

FEB 7 2014

FILED BY

B. Broadman

1 IN THE NOOKSACK TRIBAL COURT
2 FOR THE NOOKSACK INDIAN TRIBE

3 DEMING, WASHINGTON

4 Case No.: 2013-CI-CL-004

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

7 vs.

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

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

9 **THIS COURT** held a hearing on December 3, 2013 to address the Defendants' *Motion to Dismiss*.

10 The Plaintiffs' attorneys appeared by telephone, with Anthony Broadman arguing and Gabriel
11 Galanda and Joseph Sexton appearing by phone. The Defendants' attorneys appeared in person,
12 with Thomas Schlosser arguing and Grett Hurley, Rickie Armstrong, and Adrienne DelCotto also in
13 the courtroom. After reviewing the filings by the parties and being fully advised, the Court hereby
14 issues the following:

15 **DECISION**

16 The Plaintiffs filed a *Complaint for Prospective Equitable Relief* on October 23, 2013. On
17 October 29, 2013, the Plaintiffs filed a *Motion For Temporary Restraining Order*, which the Court
18 denied on November 15, 2013. The Defendants relied upon its *Defendants' Response in Opposition*
19 *to Plaintiffs' Motion for TRO and Defendants' Brief in Support of the Motion to Dismiss*, filed on
20 November 4, 2013, when it filed its *Motion to Dismiss* on November 5, 2013. The Plaintiffs filed a
21 *Response to Defendants' Motion to Dismiss* and the Defendants filed a *Reply to Plaintiffs' Response*
22 *to the Motion to Dismiss* on December 2, 2013.

1 The Court denied the *Motion for a TRO* on November 15, 2013 on the grounds that the
2 Defendants were protected by sovereign immunity when they denied the Recall Petition filed by
3 Honorato “Bo” Rapada III. The Court repeats its analysis in that order here:

4 As the Court has analyzed in multiple decisions in related cases, sovereign immunity protects
5 both the Nooksack Indian Tribe and its officers. The Defendants have vigorously asserted
6 their sovereign immunity in this matter. “Tribal sovereign immunity ‘extends to tribal
7 officials when acting in their official capacity and within the scope of their authority.’” *Cook*
8 *v. AVI Casino, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008). “The general rule is that relief
9 sought nominally against an officer is in fact against the sovereign if the decree would
10 operate against the latter.” *Hawaii v. Gordon*, 373 U.S. 57 (1963). The Court’s analysis
11 goes beyond the captioning of the case, but looks to the “the substance rather than the form
12 of the relief sought.” “The general rule is that a suit is against a sovereign ‘if the judgment
13 sought would expend itself to the public treasury or domain, or interfere with the public
14 administration . . . or if the effect of the judgment would be “to restrain the Government from
15 acting or compel it to act.” *Shermoen v. U.S.*, 982 F.2d 1312, 1320 (9th Cir. 1992) *citing*
16 *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 70 (1949).

17 *Order Denying TRO*, 4-5. On January 15, 2014, the Nooksack Court of Appeals ruled in the
18 matter of *Lomeli v. Kelly*, 2013-CI-APL-002, setting out the tests for cases with Tribal Council
19 defendants. The Court uses that analysis for this *Motion*.

20 The Plaintiffs’ Complaint alleges that the Defendants are violating the Nooksack
21 Constitution by 1) failing to validate Plaintiff Rapada’s recall petition; 2) disenrolling four
22 individuals using an “automatic” process; 3) conducting Council meetings telephonically, 4)
23 employing counsel without Secretarial approval, and 5) passing Disenrollment Procedures. The
24 Defendants are Robert Kelly Jr., Chairman of the Nooksack Indian Tribe, Rick D. George, Vice-
Chairman, Agripina “Abby” Smith, Treasurer, Bob Solomon, Councilmember, Katherine Canete,
Councilmember and Nooksack General Manager, and Agripina “Lona” Johnson, Councilmember.
Plaintiffs are numerous members of the Nooksack Indian Tribe, some of whom have been served
with “Notices of Intent to Disenroll” and some of whom have not. The Court will take each issue in

1 turn.

2 **DECISION**

3 In *Lomeli*, the Nooksack Court of Appeals held that the Nooksack Tribal Court has
4 jurisdiction to hear suits against Tribal Council members. “The threshold question is whether a
5 complaint alleges civil matters “concerning members of the Nooksack Indian Tribe” or “matters
6 concerning the establishment and functions of the tribal government. If the allegations are the
7 former, the Tribal Court has subject matter jurisdiction regardless of whether the Tribe’s officials
8 and employees are clothed with the Tribe’s sovereign immunity. If, however, the allegations
9 concern the “establishment and functions of the tribal government,” the court has no subject matter
10 jurisdiction unless the Tribe expressly waives sovereign immunity. *Lomeli*, at 11. The Court further
11 explains “These functions [of tribal government] require either the exercise of discretion in applying
12 government authority or the use of value judgments in making decisions for the government.
13 Elected Council members, and the Tribe’s agents, must be free from intimidation, harassment, and
14 the threat of lawsuits in executing the functions of tribal government. The Tribe’s officers
15 necessarily enjoy the discretion to determine the manner and method in which it administers the
16 Tribe’s governmental functions.” However, if a tribal officer, employee or agent acting in his or her
17 official capacity loses the protection of sovereign immunity if s/he “enforces or threatens to enforce
18 an unconstitutional law or policy because he or she does not have the “authority” to enforce laws
19 that do not comply with the constitution.” *Id.* at 13. In a suit against officers alleging that they are
20 acting in contravention with the Constitution, “the Tribal Court must make a threshold finding on the
21 constitutionality of the law or policy.” If the Court finds such an order warranted, the Court may
22 enjoin or restrain the officers. *Id.* at 14.

1 Such a threshold finding may not be made, however, when the Complaint centers on “non-
2 justiciable political questions.” *Id.* at 21. *Lomeli* held that “a political question may arise when . . . a
3 textually demonstrable constitutional commitment of the issue [is delegated] to a coordinate political
4 department.” *Id.* at 21, fn. 26. In *Lomeli*, the Court held that the decision of Chairman Kelly not to
5 call First Tuesday meetings was a “function of the Tribal government” that the Tribal Court had no
6 jurisdiction to address. Threshold requirements of standing still apply under the *Lomeli* analysis.

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8 1. The Recall Petition

9 Plaintiff Rapada filed a Recall Petition against Chairman Robert Kelly Jr. with the Nooksack
10 Tribal Council. He alleged three bases for recall: 1) that Chairman Kelly failed to call regular
11 meetings in accordance with the Nooksack Bylaws, 2) that Chariman Kelly failed to call Special
12 Meetings requested by Tribal Council Secretary Rudy St. Germain and Councilmember Michelle
13 Roberts, and 3) that Chairman Kelly failed to notify Secretary St. Germain and Councilmember
14 Roberts of Special Meetings that were convened. Mr. Rapada filed the Recall Petition on September
15 20, 2013. On October 22, 2013, the Nooksack Tribal Council convened and found that the Recall
16 Petition did not meet the requirements of Title 60. The letter, titled “Notice of Invalid Petition,” is
17 written on letterhead of the Nooksack Indian Tribe and signed by Vice-Chairman Rick D. George
18 and sets out three bases for the rejection of the Recall Petition: 1) That the petition did not contain
19 the statement required by Title 60, Section 60.02.050 if no rebuttal is attached to the petition; 2) that
20 Chairman Kelly did not receive proper notice as required by Title 60, and 3) that proof of service
21 was not provided at the time the petition was returned.

22 The Nooksack Tribal Constitution and the Nooksack Tribal Code’s Title 60, Constitutional
23 Petition Ordinance, with Amendments from Resolution 13-52, govern the procedures by which an
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1 enrolled Tribal Member may call a recall election. Article V, Section 4 sets out recall procedures,
2 which Title 60 develops by setting out the requirements for a Petition to be filed as well as the
3 process of review. The authority for the promulgation of the regulations stems from the Nooksack
4 Tribal Constitution, Article VI, Section 1(J), which grants the Tribal Council the authority to adopt
5 resolutions and procedures to determine the validity of petitions. Title 60 defines the Petition
6 Review Board as the Tribal Council, although it reserves to the Council the authority to appoint a
7 separate Petition Review Board. The Tribal Council reviews the Petitions as to form and
8 sufficiency. NTC 60.03.020. Title 60 provides for recall if a Council Member is convicted of a
9 felony, NTC 60.03.030, or “if the allegation alleges specific facts and dates, of actions or inactions
10 by the council member subject to the petition, which would warrant the recall of said council
11 member from office held.” Resolution 13-52, adopted on March 26, 2013.

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

21 It’s undisputed that Plaintiff Rapada filed his Petition with the Tribal Council on September
22 20th and the Tribal Council convened to hear it on October 22nd. The meeting to review the Petition
23 had been scheduled for October 21st, but Secretary St. Germain asked for 24 hours notice in an email
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1 in which he said “I am available [for the October 21st meeting], would like to have liked [sic] 24 hr
2 notice.” *Defendant’s Ex. D.* Chairman Kelly postponed the meeting to October 22nd as a result of
3 this request and Plaintiff Rapada was informed of the decision of the Council on October 23rd, the
4 same date this lawsuit was started. According to the Defendants’ *Declaration of Amiliana Johnny,*
5 *Assistant to the Nooksack Tribal Chairman,* Plaintiff Rapada did not submit a request for
6 reconsideration to the Tribal Council during the five-day period provided under NTC 60.03.050(A).

7 The Court denied Plaintiff Rapada’s TRO. The Defendants ask the Court to dismiss this
8 action arguing it lacks jurisdiction to hear it. The Court agrees, based upon the *Lomeli* analysis.
9 When the Tribal Council received the Recall Petition from Plaintiff Rapada, they were required to
10 hold a recall election if the Recall Petition was valid; the Tribal Council found it to be invalid, under
11 its authority under Article V, Section (B). Article V, Section (B) states that “a valid recall petition
12 shall satisfy the requirements herein, and those stated in the tribal ordinance enacted for the purpose
13 of implementing the recall process or the petition shall be declared invalid by the Tribal Council.”
14 After reviewing the recall petition, the Tribal Council issued a written decision, declaring the
15 Petition invalid under Article V, Section (B) and Title 60. They notified Plaintiff Rapada within the
16 five days required under Title 60. Upon making that finding, Plaintiff Rapada had five days to seek
17 reconsideration, which he failed to do.

18 The determination as to the validity or invalidity of a recall petition is a function of the tribal
19 government. The postponement of the meeting to review the validity of the Petition occurred at the
20 request of the one of the members of Tribal Council; as the Court of Appeals established, “there are
21 a class of questions that either are not amenable to judicial resolution because the relevant
22 considerations are beyond the courts’ capacity to gather and weigh, or have been committed by the
23 Constitution to the exclusive, unreviewable discretion of the executive and/or legislative branches of
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1 the government.” *Lomeli*, 22, relying on *Miami Nation of Indians v. U.S. Dept. of Interior*, 255 F.3d
2 342, 347 (7th Cir. 2001). The decision to move the meeting one day later than originally called
3 occurred at the request of one of the Plaintiff-Tribal Council Members; this is a decision about
4 meeting procedures that constitutes a non-justiciable question. In addition, the recall petition was
5 declared invalid for failing to comply with the requirements of Article V Section (B) and Title 60
6 and those issues were set out in the letter to Plaintiff Rapada. Further, it’s undisputed that Plaintiff
7 Rapada failed to exhaust his administrative remedies and seek reconsideration. The petition was
8 rejected on technical grounds; Plaintiff Rapada had the opportunity to use the reconsideration
9 procedures set out in Title 60 and he failed to do so.

10 The Tribal Council defendants are required to follow the Nooksack Constitution’s
11 provisions; here, the Tribal Council did so. Thus, this claim fails because the Plaintiffs have not
12 shown that the Defendants’ actions are unconstitutional; looking at the facts in the light most
13 favorable to the Plaintiffs, the Court finds no violation of the Nooksack Indian Tribe’s Constitution
14 or laws.

15 2. Remaining Claims

16 The Plaintiffs remaining claims also fail to survive the Defendants’ *Motion to Dismiss*. The
17 Nooksack Court of Appeals held in *Lomeli* that the Plaintiffs claims surrounding the Tribal Council
18 defendants’ adherence to the Bylaws “is a political question not subject to judicial review.” *Lomeli*,
19 21. Therefore, the issue regarding whether the Tribal Council defendants have or have not the
20 Special Meetings as requested has been decided, as has the decision to hold Council meetings
21 telephonically. Both issues are non-justiciable political questions. The Court has already decided
22 the issue of the employment of the Tribe’s attorneys in a separate order, also filed by this Court
23 today, and has denied the Plaintiffs’ *Motion to Disqualify* on the grounds that the decision as to how
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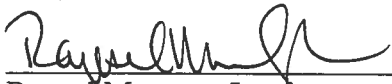
1 to comply with Article VI, Section D also constitutes a non-justiciable political question.

2 Finally, the disenrollment of four tribal members through an “automatic disenrollment” and
3 the passage of Disenrollment Procedures are already on appeal and being heard by the Nooksack
4 Indian Tribe’s Court of Appeals in the matter of *Roberts v. Kelly*, 2013-CI-APL-003. Therefore, the
5 Court finds that these matters have already been addressed by this Court and are now on appeal,
6 thereby divesting the Court of jurisdiction to hear and revisit them. The Court of Appeals issued a
7 stay on all disenrollment proceedings on January 23, 2014. Until the Court of Appeals otherwise
8 instructs this Court to do so, this Court declines to rule on the impact of that stay on the four
9 “automatic” disenrollees. Doing so would not only overstep this Court’s authority, it may also
10 further confuse the issues in an already procedurally complex series of cases.

11 For the above reasons, the Court finds that the Defendants are entitled to dismissal and the
12 Court hereby GRANTS the Motion to Dismiss.

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14 **IT IS SO ORDERED.**

15 **DATED** this 7 day of Feb., 2014.

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Raquel Montoya-Lewis
Chief Judge, Nooksack Tribal Court