

NOV 15 2013

FILED BY  
*Betsy [Signature]*

1 IN THE NOOKSACK TRIBAL COURT  
2 FOR THE NOOKSACK INDIAN TRIBE  
3 DEMING, WASHINGTON

Case No.: 2013-CI-CL-004

4  
5 ADAMS, *et. al.*,  
6 Plaintiffs,

7 vs.

8 KELLY, *et. al.*,  
Defendants.

**ORDER DENYING PLAINTIFFS'  
MOTION FOR TEMPORARY  
RESTRAINING ORDER**

9 **THIS COURT** held a hearing on November 5, 2013 to address the Plaintiffs' *Motion for Temporary*  
10 *Restraining Order*. The Plaintiffs' attorneys appeared by telephone, with Anthony Broadman  
11 arguing and Gabriel Galanda and Joseph Sexton appearing by phone. The Defendants' attorneys  
12 appeared in person, with Thomas Schlosser arguing and Grett Hurley, Rickie Armstrong, and  
Adrienne DelCotto also in the courtroom. Five of the named Plaintiffs also appeared in the  
courtroom. After reviewing the filings by the parties and being fully advised, the Court hereby  
issues the following:

13 **DECISION**

14 The Plaintiffs filed a *Complaint for Prospective Equitable Relief* on October 23, 2013. On  
15 October 29, 2013, the Plaintiffs filed this *Motion For Temporary Restraining Order*, asking that this  
16 Court issue a Temporary Restraining Order (TRO) "ordering that the Defendants refrain from  
17 interfering with the lawful holding of a special recall election against Chairman Kelly initiated by  
18 the Petition of Plaintiff Honorato "Bo" Rapada III, submitted to the Tribal Council on September 20,  
19 2013." *Motion*, 4. The Defendants are Robert Kelly, Chairman of the Nooksack Indian Tribe, Rick  
20 D. George, Vice-Chairman, Agripina Smith, Treasurer, Bob Solomon, Councilmember, Katherine  
21 Canete, Councilmember and Nooksack General Manager, and Agripina "Lona" Johnson,  
22 Councilmember. Plaintiffs are numerous members of the Nooksack Indian Tribe, some of whom  
23 have been served with "Notices of Intent to Disenroll" and some of whom have not. The Complaint  
24

1 makes several allegations that are not part of this TRO. This Decision addresses the narrow issue of  
2 the TRO brought by the Plaintiffs regarding the recall petition submitted by Plaintiff Honorato “Bo”  
3 Rapada III.

4  
5 Plaintiff Rapada filed a Recall Petition against Chairman Robert Kelly with the Nooksack  
6 Tribal Council. He alleged three bases for recall: 1) that Chairman Kelly failed to call regular  
7 meetings in accordance with the Nooksack Bylaws, 2) that Chariman Kelly failed to call Special  
8 Meetings requested by Tribal Council Secretary Rudy St. Germain and Councilmember Michelle  
9 Roberts, and 3) that Chairman Kelly failed to notify Secretary St. Germain and Councilmember  
10 Roberts of Special Meetings that were convened. Mr. Rapada filed the Recall Petition on September  
11 20, 2013. On October 22, 2013, the Nooksack Tribal Council convened and found that the Recall  
12 Petition did not meet the requirements of Title 60. The letter, titled “Notice of Invalid Petition,” is  
13 written on letterhead of the Nooksack Indian Tribe and signed by Vice-Chairman Rick George and  
14 sets out three bases for the rejection of the Recall Petition: 1) That the petition did not “contain the  
15 statement required by Title 50, Section 60.02.050 if not rebuttal is attached to the petition; 2) that  
16 Chairman Kelly did not receive proper notice as required by Title 60, and 3) that proof of service  
17 was not provided at the time the petition was returned.

18  
19 The Nooksack Tribal Constitution and the Nooksack Tribal Code’s Title 60, Constitutional  
20 Petition Ordinance, with Amendments from Resolution 13-52, govern the procedures by which an  
21 enrolled Tribal Member may call a recall election. Article V, Section 4 sets out recall procedures,  
22 which Title 60 develops by setting out the requirements for a Petition to be filed as well as the  
23 process of review. The authority for the promulgation of the regulations stems from the Nooksack  
24

1 Tribal Constitution, Article VI, Section 1(J), which grants the Tribal Council the authority to adopt  
2 resolutions and procedures to determine the validity of petitions. Title 60 defines the Petition  
3 Review Board as the Tribal Council, although it reserves to the Council the authority to appoint a  
4 separate Petition Review Board. The Tribal Council reviews the Petitions as to form and  
5 sufficiency. NTC 60.03.020. Title 60 provides for recall if a Council Member is convicted of a  
6 felony, NTC 60.03.030, or “if the allegation alleges specific facts and dates, of actions or inactions  
7 by the council member subject to the petition, which would warrant the recall of said council  
8 member from office held.” Resolution 13-52, adopted on March 26, 2013.

9  
10 Under Article V, Section 4, states that “upon receipt of a valid recall petition as provided  
11 herein by the tribal council secretary, the tribal council shall hold a special recall election not less  
12 than thirty days nor more than sixty days from the date the petition is filed.” Section 60.03.050 states  
13 that “[t]he Council shall have thirty (30) calendar days from receipt of the Petition to either accept it  
14 as valid or reject the Petitioner as invalid. The Petitioner will be notified of the Council’s decision  
15 within five (5) calendar days of the decision.” If the petition is rejected, the Petitioner will be  
16 notified and has up to five days after the notification to request reconsideration. If the Petition meets  
17 the requirements, “a special election shall be called pursuant to the requirements of Title 62”  
18 between 30 and 60 days from the date the Petition is filed.

19  
20 It’s undisputed that Plaintiff Rapada filed his Petition with the Tribal Council on September  
21 20<sup>th</sup> and the Tribal Council convened to hear it on October 22<sup>nd</sup>. The meeting to review the Petition  
22 had been scheduled for October 21<sup>st</sup>, but Secretary St. Germain asked for 24 hours notice in an email  
23 in which he said “I am available [for the October 21<sup>st</sup> meeting], would like to have liked [sic] 24 hr  
24

1 notice.” *Defendant’s Ex. D.* Chairman Kelly postponed the meeting to October 22<sup>nd</sup> as a result of  
2 this request and Plaintiff Rapada was informed of the decision of the Council on October 23<sup>rd</sup>, the  
3 same date this lawsuit was started. According to the Defendants’ *Declaration of Amiliana Johnny,*  
4 *Assistant to the Nooksack Tribal Chairman,* Plaintiff Rapada did not submit a request for  
5 reconsideration to the Tribal Council during the five-day period provided under NTC 60.03.050(A).  
6

7 Plaintiff Rapada asks that this Court order the Defendants to “refrain” from interfering with  
8 the lawful holding of an election, arguing that the Tribal Council’s failure to reject the petition  
9 within 30 days requires them to hold a recall election. In his *Motion*, Plaintiff Rapada states “The  
10 Nooksack Constitution requires that if a Petition is not rejected by the Tribal Council, a special recall  
11 election “shall” be held.” Plaintiff Rapada engages in a selective reading of the Nooksack  
12 Constitution, which actually states “Upon receipt of a *valid* petition . . . the tribal council shall hold a  
13 special recall election.” Nooksack Tribal Constitution, Article V, Section 4.  
14

15 As the Court has analyzed in multiple decisions in related cases, sovereign immunity protects  
16 both the Nooksack Indian Tribe and its officers. The Defendants have vigorously asserted their  
17 sovereign immunity in this matter. “Tribal sovereign immunity ‘extends to tribal officials when  
18 acting in their official capacity and within the scope of their authority.” *Cook v. AVI Casino, Inc.*,  
19 548 F.3d 718, 727 (9<sup>th</sup> Cir. 2008). “The general rule is that relief sought nominally against an  
20 officer is in fact against the sovereign if the decree would operate against the latter.” *Hawaii v.*  
21 *Gordon*, 373 U.S. 57 (1963). The Court’s analysis goes beyond the captioning of the case, but looks  
22 to the “the substance rather than the form of the relief sought.” “The general rule is that a suit is  
23 against a sovereign ‘if the judgment sought would expend itself to the public treasury or domain, or  
24

1 interfere with the public administration . . . or if the effect of the judgment would be “to restrain the  
2 Government from acting or compel it to act.” *Shermoen v. U.S.*, 982 F.2d 1312, 1320 (9<sup>th</sup> Cir. 1992)  
3 *citing Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 70 (1949).

4  
5 Plaintiff Rapada brings this TRO against the Defendants arguing that the failure of the Tribal  
6 Council to reject or accept the recall petition in 30 days, responding instead in 31 days after the  
7 meeting was postponed at the request of Secretary St. Germain, strips the Defendants of their  
8 sovereign immunity protections. If the Court were to grant this TRO, the action the Plaintiff seeks  
9 would compel the Nooksack Indian Tribe, which is not a party to this suit or TRO, to act by  
10 conducting a recall election against Chairman Kelly.

11  
12 Plaintiffs creatively style their TRO motion by asking this Court to restrain the Defendants  
13 from interfering with the calling of a special election. That linguistic trick, however, fails. If the  
14 Court grants the relief sought by the Plaintiffs, the Court compels the Nooksack Indian Tribe,  
15 through its Tribal Council and staff, to hold a special recall election. Elections require the  
16 expenditure of the public treasury. According to Title 60, if a Petition is accepted as valid, the  
17 special election shall be called according to the requirements of Title 62.

18  
19 Title 62, *Election Ordinance*, requires the appointment of an Election Board, the appointment  
20 of an Election Superintendent, the issuance of a Notice of Election, the supervision of the election  
21 itself, the counting of ballots, and rulings on election and ballot contests. Each of these activities  
22 requires the expenditure of tribal dollars, as well as the affirmative actions of governmental officials  
23 and staff members. There are few actions taken by a tribal government that cut more to the heart of  
24

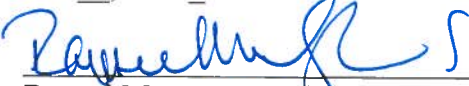
1 tribal sovereignty than the holding of elections, whether regular, special or recall. If the Court  
2 ordered the Defendants to refrain from “interfering with” the special recall election, it would, in  
3 reality, be ordering the Tribal Council and the Nooksack Indian Tribe to hold an election. Doing so  
4 violates not only sovereign immunity, but also the exceptions to sovereign immunity to which the  
5 Plaintiffs cling.

6  
7 Plaintiffs argue that because the Tribal Council failed to respond to Plaintiff Rapada’s  
8 Petition in 30 days, their sovereign immunity protection evaporates and the Court has the power and  
9 authority to order them to (tautologically) refrain from acting by compelling them to hold an  
10 election. Since any such order would compel affirmative governmental action, there is no basis for  
11 the Court to issue such an order and, therefore, it declines to do so.

12  
13 Plaintiff Rapada has failed to demonstrate that he will succeed on the merits and, therefore,  
14 fails to satisfy the first element required to obtain a TRO. *Winter v. Natural Res. Def. Council*, 555  
15 U.S. 7, 20 (2008). Therefore, the *Motion for Temporary Restraining Order* is hereby denied.

16  
17 **IT IS SO ORDERED.**

18 **DATED** this \_\_15\_\_ day of \_\_\_\_\_ November \_\_, 2013\_\_.

19   
20 \_\_\_\_\_  
Raquel Montoya-Lewis  
Chief Judge, Nooksack Tribal Court