

FEB 7 2014

FILED BY

Betty [Signature]

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

Case No.: 2014-CI-CL-006

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

7 vs.

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

**ORDER DENYING PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION/WRIT OF MANDAMUS**

ADAMS II

10 **THIS COURT** received a new Complaint on January 21, 2014 in which the Plaintiffs also sought a
11 Writ of Mandamus from this Court compelling the Defendants, members of the Tribal Council, to
12 stop acting in furtherance of Resolutions 14-03 and 14-04 removing Plaintiffs Rudy St. Germain and
13 Michelle Roberts. The Plaintiffs also ask this Court to order the reinstatement of the Plaintiffs to
14 their positions as Tribal Council Secretary and Tribal Council member respectively. Attorney Ryan
15 Dreveskracht appeared by telephone for the Plaintiffs, with Anthony Broadman and Gabe Galanda
16 also appearing by phone. Attorney Thomas Schlosser argued for the Defendants, with attorneys
17 Grett Hurley and Rickie Armstrong of the Nooksack Office of the Tribal Attorney appearing in the
18 courtroom as well. Five of the named Plaintiffs appeared in the courtroom as well.

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20 **DECISION**

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22 This is the fifth lawsuit brought by a group of tribal members, some of whom are proposed
23 for disenrollment and some of whom are not, against members of the Tribal Council. In this Motion
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1 for Preliminary Injunction-Writ of Mandamus, the Plaintiffs ask that this Court “enjoin the
2 Defendants from acting in furtherance of Resolution 14-03 and 04” and reinstate Rudy St. Germain
3 and Michelle Roberts to their Tribal Council seats.

4 On January 16, 17, and 19th, 2014, Tribal Council Chairman Robert Kelly, Jr. called three
5 Special meetings for each following day, January 17, 18, and 20th, 2014. He convened each meeting
6 via the Special Meeting procedures in the Bylaws of the Nooksack Indian Tribe’s Constitution,
7 notifying all of the Tribal Council members via email. There’s no dispute that all of the Tribal
8 Council members, including Plaintiffs St. Germain and Roberts, received that notice. Plaintiff
9 Roberts emailed Chairman Kelly on January 18, 2014 stating “with your spontaneous call of council
10 meetings at the Chairmanship office, I am feeling uncomfortable being there with all the hate going
11 on right now and the unprofessional on how terminations have been carried out and other actions this
12 council has taken to hurt my family . . . I will be AVAILABLE for this afternoons meeting by
13 teleconference, please provide me with an access code or I will just call into the chairmans office. I
14 am assuming this is an open meeting.” *Email from M. Roberts to R. Kelly, 1/18/2014, 2:23 PM,*
15 *(errors in original).* Plaintiff St. Germain also emailed Chairman Kelly, stating “I will be available
16 by phone only can you please give me an access code so I can call in for the meeting?” *Email from*
17 *R. St. Germain to R. Kelly, 1/17/2014, 1:50 PM (errors in original).* Plaintiff St. Germain sent
18 another email on January 19, 2014 at 12:53 pm indicating he had a family emergency and would not
19 be attending the January 19th meeting, but would be available via email. On January 20th, Plaintiff
20 St. Germain emailed Chairman Kelly again stating that he was “out of town on family emergency I
21 will be back in town Tuesday morning. I will be available through via teleconference today I will
22 need to get access code to call in.” *Email from R. St. Germain to R. Kelly, 1/20/2014, 8:19AM*
23 *(errors in original).*

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2 Plaintiffs Roberts emailed Chairman Kelly on January 20, 2014 stating that she had called
3 the Chairman's Office at 10:40 am (the time the meeting had been called) and asked to join the
4 meeting by telephone. She stated, "The message given was you were in session already why would
5 you prevent me from attending when you have allowed Abby and others to walk in late. You have
6 set the precedence of teleconference this year so why are you disallowing it now." *Email from M.*
7 *Roberts to R. Kelly, 1/20/2014, 10:47 AM (errors in original).*

8 During the January 20th meeting, Tribal Council members in attendance (Chairman Kelly,
9 Vice-Chair Rick George, A...) discussed the absence of Plaintiffs St. Germain and Roberts and
10 passed Resolutions 14-03 and 14-04 removing them from their positions for missing three
11 consecutive meetings without sufficient cause. Both resolutions passed by a vote of 5-0. Following
12 the passage of these resolutions, the Tribal Council appointed two tribal members to replace
13 Plaintiffs St. Germain and Roberts. Plaintiff St. Germain's seat is up for election during the 2014
14 elections, but Plaintiff Roberts' seat is not.

15 Plaintiffs argue that the Tribal Council Defendants have acted in contravention of the
16 Nooksack Indian Tribe's Constitution by passing Resolutions 14-03 and 14-04 and asks that the
17 Court issue a Writ of Mandamus/Preliminary Injunction and ordering the reinstatement of the
18 Plaintiffs to their council seats. Defendants argue that this Court lacks the jurisdiction to take this
19 action.

20 The Nooksack Tribal Court has jurisdiction to hear suits against Tribal Council members. As
21 the Nooksack Court of Appeals held in *Lomeli v. Kelly, 2013-CI-APL-002* "The threshold question
22 is whether a complaint alleges civil matters "concerning members of the Nooksack Indian Tribe" or
23 "matters concerning the establishment and functions of the tribal government. If the allegations are
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1 the former, the Tribal Court has subject matter jurisdiction regardless of whether the Tribe's officials
2 and employees are clothed with the Tribe's sovereign immunity. If, however, the allegations
3 concern the "establishment and functions of the tribal government," the court has no subject matter
4 jurisdiction unless the Tribe expressly waives sovereign immunity. *Lomeli*, at 11. The Court further
5 explains "These functions [of tribal government] require either the exercise of discretion in applying
6 government authority or the use of value judgments in making decisions for the government.
7 Elected Council members, and the Tribe's agents, must be free from intimidation, harassment, and
8 the threat of lawsuits in executing the functions of tribal government. The Tribe's officers
9 necessarily enjoy the discretion to determine the manner and method in which it administers the
10 Tribe's governmental functions." However, if a tribal officer, employee or agent acting in his or her
11 official capacity loses the protection of sovereign immunity if s/he "enforces or threatens to enforce
12 an unconstitutional law or policy because he or she does not have the "authority" to enforce laws
13 that do not comply with the Constitution." *Id.* at 13. In a suit against officers alleging that they are
14 acting in contravention with the Constitution, "the Tribal Court must make a threshold finding on the
15 constitutionality of the law or policy." If the Court finds such an order warranted, the Court may
16 enjoin or restrain the officers. *Id.* at 14.

17 Such a threshold finding may not be made, however, when the Complaint centers on "non-
18 justiciable political questions." *Id.* at 21. *Lomeli* held that "a political question may arise when . . . a
19 textually demonstrable constitutional commitment of the issue [is delegated] to a coordinate political
20 department." *Id.* at 21, fn. 26. In *Lomeli*, the Court held that the decision of Chairman Kelly not to
21 call First Tuesday meetings was a "function of the Tribal government" that the Tribal Court had no
22 jurisdiction to address.

1 The Constitution states in Article V, Section 1:

2 If any officer or member of the tribal council shall be absent from any three (3) consecutive
3 regular or special meetings without sufficient reason, *the other members may declare the*
4 *council position vacant by a four-seventh vote of the tribal council.* The council member
subject to the removal may not participate in the vote of the tribal council. (Emphasis
added.)

5 The Court finds that the decision to remove a Tribal Council Member under Article V,
6 Section 1 of the Nooksack Constitution rests solely with the Tribal Council. The Constitution
7 specifically states that only the Tribal Council members not subject to the removal vote may vote to
8 declare the position vacant; no review power or other powers of intervention are given to the Tribal
9 Court. There is simply no other reading of this section of the Constitution that makes sense given
10 the structure provided in *Lomeli*. The power of removal of a Tribal Council member due to absence
11 lies solely with the Tribal Council as a function of the tribal government. It is not up to the Tribal
12 Court to define what a sufficient reason is; that authority rests with the Tribal Council and the Tribal
13 Council made that finding in Resolutions 14-03 and 14-04. This is exactly the kind of political
14 question *Lomeli* contemplates in footnote 26. The function of removal from office under Article V,
15 Section 1 lies with the Tribal Council and it is the very definition of an allegation that concerns the
16 establishment and functions of the tribal government over which this Court has no subject matter
17 jurisdiction.

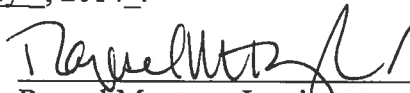
18 The Tribal Council defendants' decision to remove Plaintiffs St. Germain and Roberts lies
19 within its power and is, in fact, action *required* by the Constitution. In *Lomeli*, the Court held "A
20 duty, however, is an obligation. While the manner or means of performing a duty allows for
21 discretion and value judgments, its performance is nonetheless required." *Lomeli* at 11. The
22 Defendants here were required to act under the Constitution when the Plaintiff Tribal Council
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1 members failed to appear at the meeting. The Tribal Council defendants could have declared the
2 stated reasons for their failure to appear sufficient, but they did not. Plaintiffs argue that the
3 situation was “engineered” in order to replace them with Tribal Council members who are
4 sympathetic to the political positions taken by the Tribal Council defendants. The intentions behind
5 these actions are the kind of political questions that are non-justiciable, as held by the Court of
6 Appeals in *Lomeli*. The Plaintiffs failed to appear at these meetings. They provided reasons to
7 Chairman Kelly and the Tribal Council declared those reasons to be insufficient. It is not for this
8 Court to delve into the political judgments of the Tribal Council when those matters are specifically
9 reserved to that branch of government by the Constitution.

10 The *Motion for Writ of Mandamus/Preliminary Injunction* is hereby DENIED.

11 **IT IS SO ORDERED.**

12 **DATED** this 7 day of February, 2014.

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14 Raquel Montoya-Lewis
15 Chief Judge, Nooksack Tribal Court
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