

IN THE TRIAL COURT OF THE
MODOC NATION
MIAMI, OKLAHOMA

MODOC NATION, a Federally Recognized)
Indian Tribe, by and through its Elected Council,)
Plaintiff,)
)
vs)
)
KIRK MILLER, BEN KARNES, DANNY)
BURKYBILE, EDD MILLER, ANITA)
WILLIAMS, AND JASON CLARK,)
Defendants.)

Case No.: CIV-22-001

FILED

ORDER

THIS MATTER came before the undersigned duly elected Judge of the Modoc Nation and the specially appointed Associate Judge on June 29, 2022 for a show cause hearing upon Plaintiff’s Emergency Ex Parte Application for Emergency Restraining Order, Preliminary Injunction and Declaratory Relief. The Court is also in receipt of Plaintiff’s Motion for Order to Show Cause for Contempt and Attorneys’ fees.

The Plaintiffs appear by and through counsel, Conley Schulte and Patrick Bergin. Defendants appear by and through counsel, Joe Keene.

Having heard the arguments of counsel and reviewed the pleadings, including the evidence attached thereto and the points and authorities identified therein, being fully advised, premises considered, and for good cause shown the Court does FIND and ORDER as follows:

1. Jurisdiction is proper in this Court pursuant to Article VII of the Constitution of the Modoc Nation. The Court further FINDS that the Honorable Jack Shadwick has been duly appointed to fulfill the term of the previously elected Judge of the Modoc judiciary. Furthermore, the Court FINDS the Honorable Judge Shadwick has, within his authority, appointed a special judge in the Honorable Marsha Harlan. Both judges sit for this matter.

2. That the Defendants have filed an Opposition to Plaintiff’s Emergency Ex Parte Application for Emergency Restraining Order, Preliminary Injunction and Declaratory Relief and, in doing so, request in footnote 5 that Judge Harlan consider recusing herself for the reason

that she is associated with the Modoc Tribal Attorney, Troy Little Axe, Jr., and same could give the appearance of bias.¹ The Court has considered this request and does hereby DENY the request to recuse for the reason that Mr. Little Axe is not an attorney of record in this matter. Further, Mr. Little Axe has no authority over Judge Harlan and Judge Harlan's contract with the Modoc Nation is independent of her rights and responsibilities to the shared interest in a law firm.

PROCEDURAL HISTORY

1. On or about April 7, 2022, the Modoc Nation received three (3) applications in which discrepancies were allegedly identified by the Nation's Enrollment and Cultural Department. As a result of these alleged discrepancies, the Nation undertook a limited internal investigation of enrollment actions taken by the Tribal Registrar in the preceding three (3) years. On or about April 11, 2022, the Enrollment and Cultural Department concluded that there were potential irregularities in the investigation surrounding the processing of enrollment applications. Further, the Enrollment Committee had not undertaken its obligation to approve or disapprove of enrollment applications since approximately 2003. Based upon the alleged irregularities and the lack of approval by the Election Committee, which is comprised of the Elected Tribal Council, the Election Committee determined an official audit was to be had to determine the validity of enrolled members. The Election Committee contracted the services of Wipfli LLP to conduct the audit and the audit is reportedly underway at this time.

2. That the Constitution of the Modoc Nation specifies that an annual meeting of the Tribal Council (all members having attained the age of 18) is to be held on the first Saturday of May with appropriate notice being required to be given by the Secretary/Treasurer of the Modoc Elected Council at least ten (10) days prior to the date of the meeting.² The first Saturday of May in 2022 would have been May 7.

3. That as a result of the alleged discrepancies of the enrollment records and the ongoing global pandemic, the Elected Tribal Council issued a public notice on April 21, 2022, and passed

¹ Defendant's Opposition to Plaintiffs' Emergency Ex Parte Application for Emergency Restraining Order, Preliminary Injunction and Declaratory Relief, fn. 5, p.5

² *Constitution of the Modoc Nation*, Article X, Section 1.

Resolution 22-16, that the constitutionally required annual meeting would be postponed for a period of time. The reason given for the postponement was to protect the health and safety of the Nation and to preserve the integrity of the impending tribal election. The date for the annual meeting was set for August 6, 2022 and was subject to the issuance of the Final Enrollment Audit Report. This notice was publicized in local media, the Nation's website and by a mailing to all tribal members on or about April 26, 2022. Additionally, the Elected Council also passed Resolution 22-17 in which they amended the Election Ordinance to remove the date of May 7, 2022.

4. That between the approximate dates of April 23, 2022, to May 6, 2022, Defendant Karnes published multiple posts on social media in which he encouraged tribal members to "stand together" and calling for the annual meeting to convene on May 7, 2022. At the time of this public postings, Defendant Karnes was not an elected official nor was he authorized by the properly sitting Elected Tribal Council to act on behalf of the Secretary/Treasurer to give notice of the annual meeting.

5. That Plaintiffs allege Defendant Karnes also published a previous post (one made by the Nation prior to the Elected Council's decision to postpone the annual meeting) announcing the May 7, 2022 annual meeting. Plaintiffs allege the publication was done to confuse tribal members as no mention was made of the subsequent postponement decision or notices.

6. That on May 7, 2022, the Defendants, along with several other tribal members, gathered for the purpose of conducting an annual meeting. That during the meeting, the Defendants and those members gathered held an election in which Defendants Kirk Miller, Ben Karnes, Danny Burkybile, Edd Miller and Anita Williams were allegedly elected as the new Elected Council members. The purported action also included the election of Jason Clark as the elected Judge of the Modoc Nation.

7. That in an attempt to clarify the appropriateness of the convened annual meeting, the previously seated Elected Council issued a public memorandum on May 7, 2022 in which they denounced the meeting attended by the Defendants and emphasized the annual meeting had been postponed to August 6, 2022.

8. That on or about June 7, 2022 the Defendants filed an application for temporary restraining order with the purported judiciary overseen by Jason Clark. That Court set a hearing for June 14, 2022 at the Modoc Nation headquarters. While it is disputed whether appropriate service was provided to the Plaintiffs of that hearing, the Plaintiffs denied access to the Modoc Administration Building and the Defendants, along with Mr. Clark, reportedly moved to an undisclosed location and proceeded to hold the restraining order hearing.

9. Simultaneous to the Clark Court holding a hearing, the Plaintiffs filed the instant action and this Court granted an Ex Parte Emergency Temporary Restraining Order prohibiting the Defendants, or any agents acting on their behalf, from entering the governmental offices of the Modoc Nation for the purpose of interfering with, or conducting, any business related to the governance of the Modoc Nation; and holding themselves out as elected governmental officials and thereby acting as Modoc Nation officials.³

DECISION

The competing court orders and the purported dueling Elected Councils have resulted in this Court hearing this matter on the merits of the Preliminary Injunction in an attempt to avoid a constitutional crisis that jeopardizes the political integrity of the Modoc Nation as well as causes harm to the health and welfare of tribal members, or otherwise abridges the rights and responsibilities of the Modoc people.

While this Court FINDS that accurate membership records are an integral part of any sovereign tribal government, the issues surrounding membership disputes involving the electoral process may be resolved by the due process rights afforded in the Modoc Nation Election Ordinance at Section 5(D).⁴ As stipulated by both counsel, no parties have been dis-enrolled as of this date and any plan to do so is mere conjecture at this point. As such, the Court will not address the validity of various tribal members' status at this time but instead will leave the decision as to whether a person is qualified to run for office or qualified to vote in the hands of the Election Commission pursuant to the Election Ordinance.

³ Ex Parte Temporary Restraining Order dated June 14, 2022.

⁴ Modoc Election Ordinance (January 25, 2022), Section 5(D).

As to the issue of the validity of the annual meeting reportedly held on May 7, 2022, this Court FINDS the actions of those members attending were contradictory to the constitution in that the meeting was not properly called by the Secretary/Treasurer and the influx of information being distributed was nothing short of confusing to tribal members. While some tribal members were likely informed the meeting would be postponed, others were led to believe the meeting would proceed as originally scheduled on May 7, 2022. However, the Defendants, specifically Defendant Karnes, did not have authority to call an annual meeting. To enforce Article X of the Modoc Nation Constitution, any tribal member could have, and should have, filed a writ of mandamus with this Court. This is the remedy for enforcing government action or inaction. It is rarely, and certainly not in this instance, an authorized act to employ “self-help” in enforcing governmental functions.

Moreover, the Court is cognizant of Defendants’ argument that the Court was not in existence or operational; however, this Court does not FIND that argument to be plausible as there was a properly elected judge seated prior to her resignation earlier in the year which is sufficient evidence of the existence of the Court. The Court notes that the Elected Tribal Council did not appoint a subsequent judge until on or about June 8, 2022. However, if the Defendants had filed an action, most assuredly the Elected Council would have, or should have, appointed the successor judge to hear the matter. It is not enough for Defendants to simply assume the Elected Council would have ignored their obligations to seat a judge to hear tribal disputes and this Court is not persuaded by the argument that there didn’t appear publicly to be a Court, thus the Court FINDS it was unjustifiable that no filing was sought.

The fact that no meeting was properly called by the Secretary/Treasurer, as evidenced by Ramona Rosiere’s declaration, yet the Defendants gathered for an annual meeting, is a potential disenfranchisement to other tribal members/voters and a violation of Article XVI of the Modoc Constitution in which members are entitled to certain and specific protections of their civil rights and liberties.⁵ One of the primary rights are the protection of the right to vote and due process of law. The Constitution of the Modoc Nation requires notice to all eligible voting members and not just those of whom follow Defendant Karnes on social media. The actions of the Defendants,

⁵ *Constitution of the Modoc Nation*, Article XVI

while they may have been offered with good civic intentions, resulted in confusion and violated the at-large tribal memberships' due process protections and their right to vote. For the annual meeting to be valid, it must have been called by the properly seated Secretary/Treasurer, who at the time was Ramona Rosiere, and no evidence has been provided which contradicts Secretary/Treasurer Roseie's declaration that she did not call for the annual meeting. This Court is aware that various individuals within the Modoc Nation caused there to be a publication of the impending annual meeting on May 7, 2022 but that doesn't circumvent the requirement of Article X, Section 1 which specifically requires a notice and time be given by the Secretary/Treasurer through communications such as radio or television.⁶

The Plaintiffs are also not without fault in this matter. A plain reading of the Constitution of the Modoc Nation requires an annual meeting be held on the first Saturday in May. The wording of the Constitution is specific - it says "shall." This is not permissible but rather mandatory language. While there may be exigent circumstances, such as a global pandemic wherein hundreds of thousands of people are dying, that would be sufficient cause for delay of the annual meeting, the Court is not persuaded that the pandemic is in fact the reason the 2022 annual meeting was postponed. Rather, all evidence points to the fact that the Elected Council sought to postpone the annual meeting in order to identify rightful members of the Modoc Nation. It would seem the ongoing pandemic was a secondary reason for the delay; however, it does not escape this Court that in general, society has returned to pre-pandemic gatherings for some time now. Further, masks and social distancing could have been employed in an effort to overcome the pandemic risks. Additionally, and as stated above, while the Court does find tribal membership to be an important component to the sovereign existence of a tribal nation, there were a multitude of other ways in which the situation could have been handled. One example would have been to verify whether the ballots being cast were done so by a qualified member. For those whose tribal membership was questionable, the ballots could have been sealed and held until that person's qualifications as a member were ascertained. There is no requirement in the Constitution of the Modoc Nation to *complete* the electoral process on the first Saturday of May. In fact, the Constitution contains at least two provisions for the seated members of the

⁶ *Constitution of the Modoc Nation*, Article X, Section 1

Elected Council and the judicial branch to remain seated until their successor is duly elected and installed.⁷

In addition to the mandatory provision for the date of the annual meeting, the same provision, Article X, Section 1, also mandates the Secretary/Treasurer give notice of the annual meeting, including the time and place.⁸ Again, this is not permissive language. It is a mandatory duty of the Secretary/Treasurer to act. The failure to act could have been, and should have been, addressed through court action. Once more, the appropriate remedy would have been to acquire a writ of mandamus requiring the Secretary/Treasurer, Ramona Rosiere, to act.

For the foregoing reasons, the Court FINDS that neither side is without fault but it is the at-large tribal members who are negatively impacted. The actions of both sides have led to turmoil and angst as to the political integrity of the Modoc Nation, a great nation with a beautiful yet traumatic history that is to be protected, not taken lightly or to be assaulted by action or inaction that can only lead toward a constitutional crisis and infighting amongst the people.

ORDER

Based upon the foregoing, the Court does hereby ORDER as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the purported May 7, 2022 annual meeting was not validly called by the Secretary/Treasurer and therefore any elections, decisions or votes made or taken during that occasion are hereby null and void.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants are not properly elected as a result of the invalid annual meeting and therefore have no authority to act as elected officials of the Modoc Nation and are hereby enjoined from acting in any capacity as a governmental official of the Modoc Nation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs have met the required elements for a temporary injunction and have established 1) that they have a substantial likelihood of prevailing on the merits as the purported meeting was invalidly held; 2) that the Modoc Nation will suffer irreparable harm if the injunction is denied as there cannot possibly be a protection of the political integrity of the Modoc Nation with two competing

⁷ *Constitution of the Modoc Nation*, Article IV, Section 2; and Article VII, Section 3 respectively.

⁸ *Constitution of the Modoc Nation*, Article X, Section 1

Elected Councils and two competing courts; 3) that the threatened injury to the movant outweighs the injury that the opposing party will suffer under the injunction in that the political integrity of the Modoc Nation is to be protected and the Defendants can certainly seek qualifications to be placed on the ballot for elective office at a duly called annual meeting; and 4) that the injunction would not be adverse to the public interest as the protections of the due process rights of the Modoc tribal members are paramount, there can be no question that this injunctive relief is not adverse to the public.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as a result of the previous provision of this order wherein all actions taken at the purported annual meeting on May 7, 2022 have been found to be void, including the election of a judge, the Court order issued by Jason Clark is void.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court **DECLARES** that the Elected Tribal Council has a constitutional duty to have the annual meeting on the first Saturday of May and that they failed to do so timely. Therefore, this Court **ORDERS** the Elected Council to proceed in making preparations for the annual meeting which is to be held on August 6, 2022 - approximately 37 days from the filing of this order. This Court does hereby **DECLARE** that the August 6, 2022 annual meeting shall include required elections for the Elected Tribal Council and any questions as to valid voters shall be resolved by the Election Commission. **NO ELECTED OFFICIAL MAY POSTPONE THE ANNUAL MEETING ANY FURTHER.**

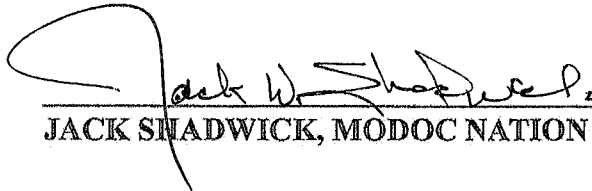
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Secretary/Treasurer of the Modoc Nation has a constitutional duty to give "appropriate notice of the time and place for the annual meeting" and to do so "through communications such as radio or television at least ten (10) days prior to the date of the meeting," and that the properly seated Secretary/Treasurer failed to act accordingly. Therefore, this Court **ORDERS** Secretary/Treasurer Ramona Rosiere to give, or cause to be given, appropriate notice of the time and place of the annual meeting to be held on August 6, 2022 within ten (10) days of the issuance of this **ORDER**. That said notice be made public at the direction of the Secretary/Treasurer in a written declaration on or before July 27, 2022 and that same be made by publication in various outlets

including radio, television, Modoc Nation website, mailings, social media, electronic correspondence and the like.


IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court has pending before it a motion for show cause as to contempt against the Defendants and same shall be **STAYED** pending further hearing on the merits of Plaintiff's complaint for Declaratory and Injunctive Relief.

IT IS FINALLY ORDERED, ADJUDGED AND DECREED that the Court will hold a hearing on the merits of the Complaint for Declaratory and Injunctive Relief on July 20, 2022 at 1:00 p.m. if the parties believe same is necessary. Any such hearing will be held via Microsoft Teams and notice will be provided of the link within 48 hours of the hearing.

IT IS SO ORDERED.



JACK SHADWICK, MODOC NATION JUDGE



MARSHA HARLAN, SPECIAL ASSOC. JUDGE