “all Indian affairs and . . . all matters arising out of Indian relations,”
15 PDAS Roberts rejected the holdover Council’s efforts “to disenroll current tribal citizens,”
16 explaining that the holdover Council “lack[ed] any authority to conduct business on behalf of the
17 Tribe.” *Id.*, Exs. E, F. In 2017, the holdover Council sued the Interior Department Secretary to
18 invalidate PDAS Roberts’ decisions but U.S. District Court Judge John C. Coughenour
19 dismissed the case because they lacked standing. *Nooksack Indian Tribe v. Zinke*, No. 2:18-cv-
20 00859TSZ (W.D. Wash.), Dkt. # 43. The holdover Council did not appeal. PDAS Roberts’
21 decisions were never withdrawn by Interior; they stand today. *See id.*

22 On or about March 15, 2018, after the Tribal Council gained federal re-recognition, the
23 Tribal Council again purportedly disenrolled Defendant, disregarding the fact that any Nooksack
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1 disenrollment action remained stayed or enjoined by federal law¹ and multiple Nooksack Tribal
2 Court and Tribal Court of Appeals orders.² *See id.*, Ex. G. Those injunctions did not lift until
3 April 18, 2019.³ Defendant has not since been disenrolled.

4 On May 10, 2019, at 4:30 PM, Defendant was exercising his Nooksack Treaty fishing
5 right along with three relatives, as “subsistence clam harvesters.” *Id.*, Ex. A. According to a
6 Washington State Fish and Wildlife Arrest Report:

7 On 5/10/2019 Lummi Natural Resource Officer Aaron Hillaire contacted four clam harvesters in
8 the Semiahmoo Spit area of Whatcom County. All four subject did not have the proper license to
9 conduct such an activity. Officer Hillaire identified the four subjects as James Rabang, Lisa
10 Rabang, Francisco Rabang and Michael Rabang. After a brief investigation, Officer Hillaire was
11 able to determine that the four subjects were disenrolled Nooksack Tribal members, thus
12 requiring them to have a state fishing license.

11
12 ¹ *St. Germain v. Acting N.W. Reg'l Dir.*, 17 IBIA No.16-022 (Bd. of Indian App. 2016) (Appealing “whether the
13 Superintendent and Regional Director approved the Tribe’s proposed amend to Title 63 in accordance with the
14 administrative rules, procedures, and laws that direct BIA decision making.”); 43 C.F.R. § 4.314(a) (2004) (“No
15 decision of an administrative law judge, Indian probate judge, or BIA official that at the time of its rendition is
16 subject to appeal to the Board, will be considered final”); 25 C.F.R. § 2.6(a) (1989) (“No decision, which at the
17 time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final”);
18 25 C.F.R. § 2.6(b) (1989) (“Decisions made by officials of the Bureau of Indian Affairs shall be effective when the
19 time for filing a notice of appeal has expired and no notice of appeal has been filed.”) [“Federal Stay Laws”].

20 ² *Michelle Roberts, et al., v. Robert Kelly, et al.*, No. 2013-CI-CL-003 and *Belmont, et al, v. Kelly, et al.*, No. 2014-
21 CI-CL-007 (Nooksack Tribal Ct. Feb. 26, 2015), Order at 2 (“the Parties shall maintain the status quo . . . until a
22 decision approving Title 63 becomes final for the Department of the Interior pursuant to 25 C.F.R. § 2.6.”), available
23 at <https://turtletalk.files.wordpress.com/2015/02/order.pdf>; *see also Michelle Roberts, et al., v. Robert Kelly, et al.*,
24 No. 2013- CI-CL-003 (Nooksack Tribal App. Ct. Mar. 18, 2014), Opinion at 9 (“[T]hese procedures were not
25 properly adopted in accordance with the strict requirements of the Nooksack Constitution, and any procedural rules
governing disenrollment proceedings must be adopted by ordinance and the ordinance approved by the Secretary of
the Interior as provided for in the Nooksack Constitution.”), available at <https://turtletalk.files.wordpress.com/2014/03/roberts-v-kelly-coa-opinion.pdf>; *Belmont et al, v. Kelly, et al.*, No.
214-CI-CL-007 (Nooksack Tribal Ct. June 12, 2014), Decision and Order Granting Plaintiffs’ Motion for
Preliminary Injunction (granting Plaintiff’s motion for preliminary injunction holding “[t]his approach appears to be
an attempt to circumvent the very clear holdings of the Court of Appeals that disenrollment procedures . . . must be
approved by the Secretary of the Interior”), available at [https://turtletalk.files.wordpress.com/2014/06/belmont-
v-kelly-case-no-2014-ci-cl-007-decision-and-order-
granting-plaintiffs-motion-for-preliminary-injunction.pdf](https://turtletalk.files.wordpress.com/2014/06/belmont-v-kelly-case-no-2014-ci-cl-007-decision-and-order-granting-plaintiffs-motion-for-preliminary-injunction.pdf);
Michelle Roberts, et al., v. Robert Kelly, et al., No. 2013-CI-CL-003 (Nooksack Tribal Ct. Mar. 31, 2014), Order
Enjoining Disenrollment Proceedings (Court “hereby issues a permanent injunction against the Defendants
enjoining them from undertaking disenrollment proceedings”), available at
[https://turtletalk.files.wordpress.com/2014/04/roberts-v-kelly-order-permanently-enjoining-
proceedings.pdf](https://turtletalk.files.wordpress.com/2014/04/roberts-v-kelly-order-permanently-enjoining-disenrollment-proceedings.pdf); *Belmont, et al, v. Kelly, et al.*, No. 2014-CI-CL-007 (Nooksack Tribal App. Ct. Sept. 28, 2016),
Second Order Granting Request to Join April 15, 2016, Motion and Be Subject to June 28, 2016, Order (order
granting Formal Indications to 127 more plaintiffs regarding Nooksack Tribal Court June 28, 2016 Order); *Belmont, et al,*
v. Kelly, et al., No. 2014-CI-CL-007 (Nooksack Tribal App. Ct. Sept. 21, 2016), Order Granting Requests to Join
April 15, 2016, Motion and Be Subject to June 28, 2016, Order (order granting Formal Indications to 17 plaintiffs
regarding Nooksack Tribal Court June 28, 2016 Order) [“Tribal Injunction Orders”].

³ *St. Germain v. Acting N.W. Reg'l Dir.*, 17 IBIA No.16-022 (Bd. of Indian App. Apr. 18, 2019), Order Dismissing
Appeal.

1 *Id.* Defendant produced his “Nooksack Tribal enrollment card[]” to a Lummi officer; his relative
2 “stated ‘no’ they do not to have any permits to harvest for subsistence”⁴; and the officer “thanked
3 them for their cooperation and cleared the area” without incident. *Id.*

4 The State waited six months to charge Defendant; he was cited with a single, unspecified
5 violation of “RCW 77.15.380” on November 6, 2019. *Id.*, Ex. A. The State alleges Defendant
6 “Did clam w/o license.” *Id.* The State offers no evidence that Defendant actually harvested any
7 shellfish on May 10, 2019. *See id.*

8 **II. ISSUES & BRIEF ANSWERS**

9 **A.** Is Defendant a Nooksack Tribal member? **Yes.**

10 **B.** Was Defendant fishing for shellfish in a usual and accustomed Nooksack fishing
11 place? **Yes.**

12 **C.** Should the charge for violating RCW 77.15.380(1) be dismissed? **Yes.**

13 **III. EVIDENCE RELIED UPON**

14 Defendant’s Motion relies upon the Declaration of Gabriel S. Galanda, the exhibits
15 attached thereto, and the pleadings on file in this case.

16 **IV. LAW AND ARGUMENT**

17 The Point Elliott Treaty of 1855 guarantees Nooksack Indians “the right of taking fish at
18 usual and accustomed grounds.” 12 Stat. 927, Art. V. Washington State agrees that the
19 Semiahmoo Spit is a usual and accustomed Nooksack fishing area under federal law. Galanda
20 Decl., Ex. B, Attachment 1 at 4.

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24 ⁴ It is immaterial for purposes of RCW 77.15.380(1) whether Defendant possessed a “permit issued by the Lummi
25 Natural Resource office” or by the Nooksack Tribe for “to harvest for subsistence.” What matters is whether
Defendant needed to have “purchased the appropriate fishing or shellfishing license.” RCW 77.15.380(1)—he
needn’t have. There are other state shellfishing laws that make an alleged “violation of any tribal law” a basis to
charge a state crime, *see* RCW 77.15.630(2)(c), but not RCW 77.15.380(1).

1 That Nooksack Treaty fishing right was affirmed in the Boldt Decision, *U.S. v.*
2 *Washington*, 384 F. Supp. 312, and later held to include the right to harvest shellfish. *U.S. v.*
3 *Washington*, 157 F.3d 630 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1376.

4 In 1942, the U.S. Supreme Court held that Point Elliott Treaty fisherpersons could not be
5 required to purchase a state fishing license. *Tulee v. Washington*, 315 U.S. 681 (1942). State
6 law reflects that a “Treaty Indian fisher’ . . . may exercise treaty Indian fishing rights as
7 determined under *United States v. Washington*,” without being subject to those fishing
8 prohibitions or restrictions that the State imposes upon “non-Indians.” *U.S. v. Washington*, 384
9 F. Supp. at 333; RCW 77.15.570; RCW 77.15.570(4)(a).

10 Defendant is a Nooksack Tribal member⁵ and, therefore, a Treaty Indian fisher under
11 federal Treaty and common law and state statute. *Id.*; Galanda Decl., Exs. C, E; Federal Stay
12 Laws *supra* n.1; Tribal Injunction Orders *supra* n.2. On May 10, 2019, he was seeking to
13 harvest subsistence clams on the Semiahmoo Spit, which constitutes Nooksack usual and
14 accustomed fishing grounds. 12 Stat. 927, Art. V; Galanda Decl., Ex. B, Attachment 1 at 4.

15 Defendant is not a non-Indian Washington resident who is required by RCW
16 77.15.380(1) to have purchased a state recreational shellfishing license in order to fish for clams.
17 *U.S. v. Washington*, 384 F. Supp. at 333; *Tulee*, 315 U.S. 681. The Court should dismiss this
18 case pursuant to CrRLJ 8.1 because the State cannot establish a prima facie case that Defendant
19 violated of RCW 77.15.380(1) for want of a state shellfishing license.

20 A proposed Order of dismissal accompanies this Motion.

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25 ⁵ Even were Defendant disenrolled—he is not—federal law suggests that tribal membership is not dispositive in matters of criminal jurisdiction involving Indians. *U.S. v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015).
CrRLJ 8.3(c) MOTION TO DISMISS - 5

1 DATED this 5th day of February, 2020.

2 GALANDA BROADMAN, PLLC

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4 _____
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9 Attorneys for Michael J. Rabang

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1 **CERTIFICATE OF SERVICE**

2 I, Wendy Foster, declare as follows:

3 1. I am now and at all times herein mentioned a legal and permanent resident of the
4 United States and the State of Washington, over the age of eighteen, not a party to the above-
5 entitled action, and competent to testify as a witness.

6 2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue
7 NE Suite L1, Seattle, WA 98115.

8 3. Today, I served the foregoing document via email and USPS on the following:

9
10 Jesse Corkern
11 Whatcom County Prosecutor's Office
12 311 Grand Avenue, Suite 201
13 Bellingham, WA 98225
14 JCorkern@co.whatcom.wa.us

15 The foregoing statement is made under penalty of perjury under the laws of the State of
16 Washington is true and correct.

17 DATED this 5th day of February, 2020.

18 
19 _____
20 WENDY FOSTER