



Nooksack Tribal Council
4979 Mt. Baker Hwy, Suite G.
PO Box 63
Deming, WA 98244
Ph: (360) 592-5164 Fx: (360) 592-4506

Sent via email: ohchr-registry@un.org

June 6, 2023

United Nations, Office of High Commissioner
Attn: [REDACTED] Chief
Office of the United Nations High Commissioner for Human Rights
Palais Wilson
52 rue des Pâquis
CH-1201 Geneva, Switzerland

Re: AL OTH 5/2023

Ms. [REDACTED]:

The Tribe is in receipt of your most recent correspondence¹ and appreciates this apparent opportunity to comment prior to the UN's publication of false allegations in conflict with the factual record. As you are aware, Mandate Holders are to rely on objective and dependable facts² in the information gathering process. Unfortunately, both UN correspondences gloss over (or completely ignore) independent, objective federal reviews and numerous court orders³. The publication of false (or unfounded) allegations (without any real investigation) violates your Code of Conduct for Mandate Holders, and causes damage to the Tribe.

Here, your correspondence references two separate outside investigations wherein no violations were found. Rather than incorporate the findings, which address many of the allegations listed in your recent correspondence, the UN ignores these relevant findings and continues to print falsehoods. The UN makes no effort to cast the tenants' allegations in the proper light⁴ – they were found false (or unfounded) as determined by various courts and an independent federal agency. Further, numerous courts reviewed the tenants' rhetoric, and found their allegations false

¹ Your latest correspondence failed to respond to the Nooksack Indian Tribe's (Tribe) request for a retraction of your earlier salacious and unverified allegations. See attached Correspondence (Feb. 4, 2022). I also note that the UN unceremoniously removed the prior correspondence from its website however.

² Art. 8(c).

³ Art. 3(a) states that Mandate Holders will exercise their functions in a professional manner.

⁴ Mandate Holders must "constantly keep[] in mind the fundamental obligations of truthfulness." Art. 3(d).

or unfounded.⁵ Again, rather than incorporate these courts' findings, which address many of the allegations, the recent UN correspondence simply cuts and pastes the false and unfounded allegations for republication.

The UN's latest correspondence repeats many of the same allegations from your 2021 correspondence and evidences a total failure to collect, review, and consider independent, third party information widely available. Here, the tenants exhausted federal and state court review; they received full summary judgment hearings and/or trials in Tribal Court. These courts found many of the tenants' allegations that you repeat, are false (or unfounded). The UN's action (or inaction) - the failure to incorporate facts obtained after a full hearing (or trial) or independent, federal investigation -- leave the appearance that the UN has no interest in the truth.

In addition to reciting the tenants' rhetoric, the UN independently alleges the following misinformation:

1. the "Government [DOI and HUD] response ... did not ... respond to the [Tenants' 2021 complaints]," including denial of (1) administrative due process (2) home-ownership claims.
2. tribal membership is *only* a pre-condition for construction and rehabilitation of the tenants' rental units.

The February 2022 DOI review found that the tenants were in the administrative review process, in compliance with NIHA Policy. The DOI also found the tenants lacked a home ownership claim; they were simply tenants subject to a rental agreement. The Thurston County Superior Court also found that the tenants "failed to demonstrate that they ... have a 'clear' legal or equitable right to remain in the homes in which they currently reside."⁶ The Tribal Court held that "[n]either Ms. Roberts, nor the other occupants of the housing unit, ... have a substantial claim of a lease or title of the property."⁷ Further, the Tribal Court found that "the allegation that Ms. Roberts is a homeowner rather than a renter *is without support*⁸." Here, the UN simply disregards the facts, and repeats the tenants' rhetoric.

Next, the Tribe adopted a NIHA Policy wherein tribal membership is an initial (and continuing) requirement for program participation. "To demonstrate eligibility for services... an applicant must be a Native Family⁹." Both state and tribal courts reviewed the NIHA Policy and found that "NIHA Policies require that Ms. Roberts, as a tenant, *establish and maintain* continuing eligibility for housing, including the maintenance of a 'Native Family'¹⁰." The Washington Supreme Court found that NIHA Policy "ha[s] consistently required all participants in the Tribe's housing

⁵ See Order Deny'g Pls.' Mot. For Preliminary Injunction at 3, *Oshiro v. Washington State Housing Comm'n*, 22-2-00567-34 (April 13, 2022); Decision and Order Grant'g Partial Summary Judgment at 8, *NIHA v. Roberts*, 2022-CI-HSG-005 (Feb. 16, 2023).

⁶ Order Deny'g Pls.' Mot. For Preliminary Injunction at 3, *Oshiro v. Washington State Housing Comm'n*, 22-2-00567-34 (April 13, 2022).

⁷ See e.g. Decision and Order Grant'g Partial Summary Judgment at 8, *NIHA v. Roberts*, 2022-CI-HSG-005 (Feb. 16, 2023).

⁸ *Id.* at 16.

⁹ NIHA Policy, Ch. II(A)(1).

¹⁰ See e.g. Decision and Order Grant'g Partial Summary Judgment at 2, *NIHA v. Roberts*, 2022-CI-HSG-005

programs be enrolled members of [a tribe]" and "failure to maintain membership in the Tribe is grounds for termination."¹¹ Your attempt to minimize (and remove) the continuing nature of the membership requirement is an affront to the Tribal sovereignty and this Tribe's right to establish its own laws. Your mischaracterization of Tribal law is simply evidence that the UN accepts the tenants' allegations as true, despite the factual record to the contrary.

The Tribe appreciates the mission of your office. I hope any future UN publication (or correspondence) incorporates facts from reviews by outside or impartial observers. To assist, I enclose copies of (1) 2022 DOI correspondence (again); (2)-(4) Tribal Court Order on Motions for Summary Judgment (Oshiro; Aldredge; Roberts); (5) Thurston County Order Denying Plaintiffs' Motion for Preliminary Injunction; (6) Washington Supreme Court Ruling (June 23, 2022); (7) Washington Supreme Court Order (Sept. 16, 2022); and (8) Order Denying Motion for Legal Representation. Good luck in your review.

Regards,



Chairwoman RoseMary LaClair
Nooksack Indian Tribe

Cc: Northwest Region, Tribal Chairpersons
Regional Director [REDACTED], Dept. of Interior, Northwest Region
Superintendent [REDACTED], Bureau of Indian Affairs, Puget Sound Agency
Administrator [REDACTED], Northwest Office of Native American Programs
Regional Counsel [REDACTED], U.S. Housing & Urban Development
Rep. [REDACTED], District 42, Washington State
Rep. [REDACTED], District 42, Washington State
Sen. [REDACTED], District 42, Washington State
Rep. [REDACTED], District 2

Encl:
2022 DOI correspondence (again)
2/4/22 Correspondence to UN (again)
Code of Conduct (draft)
Tribal Court Order on Motions for Summary Judgment (Oshiro) (Aldredge) (Roberts)
Thurston County Order Denying Plaintiffs' Motion for Preliminary Injunction

¹¹ Ruling Granting Review, *Oshiro v. Washington State Housing Finance Comm'n* at 4-5, No. 100827-9 (later vacated on separate grounds).

Washington Supreme Court Ruling (June 23, 2022)
Washington Supreme Court Order (Sept. 16, 2022)
Order Denying Motion for Legal Representation



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Northwest Regional Office

911 Northeast 11th Avenue

Portland, Oregon 97232

The Honorable [REDACTED] Sr.
Chairman, Nooksack Tribe
P.O. Box 157
Deming, Washington 98244

Dear Chairman [REDACTED]:

Last fall, the Department of Housing and Urban Development (HUD) notified the Department of the Interior (Department) of potential Indian Civil Rights Act violations surrounding the evictions of individuals from Nooksack tribal housing. The Department agreed to review the situation, looking particularly at compliance with applicable and relevant federal laws within the scope of the Department of the Interior's purview. (*Letter from AS-IA to Chairman Cline, dated October 5, 2021*). Additional questions have been raised regarding compliance with Department of Housing and Urban Development regulations, policies, or funding agreements. These issues are beyond the scope of this Department's review.

In the Fall of 2021, an attorney for the individuals began sending emails and letters to various offices in the Department concerning the removal of nine individuals from Nooksack Indian Housing Authority (NIHA) homes. The emails and letters generally warned of potential Indian Civil Rights Act and due process violations by NIHA and the Tribe in their attempts to remove these individuals from tribal housing. I also discussed these allegations with you and Tribal Council, and on January 13, 2022, you agreed to delay any action on evictions for these nine individuals until February 1, 2022, to allow the Regional Office of the Bureau of Indian Affairs (BIA) to review the allegations.

Though numerous of Departmental employees have engaged on these issues over the past few months, multiple employees from the Northwest Region of BIA and the Portland Regional Solicitor's Office conducted an in-depth regional review over the last month. These offices reviewed the emails and letters sent by the individuals' attorney, documents provided by the Nooksack Tribe concerning the nine individuals proposed for eviction, tribal housing policies, Nooksack Tribal Code, Chapters 45 and 80, Title Status Reports and other title documents recorded with the BIA. The review was based only on examination of these documents and pertains only to the following nine individuals: Norma Aldredge, Cathalina Barril, Saturnino Javier, Alexander Nicol-Mills, Olive Oshiro, Francisca Rabang, Francisco Rabang, Michael Rabang, and Michelle Roberts, collectively, the "Tenants."

The Department's review found that the Tenants currently reside in NIHA developments located on trust land owned by the Nooksack Indian Tribe. Each of the nine Tenants entered into a Rental Agreement with NIHA for housing. The Tribe's process for removing tenants from tribal housing is a multi-step process. In addition to the termination process outlined in the terms of



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Northwest Regional Office

911 Northeast 11th Avenue

Portland, Oregon 97232

the Rental Agreements, the processes set out in the *Nooksack Indian Housing Authority Program Policy & Procedures* (June 15, 2021) (Procedures) also apply.

NIHA initially notified the nine Tenants that they were ineligible for tribal housing because they have been disenrolled from the Nooksack Tribe. After the Tenants failed to reestablish their eligibility for tribal housing, NIHA issued each Tenant a Notice of Termination. Some, but not all the Tenants, challenged those Notices of Termination pursuant to NIHA Procedures. The Procedures allow an individual to request a Resolution Conference to discuss with the Housing Director why their lease should not be terminated. (Procedures, Section XV, B.3.) The Housing Director issues a written decision after discussion with the tenant. (Procedures, Section XV, B.4.) If a tenant disagrees with the Housing Director's decision, the tenant may request a Grievance Hearing before the Housing Committee. (Procedures, Section XV, C.1.)

All Tenants who challenged their Notice of Termination are currently in the administrative review process; they are waiting for dates to be scheduled for a Resolution or Grievance Hearing or waiting for a decision on a Grievance Hearing. At this time, while the administrative process is not complete, it appears that NIHA has followed its Procedures and the process for removal of individuals from tribal housing. NIHA has not filed any complaints in tribal court for unlawful detainer at this time for any of the Tenants; accordingly, the Department is not commenting on the validity of any future tribal court actions concerning the Tenants.

Emails and letters received by the Department of the Interior over the past several months have made numerous claims of violations under the Indian Civil Rights Act (ICRA) 82 Stat. 77, 25 U.S.C. 1301 *et seq.* The Department's review of the ICRA claims was limited in scope to whether the Tribe's eviction process complied with the due process requirements of ICRA. Under ICRA, "[n]o Indian tribe in exercising powers of self-government shall ... deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(a)(8). From our review of the materials pertaining to the Tenants' proposed evictions, even though these eviction processes have not been finalized, NIHA has thus far, adhered to the terms of the Rental Agreements and NIHA Procedures.

We appreciate the Nooksack Tribe's cooperation in refraining from eviction actions in the last weeks to allow the Department to proceed with its review. We also recognize the detrimental effects that evictions can have on a community, particularly on the Tenants and their families. Though they lack tribal citizenship, they are members of the community, and we encourage the Tribe to treat them with dignity and respect their legal rights moving forward. In summary, as of the date of this letter, it appears that NIHA has complied with the Rental Agreements and NIHA procedures, as they relate to the eviction process, concerning these nine individuals: Norma Aldredge, Cathalina Barril, Saturnino Javier, Alexander Nicol-Mills, Olive Oshiro, Francisca Rabang, Francisco Rabang, Michael Rabang, and Michelle Roberts.



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Northwest Regional Office

911 Northeast 11th Avenue

Portland, Oregon 97232

The Department makes no conclusions on any future actions taken against the nine Tenants or on any eviction processes for any other individuals.

Sincerely,

[Redacted Signature]

Digitally signed by

[Redacted Name]
Date: 2022.02.02 15:56:13

-08'00'

[Redacted Title]
Regional Director, Northwest Region, BIA

Cc:

[Redacted Name]

Assistant Secretary – Indian Affairs

Director, Bureau of Indian Affairs

Deputy Assistant Secretary, Native American Programs, HUD



Nooksack Indian Tribe

February 4, 2022

To: United Nations Human Rights Office of the High Commissioner

Dear High Commissioner Michelle Bachelet Jeria;

I write on behalf of the Nooksack Indian Tribe and our over 2,000 members to demand an immediate retraction of your press release dated February 3, 2022 and concerning the Nooksack Tribe.

The Nooksack Indian Tribe are a federally recognized Tribe, a party to the Point Elliott Treaty of 1855, and today are based in their ancestral homeland of Whatcom County. They are Coast Salish people who lived, fished, hunted, and gathered for untold generations in their historic traditional lands from the base of Mt. Baker to the saltwater at Bellingham Bay. They extended into Skagit County to the south, and British Columbia to the north. Their territory included a primary Nooksack area, not open to free use by members of other groups, and joint-use areas, which were shared. Today there are approximately 2,000 enrolled Tribal members and the Nooksack reservation is at the town of Deming with Tribal land extending from Lynden to the South Fork Valley.

We ask that you immediately retract your statement. It is false and references an investigation which never took place. Mr. Balakrishnan Rajagopal or Mr. Francisco Cali Tzay failed to contact us or to learn the facts of the case. They appear to have communicated solely with [REDACTED] attorney who uses this issue to garner free press for his private business. Rather than investigate, Mr. Rajagopal and Mr. Tzay produced a press release riddled with misinformation provided to them by the attorney. Here are the facts:

- The people in question are not indigenous. That is why they are not Nooksack citizens and why they are not eligible for low-income housing at Nooksack.
- Contrary to the UN statement, none of them were "acquiring ownership" in the houses; they were all rental tenants with leases (see [REDACTED]'s letter), so that was a blatant lie.
- This dispute began in 2015, so they have had notice for more than 7 years to move out.
- The Tribe's court did not block the evictions, contrary to the UN statement, so that is flatly wrong. In addition, federal and state courts both have said that the Tribe can proceed with evictions.

- Asking the US government to Intervene Impairs tribal sovereignty (not to mention violates federal law), which is something that those we purport to advocate for indigenous peoples ought to defend rather than attack.

Attached is a letter from [REDACTED] Regional Director, Northwest Region, the United States Department of the Interior, Bureau of Indian Affairs with the results of their investigation. The Nooksack Indian Tribe welcomed the investigation.

Sincerely,

[REDACTED]

[REDACTED]

Nooksack Indian Tribe Chairman

cc: Michelle Bachelet Jeria
Mr Balakrishnan Rajagopal
Mr. Franciso Cali Tzay
Ms [REDACTED]



General Assembly

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18 June 2007

Original: ENGLISH

HUMAN RIGHTS COUNCIL
Fifth session
Agenda item 2

**IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251
OF 15 MARCH 2006 ENTITLED "HUMAN RIGHTS COUNCIL"**

Algeria (on behalf of the African Group): Draft resolution

**5/... Code of Conduct for Special Procedures Mandate-holders
of the Human Rights Council**

The Human Rights Council,

Guided by the aims and principles of the Charter of the United Nations and the Universal Declaration of Human Rights and recognizing the ensuing obligations inter alia of States to cooperate in promoting universal respect for human rights as enshrined therein,

Recalling the Vienna Declaration and Programme of Action adopted on 25 June 1993 by the World Conference on Human Rights,

Recalling also that in resolution 60/251 of 15 March 2006, entitled "Human Rights Council", the General Assembly:

(a) Reaffirmed that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and that all human rights must be treated in a fair and equal manner on the same footing and with the same emphasis;

(b) Acknowledged that peace and security, development and human rights are the pillars of the United Nations system and that they are interlinked and mutually reinforcing;

(c) Decided that members elected to the Council shall uphold the highest standards in the promotion and protection of human rights and shall fully cooperate with the Council;

(d) Stressed the importance of “ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization”;

(e) Further recognized that the promotion and protection of human rights “should be based on the principles of cooperation and genuine dialogue and aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings”;

(f) Decided that “the work of the Council shall be guided by the principles of universality, impartiality, objectivity, and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development”;

(g) Also decided that “the methods of work of the Council shall be transparent, fair and impartial and shall enable genuine dialogue, be results-oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms”;

Underlining the centrality of the notions of impartiality and objectivity, as well as the expertise of mandate-holders, within the context of special procedures, along with the need to give the required degree of attention to all human rights violations, wherever they may be taking place,

Bearing in mind that the efficiency of the system of special procedures should be reinforced through the consolidation of the status of mandate-holders and the adoption of principles and regulations taking the specificities of their mandate into consideration,

Considering that it is necessary to assist all stakeholders, including States, national human rights institutions, non-governmental organizations and individuals, to better understand and support the activities of mandate-holders,

Recalling articles 100, 104, 105 of the Charter of the United Nations, section 22 of article VI of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 and paragraph 6 of General Assembly resolution 60/251,

Noting decision 1/102 of 30 June 2006, in which the Council decided to extend exceptionally for one year the mandates and mandate-holders of the special procedures of the Commission on Human Rights of the Sub-Commission for the Promotion and Protection of Human Rights as well as the procedure established pursuant to Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970,

Noting also decision 1/104 of 30 June 2006, in which the Council established the Open-ended Intergovernmental Working Group entrusted with the task of formulating recommendations on the issue of the review, and possibly the enhancement and rationalization, of all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, in order to maintain a regime of special procedures in accordance with paragraph 6 of General Assembly resolution 60/251,

Noting further resolution 2/1 of 27 November 2006, in which the Council requested the Open-ended Intergovernmental Working Group to “draft a code of conduct regulating the work of the special procedures”,

Considering that this code of conduct is an integral part of the review, improvement and rationalization called for in General Assembly resolution 60/251 that, inter alia, seeks to enhance the cooperation between Governments and mandate-holders which is essential for the effective functioning of the system,

Considering also that such a code of conduct will strengthen the capacity of mandate-holders to exercise their functions whilst enhancing their moral authority and credibility and will require supportive action by other stakeholders, and in particular by States,

Considering further that one should distinguish between, on the one hand, the independence of mandate-holders, which is absolute in nature, and, on the other hand, their prerogatives, as circumscribed by their mandate, the mandate of the Human Rights Council, and the provisions of the Charter of the United Nations,

Mindful of the fact that it is desirable to spell out, complete and increase the visibility of the rules and principles governing the behaviour of mandate-holders,

Noting the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission that was adopted by the General Assembly in resolution 56/280 of 27 March 2002,

Noting also the draft Manual of the United Nations Human Rights Special Procedures adopted in 1999 by the sixth annual meeting of mandate-holders, as revised,

Taking note of the deliberations and proposals of the Open-ended Intergovernmental Working Group on Review of Mandates,

1. *Urges* all States to cooperate with, and assist, the special procedures in the performance of their tasks and to provide all information in a timely manner, as well as respond to communications transmitted to them by the special procedures without undue delay;

2. *Adopts* the Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council, the text of which is annexed to the present resolution and whose provisions should be disseminated by the Office of the United Nations High Commissioner for Human Rights, to the mandate-holders, to the Member States of the United Nations and to other concerned parties.

Annex

**Draft Code of Conduct for Special Procedures Mandate-Holders
of the Human Rights Council**

Article 1 - Purpose of the Code of Conduct

The purpose of the present Code of Conduct is to enhance the effectiveness of the system of special procedures by defining the standards of ethical behaviour and professional conduct that special procedures mandate-holders of the Human Rights Council (hereinafter referred to as “mandate-holders”) shall observe whilst discharging their mandates.

Article 2 - Status of the Code of Conduct

1. The provisions of the present Code complement those of the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission (ST/SGB/2002/9) (hereinafter referred to as “the Regulations”);
2. The provisions of the draft manual of United Nations Human Rights Special Procedures should be in consonance with those of the present Code;
3. Mandate-holders shall be provided by the United Nations High Commissioner for Human Rights, along with the documentation pertaining to their mission, with a copy of the present Code of which they must acknowledge receipt.

Article 3 - General principles of conduct

Mandate-holders are independent United Nations experts. While discharging their mandate, they shall:

- (a) Act in an independent capacity, and exercise their functions in accordance with their mandate, through a professional, impartial assessment of facts based on internationally recognized human rights standards, and free from any kind of extraneous influence, incitement, pressure, threat or interference, either direct or indirect, on the part of any party, whether

stakeholder or not, for any reason whatsoever, the notion of independence being linked to the status of mandate-holders, and to their freedom to assess the human rights questions that they are called upon to examine under their mandate;

(b) Keep in mind the mandate of the Council which is responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, through dialogue and cooperation as specified in General Assembly resolution 60/251 of 15 March 2006;

(c) Exercise their functions in accordance with their mandate and in compliance with the Regulations, as well as with the present Code;

(d) Focus exclusively on the implementation of their mandate, constantly keeping in mind the fundamental obligations of truthfulness, loyalty and independence pertaining to their mandate;

(e) Uphold the highest standards of efficiency, competence and integrity, meaning, in particular, though not exclusively, probity, impartiality, equity, honesty and good faith;

(f) Neither seek nor accept instructions from any Government, individual, governmental or non-governmental organization or pressure group whatsoever;

(g) Adopt a conduct that is consistent with their status at all times;

(h) Be aware of the importance of their duties and responsibilities, taking the particular nature of their mandate into consideration and behaving in such a way as to maintain and reinforce the trust they enjoy of all stakeholders;

(i) Refrain from using their office or knowledge gained from their functions for private gain, financial or otherwise, or for the gain and/or detriment of any family member, close associate, or third party;

(j) Not accept any honour, decoration, favour, gift or remuneration from any governmental or non-governmental source for activities carried out in pursuit of his/her mandate.

Article 4 - Status of mandate-holders

1. Mandate-holders exercise their functions on a personal basis, their responsibilities not being national but exclusively international.
2. When exercising their functions, the mandate-holders are entitled to privileges and immunities as provided for under relevant international instruments, including section 22 of article VI of the Convention on the Privileges and Immunities of the United Nations.
3. Without prejudice to these privileges and immunities, the mandate-holders shall carry out their mandate while fully respecting the national legislation and regulations of the country wherein they are exercising their mission. Where an issue arises in this regard, mandate-holders shall adhere strictly to the provisions of Regulation 1 (e) of the Regulations.

Article 5 - Solemn declaration

Prior to assuming their functions, mandate-holders shall make the following solemn declaration in writing:

“I solemnly declare that I shall perform my duties and exercise my functions from a completely impartial, loyal and conscientious standpoint, and truthfully, and that I shall discharge these functions and regulate my conduct in a manner totally in keeping with the terms of my mandate, the Charter of the United Nations, the interests of the United Nations, and with the objective of promoting and protecting human rights, without seeking or accepting any instruction from any other party whatsoever.”

Article 6 - Prerogatives

Without prejudice to prerogatives for which provision is made as part of their mandate, the mandate-holders shall:

- (a) Always seek to establish the facts, based on objective, reliable information emanating from relevant credible sources, that they have duly cross-checked to the best extent possible;

(b) Take into account in a comprehensive and timely manner, in particular information provided by the State concerned on situations relevant to their mandate;

(c) Evaluate all information in the light of internationally recognized human rights standards relevant to their mandate, and of international conventions to which the State concerned is a party;

(d) Be entitled to bring to the attention of the Council any suggestion likely to enhance the capacity of special procedures to fulfil their mandate.

Article 7 - Observance of the terms of the mandate

It is incumbent on the mandate-holders to exercise their functions in strict observance of their mandate and in particular to ensure that their recommendations do not exceed their mandate or the mandate of the Council itself.

Article 8 - Sources of information

In their information-gathering activities the mandate-holders shall:

(a) Be guided by the principles of discretion, transparency, impartiality, and even-handedness;

(b) Preserve the confidentiality of sources of testimonies if their divulgation could cause harm to individuals involved;

(c) Rely on objective and dependable facts based on evidentiary standards that are appropriate to the non-judicial character of the reports and conclusions they are called upon to draw up;

(d) Give representatives of the concerned State the opportunity of commenting on mandate-holders' assessment and of responding to the allegations made against this State, and annex the State's written summary responses to their reports.

Article 9 - Letters of allegation

With a view to achieving effectiveness and harmonization in the handling of letters of allegation by special procedures, mandate-holders shall assess their conformity with reference to the following criteria:

- (a) The communications should not be manifestly unfounded or politically motivated;
- (b) The communication should contain a factual description of the alleged violations of human rights;
- (c) The language in the communication should not be abusive;
- (d) The communication should be submitted by a person or a group of persons claiming to be victim of violations or by any person or group of persons, including non-governmental organizations, acting in good faith in accordance with principles of human rights, and free from politically motivated stands irrelevant or contrary to, the provisions of the Charter of the United Nations, and claiming to have direct or reliable knowledge of those violations substantiated by clear information;
- (e) The communication should not be exclusively based on reports disseminated by mass media.

Article 10 - Urgent appeals

Mandate-holders may resort to urgent appeals in cases where the alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or either imminent or ongoing damage of an extremely grave nature to victims that cannot be addressed in a timely manner by the procedure under article 9 of the present Code.

Article 11 - Field visits

Mandate-holders shall:

- (a) Ensure that their visit is conducted in compliance with the terms of reference of their mandate;

(b) Ensure that their visit is conducted with the consent, or at the invitation, of the State concerned;

(c) Prepare their visit in close collaboration with the Permanent Mission of the concerned State accredited to the United Nations Office at Geneva except if another authority is designated for this purpose by the concerned State;

(d) Finalize the official programme of their visits directly with the host country officials with administrative and logistical back-up from the local United Nations Agency and/or Representative of the High Commissioner for Human Rights who may also assist in arranging private meetings;

(e) Seek to establish a dialogue with the relevant government authorities and with all other stakeholders, the promotion of dialogue and cooperation to ensure the full effectiveness of special procedures being a shared obligation of the mandate-holders, the concerned State and the said stakeholders;

(f) Have access upon their own request, in consultation with the Office of the High Commissioner for Human Rights and after a common understanding between the host Government and the mandate-holder, to official security protection during their visit, without prejudice to the privacy and confidentiality that mandate-holders require to fulfil their mandate.

Article 12 - Private opinions and the public nature of the mandate

Mandate-holders shall:

(a) Bear in mind the need to ensure that their personal political opinions are without prejudice to the execution of their mission, and base their conclusions and recommendations on objective assessments of human rights situations;

(b) In implementing their mandate, therefore, show restraint, moderation and discretion so as not to undermine the recognition of the independent nature of their mandate or the environment necessary to properly discharge the said mandate.

Article 13 - Recommendations and conclusions

Mandate-holders shall:

(a) While expressing their considered views, particularly in their public statements concerning allegations of human rights violations, also indicate fairly what responses were given by the concerned State;

(b) While reporting on a concerned State, ensure that their declarations on the human rights situation in the country are at all times compatible with their mandate and the integrity, independence and impartiality which their status requires, and which is likely to promote a constructive dialogue among stakeholders, as well as cooperation for the promotion and protection of human rights;

(c) Ensure that the concerned government authorities are the first recipients of their conclusions and recommendations concerning this State and are given adequate time to respond, and that likewise the Council is the first recipient of conclusions and recommendations addressed to this body.

Article 14 - Communication with Governments

Mandate-holders shall address all their communications to concerned Governments through diplomatic channels unless agreed otherwise between individual Governments and the Office of the High Commissioner for Human Rights.

Article 15 - Accountability to the Council

In the fulfilment of their mission, mandate-holders are accountable to the Council.

FEB X 3 2023

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**IN THE NOOKSACK TRIBAL COURT
FOR THE NOOKSACK INDIAN TRIBE
DEMING, WASHINGTON**

NOOKSACK INDIAN HOUSING AUTHORITY, Plaintiff. v. OLIVE OSHIRO, Defendant.	Case No. 2022-CI-HSG-003 ORDER ON MOTIONS FOR SUMMARY JUDGMENT
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THIS MATTER came before the Court pursuant to Motions for Summary Judgment filed by the parties. In advance of the hearing, the parties filed a Joint Response to November 30, 2022 Scheduling Order. In that Joint Response, the parties identified issues which they agreed could be addressed by the Court with oral argument. Oral argument was conducted on January 25, 2023 on those issues.

I. ISSUES WITHOUT ORAL ARGUMENT

The parties have identified three issues that the Court could address without oral argument. Those issues are as follows:

1. Whether as matter of law, NIHA must provide a 30-Day CARES Act Notice to Vacate prior to commencement of an unlawful detainer action for a termination not based on non-payment of rent; and

- 1 2. Whether promissory estoppel may be maintained by Defendant as a defense to an
2 unlawful detainer action brought by NIHA, and, if so, what are the prima facie
3 elements for raising such a claim; and
4 3. Whether equitable estoppel may be maintained by Defendant as a defense to an
5 unlawful detainer action brought by NIHA, and, if so, what are the prima facie
6 elements for raising such a claim.

7 The Court will address each of these issues in order.

8

9

1.1 CARES Act Notice

10 Due to the Coronavirus pandemic, the federal government enacted 15 U.S.C. §9058
11 providing for a temporary moratorium on eviction filings. The moratorium under that statute
12 was in place for 120 days beginning on March 27, 2020. *See, 15 U.S.C.A. §9058(b)*. That
13 moratorium was therefore in effect from March 27, 2020 to July 24, 2020. The moratorium
14 prevented lessors of covered dwelling units from initiating legal action to recover possession of a
15 covered dwelling from a tenant for non-payment of rent. *See, 15 U.S.C. §9058(b)(1)*. A
16 particular notice was required to be used during the moratorium. *See, 15 U.S.C. §9058(c)*.

17 Covered dwellings included dwellings occupied by a tenant pursuant to a residential
18 lease, or without a lease, or with a lease terminable under state law. *See, 15 U.S.C.*
19 *§9058(a)(1)(A)*. For purposes of the statute, state law included Tribal law. *See, 15 U.S.C.*
20 *§9041(10)(E)*.

21 In reviewing the statutory enactments, the Court notes that the Complaint for Unlawful
22 Detainer in this case was filed on May 24, 2022. This is well after the expiration of the
23 temporary moratorium identified in 15 U.S.C. §9058.

24

25

1 It is argued that the notice required under the temporary moratorium requires a lessor of a
2 covered dwelling unit to issue a CARES Act Notice even after expiration of the temporary
3 moratorium. This argument is based upon the language of 15 U.S.C. §9058(c). However, that
4 language must be read in context. The context is that the entire statutory scheme is purposely
5 denominated as a "temporary moratorium." The moratorium only existed from late March to
6 late July of 2020. Therefore, the Court finds that the Cares Act notice required in 15 U.S.C.
7 §9058(c) does not apply to this case since the moratorium expired well in advance of the date
8 that this case was filed in Court.

9 An additional reason that the Court does not believe the CARES Act notice applies in this
10 case is that the moratorium under 15 U.S.C. §9058 only prohibited landlords from instituting
11 legal actions to recover possession of a covered dwelling unit for non-payment of rent. See, 15
12 U.S.C. §9058(b)(1). This is not a non-payment of rent case. Therefore, the requirements of 15
13 U.S.C. §9058 do not apply to this case.

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15 **1.2. Promissory Estoppel / Equitable Estoppel**

16 This action was brought under the provisions of the Nooksack Unlawful Detainer Code,
17 in Title 45 of the Nooksack Tribal Code. It is a narrow proceeding designed to protect the real
18 and personal property rights of all persons and entities, and to establish a peaceable process by
19 which a real property owner may regain possession of property following occupancy of the
20 property by another. See, *Nooksack Tribal Code (hereinafter "N.T.C.") §45.01.020*.

21 The unlawful detainer process is designed to be a speedy procedure to determine
22 legitimate occupancy of another's property. The Code requires a trial date to be identified in the
23 initial Summons served upon the occupier specifying a trial date not less than five nor more than
24 45 days from the date of service. See, *N.T.C. §45.02.020(B)*. That is an unusually speedy trial
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1 date. The initial hearing is to be a summary judgment proceeding based on the evidence, to
2 determine if there are genuine issues for trial. See, N.T.C. §45.02.040.

3 If the Court finds in favor of the landlord, the Court only has authority to extend the
4 eviction date “. . . no later than 14 days after the entry of the order of eviction . . .” unless the
5 parties agree to a later date. See, N.T.C. 45.02.070. All of these provisions indicate a clear intent
6 of the Tribal Council to provide a speedy process to handle unlawful detainer actions.

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8 an Answer, there are no restrictions in the Code on what defenses are available in such actions.
9 See, N.T.C. §45.02.020(B). To the knowledge of the Court, there are no Nooksack Tribal Court
10 cases that directly address the topic.¹ Therefore the law of other jurisdictions needs to be
11 examined for guidance.

12 In Washington the law of unlawful detainer is well-developed. Typically, issues not
13 related to possession are not properly part of the action due to the limited jurisdiction of the
14 Court in unlawful detainer actions. The Nooksack Unlawful Detainer Code has the purpose of
15 limiting the action to the landlord’s right to possession of the property. See, N.T.C. §45.01.020.
16 This purpose implies, along with the speedy time deadlines, that this Court has limited
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18 Under Washington State law, counterclaims may not be asserted in an unlawful detainer
19 action:

20 It has long been settled that counterclaims may not be asserted in an unlawful
21 detainer action. Young v. Riley, 59 Wash.2d 50, 365 P.2d 769 (1961); Woodward
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1 by statute and *not* as a court of general jurisdiction with the power to hear and
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5 or setoff is based on facts which excuse a tenant's breach. Munden v. Hazelrigg, 105 Wash.2d
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8 Ms. Oshiro in her Answer asserted a defense of equitable estoppel. *See, Answer, Section*
9 *II(E), at pp. 6 - 7*. The estoppel defense has four traditional elements: (1) a false representation,
10 (2) an intent to induce the claimant to act on the misrepresentation, (3) the claimant's lack of
11 knowledge or inability to obtain the true facts, and (4) the claimant's reliance on the
12 misrepresentation to his or her detriment. Rutten v. United States, 299 F.3d 993, at 995 (8th Cir.
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14 Ms. Oshiro's defense is based in part upon NIHA's statement that at the commencement
15 of her tenancy, Ms. Oshiro qualified as a Tribal member, and therefore met the eligibility
16 standard to occupy the home. That was factually correct at the commencement of the tenancy,
17 but subsequently changed when Ms. Oshiro was disenrolled from the Nooksack Tribe and did
18 not provide evidence to NIHA that she qualified as a member of any other federally recognized
19 Indian Tribe. On that basis, NIHA asserted she no longer met the eligibility qualifications to
20 occupy Tribal housing. If the defense of equitable estoppel or promissory estoppel were
21 permitted, those arguments would fail on the basis that the allegedly false statement was not
22 false.

23 The Court has reviewed the arguments of NIHA in opposition to application of equitable
24 estoppel against a governmental entity. *See, Response to Defendant's Motion to Dismiss / Set for*
25 *Trial, filed June 21, 2022, at pp. 6 - 8*. The Court agrees that the federal authorities cited add an

1 additional element to estoppel claims against the government, in that the moving party must
2 allege and prove that the government committed affirmative misconduct, going beyond mere
3 negligence. See, Socop-Gonzalez v. I.N.S., 208 F.3d 838, at 842 (9th Cir. 2000), and cases cited
4 therein. There is simply no evidence in the record that would satisfy that required element.

5 For these reasons, the Court dismisses the affirmative defenses of equitable estoppel and
6 promissory estoppel.

7 8 **II. MOTION TO DISMISS - ISSUES ARGUED**

9 10 **2.1 Failure to Conduct Grievance Hearing**

11 Counsel for Ms. Oshiro asserts that the Defendant's due process rights were violated
12 when the Nooksack Housing Committee accepted her grievance but failed to hold a hearing
13 when she appealed the Housing Director's action upholding the Notice of Termination.

14 It is clear from the record that a timely appeal of the Notice of Termination was made by
15 Ms. Oshiro, and that she received an informal conference with the Housing Director, who upheld
16 the Notice of Termination. Ms. Oshiro then timely appealed that action and requested a
17 grievance hearing before the Nooksack Housing Committee. See, *Declaration of Malori*
18 *Klushkan*, at p. 3 of 5, Paragraph 15. Ms. Oshiro was actively participating in the administrative
19 process.

20 The Committee canceled the hearing at least one day before it was to occur. This was
21 based on the Committee's position that the documents presented did not show that Ms. Oshiro
22 met the qualifications for Tribal housing that the Tenant must meet the definition of a "Native
23 Family" under NIHA Policy. See, *NIHA Policies*, at p. 5 of 87, Section II(A)(1); also see, *NIHA*
24 *Policies* at p. 29 of 87, Section VIII(D)(2)(a)(v). The term "Native Family" is defined as "... a

1 Family whose Head of Household or spouse is [a] currently enrolled member of a federally
2 recognized Indian Tribe." See, *NIHA Policies, at p. 82 of 87, Definition of "Native Family."*

3 The central issue in this case is whether Ms. Oshiro has maintained eligibility for Tribal
4 housing after her disenrollment from the Nooksack Tribe. It is undisputed that she was eligible
5 when she commenced her tenancy in December of 2005. She has continued residing in Tribal
6 Housing up to the present time. However, in 2018 she was disenrolled from the Nooksack Tribe,
7 and there is no evidence in the record that after that disenrollment that Ms. Oshiro met the
8 definition of a Native Family, because there is no evidence that she or a spouse is currently
9 enrolled in another federally recognized Indian Tribe.

10 That was the evidence before the Housing Committee. The Committee set a deadline of
11 April 8, 2022 for the parties, including Ms. Oshiro, to submit proposed evidence and witness lists
12 to the Committee in advance of the hearing scheduled for April 13, 2022. See, *Declaration of*
13 *Malori Klushkan, at Exhibit 8.* The materials presented to the Committee by the April 8 deadline
14 did not contradict the NIHA evidence that Ms. Oshiro was not a currently enrolled member of a
15 federally recognized Indian tribe. That was the basis on which the termination was founded, and
16 that was the issue to be determined by the Housing Committee. The Committee elected to cancel
17 the hearing because there was no need to conduct the hearing in light of the lack of essential
18 evidence to contradict the Housing Director's decision on the central issue.

19 The Committee has the authority under its policies to cancel a hearing and render a
20 decision without a hearing if the Committee determines that the issue has been previously
21 decided in another proceeding. See, *NIHA Policies, at pp. 71 - 72 of 87, Section XV(C)(11).* The
22 Committee did so in this case. Ms. Oshiro argues that action deprived her of her due process
23 right to an opportunity to be heard.

24

25

1 However, there is nothing in the record to support the argument that Ms. Oshiro does
2 indeed meet the definition of "Native Family." Ms. Oshiro had multiple opportunities at the
3 administrative level to show she met that definition. If she had, this case would never have been
4 filed. The Court can find no harm in the Committee's election to cancel the hearing, as there is
5 no evidence that a different result would have occurred if the Committee had conducted the
6 hearing.

7 2.2 Good Cause Requirement

8 The Defendant argues that under the Federal Housing Program good cause must exist to
9 evict a tenant. *See, 24 C.F.R. §966.4(a)(2)(iii); see also, 24 C.F.R. §966.4(l)(2)(ii).* The good
10 cause requirement is also found in the Lease, which allows NIHA to terminate the Lease under
11 the following provision: "Other Good Cause . . . as determined by the NIHA." *See,*
12 *Declaration of Malori Klushkan, at Exhibit 3, NIHA Rental Agreement, at p. 5 of 7, Section*
13 *10(B)(4).* As it pertains to this case, the issue becomes whether the good cause requirement
14 includes failure of a tenant to meet eligibility requirements under NIHA Policies.

15 The Nooksack Housing Policies require a tenant to initially establish, then maintain
16 continuing eligibility for housing, including maintenance of a "Native Family" as defined in
17 NIHA Policies. *See, NIHA Policies, at p. 5 of 87, §II(A)(1); see also, NIHA Policies, at p. 29 of*
18 *87, §VIII(D)(2)(v).* The definition of "Native Family" in the NIHA Policies is as follows:
19

20 **Native Family** means a family whose head of household or spouse is a currently
 enrolled member of a federally recognized Indian Tribe.

21 *See, NIHA Policies, at p. 82 of 87, Definition of "Native Family."*

22 Under Ms. Oshiro's Lease with NIHA, she is required to comply with NIHA Policies.
23 *See, Declaration of Malori Klushkan, at Exhibit 3, NIHA Rental Agreement, at p. 5 of 7, Section*
24 *10(B); and at p. 6 of 7, Section 11(b)(2).* Ms. Oshiro acknowledged receipt of a copy of the
25

1 NIHA Policies at lease commencement on September 30, 2005. *See, Declaration of Malori*
2 *Klushkan, at Exhibit 3.*

3 The record in this case is clear that when Ms. Oshiro originally began her tenancy she
4 qualified as a "Native Family" by providing proof of enrollment with the Nooksack Indian Tribe.
5 *See, Declaration of Malori Klushkan, at p. 2, Paragraph No. 5, and Exhibit 2 thereto.* The
6 Housing Authority subsequently received a Notice of Involuntary Disenrollment in 2008
7 concerning Ms. Oshiro. *See, Declaration of Malori Klushkan, at Exhibit 4.*

8 The Housing Authority thereafter provided Ms. Oshiro an opportunity to re-establish
9 eligibility. *See, Declaration of Malori Klushkan, at Exhibit 5.* These proceedings were the
10 culmination of that administrative process. The Notice of Termination of Tenancy and the
11 Complaint for Unlawful Detainer in this matter were based upon facts showing that Ms. Oshiro
12 no longer was able to establish her eligibility as a "Native Family" under the NIHA Policies.

13 Under the federal housing scheme, good cause to evict a tenant exists if facts are
14 discovered that make the tenant ineligible for housing. *See 24 C.F.R. §966.4(l)(2)(iii)(B).* NIHA
15 is also permitted to terminate a lease for "good cause" under Section 10(B)(4) of Ms. Oshiro's
16 Lease when NIHA discovers a tenant no longer meets the definition of a "Native Family." That
17 is what occurred when NIHA received the Notice of Disenrollment.

18 During the course of this proceeding, a parallel proceeding involving Ms. Oshiro had
19 been making its way through Washington State Courts. In a ruling granting review filed June 23,
20 2022, a Commissioner for the Washington State Supreme Court opined as follows:

21 . . . As indicated, petitioners represented and were deemed to be enrolled
22 members of the Tribe when applying for housing, but years later the Tribe
23 determined they were not Nooksack people after all and disenrolled them
24 accordingly. NIHA's housing eligibility policies cannot be any clearer: the
25 applicant or participant must be an enrolled member of the Tribe or any other
Tribe recognized by the United States. There is nothing this court can do about

1 that. Petitioners' argument that lack of tribal membership does not constitute
2 good cause to evict them from tribal housing, lacks persuasive weight.

3 Oshiro et al. v. Washington State Housing Finance Commission et al., Washington Supreme
4 Court Case No. 100827-9, Ruling Granting Review, at pp.14 - 15. This Court concurs in that
5 assessment.

6 The premises at issue in this case is Tribal housing, which unfortunately is in short supply
7 and cannot meet the needs of the Nooksack Indian Community. It is reasonable for the Nooksack
8 Indian Housing Authority to have an eligibility requirement that Nooksack Tribal Housing be
9 only available to Nooksack Tribal members or to members of other federally recognized Tribes.
10 Failure to meet that standard constitutes good cause to evict under both the federal scheme, and
11 the policies of the Nooksack Indian Housing Authority.

12 13 14 **III. ORDER**

15 Based upon the foregoing, the Court rules as follows:

16 1. **CARES Act Notice.** The CARES Act, by its own terms, applies: (1) to cases
17 involving non-payment of rent only; and (2) during the 120 day period commencing on March
18 27, 2020. This action did not involve the non-payment of rent, and was commenced after the
19 expiration of the 120 day CARES Act period. The CARES Act is inapplicable to this case, and
20 therefore the notice required under that Act does not apply to this action.

21
22 2. **Equitable Estoppel / Promissory Estoppel.** The Court rules that if the
23 defenses of equitable estoppel or promissory estoppel may be asserted in unlawful detainer
24 actions, then the additional element of showing the governmental entity – NIHA in this case –
25

1 committed affirmative misconduct is a required element of such defenses. The undisputed
2 evidence before the Court shows that this action, and the estoppel defenses, are based upon the
3 failure of Ms. Oshiro to maintain eligibility for Tribal Housing under NIHA's policies by losing
4 her Tribal enrollment status. There is no evidence of governmental affirmative misconduct, so
5 the affirmative defenses of equitable estoppel and promissory estoppel are dismissed.

6 3. Service of Notice of Termination. The Court finds that service of the Notice of
7 Termination was not in strict compliance with NIHA policy, but the record clearly demonstrates
8 that Ms. Oshiro did receive actual notice of the Notice of Termination, and her rights were not
9 prejudiced by the failure of NIHA to post the Notice as well as mail the Notice. The purpose of
10 these requirements is to ensure that the Tenant receives the Notice of Termination. The Tenant
11 in this case did so. The Court would rule in a different manner if there was no evidence in the
12 record that the Tenant actually received the Notice of Termination. The Court rules that
13 substantial compliance, coupled with evidence of actual notice, is sufficient substantial
14 compliance with the service requirements of NIHA policy for service of a Notice of Termination.
15

16 4. Failure to Conduct Grievance Hearing. Ms. Oshiro actively pursued her
17 grievance rights, but upon review of the materials submitted by the parties prior to the hearing,
18 the Housing Committee determined that a hearing was not necessary. The NIHA policies
19 provided authority to the Committee to render a decision without a hearing if the Committee
20 determines the issue was previously decided in another proceeding. The Committee cited the
21 Barril proceeding, which presented the same issue as the proceeding involving Ms. Oshiro. The
22 record does not indicate that any evidence was submitted to the Committee in advance of the
23 scheduled hearing that would support a conclusion that Ms. Oshiro was eligible for NIHA
24
25

1 housing, which was the issue before the Committee. The Court rules that the Housing
2 Committee had authority to determine this Tenant's case without a hearing, so that argument is
3 denied.

4 5. Good Cause Requirement. The Court finds that the good cause requirement
5 applies to this case under both federal regulations and under the terms of the lease at issue, which
6 also incorporated NIHA policies. Good cause existed because failure to maintain eligibility
7 under NIHA policies would satisfy the "good cause" requirement to terminate the lease. There is
8 no evidence in the record before the Court that Ms. Oshiro, at the time the Lease was terminated,
9 qualified as a "Native Family" under the NIHA policies. Therefore, NIHA had good cause to
10 terminate the Lease at issue.
11

12 6. Status Conference. In light of these rulings, the parties are requested to consult
13 and determine if there are any additional issues that require a trial to be conducted in this case.
14 The parties shall notify the Court Clerk of mutually available dates for a Status Conference to be
15 conducted as soon as possible to address any additional proceedings in this case.
16

17
18 SO ORDERED this 3rd day of February, 2023.

19
20 NOOKSACK TRIBAL COURT

21
22 By: 

23 Charles R. Hostnik, Judge Pro Tem
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TIME: 2:04 AM | PM
FILED BY: CH CLERK: [Signature]

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**IN THE NOOKSACK TRIBAL COURT
FOR THE NOOKSACK INDIAN TRIBE
DEMING, WASHINGTON**

<p>NOOKSACK INDIAN HOUSING AUTHORITY, Plaintiff.</p> <p>v.</p> <p>NORMA ALDREDGE, Defendant.</p>	<p>Case No. 2022-CI-HSG-002</p> <p>ORDER ON MOTIONS FOR SUMMARY JUDGMENT</p>
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THIS MATTER came before the Court pursuant to Motions for Summary Judgment filed by the parties. In advance of the hearing, the parties filed a Joint Response to November 30, 2022 Scheduling Order. In that Joint Response, the parties identified issues which they agreed could be addressed by the Court with oral argument. Oral argument was conducted on January 25, 2023 on those issues.

I. ISSUES WITHOUT ORAL ARGUMENT

The parties have identified three issues that the Court could address without oral argument. Those issues are as follows:

1. Whether as matter of law, NIHA must provide a 30-Day CARES Act Notice to Vacate prior to commencement of an unlawful detainer action for a termination not based on non-payment of rent; and

1 2. Whether promissory estoppel may be maintained by Defendant as a defense to an
2 unlawful detainer action brought by NIHA, and, if so, what are the prima facie
3 elements for raising such a claim; and

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5 unlawful detainer action brought by NIHA, and, if so, what are the prima facie
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7 The Court will address each of these issues in order.

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11 providing for a temporary moratorium on eviction filings. The moratorium under that statute
12 was in place for 120 days beginning on March 27, 2020. *See, 15 U.S.C.A. §9058(b)*. That
13 moratorium was therefore in effect from March 27, 2020 to July 24, 2020. The moratorium
14 prevented lessors of covered dwelling units from initiating legal action to recover possession of a
15 covered dwelling from a tenant for non-payment of rent. *See, 15 U.S.C. §9058(b)(1)*. A
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19 *§9058(a)(1)(A)*. For purposes of the statute, state law included Tribal law. *See, 15 U.S.C.*
20 *§9041(10)(E)*.

21 In reviewing the statutory enactments, the Court notes that the Complaint for Unlawful
22 Detainer in this case was filed on May 24, 2022. This is well after the expiration of the
23 temporary moratorium identified in 15 U.S.C. §9058.

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1 It is argued that the notice required under the temporary moratorium requires a lessor of a
2 covered dwelling unit to issue a CARES Act Notice even after expiration of the temporary
3 moratorium. This argument is based upon the language of 15 U.S.C. §9058(c). However, that
4 language must be read in context. The context is that the entire statutory scheme is purposely
5 denominated as a "temporary moratorium." The moratorium only existed from late March to
6 late July of 2020. Therefore, the Court finds that the Cares Act notice required in 15 U.S.C.
7 §9058(c) does not apply to this case since the moratorium expired well in advance of the date
8 that this case was filed in Court.

9 An additional reason that the Court does not believe the CARES Act notice applies in this
10 case is that the moratorium under 15 U.S.C. §9058 only prohibited landlords from instituting
11 legal actions to recover possession of a covered dwelling unit for non-payment of rent. *See, 15*
12 *U.S.C. §9058(b)(1)*. This is not a non-payment of rent case. Therefore, the requirements of 15
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19 which a real property owner may regain possession of property following occupancy of the
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9 *Section II(D), at pp. 7 - 8.* The estoppel defense has four traditional elements: (1) a false
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21 estoppel were permitted, those arguments would fail on the basis that the allegedly false
22 statement was not false.

23 The Court has reviewed the arguments of NIHA in opposition to application of equitable
24 estoppel against a governmental entity. *See, Response to Defendant's Motion to Dismiss / Set for*
25 *Trial, filed June 21, 2022, at pp. 6 - 8.* The Court agrees that the federal authorities cited add an

1 additional element to estoppel claims against the government, in that the moving party must
2 allege and prove that the government committed affirmative misconduct, going beyond mere
3 negligence. *See, Socop-Gonzalez v. I.N.S., 208 F.3d 838, at 842 (9th Cir. 2000), and cases cited*
4 *therein.* There is simply no evidence in the record that would satisfy that required element.

5 For these reasons, the Court dismisses the affirmative defenses of equitable estoppel and
6 promissory estoppel.

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II. MOTION TO DISMISS - ISSUES ARGUED

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2.1 Service of Notice of Termination

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Counsel for Ms. Aldredge argues that she did not receive proper service of the Notice of Termination dated by the Housing Authority on December 7, 2021 because the record indicates personal service was made upon Francis Ciochon, who was not an adult resident of the Aldredge home. That position is supported by a Declaration of Francis Ciochon filed with the Nooksack Tribal Court on January 18, 2023.

The Nooksack Indian Housing Authority Program Policies and Procedures require a Service of Notice of Termination to be made by either:

- a. Delivering a copy personally to the Tenant or other adult resident therein; or
- b. Posting the Notice in a conspicuous place near the entrance to said premises and mailing an additional copy by certified mail, return receipt requested to the Tenant's last known address, postage prepaid.

NIHA Policies, at p. 29 of 87, Section VIII(D)(5).

Service was made by a Tribal Police Officer delivering a copy at the residence to Francis Ciochon, described in the form Corrected Declaration of Service as “. . . an occupier or . . . an

1 adult member of the family . . .” See, *Declaration of Malori Klushkan, filed May 24, 2022, at*
2 *Exhibit 6*. However, according to the Declaration of Francis Ciochon, he was the boyfriend of
3 the Tenant’s daughter who happened to be visiting that day. Mr. Ciochon was an adult. See,
4 *Declaration of Malori Klushkan, filed May 24, 2022, at Exhibit 6, Incident Report at p. 1*. But as
5 a visitor, he was not the Tenant, nor an “adult resident therein.”

6 Although the personal service might have been effective service under the Unlawful
7 Detainer Code (see, *N.T.C. §45.02.030(A)*), service on an adult occupier of the residence does
8 not comply with the Housing Policies governing service of a Notice of Termination. The Court
9 notes, however, that the lease itself does permit service of a Notice of Termination to be given in
10 writing by “Delivering a copy personally to the Tenant or occupier or to any adult member of
11 the family residing on the premises . . .” See, *Declaration of Malori Klushkan, at Exhibit 3,*
12 *NIHA Rental Agreement, p. 6 of 7, Section 11(3)(a) (emphasis added)*.

13 The alternative method of service under the Policies is to post and mail to the last known
14 residence. The record is clear, and NIHA admits, that there is no evidence contained in the
15 record that the Notice was posted at the Aldredge home. The record does include a Declaration
16 that the Notice was mailed to Ms. Aldredge’s post office box address and that she received it on
17 December 10, 2021 by signing the Return Receipt card. See, *Declaration of Malori Klushkan, at*
18 *Exhibit 7*. The Court does note that the Declaration of Service signed by Ms. Klushkan, under
19 penalty of perjury, states that the Notice of Termination was mailed on December 7, 2021,
20 postage prepaid and addressed to Ms. Aldredge at 5921 Johnny Court in Deming, Washington,
21 not to the Post Office Box indicated on the Return Receipt card attached to the Declaration.
22 Although that inconsistency is troubling to the Court, it is clear that Norma Aldredge received
23 the Notice of Termination three days after it was placed in the mail to her by personally signing
24 the Return Receipt card.

1 The Tribe argues that it is clear Ms. Aldredge received the Notice, and in fact exercised
2 her right to appeal the Notice of Termination. This indicates that Ms. Aldredge did in fact have
3 actual notice of the Notice of Termination, which is clearly the intent of the NIHA Policies
4 requiring service by either: (1) personal service, or (2) posting and certified mailing. Both are
5 methods to achieve actual notice.

6 The Court is aware of the Court of Appeals decision in Nooksack Indian Housing
7 Authority v. Cline, 12 NICS App. 91 (Nooksack Tribal Court of Appeals 2014). The Court has
8 reviewed that opinion in detail, but finds an essential distinction between the case before the
9 Court and the case before the Court of Appeals in NIHA v. Cline. That essential distinction is
10 that there was no evidence in the record in that appellate case that the Defendant received actual
11 notice of the Notice of Eviction. In fact, his position in that case was that he did not receive
12 notice of the action, and was unaware of the pending eviction. Mr. Cline did not appear for the
13 hearing on the Notice of Eviction. That is a critical distinction between that case and the case
14 before this Court.

15 In this case, there is clear evidence in the record that Ms. Aldredge did in fact receive
16 actual notice by signing the Return Receipt card. Furthermore, Ms. Aldredge actively
17 participated in pursuing her rights subsequent to issuance of the Notice of Termination. Those
18 facts distinguish this case from NIHA v. Cline.

19 The Court finds that NIHA did substantially comply with the Notice requirements
20 inherent in their Policy but only because there is clear evidence in the record that Ms. Aldredge
21 did in fact receive actual notice of the Notice of Termination, and fully participated in this matter
22 following issuance of the Notice of Termination. There does not appear to be any prejudice to
23 the Tenant as a result of NIHA's failure to strictly comply with the service requirements. This is
24 a clearly different case than NIHA v. Cline. NIHA is cautioned, however, to be sure its policies
25

1 with regard to service are followed, and that documentation of those actions is properly
2 presented to the Court. Absent evidence of actual notice, this Court would reach a different
3 conclusion.

4 2.2 Failure to Conduct Grievance Hearing

5 Counsel for Ms. Aldredge asserts that the Defendant's due process rights were violated
6 when the Nooksack Housing Committee accepted her grievance but failed to hold a hearing
7 when she appealed the Housing Director's action upholding the Notice of Termination.

8 It is clear from the record that a timely appeal of the Notice of Termination was made by
9 Ms. Aldredge, and that she received an informal conference with the Housing Director, who
10 upheld the Notice of Termination. Ms. Aldredge then timely appealed that action and requested
11 a grievance hearing before the Nooksack Housing Committee. *See, Declaration of Malori*
12 *Klushkan, at p. 3 of 5, Paragraph 15.* According to the Housing Director's Declaration, Ms.
13 Aldredge provided documentation to the Committee in support of her grievance request.² Ms.
14 Aldredge was actively participating in the administrative process.

15 The Committee canceled the hearing at least one day before it was to occur. This was
16 based on the Committee's position that the documents presented did not show that Ms. Aldredge
17 met the qualifications for Tribal housing that the Tenant must meet the definition of a "Native
18 Family" under NIHA Policy. *See, NIHA Policies, at p. 5 of 87, Section II(A)(1); also see, NIHA*
19 *Policies at p. 29 of 87, Section VIII(D)(2)(a)(v).* The term "Native Family" is defined as ". . . a
20 Family whose Head of Household or spouse is [a] currently enrolled member of a federally
21 recognized Indian Tribe." *See, NIHA Policies, at p. 82 of 87, Definition of "Native Family."*

22
23 ² The Declaration of Malori Klushkan, at p. 3 of 5, Section 15, states that Ms. Aldredge
24 provided documentation to the Housing Committee. The documents submitted were supposed
25 to be attached to that Declaration as Exhibit 7. They were not. This representation is contrary
to the Housing Committee's Decision Following Grievance Hearing, which indicated the only
written materials submitted to the Committee were from the Housing Director. *See, Declaration*
of Malori Klushkan at Exhibit 9, page 1, paragraph 2.

1 The central issue in this case is whether Ms. Aldredge has maintained eligibility for
2 Tribal housing after her disenrollment from the Nooksack Tribe. It is undisputed that she was
3 eligible when she commenced her tenancy in December of 2005. She has continued residing in
4 Tribal Housing up to the present time. However, in 2018 she was disenrolled from the Nooksack
5 Tribe, and there is no evidence in the record that after that disenrollment that Ms. Aldredge met
6 the definition of a Native Family, because there is no evidence that she or a spouse is currently
7 enrolled in another federally recognized Indian Tribe.

8 That was the evidence before the Housing Committee. The Committee set a deadline of
9 April 8, 2022 for the parties, including Ms. Aldredge, to submit proposed evidence and witness
10 lists to the Committee in advance of the hearing scheduled for April 13, 2022. The materials
11 presented to the Committee by the April 8 deadline did not contradict the NIHA evidence that
12 Ms. Aldredge was not a currently enrolled member of a federally recognized Indian tribe. That
13 was the basis on which the termination was founded, and that was the issue to be determined by
14 the Housing Committee. The Committee elected to cancel the hearing because there was no
15 need to conduct the hearing in light of the lack of essential evidence to contradict the Housing
16 Director's decision on the central issue.

17 The Committee has the authority under its policies to cancel a hearing and render a
18 decision without a hearing if the Committee determines that the issue has been previously
19 decided in another proceeding. *See, NIHA Policies, at pp. 71 - 72 of 87, Section XV(C)(11)*. The
20 Committee did so in this case. Ms. Aldredge argues that action deprived her of her due process
21 right to an opportunity to be heard.

22 However, there is nothing in the record to support the argument that Ms. Aldredge does
23 indeed meet the definition of "Native Family." Ms. Aldredge had multiple opportunities at the
24 administrative level to show she met that definition. If she had, this case would never have been
25

1 The record in this case is clear that when Ms. Aldredge originally began her tenancy she
2 qualified as a "Native Family" by providing proof of enrollment with the Nooksack Indian Tribe.
3 *See, Declaration of Malori Klushkan, at p. 2, Paragraph No. 5, and Exhibit 2 thereto.* The
4 Housing Authority subsequently received a Notice of Involuntary Disenrollment in 2008
5 concerning Ms. Aldredge. *See, Declaration of Malori Klushkan, at Exhibit 4.*

6 The Housing Authority thereafter provided Ms. Aldredge an opportunity to re-establish
7 eligibility. *See, Declaration of Malori Klushkan, at Exhibit 5.* These proceedings were the
8 culmination of that administrative process. The Notice of Termination of Tenancy and the
9 Complaint for Unlawful Detainer in this matter were based upon facts showing that Ms.
10 Aldredge no longer was able to establish her eligibility as a "Native Family" under the NIHA
11 Policies.

12 Under the federal housing scheme, good cause to evict a tenant exists if facts are
13 discovered that make the tenant ineligible for housing. *See 24 C.F.R. §966.4(1)(2)(iii)(B).* NIHA
14 is also permitted to terminate a lease for "good cause" under Section 10(B)(4) of Ms. Aldredge's
15 Lease when NIHA discovers a tenant no longer meets the definition of a "Native Family." That
16 is what occurred when NIHA received the Notice of Disenrollment.

17 During the course of this proceeding, a parallel proceeding involving Ms. Aldredge had
18 been making its way through Washington State Courts. In a ruling granting review filed June 23,
19 2022, a Commissioner for the Washington State Supreme Court opined as follows:

20 . . . As indicated, petitioners represented and were deemed to be enrolled
21 members of the Tribe when applying for housing, but years later the Tribe
22 determined they were not Nooksack people after all and disenrolled them
23 accordingly. NIHA's housing eligibility policies cannot be any clearer: the
24 applicant or participant must be an enrolled member of the Tribe or any other
25 Tribe recognized by the United States. There is nothing this court can do about
that. Petitioners' argument that lack of tribal membership does not constitute
good cause to evict them from tribal housing, lacks persuasive weight.

1 Oshiro et al. v. Washington State Housing Finance Commission et al., Washington Supreme
2 Court Case No. 100827-9, Ruling Granting Review, at pp.14 - 15. This Court concurs in that
3 assessment.

4 The premises at issue in this case is Tribal housing, which unfortunately is in short supply
5 and cannot meet the needs of the Nooksack Indian Community. It is reasonable for the Nooksack
6 Indian Housing Authority to have an eligibility requirement that Nooksack Tribal Housing be
7 only available to Nooksack Tribal members or to members of other federally recognized Tribes.
8 Failure to meet that standard constitutes good cause to evict under both the federal scheme, and
9 the policies of the Nooksack Indian Housing Authority.
10

11 III. ORDER

12 Based upon the foregoing, the Court rules as follows:

13 1. CARES Act Notice. The CARES Act, by its own terms, applies: (1) to cases
14 involving non-payment of rent only; and (2) during the 120 day period commencing on March
15 27, 2020. This action did not involve the non-payment of rent, and was commenced after the
16 expiration of the 120 day CARES Act period. The CARES Act is inapplicable to this case, and
17 therefore the notice required under that Act does not apply to this action.
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19 2. Equitable Estoppel / Promissory Estoppel. The Court rules that if the
20 defenses of equitable estoppel or promissory estoppel may be asserted in unlawful detainer
21 actions, then the additional element of showing the governmental entity – NIHA in this case –
22 committed affirmative misconduct is a required element of such defenses. The undisputed
23 evidence before the Court shows that this action, and the estoppel defenses, are based upon the
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1 failure of Ms. Aldredge to maintain eligibility for Tribal Housing under NIHA's policies by
2 losing her Tribal enrollment status. There is no evidence of governmental affirmative
3 misconduct, so the affirmative defenses of equitable estoppel and promissory estoppel are
4 dismissed.

5 3. Service of Notice of Termination. The Court finds that service of the Notice of
6 Termination was not in strict compliance with NIHA policy, but the record clearly demonstrates
7 that Ms. Aldredge did receive actual notice of the Notice of Termination, and her rights were not
8 prejudiced by the failure of NIHA to post the Notice as well as mail the Notice. The purpose of
9 these requirements is to ensure that the Tenant receives the Notice of Termination. The Tenant
10 in this case did so. The Court would rule in a different manner if there was no evidence in the
11 record that the Tenant actually received the Notice of Termination. The Court rules that
12 substantial compliance, coupled with evidence of actual notice, is sufficient substantial
13 compliance with the service requirements of NIHA policy for service of a Notice of Termination.
14

15 4. Failure to Conduct Grievance Hearing. Ms. Aldredge actively pursued her
16 grievance rights, but upon review of the materials submitted by the parties prior to the hearing,
17 the Housing Committee determined that a hearing was not necessary. The NIHA policies
18 provided authority to the Committee to render a decision without a hearing if the Committee
19 determines the issue was previously decided in another proceeding. The Committee cited the
20 Barril proceeding, which presented the same issue as the proceeding involving Ms. Aldredge.
21 The record does not indicate that any evidence was submitted to the Committee in advance of the
22 scheduled hearing that would support a conclusion that Ms. Aldredge was eligible for NIHA
23 housing, which was the issue before the Committee. The Court rules that the Housing
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1 Committee had authority to determine this Tenant's case without a hearing, so that argument is
2 denied.

3 5. Good Cause Requirement. The Court finds that the good cause requirement
4 applies to this case under both federal regulations and under the terms of the lease at issue, which
5 also incorporated NIHA policies. Good cause existed because failure to maintain eligibility
6 under NIHA policies would satisfy the "good cause" requirement to terminate the lease. There is
7 no evidence in the record before the Court that Ms. Aldredge, at the time the Lease was
8 terminated, qualified as a "Native Family" under the NIHA policies. Therefore, NIHA had good
9 cause to terminate the Lease at issue.
10

11 6. Status Conference. In light of these rulings, the parties are requested to consult
12 and determine if there are any additional issues that require a trial to be conducted in this case.
13 The parties shall notify the Court Clerk of mutually available dates for a Status Conference to be
14 conducted as soon as possible to address any additional proceedings in this case.
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17 SO ORDERED this 3rd day of February, 2023.

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19 NOOKSACK TRIBAL COURT

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21 By: CR Hostnik
22 Charles R. Hostnik, Judge Pro Tem
23
24
25

IN THE NOOKSACK TRIBAL COURT
FOR THE NOOKSACK INDIAN TRIBE
DEMING, WA

NOOKSACK TRIBAL COURT
NOOKSACK INDIAN TRIBE
FEB 16 2023
TIME: 9:15 AM PM
FILED BY: DH CLERK: UM

IN RE:

NOOKSACK INDIAN HOUSING AUTHORITY

Plaintiff(s)/Petitioner(s),

and

MICHELLE ROBERTS

4732 FALSE CREEK LN

DEMING, WA 98244

Defendant(s)/Respondent(s)

NO. 2022-CI-HSG-005

DECISION AND ORDER GRANTING
PARTIAL SUMMARY JUDGMENT

A summary judgment hearing was held pursuant to NLO 42.02.040 on December 2, 2022. The court thanks the parties for the extensive record made before it, especially the supplemental materials provided pursuant to the court's order. After careful review of the pleadings and oral argument, this court makes the following findings of fact, conclusions of law and analysis

The court makes the following Findings of Fact and Conclusions of Law upon the materials submitted by NIHA and by Ms. Roberts:

Findings of Fact

1. Defendant Michelle Roberts ("Ms. Roberts") resides at 4732 False Creek Lane, Deming, WA 98244 ("the housing unit");
2. The real property at that address, upon which the housing unit sits, is land held in trust by the United States Government for the Nooksack Indian Tribe;

3. The Nooksack Indian Housing Authority ("NIHA") is a subordinate body of the Nooksack Tribal Council. NIHA operates and manages the Tribe's housing authority including all rental housing;
4. On or about December 21, 2007, Ms. Roberts entered into a Nooksack Housing Rental Agreement ("Rental Agreement");
5. In her application for housing, Ms. Roberts indicated that hers was a Nooksack Family and homeless with dependent children;
6. The Rental Agreement was made in accordance with NIHA Policies and Procedures ("NIHA Policies) and provided for annual recertification;
7. NIHA Policies require that Ms. Roberts, as a tenant, establish and maintain continuing eligibility for housing, including the maintenance of a "Native Family"¹, as that term is defined in Chapters II and VIII thereof;
8. Ms. Roberts initially established eligibility as a "Native Family", which, under NIHA Policies means "...a family whose Head of Household or spouse is a currently enrolled member of a federally recognized Indian Tribe";
9. NIHA received notice of Ms. Roberts' involuntary disenrollment from the Nooksack Indian Tribe;
10. Because it did not have evidence indicating Ms. Roberts was an enrolled member of a federally recognized Indian Tribe, and that therefore that the housing unit was no longer occupied by a "Native Family", NIHA served Ms. Roberts with a Notice of Need to Reestablish Eligibility;
11. To this date, Ms. Roberts has not provided evidence that she, or her spouse, are members of a tribe recognized by the federal government of the United States;
12. Ms. Roberts has been recognized as Indigenous by the Canadian government;
13. On or about November 6, 2021, NIHA served upon Ms. Roberts a Notice of Termination;

¹ "Native Family" is a term of art under NIHA Policies. It is therefore placed in quotation marks. No disrespect is intended.

14. Ms. Roberts timely requested reconsideration of that notice, but failed to provide proof of membership in a tribe recognized by the federal government of the United States;
15. Housing Director Malori Klushkan denied reconsideration;
16. Ms. Roberts appealed to the Nooksack Housing Committee, and submitted materials, but those materials did not include proof that she or the other occupants of the land and house located thereon were members of a tribe recognized by the federal government of the United States.
17. The record does not contain any document reflecting the Housing Committee's decision, nor does it contain evidence of the procedural rules under which Ms. Roberts' appeal from the Notice of Termination was heard. See Conclusion of Law 10 below. It is alleged that the Committee decided the case without a hearing, and denied Ms. Robert's appeal after determining that the issue in Ms. Roberts' appeal had previously been decided by the committee in a previous appeal in *In Re Barril*. Because it was alleged in Malori Klushkan's declaration that the Housing Committee's decision denied Ms. Roberts' appeal, and that allegation was not controverted by Ms. Roberts, the court finds that the Housing Committee's decision denied Ms. Robert's appeal. However, because the provisions under which that decision was made were not supplied to the court, the court cannot find that the decision was made under NIHA Policies and Procedures ;
18. In the case of *In Re Barril*, following a hearing on December 7, 2021, the Housing Committee upheld the Notice of Termination of that tenancy on the grounds that Ms. Barril, whose disenrolment from the Nooksack Indian Tribe had become final, had not re-established eligibility for housing as she had not established that a Native Family was maintained in the home;
19. Following the Housing Committee's decision in Ms. Roberts' appeal, NIHA served her with a Notice to Vacate;

20. Ms. Roberts and the other occupants of the real property and housing unit located at 4732 False Creek Lane, have refused to vacate the real property and housing unit and continue to reside there.

Conclusions of Law

1. The phrase "federally recognized Indian tribe" refers to tribes recognized by the federal government of the United States, see e.g. 25 USC 5130, 5131, 25 U.S.C. 4103 (13)(B);
2. Ms. Roberts, and the other occupants of her household, have not provided proof to NIHA, or to this court that they are members of an Indian tribe recognized by the United States government;
3. The Rental Agreement entered by Ms. Roberts and NIHA was made in accordance with NIHA Policies and Procedures, which required in this case that the real property and housing unit be occupied by a "Native Family", as defined in NIHA Policies;
4. Subsection 4.2 of the Nooksack Indian Housing Authority Operating Procedures (hereinafter "Operating Procedures") sets forth Selection Priorities for housing, listing 13 different classifications of applicants, all of which, save one inapplicable here (subsection 4.2.1.3 requiring the completion of a substance abuse treatment within the 12 months prior to screening), include a requirement that either the head of household, or another occupant, either be a Nooksack Tribal member, or be a Nooksack Family as defined by subsection 3.2 of the Operating Procedures;
5. Ms. Roberts applied under subsection 4.2.1.4 (Applicant Nooksack Family who is homeless and has permanent custody of minor children);
6. Section 2 of the Operating Procedures describes various programs administered by NIHA, including, at subsection 2.4, the Low-Income Housing Tax Credit Program

7. Section 3.2 of the Operating Procedures states:

An applicant must qualify as an Indian family, defined by Nooksack Indian Housing Authority as a family whose head of household or spouse is an enrolled member of a federally recognized **American Indian Tribe**

(emphasis supplied);

8. Paragraph V of Chapter 5 of NIHA Policies and Procedures (Low-Income Housing Tax Credit) sets forth:

Should a participant in a unit located on land held in trust by the United States government for the benefit of the Nooksack Indian Tribe fail to meet their program's tribal membership criteria at any time during their occupancy, their participation shall be immediately terminated.

9. Neither Ms. Roberts, nor the other occupants of the real property have, or have had, an interest in the real property upon which the housing unit is located which is held in trust by the United States government for the benefit of the Nooksack Indian Tribe. See e.g. Exhibit "A" to Ms.

Roberts' Response to Motion for Summary Judgment, p. 2;

10. In NIHA's initial submissions in support of its Motion for Summary Judgment, NIHA included its Policies and Procedures consisting of two documents, i.e., "Program Policies and Procedures" and "Nooksack Indian Housing Authority Operating Procedures". Exhibit 7 to the Declaration of Laura Point-Solomon, filed herein on September 22, 2022. Exhibit 7 appears to have contained the only Policies and Procedures initially submitted by either of the parties. It is of note that these Policies and Procedures appear to date from 2005. No newer edition or revision was initially submitted.

The procedures initially set forth for grieving or appealing a decision of NIHA are contained in Chapter 3 of the "Program Policies and Procedures", which chapter is entitled "Grievances for All NIHA Programs". Section 2 of Chapter 3 envisions an informal grievance resolution involving discussions like those had here. However, the next step in the grievance/appeal process envisioned by Chapter 3 is a hearing before the Tribal Council. No reference is made to a Housing Committee.

In the materials submitted by NIHA pursuant to the court's order to produce *the In Re Barril* decision and materials submitted in support of the parties' positions, in particular Tab 9, is a set of grievance procedures dated June 15, 2021 that were provided to Ms. Barril as part of her notice that the Decision Following Resolution Conference/Informal Meeting had been against her. Because of the dates of the events in this case, the court surmises that these are the procedures under which Ms. Roberts grieved/appealed the termination of her tenancy. However, surmise is not evidence.

In paragraph 17 of her declaration submitted in support of the motion for summary judgment, Malori Klushkan states:

Following the appeal to the Housing Committee, the Committee upheld the Department's termination of the tenant's rental agreement. A true and correct copy of the **Decision following Grievance Hearing** with proof(s) of service is attached hereto as **Exhibit 9.** (emphasis original)

However, what is attached as Exhibit 9, is a copy of the Decision Following Resolution Conference/Informal Meeting. The court searched for the decision of the Housing Committee in this case but could not find it. Nonetheless, Ms. Klushkan alleged that the Committee's decision was to deny Ms. Roberts' appeal, and Ms. Roberts' did not controvert that assertion.

In its Motion for Summary Judgment, NIHA asserts that the materials submitted to the Housing Committee by Ms. Roberts were forwarded to the Committee, but that she "...again failed to provide documentation (proof of membership a federally recognized Indian Tribe) to the Committee. Resultantly, the Housing Committee rendered a decision without proceeding to a hearing after determining [Ms. Robert's] appeal concerned an issue previously decided in [*In Re Barril*], that is termination based on (In)eligibility as a "Native Family".

Paragraph C.11 of the June 15, 2021 procedures provides:

"The Committee may render a decision without proceeding with the hearing if the Committee determines that the issue has been previously decided in another proceeding".

11. For the reasons set forth in the Analysis section of this decision, the court declines to hear Ms.

Roberts' counterclaims:

- 1] Sovereign immunity bars the counterclaims;
- 2] Ms. Roberts fails to state a claim for relief, in that the Indian Civil Rights Act does not create a cause of action;
- 3] That Defendant's counterclaims cannot be raised in an unlawful detainer action, i.e., that the only issue is the right to actual possession of the premises.

STANDARD FOR SUMMARY JUDGMENT

NLO 45.02.040 provides that the hearing on a complaint of unlawful detainer "...shall be a summary judgement hearing based on the evidence submitted on the day of the hearing." That section requires the court to consider all proof in favor of the defendant(s). Once the plaintiff proves there are no genuine issues for trial, the burden shifts to the defendant(s) to set out specific facts that demonstrate there are genuine issues for trial.

UNLAWFUL DETAINER

Title 45 of the NLO sets forth a "a peaceable process by which a real property owner may regain possession of his or her property following the occupation of the property by another". NLO 45.01.020. The grounds upon which a "tenant or other occupier of land" can be found guilty of unlawful detainer are set forth in NLO 45.02.010 should he or she "continue in occupancy of real property" under certain situations, including the two grounds alleged in this case:

- B. If such person [the tenant] has entered onto or remains on the real property of another without the permission of the owner and without having any substantial claim of a lease to or title of the property; [and]
- C. After the Nooksack Indian Housing Authority has terminated such person's tenancy pursuant to their Policies and Procedures...

Remaining on real property of another without the permission of the owner and without having any substantial claim of a lease to or title of the property

The land upon which the housing unit sits is held by the United States in trust for the Nooksack Indian Tribe. Neither Ms. Roberts, nor the other occupants of the housing unit, have the permission of either the United States government or the Nooksack Indian Tribe to remain on the real property. Nor do they have a substantial claim of a lease to or title of the property. It is clear that this manner of unlawful detainer has been established. The court finds that there are no genuine issues for trial this ground and finds that Ms. Roberts is guilty of unlawful detainer under NLO 45.02.010 (B).

Continuing in occupancy after the Nooksack Indian Housing Authority has terminated such person's tenancy pursuant to their Policies and Procedures

It is beyond argument that Ms. Roberts remains in occupancy following the termination of her tenancy by NIHA.

The next question is whether NIHA terminated her tenancy "...pursuant to their Policies and Procedures". In light of Finding of Fact 16 and Conclusion of Law 10 above, this court cannot find that there are no genuine issues of fact for trial with respect to NLO 45.02.010 (C), that is, whether Ms. Roberts tenancy was terminated pursuant to NIHA Policies and Procedures. Because the court does not have proof that Ms. Robert's was provided with the procedural protections in place at the time of the termination of her tenancy, as opposed to those that obtained in 2005, it cannot grant summary judgment but rather must set this limited issue for trial. Because of the remainder of this decision, in which the court grants summary judgment as to NLO 45.02.010 (B) and in which the court declines to hear Ms. Roberts' counterclaims, it appears that the only issue for trial will be whether Ms. Roberts' appeal was handled pursuant to NIHA policies and procedures in place at the time of the termination of her tenancy.

As to the hearing in an Unlawful Detainer action, NLO 45.02.040 provides in pertinent part:

The hearing shall be a summary judgment hearing based on the evidence submitted the day of the hearing. The Tribal Court must consider all proof in favor of the defendant(s). Once the plaintiff proves there are no genuine issues for trial, the burden shifts to the defendant(s) to set out specific facts that demonstrate there are genuine issues for trial...

(emphasis supplied)

Although specific procedures for trial are not set forth in Title 45, other than it would not be before a Jury, NLO 45.02.050, it is clear if summary judgment is not granted, that a trial on the complaint is to be held.

COUNTERCLAIMS

Ms. Roberts has raised counterclaims. They appear to include that her "property rights as an LIHTC Program home buyer are protected by the "Indian Civil Rights Act" (hereinafter "ICRA"), 25 U.S.C. 1302 (a)(5) and (8) and under Article X (sic) of the Nooksack Constitution. The ICRA provisions cited by Ms. Roberts involve 1] takings without just compensation and 2] due process. The court believes that Ms. Roberts means Article IX of the Nooksack Constitution, as Article X deals with the process for amending the Constitution and Article IX sets forth a Bill of Rights for Nooksack Tribal members, referring to the ICRA.

NIHA, in its reply, raises several defenses to the counterclaims asserted by Defendant:

1] That the counterclaims must fail because they were not served upon the Chairwoman of the Tribe as required by NLO 10.05.050(g) which states:

"In cases involving the Nooksack Indian Tribe, or its officers, agents, or employees as a named party Defendant, the Plaintiff shall serve initial process by way of certified mail, return receipt requested upon the Chairman and the Office of the Tribal Attorney...";

- 2] Sovereign Immunity bars the counterclaims;
- 3] Defendant fails to state a claim for relief, i.e., that the ICRA does not create a cause of action and that Defendant's Article IX claim fails because she is not a member of the Nooksack Indian Tribe; and
- 4] That Defendant's counterclaims cannot be raised in an unlawful detainer action, i.e., that the only issue is the right to actual possession of the premises.

The court will deal with the counterclaims by way of analysis of each of NIHA's responses thereto, and will deal with them in the order raised:

1] The counterclaims must fail because they were not served upon the Chairwoman of the Tribe.

This response must be addressed by construction of the term "initial process". If a counterclaim is "initial process", then it must be served on the Chairwoman or Chairman, as the case may be, of the Nooksack Indian Tribe.

Neither the term "initial process" nor "process" appears to be defined in the NLO's, either in Title 45 or Title 10. It is therefore necessary for the court to look to other sources to determine their meanings.

Black's Law Dictionary Online defines "original process" as follows:

"This a term that applies to the procedure and the method that is sued to commence a law suit."

Although NLO 10.05.020(d) is clear that the rules of civil procedure used in State or Federal court shall not apply to hearings, this court believes it is permissible to examine those rules in connection with answering what "process" might mean, especially when the term remains undefined in the NLO's. Looking at CR 4 from the State of Washington Rules of Civil Procedure, which is entitled "Process", it is clear that said rule applies to summonses. Federal Rule of Civil Procedure 4 is more directly entitled "Summons", and deals with the documents initiating a lawsuit, i.e., the summons and complaint.

Finally, the court looks to two sections under Title 10:

NLO 10.01.020 General Rules: The Tribal Court shall interpret tribal Titles resolutions, regulations and, policies in order that the substantive intent of the Tribal Council is ensured. The court shall not indulge in highly technical or

legalistic interpretations of tribal Titles, regulations, and policies when such interpretation would defeat the overall legislative goals of the Tribal Council.

NLO 10.00.080 – 10.00.080 Liberal Interpretation: These rules shall be liberally interpreted and applied to achieve the following purposes: reveal the truth, treat all parties fairly and without prejudice, secure simplicity in proceedings, and protect individual rights guaranteed by the Constitution and Bylaws of the Nooksack Indian Tribe, and encourage the application of traditions and customs of the Nooksack Indian Tribe.

Considering the apparent purpose of NLO 10.05.050(g) is to ensure the Tribal Chairperson (and thereby the Tribal Council) has notice of the initiation of a lawsuit filed against it, considering other definitions of the terms “process”, “initial process” and “original process” and considering the prohibition on engaging in highly technical or legalistic interpretations of tribal law, this court finds that “initial process” means documents filed to initiate an action, and does not include responsive pleadings such as counterclaims.

2] Sovereign Immunity bars the counterclaims

In *Olson v. NIHA*, 6 NICS App. 49 (2001), the Nooksack Tribal Court of Appeals held that sovereign immunity of the Nooksack Indian Tribe extended to the Nooksack Indian Housing Authority in an action filed by the Olsons in tribal court. The Olsons alleged that NIHA had violated their rights under the ICRA by evicting them from their home. The Court of Appeals affirmed the dismissal of the action based on sovereign immunity.

In making her argument that sovereign immunity doesn't apply in this case, Ms.

Roberts states:

“Under equitable recoupment doctrine, Nooksack sovereign immunity does not prohibit [Ms. Roberts'] counterclaims against NIHA because they arise out of the same transaction or occurrence and function of Nooksack government as NIHA's unlawful detainer claim and because [she seeks] the same types of relief sought by NIHA”.

The court disagrees.

Equitable recoupment may defeat a claim of sovereign immunity under limited circumstances:

Claims in recoupment arise out of the same transaction or occurrence, **seek the same kind of relief as the plaintiff, and do not seek an amount in excess of that sought by the plaintiff.**

Berrey v. Asarco Inc., 439 F.3d 636, 643 (10th Cir. 2006) (emphasis supplied)

An unlawful detainer complaint seeks restoration of possession of property to the owner. In this case, the relief sought is moneys to be paid as just compensation for an alleged taking and for an Injunction which restrains NIHA from taking Ms. Roberts home. It cannot reasonably be said that the counterclaim asking for just compensation seeks the same kind of relief as does the Plaintiff's complaint. No money, other than incidental expenses such as rent, unpaid utilities, etc., is sought by NIHA.

The counterclaim for a permanent injunction against "taking" the home in violation of the due process and taking clauses of the ICRA present a closer question. It must be noted that, even assuming that this counterclaim is correct, and that the ICRA and/or Article IX of the Nooksack Constitution establish a cause of action, the claim applies only to the housing unit itself and not the land upon which it is located, for that is held in trust by the United States for the benefit of the Tribe.

That having been said, Ms. Roberts presents no case or other authority holding that equitable recoupment may be asserted as a counterclaim to unlawful detainer. Indeed, one of the cases cited, *Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104 (N.D.N.Y. 2002), held:

Defendants contend that their disestablishment counterclaim sounds in recoupment and that the United States and Plaintiffs have therefore waived their immunity to such a claim by bringing this action. In order for the Court to exercise subject matter jurisdiction over Defendants' counterclaim as a claim

sounding in recoupment, the counterclaim must arise “out of the transaction that grounds the main action” and **must request only a set-off of damages, not affirmative recovery.** ... The rule governing sovereign immunity in recoupment actions is that **“a party sued by the United States may recoup damages ... so as to reduce or defeat the government’s claim ... though no affirmative judgment ... can be rendered against the United States.”**

Id at 136 (emphasis supplied)

The relief requested by Ms. Roberts is not a set off, nor is it of the same type requested by NIHA. This court holds that equitable recoupment cannot be interposed as a counterclaim in this unlawful detainer action.

3] Ms. Roberts fails to state a claim for relief, i.e., that the ICRA does not create a cause of action and that her Article IX claim fails because she is not a member of the Nooksack Indian Tribe

It is well established that, except for *habeas corpus*, the ICRA does not create a cause of action. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61, 98 S. Ct. 1670, 1678–79, 56 L. Ed. 2d 106 (1978):

“These precedents, however, are simply not dispositive here. Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but, to the contrary, **the structure of the statutory scheme and the legislative history of Title I suggest that Congress’ failure to provide remedies other than habeas corpus was a deliberate one.**”

(emphasis supplied)

Ms. Roberts has not cited, nor has this court’s research revealed, any case which has overruled the *Santa Clara Pueblo* Court’s holding on this point. The ICRA does not create an individual cause of action in the circumstances presented here, and this court will not recognize one.

Ms. Roberts would presumably would urge that this court recognize an individual cause of action under Article IX of the Nooksack Constitution, which states:

All members of the Nooksack Indian Tribe shall be accorded equal rights pursuant to tribal law. The protection guaranteed to persons by Title II of the Civil Rights Act of 1968 (82 Stat. 77) against actions of the Nooksack Indian Tribe in the exercise of its powers of self-government shall apply to the members of the Nooksack Indian Tribe.

Ms. Roberts has not provided any briefing or authority which support such a claim, had she expressly made it. Because of the lack of authority provided by Ms. Roberts on this issue, or found in this court's research, this court will not create such a cause of action.

NIHA argues that Ms. Roberts is not entitled to protection under Article IX as she is no longer a member of the Nooksack Indian Tribe. Because the court has previously determined above that Article IX creates no individual cause of action, even for a member, it does not rule on this claim.

4] That Defendant's counterclaims cannot be raised in an unlawful detainer action, i.e., that the only issue is the right to actual possession of the premises.

The text of Title 45 of the NLO does not mention counterclaims, nor does the procedure prescribed therein imply that they are to be allowed in unlawful detainer actions.

The court has found no Nooksack Court of Appeals case on this point. Nor has it found any cases from any Tribal Court on this point. Nor has Ms. Roberts cited any Tribal court authority or other cases on this point. Indeed, Ms. Roberts has not briefed this point at all.

NIHA, in its reply, has cited caselaw from other jurisdictions holding that counterclaims cannot be made in unlawful detainer actions, because unlawful detainer is meant to be a "speedy, simple and inexpensive means to recover possession of property":

[The lessor] relies on the general and well settled rule that counterclaims may not be asserted in an unlawful detainer action because the Legislature's intent in creating this action was to establish a summary procedure for determining the limited issue of the landlord's right of possession.

First Union Management v. Slack, 36 Wn.App. 849, 853 (1984)

It is clear from the structure of Title 45 that the Tribal Council intended that unlawful detainer be a summary procedure to restore possession of property to a landlord. The court is unwilling to create a right to bring counterclaims in unlawful detainer actions in the absence of statutory or decisional authority.

WHAT THE COURT CANNOT CONSIDER

This court is required to interpret and apply the Constitution and Bylaws of the Nooksack Indian Tribe of Washington (hereinafter "Nooksack Constitution") and Nooksack Laws and Ordinances (hereinafter "NLO") in cases in which it properly has jurisdiction. In this case, the Defendants have urged the court to:

- 1) Recognize that the Ms. Roberts dispute her disenrollment;
- 2) Treat the issue from a social work or human resources perspective, with a view toward "helping" Defendants in unlawful detainer actions;
- 3) Find that they are not renters but are rather homeowners; and
- 3) Consider the practical and real difficulties that eviction will bring to them.

Disputed Disenrollment

In essence, Ms. Roberts urges the court to consider the argument that she disputes her disenrollment from the Nooksack Indian Tribe. This is an issue that is not before the court. It has been alleged by the Nooksack Indian Housing Authority (hereinafter "NIHA") that she failed to re-establish eligibility to reside in the housing unit as required by NIHA policies and her rental agreement. Those allegations are substantiated respectively by Exhibits 7 and 3 to the Declaration of Laura Point-Solomon, filed in support of the Motion for Summary Judgment.

A View Toward Helping

While the court agrees that an approach which encourages success is appropriate in a social service or human resource context, such an approach is not one which the court is commissioned to take. Rather, the court must fairly and equitably apply the Nooksack Constitution and NLO without "help" to any party.

Homeowners not Renters

The allegation that Ms. Roberts is a homeowner rather than a renter is without support in the record. Neither the housing unit nor the reap property upon which it sits has not been conveyed to her.

Difficult Consequences

Ms. Roberts urges that she and her family will face difficult consequences if Writs of Restitution are granted. She goes on to argue that the proper response to a shortage of housing is not to evict them but to build more housing. None of these arguments can carry any weight in these proceedings.

ORDER OF THE COURT

The court grants NIHA's motion for summary judgment as to NLO 45.02.010 (B) and as to all issues under NLO 45.02.010 (C) except whether the tenancy was terminated pursuant to NIHA Policies and Procedures. The court will sign a Writ of Restitution consistent with this decision upon presentation by NIHA, either before or after trial on NLO 45.02.010 (C). Trial on the limited issue of whether Ms. Roberts' occupancy, and that of the other occupants of was terminated pursuant to NIHA Policies and Procedure is set for March 24, 2023 at 10:00 a.m.

Dated this _____ day of February, 2023

A View Toward Helping

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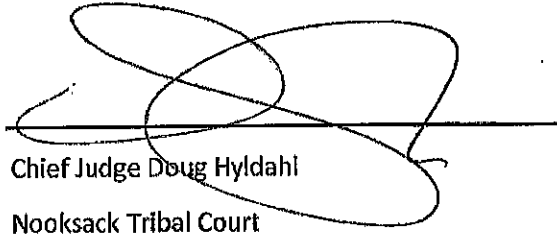
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Dated this 15 day of February, 2023



Chief Judge Doug Hyldahl
Nooksack Tribal Court

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

OSHIRO, *et al.*

Plaintiff

No. 22-2-00567-34

v.

WASHINGTON STATE HOUSING
FINANCE COMMISSION, *et al.*,

Defendants.

ORDER DENYING PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION

~~[PROPOSED]~~

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter came before the Court on *April 8, 2022* on *Plaintiffs Oshiro, et al.*, motion for an order granting a **prelliminary injunction** against *Defendants Nooksack Housing Limited Partnerships #2-#4 ("Defendants Partnerships")*. Counsel for the following parties were present:

For Plaintiffs: Corinne Sebren and Matthew Slovin, Galanda Broadman; For Defendants Partnerships: Rickie W. Armstrong, Nooksack Indian Tribe, Office Tribal Attorney; For Defendant Washington State Housing Finance Comm'n: Taki Flevaris, Kai Smith, Pacifica Law Group.

ORDER DENYING PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

PAGE 1 OF 5

1 The Court heard oral argument for counsel for *Plaintiffs, Defendants Partnership,*
2 *Defendant Washington State Housing Finance Commission.* The Court considered the pleadings
3 filed herein including the following declarations/evidence:

4 Declarations of: Alex Mills, Saturnino Javier (x2), David Bland, Elizabeth Oshiro, Norma
5 Aldredge, Michelle Roberts, Gabriel Galanda (x2), Francisco Rabang, Malori Klushkan, including
6 exhibits therein.

7
8 **Based on the argument of counsel and the evidence presented, the Court finds and**
9 **concludes:**

- 10
11 1. Plaintiffs currently reside in homes located in Whatcom County, upon Tribal trust lands,
12 owned by the United States government, held in trust for the benefit of the Nooksack Indian
13 Tribe (Tribe);
14
15 2. The Plaintiffs have not joined the Nooksack Indian Tribe, nor the United States of America
16 in this current action;
17
18 3. At a preliminary injunction hearing, plaintiffs bear the burden to prove a likelihood of
19 success on the merits by showing: (1) that they have a clear legal or equitable right; (2) that
20 they reasonably fear will be invaded by defendants' actions, and; (3) defendants' actions
21 will result in substantial harm. *Huff v. Wyman*, 184 Wn.2d 643 at 652 (2015).
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**ORDER DENYING PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

PAGE 2 OF 5

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4. Plaintiffs' failure to establish any one or more of the criteria requires that the requested injunctive relief be denied. *Id.* at 652.

5. Plaintiffs can obtain injunctive relief only if they show a "clear" legal or equitable right to not be evicted from the homes wherein each plaintiff-tenant currently resides by demonstrating that he or she has a clear legal or equitable right to remain in the housing units in the immediate future. *Id.* at 651-2.

6. Plaintiffs cannot obtain injunctive relief in a "doubtful case". *Huff* at 652.

7. Plaintiffs failed to meet their burden to obtain preliminary injunctive relief. Plaintiffs failed to demonstrate that they, either individually or collectively, have a "clear" legal or equitable right to remain in the homes in which they currently reside.

8. Substantial questions exist as to whether Plaintiffs can ultimately prevail at trial on the merits of their claims because of continuing concerns as to the following:

- a. Whether the Court has personal jurisdiction over persons not present;
- b. Whether the Court has subject matter jurisdiction given restrictions contained in R.C.W. § 37.12.060; as well as other federal law – *Williams v. Lee*; and
- c. Whether indispensable parties are not present at the current time, and whether those parties can feasibly be joined (Nooksack Indian Tribe; USA).

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It Is Ordered:

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION IS DENIED.

ORDERED THIS 13 DAY OF ^{April} 2022.

THURSTON COUNTY SUPERIOR COURT

[Handwritten signature of James Dixon]

Honorable Judge James Dixon

Presented by:
Approved as to Form:

Approved as to Form:

**ORDER DENYING PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

PAGE 4 OF 5

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NOOKSACK INDIAN TRIBE
OFFICE OF TRIBAL ATTORNEY

PACIFICA LAW GROUP

/s/ [Signature]
Rickie Armstrong, WSBA No. 34099
Tribal Attorney, Office of Tribal Attorney
For Nooksack Housing LP #2-4
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(360) 592-2227
ramstrong@nooksack-nsn.gov

[Signature] *for Taki Flevaris per [Signature]*
Taki Flevaris, WSBA 42555
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
For Washington State Hous'g Fin. Comm'n

Approved as to Form:

/s Matthew J. Slovin
Corinne Sebren WSBA No. 58777
Matthew Slovin, WSBA No. 58452
For Plaintiffs

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

OLIVE OSHIRO, et al.,

Petitioners,

v.

WASHINGTON STATE HOUSING
FINANCE COMMISSION, et al.,

Respondents.

No. 100827-9

RULING GRANTING REVIEW

Petitioners Olive Oshiro, Norma and Eugene Aldredge, Michael Rabang, Michelle and Rubert Roberts, Francisco Rabang Sr., Wilma Rabang, Alex Mills, and Saturnino Javier, formerly enrolled members of the Nooksack Tribe, seek direct discretionary review of a Thurston County Superior Court order denying petitioners' motion for a preliminary injunction against efforts to evict them from rented Nooksack tribal housing developed and managed by respondents Nooksack Housing Limited Partnership #2 through #4 (Nooksack Partnership). Another respondent in this matter is Washington Housing Finance Commission, which helped facilitate the federal tax credit program underlying financing of the tribal housing project. Because the superior court may have committed reviewable error as to some potentially dispositive issues, discretionary review is granted, as explained below.

This case leads back to a dispute over Nooksack tribal membership, a matter falling far outside this court's jurisdiction. Petitioners have lived for many years in the

Nooksack Tribe community, claiming to be enrolled members of the Tribe. Petitioners reside in modest leased homes situated on land owned by the United States government and held in trust for the benefit of the Tribe in Deming, Whatcom County.

This matter also involves a complex system of federal and state statutes and regulations and agreements between tribal and nontribal entities concerning housing programs for our native citizens. With respect to federally recognized tribes, Congress has stated, among other things, that it recognizes that “providing affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping tribes *and their members* to improve their housing conditions and socioeconomic status.” 25 U.S.C. § 4101(5) (emphasis added). Congress further stated that federal assistance for tribal housing “shall be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes or tribally designated entities.” 25 U.S.C. § 4101(7).¹

The rental properties at issue were developed and are managed by respondent Nooksack Partnership, a partnership between the Tribe and Native American Housing Fund V, L.L.C., a subsidiary of Raymond James Financial, Inc., headquartered in Florida. The Tribe is general partner and is responsible for .01 capitalization of the partnership. Native American Housing Fund is the limited partner and is responsible for 99.99 of the capitalization.

The partnership agreement partly describes the general purpose of Nooksack Partnership’s business as follows:

[T]o construct, rehabilitate, own and/or operate the Project, to hold, develop and operate it as income-producing property in a manner that will qualify for the Maximum Annual Credit in each year pursuant to the provisions of Section 42 of the code, and to engage in any other commercial enterprise

¹ The archaic term “Indian” is used only as it is quoted in statutes and regulations concerning this matter.

related to the ownership, construction, rehabilitation and/or operation of the Project not prohibited to limited partnerships under the Act.

App. to Mot. for Discr. Review at A-0717. The reference to Section 42 concerns 26 U.S.C. § 42, a section of the Internal Revenue Code providing tax credits for low income housing.

With Section 42 in mind, the Tribe entered into an agreement subordinating its interests in mortgages on the property to a tax credit regulatory agreement (agreement) with respondent Washington Housing Finance Commission (the commission) for purposes of supporting the low income housing project at issue here.

To obtain tax credit for the rental housing project, Nooksack Housing entered into a “regulatory agreement,” also called an “extended use agreement,” with the commission. The agreement sets up a 15-year initial tax credit period with the possibility of a five-year extension. Section 4.2 of the agreement states that the project is located on tribal land and that apart from section 12 of the agreement (related to dispute resolution by way of arbitration), nothing in the agreement,

shall operate to cause any federal, state or local laws that would otherwise not apply to Indian trust land or to an Indian tribal entity to apply by virtue of this Agreement, and that nothing herein will operate to subject activities on the Project property to the jurisdiction of any court other than the [Name of Tribal Court].

App. A-0025 to Mot. for Discr. Review.

Nooksack Partnership promised to rent all of the concerned housing units to residents eligible under low income guidelines at the time of their initial occupancy. As for evictions or nonrenewal of rental agreements, section 4.24 of the agreement states:

During the Compliance Period and Extended Use Period (i) no tenant of a Low-Income Housing Unit may be evicted, and (ii) the owner may not refuse to renew a rental agreement, other than for Good Cause and each rental agreement shall so provide. Further in addition to any other rights and remedies provided hereunder, any individual who meets the income limitation for a Low-Income Unit (whether a prospective, present or former occupant of the Building) shall have the right to enforce in any

State court or the [Name of Tribal Court] the requirements of this Section 4.24 and the commitments, restrictions and covenants set forth in Section 4.2 and Exhibit B hereof.

App. 0033 to Mot. for Discr. Review. The above-quoted provision requiring good cause for an eviction and allowing a tenant to seek relief in state or tribal court is similar to provisions in Section 42 requiring good cause for an eviction and allowing a tenant to seek relief in state court, but without any reference to tribal court. 26 U.S.C. § 42(6)(B)(ii), (6)(E)(ii)(I).

Section 1.37 of Exhibit C to the agreement defines “good cause” to mean in relevant part, a “serious or repeated violation of material terms of the lease as that phrase is applied with respect to federal public housing at 24 C.F.R. Section 966.4(l) or (2).” App. 0084 to Mot. for Discr. Review. The cited federal regulatory provision states in relevant part that a landlord may terminate a tenancy only for enumerated reasons, including failure to pay rent and “[o]ther good cause,” which includes, but is not limited to, “[d]iscovery after admission of facts that made the tenant ineligible,” and “[d]iscovery of material false statements or fraud by the tenant in connection with an application for assistance.” 24 C.F.R. § 966.4(l)(2)(iii)(B)-(C).

Policies and procedures promulgated and amended by the Nooksack Indian Housing Authority (now known as the Nooksack Housing Department but referred to as NIHA in this ruling) and approved by the Nooksack Tribal Council have consistently required that all participants in the Tribe’s housing programs be enrolled members of the Nooksack Tribe or enrolled members of a different tribe recognized by the United States. More specifically, a participant in the Tribe’s housing programs must be a member of a “Native Family,” “a family whose Head of Household or spouse is currently [an] enrolled member of a federally recognized Indian Tribe.” NIHA Program Policy & Procedures (2021) at 82, Exhibit 4 to Decl. of Malori Klushkan (filed Apr. 18,

2022).² There is an exception for non-native individuals who are deemed essential to the well-being of the tribal community. Expulsion from or failure to maintain membership in the Tribe is grounds for termination from such programs.

Petitioners applied for the tribal housing at issue, representing themselves as enrolled members of the Tribe. The Tribe at that time acknowledged petitioners' enrolled membership and approved them as tenants.

Petitioners' rental agreements were for initial six-month terms followed by month-to-month terms. The monthly rent was based on a low-income tax credit formula, generally ranging between \$0 and \$500 depending on the tenant's situation. There are no allegations petitioners failed to pay rent or failed to maintain their residences.

The housing units at issue were leased 10 to 16 years ago. Petitioners Olive Oshiro, Norma and Eugene Aldredge, and Michael Rabang occupied their dwellings in 2005 to 2006.³ All petitioners claim they understood that they would obtain ownership of their rental "units" after 15 years, and therefore they have a clear right to the immediate transfer or conveyance of ownership to them. But none of the individual rental agreements involved in this case include a rent-to-own provision. Nooksack Partnership denies these are rent-to-own properties.

NIHA policies identify two rent-to-own programs: Mutual Help Occupancy (MHO) and Low Income Housing Tax Credit (LIHTC). The units in question may fall within the LIHTC program, but the evidence presented thus far is not conclusive on that issue. Under the rent-to-own program, the renter eventually obtains ownership of the "unit" but must also maintain a sublease with the NIHA for the underlying tribal trust land. In other words, the resident obtains ownership of the structure but not the tribal

² This definition appears in previous versions of NIHA policies.

³ Oshiro applied for housing in 1999.

land underneath it. In any event, as indicated, NIHA's housing policies require enrolled membership in the Nooksack Tribe or another federally recognized tribe to participate in any of its housing programs, including ownership of a unit and the underlying sublease.

In 2016 the Tribe disenrolled petitioners, claiming that for many years they had fraudulently represented themselves as Nooksack people. It is unclear whether petitioners are alleged to have engaged in such fraud directly or whether their ancestors allegedly committed such fraud. In any event, the Tribe's decisions to disenroll each of these petitioners have not been reversed. Though petitioners continue to claim tribal membership, the validity of the Tribe's disenrollment decisions are not before this court. At oral argument, petitioners' counsel conceded there is no apparent evidence petitioners are enrolled members of other federally recognized tribes.⁴

Meanwhile, in the fall of 2021 the Tribe, through NIHA, notified petitioners that they were no longer eligible for tribal housing because they were not enrolled members of the Tribe. NIHA later notified petitioners that their housing rental agreements were terminated for failure to maintain tribal membership as a requirement for initial housing eligibility, followed by a demand that they vacate their leased premises. Petitioners refused to vacate. Tribal administrative grievance hearings did not alter the result. NIHA initiated unlawful detainer actions in the Nooksack Tribal Court but then paused

⁴ Some of the petitioners in this case sought relief from disenrollment by way of an action filed in federal court, naming as defendants current and former members of the Nooksack Indian Tribal Counsel, but the action ultimately failed. *See Rabang v. Kelly*, 328 F. Supp. 3d 1164 (W.D. WA. 2018), *aff'd*, 846 F. Appx. 594 (9th Cir. 2021). The district court, reasoning it lacked subject matter jurisdiction, dismissed the action without prejudice, concluding, "it is for the Nooksack Tribe, not this Court, to resolve [petitioners'] claims." *Rabang*, 328 F. Supp. 3d at 1169. Meanwhile, an apparent relative of one of the petitioners in this case filed an action in Whatcom County Superior Court against tribal employees, claiming emotional distress damages arising from eviction from different real property. The superior court dismissed the action without prejudice for lack of jurisdiction. That decision is subject to a pending appeal in Division One of the Court of Appeals. *Rabang, et ano. v. Gilliland, et al.*, No 83456-8-I.

further eviction action pending petitioner's administrative appeal to the Department of the Interior.⁵

Petitioners filed an amended complaint in Thurston County Superior Court naming as defendants the commission and Nooksack Partnership. Petitioners alleged causes of action for (1) a declaratory judgment that Nooksack Partnership was evicting petitioners without good cause in violation of federal laws, and that the commission failed to uphold its responsibility to monitor Nooksack Partnership's compliance with those laws; (2) apparently a declaratory judgment that the commission acted outside its regulatory authority and acted arbitrarily and capriciously under the Washington Administrative Procedures Act, chapter 34.05 RCW; (3) breach of a contract (the regulatory agreement) to which petitioners are third-party beneficiaries; (4) injunctive relief against Nooksack Partnership for evicting petitioners without good cause; and (5) wrongful eviction by Nooksack Partnership in violation of the Residential Landlord-Tenant Act, chapter 59.18 RCW. Petitioners sought a declaration that (1) there was no good cause to evict petitioners under federal law and the agreement, (2) petitioners had a right under the agreement to take ownership of their dwellings after 15 years of compliance with the agreement, and (3) Nooksack Partnership breached the agreement as to petitioners. Petitioners also sought an order requiring the commission to comply with chapter 43.180 RCW and enforce the agreement against Nooksack Partnership. Petitioners further requested a temporary restraining order and preliminary

⁵ The Bureau of Indian Affairs earlier criticized the Tribe for its disenrollment and eviction procedures but in more recent correspondence determined that the Tribe has thus far followed proper procedures in the disenrollment and termination of housing proceedings. This more recent communication is subject to the pending administrative appeal. A United Nations human rights agency weighed in against the evictions as well. But as noted, the disenrollment decisions appear to be final, and matters of tribal membership are beyond this court's jurisdiction. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) (tribe immune from federal court jurisdiction in disputes concerning tribal membership).

and permanent injunctions restraining Nooksack Partnership from evicting petitioners or terminating their housing.

As indicated, petitioners moved for a preliminary injunction against Nooksack Partnership. The Tribe's attorneys appeared on behalf of Nooksack Housing. Separately retained counsel appeared on behalf of the commission. The parties argued the motion before the superior court. The court observed that petitioners had not joined the Nooksack Tribe and/or the United States in the action. The court concluded that for purposes of injunctive relief petitioners had not met their burden of showing "that they, either individually or collectively, have a 'clear' legal or equitable right to remain in the homes in which they currently reside." Order Denying Plaintiff's Mot. for Prelim. Injunction at 3; App. A-1021 to Mot. for Discr. Review. The court further determined that "[s]ubstantial questions exist" as to whether petitioners could ultimately prevail in light of concerns regarding the court's personal and subject matter jurisdiction, whether the Tribe and/or the United States were indispensable parties, and whether those parties could be joined in the action. The superior court thus denied the motion for a preliminary injunction.

The court entered the above-described order on April 13, 2022. Petitioners filed the instant notice for discretionary review, motion for discretionary review and for injunctive relief, and statement of grounds for direct review on April 14, 2022. I denied the motion for injunctive relief on April 19, 2022.

On June 8, 2022, Department Two of this court granted petitioner's motion to modify my ruling and granted a preliminary injunction enjoining Nooksack Partnership from evicting petitioners pending my ruling on the instant motion for discretionary review. The matter then proceeded to a videoconference hearing on June 15, 2022. At the hearing I asked Nooksack Partnership to provide supplemental records concerning petitioners' applications for housing and NIHA policies, which have since been

provided. Now before me is whether to grant discretionary review and whether to retain this case in this court or transfer it to the Court of Appeals, possibly leaving it to that court to decide whether to grant review. RAP 2.3; RAP 4.2.

As a preliminary matter, it was represented at oral argument that none of the petitioners in this matter have been evicted. As indicated, NIHA represented to the Department of Interior that it paused eviction proceedings pending the administrative appeal, and this court subsequently enjoined the Nooksack Partnership from evicting petitioners pending a decision on this motion for discretionary review. Petitioners asserted at oral argument that an unlawful detainer hearing regarding one or more petitioners is scheduled to occur in tribal court on June 24, 2022. Nooksack Partnership is reminded of this court's order imposing a temporary injunction.

As for discretionary review, appellate courts generally disfavor interlocutory review, being reluctant to intervene in a pending lower court case to direct such court how to proceed. *Maybury v. City of Seattle*, 53 Wn.2d 716, 721, 336 P.2d 878 (1959); *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010). Petitioners contend interlocutory review is justified in this instance because the superior court committed probable error that substantially alters the status quo or that substantially limits a party's freedom to act. RAP 2.3(b)(2).⁶ This rule has two elements: probable error and prejudicial effect. Probable error is a relatively low threshold. As for the prejudice prong of the rule, in a recent decision that is not yet final, this court adopted an interpretation of RAP 2.3(b)(2) embraced by Division One of the Court of Appeals that has its origins in a law review article written by a previous commissioner of this court: the probable error criterion applies only when the prejudicial effects of the

⁶ There is no allegation that the superior court committed obvious error that renders further proceedings useless or that the lower court departed from the accepted and usual course of judicial proceedings, or a certification from the superior court that immediate appellate review is justified. RAP 2.3(b)(1), (3), (4).

error apply immediately outside the courtroom, not merely affecting the status of the instant litigation or limiting a party's freedom to act in relation that litigation. *In re Dependency of N.G.*, ___ Wn.2d ___, 510 P.3d 335, 2022 WL 1789311, at **3-4 (Wash.); *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014); Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1545-47 (1986). Injunctions, like the one requested here, fall within this rule. *Crooks*, 61 Wash. L. Rev. at 1545-46. More generally, RAP 2.3(b)(2) “typically requires a party to show that the party’s substantive rights will be impaired in some fundamental manner outside of the pending litigation.” *N.G.*, 2022 WL 1789311, at *4 (quoting Wash. Appellate Practice Deskbook § 4.4(2)(b) at 4-37 (4th ed. 2016)).

The “pending litigation” contemplated in RAP 2.3(b)(2) for purposes of this ruling is the underlying Thurston county matter. The superior court’s order denying petitioner’s request for injunctive relief certainly impairs their ability to avoid eviction from their tribal housing by way of tribal court proceedings. If there was probable error here, it substantially altered the status quo within the meaning of RAP 2.3(b)(2). Thus, the central matter here is whether probable error occurred.

Petitioners asked the superior court to issue a preliminary injunction against Nooksack Partnership barring it from proceeding with unlawful detainer proceedings against petitioners in tribal court concerning the possession of leased tribal housing on United States government land held in trust for the tribe. The court identified three threshold obstacles to petitioner’s request for injunctive relief: (1) lack of personal jurisdiction over “persons not present,” (2) lack of subject matter jurisdiction, and (3) the absence of the Tribe and the United States as indispensable parties and whether those absent parties could feasibly be joined.

The superior court's comment concerning jurisdiction over "persons not present" is rather vague. It may be a reference to the Tribe (or NIHA) and the United States and the related indispensable party issue. As indicated, this case ultimately concerns petitioners' right to reside in tribal housing located on federal land held in trust for the benefit of the Tribe. The indispensable party issue turns on whether an allegedly absent person is necessary—indispensable—for a just resolution of the case. *Auto. Union Trades Org. v. State*, 175 Wn.2d 214, 221-22, 285 P.3d 52 (2012). The court considers whether the absent party has a claim to a legally protected interest in the matter and whether its ability to protect that interest will be adversely affected by the action. *Id.* at 223. The absent party's "legally protected interest" must be "sufficiently weighty." *Id.* But an absent party's ability to protect its interests will not be harmed if its interests will be adequately represented by the already existing parties. *Id.* at 225.

This is a fairly debatable issue, at least with respect to the Tribe. Petitioners are correct that the nontribal partner controls nearly all of the initial capital put into Nooksack Partnership, but that line of argument ignores the obvious point that the Tribe is the true landlord in this case. In other words, the housing at issue sits on tribal trust land, and this case implicates the Tribe's right to have a say about who lives in housing intended for the Nooksack people. In this instance, the Tribe is acting mainly through NIHA, which filed unlawful detainer proceedings against petitioners.⁷ The United States' interest is based on its primary ownership of the land held in trust for the Tribe, but its interest in the outcome of this case is seemingly less acute than that of the Tribe. In particular, petitioners claim a right to occupancy and/or ownership of the rented dwellings but not the land underneath them.

⁷ This court's order enjoins Nooksack Partnership from evicting petitioners but the tribal entity that is actually trying to evict them is NIHA. But as indicated, NIHA represented to the Department of the Interior that it paused eviction action pending the administrative appeal. Any further action in the tribal court on the unlawful detainer proceeding will be highly problematic in light of this court's order imposing a temporary injunction.

On the other hand, it can fairly be argued that the Tribe's and NIHA's interest is adequately represented by Nooksack Partnership, which has been litigating this case with considerable vigor and is represented by the Tribe's attorneys. In fact, Nooksack Partnership referred to itself as the "Tribe" in its superior court proceedings. App. 0865 to Mot. for Disc. Rev. The superior court may have committed probable error with respect to the question of the Tribe and United States being absent and/or indispensable parties.

The indispensable party issue is intertwined with the question of personal jurisdiction. Neither the Tribe/NIHA nor the United States moved to intervene in this case. Until the court determines the indispensable party and subject matter jurisdiction issues, it may be premature to address personal jurisdiction.

Subject matter jurisdiction is even more debatable. In my earlier ruling I concluded the court lacks jurisdiction under RCW 37.12.060, which bars state court jurisdiction in cases involving tribal property. Although I continue to believe that jurisdictional rule applies generally, on deeper reflection I recognize there may be another avenue to state court jurisdiction if it can be determined that asserting jurisdiction would not infringe on the Tribe's rights to make its own laws and be ruled by them. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 181 Wn.2d 272, 276-77, 333 P.3d 380 (2014). Here, petitioners rely on the state court provision in 26 U.S.C. § 42 (h)(6)(b)(ii) and Section 4.24 of the regulatory agreement. This may be a close question. The federal statute applies to federally subsidized housing generally but not specifically to tribal housing, while the regulatory agreement ambiguously authorizes seeking relief in either state or tribal courts. It could be said that the pending tribal court action affords petitioners an adequate opportunity to vindicate their claims. The real question here it seems is whether the Tribe waived its sovereignty when it entered into the regulatory agreement. As indicated, NIHA oversees applications and

appointments for tribal housing and is the tribal agency seeking to evict petitioners. In doing so, NIHA applies policies approved by the Tribal Council. It would seem this court stepping into this matter could seriously affect the Tribe's ability to govern its people's housing affairs. On the other hand, and significant to this case, respondent commission stated at oral argument its position that state court jurisdiction exists by way of the statute and regulatory agreement. This important concession suggests the superior court may have committed probable error in determining it lacked subject matter jurisdiction.

We now turn to petitioners' request for injunctive relief. Petitioners must establish (1) that they have a clear legal or equitable right at issue, (2) that they have a well-grounded fear of immediate invasion of that right, and (3) that the acts they seek to enjoin have or will result in actual and substantial injury to them. *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1998). The second and third elements seemed to be well established: petitioners fear an immediate threat to their claim to tribal housing and losing such housing would have obviously disastrous effects on their lives. The potentially dispositive element is whether petitioners have a clear legal or equitable right to the tribal housing at issue. *Rabon*, 135 Wn.2d at 284. This necessarily requires this court to assess the likelihood petitioners will prevail on the merits. *Id.* at 285. They cannot obtain injunctive relief if the outcome is doubtful. *Huff v. Wyman*, 184 Wn.2d 643, 652, 361 P.3d 727 (2015).

Here, the superior court ruled petitioners "failed to demonstrate that they, either individually or collectively, have a 'clear' legal or equitable right to remain in the homes in which they currently reside." Order Denying Plaintiff's Mot. for Prelim. Injunction at 3; App. A-1021 to Mot. for Discr. Review. Petitioners argue they have an ownership interest in their dwellings as third-party beneficiaries to Nooksack Partnership's regulatory agreement—essentially an agreement to comply with regulations concerning

financing low-income housing programs. As indicated, there is no conclusive evidence that petitioners' housing rental agreements contemplate eventual ownership. The individual agreements appear to be simply six-month rentals that converted to month-to-month terms after the first six months. On the other hand, the Tribe maintains a rent-to-own program (LIHTC) that arguably falls within the orbit of the partnership and regulatory agreements. Relatedly, a housing management and marketing plan for the rental housing project contemplates eventual ownership for qualifying renters. In light of some evidence of a rent-to-own program, petitioners' argument concerning an ownership interest in their rental units is worthy of further exploration.

But ultimately, petitioners face a particularly daunting hurdle: they are no longer enrolled members of the Tribe. I am mindful that petitioners do not concede their loss of enrolled membership, but they recognize also that this court cannot adjudicate their tribal status. As it stands now, they are not enrolled members of the Tribe, and petitioners' counsel conceded at oral argument that there is no apparent evidence that petitioners are enrolled members of any other federally recognized tribe.⁸ Lack of tribal membership arguably undermines petitioners' claims in light of the "good cause" eviction requirement set forth in the federal statute and the regulatory agreement. As indicated, "good cause" to evict a tenant exists if "[d]iscovery after admission of facts that made the tenant ineligible," or "[d]iscovery of material false statements or fraud by the tenant in connection with an application for assistance." 24 C.F.R. § 966.4(l)(2)(iii)(B)-(C). As indicated, petitioners represented and were deemed to be enrolled members of the Tribe when applying for housing, but years later the Tribe determined they were not Nooksack people after all and disenrolled them accordingly. NIHA's housing eligibility policies cannot be any clearer: the applicant or participant must be an enrolled member of the Tribe or any other tribe recognized by the United

⁸ This is not to say petitioners are not indigenous people.

States. There is nothing this court can do about that. Petitioners' argument that lack of tribal membership does not constitute good cause to evict them from tribal housing lacks persuasive weight. It therefore appears "doubtful" petitioners can prevail in the end. *Huff*, 184 Wn.2d at 652.

Notwithstanding petitioners' arguably weak case for injunctive relief, discretionary review is justified due to the superior court's probable errors as to indispensable parties and subject matter jurisdiction. Since those threshold issues are potentially dispositive, the court may not need to reach the injunctive relief issue. If the court does reach that central issue, the parties will have the benefit of an authoritative decision on this potentially recurring issue concerning tribal housing. Furthermore, this case is of sufficient urgency and potential state-wide importance to be retained in this court for a decision on the merits. RAP 4.2(a)(4).

The motion for discretionary review is granted and the case is retained in this court. The clerk of the court will issue a scheduling letter and set a date for oral argument. The court's temporary injunction remains in place until this case becomes final (when the mandate is issued), at which time the injunction will be lifted automatically, or until this court orders the injunction to be lifted on some other date.


COMMISSIONER

June 23, 2022

THE SUPREME COURT OF WASHINGTON

OLIVE OSHIRO, et al.,)	No. 100827-9
)	
Petitioners,)	ORDER
)	
v.)	Thurston County Superior Court
)	No. 22-2-00567-34
WASHINGTON STATE HOUSING)	
FINANCE COMMISSION, et al.,)	
)	
Respondents.)	
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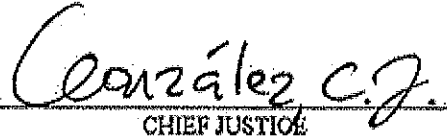
On September 15, 2022, the Court considered the Respondents’ motion to modify the Commissioner’s ruling granting discretionary review of a Thurston County Superior Court order denying the Petitioners’ request for an injunction against their evictions. This Court had previously entered a temporary injunction pending a decision on discretionary review, which the Commissioner’s ruling extended until the case became final. A majority of the Court, finding review was improvidently granted, voted in favor of the following result:

IT IS ORDERED:

That the Respondents’ motion to modify is granted. The Petitioners’ motion for discretionary review is denied. The previously imposed injunction is hereby dissolved.

DATED at Olympia, Washington, this 16th day of September, 2022.

For the Court


CHIEF JUSTICE

NOOKSACK TRIBAL COURT
NOOKSACK INDIAN TRIBE
AUG 24 2022
TIME: 9:07 AM
FILED BY: CH CLERK: [Signature]

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**IN THE NOOKSACK TRIBAL COURT
FOR THE NOOKSACK INDIAN TRIBE
DEMING, WASHINGTON**

NOOKSACK INDIAN HOUSING AUTHORITY, Plaintiff. v. SATURNINO JAVIER, SR., Defendant.	Case No. 2022-CI-HSG-001 ORDER DENYING MOTION FOR LEGAL REPRESENTATION BY GABRIEL S. GALANDA
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THIS MATTER came before the Court on the Defendant's Motion to Allow Legal Representation dated July 12, 2022. The Motion requests that attorney Gabriel S. Galanda and the law firm of Galanda Broadman, PLLC be permitted to represent Defendant as his legal counsel in this matter. The Plaintiff responded with the decisions of the Nooksack Tribal Court of Appeals and the Nooksack Supreme Court in previous cases addressing the ability of Gabriel Galanda and the Galanda Broadman law firm to practice law in the Nooksack Tribal Court. Plaintiff also opposed the Motion in its Response to Motion for Continuance dated August 10, 2022 and filed on August 12, 2022.

Law of the Case

The Court has previously ruled on this request of the Defendant. By Order filed May 18, 2022 the Court denied that request because Mr. Galanda has not received a Business License

1 from the Nooksack Tribe, and therefore is not authorized to be admitted to the Bar of the
2 Nooksack Tribal Court pursuant to Nooksack Tribal Code §10.02.010. That is the law of the
3 case in this action.

4 Moreover, to be eligible for admission to the Tribal Court Bar the Business License is to
5 be renewed each year. *See, N.T.C. §10.02.010 and N.T.C. §54.02.030(C)*. There is no evidence
6 in the record that Mr. Galanda has attempted to obtain or renew a Business License since 2016.

7
8 **Previous Appellate Court Orders**

9 The court is aware of the reliance of Mr. Galanda upon previous Orders of the Nooksack
10 Tribal Court of Appeals in In re: Gabriel S. Galanda, pro se, et al., Nooksack Tribal Court of
11 Appeals, Case No. 2016-CI-CL-001 & 002. The Court has reviewed the Orders of the Court of
12 Appeals and the Nooksack Supreme Court in that action.

13 The language relied upon by Mr. Galanda in the Nooksack Court of Appeals Order is as
14 follows:

15 . . . we now hereby order that pending a full and fair review before the Nooksack
16 Tribal Court of the Plaintiffs' claims that their rights of due process have been
17 infringed by the Nooksack Tribal Council, no action of disbarment is to be taken
18 against the Plaintiffs and, if it appears on the record of the Tribal Council by
19 resolution or otherwise that they have already been disbarred, the disbarment is
20 stayed and the Plaintiffs are reinstated as advocates admitted to practice before the
21 Nooksack Tribal Court.

22 *In re Gabriel S. Galanda, pro se, et al. v. Nooksack Tribal Court, Case No. 2016-CI-CL-001 &*
23 *002, Order Regarding Plaintiffs' Second Motion for Show Cause Order Re: Partial Summary*
24 *Judgment, Contempt, or Mandamus, at p. 2 (Nooksack Tribal Court of Appeals Order dated*
25 *September 21, 2016).*

26 There are two issues regarding this Court of Appeals Order which prevents this Court
27 from honoring that language. First, that case has been concluded and no injunction or other

1 permanent relief was ordered by the Court of Appeals permitting Mr. Galanda to practice law in
2 the Nooksack Tribal Court which survived termination of that appellate case.

3 Second, that Order was specifically vacated by Order of the Nooksack Supreme Court.
4 *See, In re: Orders Entered by Nooksack Tribal Court of Appeals after May 30, 2015, Nooksack*
5 *Indian Tribe, et al., Petitioners, Order Vacating Tribal Court of Appeals Orders as Void, at p.2,*
6 *(Nooksack Tribal Supreme Court Order dated September 21, 2016).* This Court is bound by the
7 opinions of the Nooksack Appellate Courts. As the Order relied upon by Mr. Galanda has been
8 vacated, it is not reliable precedent binding this Court's decision on the pending Motion to
9 Permit Legal Representation.

10 Moreover, those proceedings occurred in 2016. Those prior proceedings would not
11 control this Court's opinion on the pending Motion without a showing that a current annual
12 Business License had been sought or obtained, which is a condition precedent to Mr. Galanda's
13 right to practice as an advocate in the Nooksack Tribal Court.

14 15 Ghostwriting

16 The Court notes that in the Motion to Allow Legal Representation dated July 12, 2022,
17 the Defendant states the following:

18 . . . As the Court knows from the last hearing in *NIHA v. Nicol-Mills*, Mr.
19 Galanda has helped me and my cousin by "ghostwriting" our papers, but I need
20 and deserve an oral advocate. . . .

21 *Motton to Allow Legal Representation, at p. 4, lines 9 – 10.*

22 This statement is of extreme concern to the Court. The Nooksack Tribal Code requires
23 advocates in the Court to adhere to certain standards of conduct. One of those standards
24 obligates an advocate to disclose assistance provided to litigants before the Court:
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Any advocate who prepares a pleading for an otherwise pro se litigant must disclose such assistance, including the phrase "Prepared with the Assistance of Counsel" on the pleading, and identifying the advocate. Ghostwriting that represents a pleading to be pro se when it is in fact a product of the advocate is a deception on the court and a per se violation of Rule 14 of the Advocates Code of Conduct.

N.T.C. §10.02.020(c) quoted in full: see also, Nooksack Advocates Code of Conduct, Rule 14 entitled "Ghostwriting."

On August 10, 2022 the Court received a facsimile transmission of pleadings from Mr. Galanda's law firm submitted on behalf of Mr. Javier in this case. The Court has continued to receive a number of pleadings on behalf of Mr. Javier from that law firm subsequent to the Court's ruling of May 18, 2022. None of these pleadings contain the disclosure required by N.T.C. §10.02.020(c).

The fact that Mr. Galanda and his law firm have continued to provide legal services to the Defendant by ghostwriting pleadings without disclosing the assistance of counsel, and directly contrary to this Court's ruling of May 18, 2022, is of grave concern to the Court. This matter shall be referred to the Chief Judge of the Nooksack Tribal Court pursuant to N.T.C. §10.02.090 for any further proceedings as the Chief Judge deems necessary.

The Motion is denied.

SO ORDERED this 23rd day of August, 2022.

NOOKSACK TRIBAL COURT

By: 
Charles R. Hostnik, Judge Pro Tem