

MEMORANDUM

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

TO: Urmi Sharma, President, Next Voting

FROM: Calandra McCool, Nisqually Tribal Election Attorney

DATE: May 15, 2022

RE: Legal Opinion on Tribal Council Vice President and Tribal Council Treasurer Election Protests

INTRODUCTION

Pursuant to § 13.02.02(c) of the Nisqually Election Code, the Tribal Council of the Nisqually Indian Tribe (“Tribe” or “Nisqually Tribe”) together with third-party election auditor Next Voting have hired Big Fire Law & Policy Group LLP (“Big Fire”) to act as Tribal Election Attorney. On May 12, 2022, the Tribe’s duly appointed Third-Party Election Auditor, Next Voting, verified two Election Protests (“Protests”) regarding the Tribe’s May 7, 2022 General Election and appointed Big Fire to investigate the Protests as provided in § 13.03.01(c). Both Election Protests specifically allege that the General Election violated § 13.02.09 in a manner that materially affected the outcome of the election by failing to provide additional reminders and updates, § 13.02.09(f), and failure to print notice of the General Election in the Tribal newsletter, § 13.02.09(b).

My fact investigation included review of the factual allegations contained in the Election Protests and the exhibits attached thereto. Big Fire further requested specific input from Next Voting and Nisqually Tribal Attorney Nate Cushman to respond to questions relevant to the allegations, as both of those parties have first-hand factual knowledge of the disputed issue. Both Next Voting and Mr. Cushman assisted with Big Fire’s investigation and provided responses that furthered the progress of my investigation.

My legal analysis included review of the Nisqually Tribal Constitution, Title 13 of the Nisqually Tribal Code (“Election Code”), and general principles of election law and statutory construction.

In the findings of fact and conclusions of law set forth below, I have concluded that the General Election held on May 7, 2022 did not violate § 13.02.09(f) of the Election Code, and while a violation of a portion of § 13.02.09(b) occurred, it did not materially impact the outcome of the election such that a second General Election is warranted. The Election Code requires multiple, redundant election notices to be published. The Election Protests have

failed to demonstrate that a failure of a single lower tier notice requirement changed the result of the General Election. Neither the facts nor the law justifies the expense and disruption of a second General Election. As a result, I recommend that Next Voting does not invalidate the General Election Results for either Tribal Council Vice President or Tribal Council Treasurer.

I. FINDINGS OF FACT

1. The dates of the Tribal General Council Nominations Meeting, Primary Election, and General Election are prescribed by Title 13 of the Nisqually Tribal Code.
2. § 13.02.06(a) of the Election Code requires that the General Council Nomination Meeting occur on “the first Saturday of February.”
3. § 13.02.07(a) of the Election Code requires that the Primary Election occur on “the second Saturday of March.”
4. § 13.02.08(a) of the Election Code requires that the General Election occur on “the first Saturday of May.”
5. The location of the Primary Election and the General Election is also statutorily required to be the Billy Frank Jr. Gymnasium, “unless the Tribal Council has approved by Resolution, no less than ten (10) days prior to the election, an alternative polling place elsewhere on the Nisqually Reservation.” Election Code §§ 13.02.07(c) and 13.02.08 (c).
6. The Nisqually Tribal Election Code is available to the public on the Nisqually Tribe website.
7. Next Voting prepared a notice of general election, including the dates, time, and location for the General Council Nominations Meeting, the Primary Election, and the General Election as required by Election Code § 13.02.09 (“First Notice”).
8. On January 12, 2022, the First Notice of the 2022 election cycle was mailed to the last known address of each Eligible Voter and posted at the Tribal Center and elsewhere on the Reservation.
9. The First Notice included the dates, times and locations for the General Council Nominations Meeting, the Primary Election, and the General Election.
10. On January 12, 2022, Next Voting and Nate Cushman directed the Nisqually IT Department to push the notification to the appropriate departments to publish the First Notice on the Tribe’s website, on the Tribe’s social media, and in the Tribe’s newsletter, the Squalli Absch News.
11. On January 12, 2022, the appropriate departments posted the First Notice to the “She Nah Num Bulletin Facebook group, to the Tribe’s She Nah Num Facebook page, and to the Tribe’s website. The First Notice was not published in the Tribe’s newsletter, the

Squalli Absch News.

12. On February 4, 2022, the Nisqually IT Department again shared the First Notice on the She Nah Num Bulletin Facebook group.
13. On February 5, 2022, the Nisqually Tribe held the General Council Nominations Meeting at the Nisqually Youth Center at 10:00 AM local time.
14. On February 11, 2022, Next Voting mailed the Primary Election Notice of the 2022 election cycle to the last known address of each Eligible Voter and posted the Primary Election Notice at the Tribal Center and elsewhere on the Reservation.
15. On February 11, 2022, Next Voting and Nate Cushman directed the Nisqually IT Department to push the notification to the appropriate departments to publish the Primary Election Notice on the Tribe's website, on the Tribe's social media, and in the Tribe's newsletter, the Squalli Absch News.
16. On February 11, 2022, the Nisqually IT Department pushed the notification to the appropriate departments for the various teams to post the Primary Election Notice to the Tribe's website, She Nah Num Bulletin Facebook page, and to the Newsletter.
17. On February 11, 2022, the appropriate teams published the Primary Election Notice on the Tribe's website, but it was not included in the Tribe's newsletter, the Squalli Absch News, or posted on the Tribe's She Nah Num Bulletin Facebook page.
18. On March 12, 2022, the Nisqually Tribe held the Primary Election at the Billy Frank Jr. Gymnasium from 9:00 AM to 5:00 PM local time.
19. No Election Protests were filed in response to the Primary Election.
20. On March 18, 2022, Next Voting mailed the General Election Notice of the 2022 election cycle to the last known address of each Eligible Voter and posted at the Tribal Center and elsewhere on the Reservation.
21. On March 18, 2022, Next Voting and Nate Cushman directed the Nisqually IT Department to push the notification to the appropriate department to publish the General Election Notice on the Tribe's website, on the Tribe's social media, and in the Tribe's newsletter, the Squalli Absch News.
22. On March 18, 2022, the Nisqually IT Department pushed the notification to the appropriate departments for the various teams to post the Primary Election Notice to the Tribe's website, She Nah Num Bulletin Facebook page, and to the Newsletter. The General Election Notice was not included in the Tribe's newsletter, Squalli Absch News, or on the She Nah Num Bulletin Facebook page.
23. The Nisqually Tribe held the General Election on May 7, 2022, at the Billy Frank Jr. Gymnasium from 9:00 AM to 5:00 PM local time.

24. On May 12, 2022, Chris Olin served two Election Protests on the Third-Party Auditor, Next Voting; the Tribal Council Chairman, Willie Frank III; and the Tribal Council Secretary, Jackie Whittington pursuant to Election Code under § 13.03.01(c).
25. Next Voting has verified that the two Election Protests meet the requirements outlined in § 13.03.01 of the Election Code.
26. The First Election Protest challenges the outcome of the Tribal Council Vice Chairman position
27. The Second Election Protest challenges the outcome of the Tribal Council Treasurer Position.
28. Both Protests contain identical allegations.
29. Allegation #1 of the Election Protests claims that the General Election results for both positions violated § 13.03.01(b) of the Election Code because “[t]here was no notice posted in any of the Tribal News Letters [sic] from December 2021 through April 2022 informing all eligible voters of the 2022 General Election.”
30. Allegation #2 of the Election Protests claims that the General Election results for both positions violated § 13.03.01(f) of the Election Code because “[t]here were no reminders of elections mailed out or published in the tribal newsletter to the membership for the General Election.”
31. As a result, the Election Protests allege that “[d]ue to lack of proper notice the membership was not properly informed nor kept up to date throughout the election cycle resulting in low voter turn out effecting the election for the Tribal Council [Vice Chairman and Treasurer].”

II. CONCLUSIONS OF LAW

A. Interpretive Principles:

The Nisqually Indian Tribe is a federally-recognized tribe (87 Fed. Reg. 4363 (Jan 28, 2022)) governed by the Nisqually Tribal Constitution and Bylaws as amended on October 28, 1994. Article IV, Section 1 of the Nisqually Constitution requires that elections “shall be held in accordance with this Constitution and Bylaws and with rules adopted by the Tribal Council as provided herein.” Consistent with this Constitutional provision, the Tribal Council has enacted Title 13 of the Nisqually Tribal Code containing specific substantive rules and procedures for Tribal Elections.

Title 13 recognizes that “[c]ommunity participation in Tribal elections is essential to the democratic process,” and that the rules and procedures contained therein are necessary to “ensure that Nisqually Tribal elections are conducted in a manner that is consistent, fair, efficient, and reflects the needs of the Nisqually People.” Election Code § 13.01.01(b). The Election Code further stresses that “the Nisqually tribal member right to vote guaranteed in Article VII, Section

1 of the Nisqually Constitution is sacred; and, whether cast in person or via absentee ballot, that right shall be carried out in good faith.” Election Code § 13.01.01(d).

In general, election laws are to be strictly construed to prevent fraud or abuse and liberally construed in favor of the right to vote. 29 C.J.S. Elections § 24. Specifically, election laws must be construed to effectuate their purposes, which includes to facilitate the administration of the electoral process. 29 C.J.S. Elections § 21. Furthermore, some election provisions are mandatory and some are directory or discretionary. Generally, election provisions are to be construed as mandatory if the statute expressly states that failure to act in the manner set out in the statute will void the ballot. 22 C.J.S. Elections § 22. Statutory provisions “may be construed as directory if it simply prescribes the performance of certain acts in a specific manner and does not expressly state that compliance is essential to the validity of the ballot.” *Id.* Likewise, election statutes are more properly construed as mandatory when a party seeks to enforce those provisions **before an election**. *Id.* If enforcement is sought **after an election** those provisions should be construed as directory and decisionmakers should favor upholding election results. *Id.*

B. Allegations and Statutory Standards:

As set forth above, the Election Protests consist of identical protests for two separate positions: Tribal Council Vice Chairman and Tribal Council Treasurer. Each of these contain identical factual allegations and allege the same two statutory violations. Both Election Protests also state that they have been brought pursuant to §§ 13.03.01(b) of the Election Code.

As an initial matter, the Protestors have brought their Election Protests under the wrong statute. Section 13.03.01(b) is the portion of the election challenge statute that concerns recount requests, not allegations that the election included substantive violations of the Election Code. Nevertheless, the substance of the Election Protests clearly indicates that the Protestors intended to initiate the process under § 13.03.01(c), which concerns protests alleging substantive violations of Title 13 that have materially affected the outcome of the election and which would necessitate scheduling a second General Election.

Because the purpose of the Nisqually Election Code is to protect the voting rights of Nisqually Tribal members, I construe the Election Protests to be brought pursuant to 13.03.01(c).

§ 13.03.01(c) requires the following two-step inquiry: (1) whether the election process violated Title 13; and (2) whether the violation materially affected the outcome of the election.

1. Allegation #1 – Whether Notice of General Election Was Printed in the Squalli Absch News

Section 13.02.09 (b) of the Election Code requires that “[t]he Notice of Election shall be mailed to the last known address of each Eligible Voter, posted at the Tribal Center, and posted at other Public Places on the Nisqually Indian Reservation. This shall include, newsletter, Tribe’s website and social media outlets starting 1st week of January and not less than fourteen (14) days prior to the nominations meeting date.”

The purpose of the notice requirement is clear: to provide the electorate with sufficient notice of the date, location, and time of the election. In other jurisdictions, statutory requirements regarding election notice are mandatory because of the sanctity of the right to vote. *See* 29 C.J.S. Election § 143. Other jurisdictions only require substantial compliance with notice requirements. *Id.* However, the lack of statutory notice in most jurisdictions will not invalidate an election where the time and date of an election is otherwise set forth in the statute and there is no allegation of fraud or wrongdoing. *Id.*

Here, the notice was sent out at least fourteen days prior to the General Election in compliance with § 13.02.09(b). Instead, the Protestors allege that one of the five statutorily required forms of notice distribution did not occur. Section 13.02.09(b) requires five forms of notice distribution: individual mailings to each eligible voter's last known address, posting at the Tribal Center and public places, publication in the newsletter, publication on the Tribal website, and publication on social media outlets. Specifically, the two Protests allege that because the General Election Notice was not published in the Squalli Absch News, the election of only two of the positions—Tribal Council Vice Chairman and Tribal Council Treasurer—should be invalidated because it allegedly caused low voter turnout.

During Big Fire's factual investigation of this matter, we determined that *none* of the election notices had been published in the Squalli Absch News for the 2022 election cycle. Big Fire likewise interviewed Tribal attorney Nate Cushman and reviewed his communications with the Nisqually IT Department – the Tribal department responsible for newsletter publication – and discovered that the newsletter staff either did not respond to or did not receive the IT Department alerts instructing the newsletter staff to publish the notices. As a result, there is a clear violation of the letter of § 13.02.09(b).

However, in this instance, the Nisqually Electorate still received notice of the date, time and location of the General Election by at least *four* other statutorily required methods: (1) Next Voting properly and timely mailed all Election Notices to each Eligible Voter's last known address; (2) Next Voting properly and timely ensured that all Election Notices were posted at the Tribal Center and other public places; (3) Next Voting properly and timely ensured that all Election Notices were properly and timely posted on the Tribal website; and (4) Next Voting properly and timely ensured that all Election notices were properly and timely posted on the Tribes social media.

Section 13.02.09 of the Election Code, which governs Notices of Election, has built-in redundancy – consisting of *five* different notification methods. This redundancy is plainly designed to ensure that Eligible Voters receive notice of the election even if one or more methods might fail. In other words, the redundancy in § 13.02.09 demonstrates the drafters' intent that the Tribe should be permitted to hold a proper election even if some notice method might fail, either because it was not properly executed by the Tribe itself or because the Eligible Voter was unable to receive notice by one of the five methods. Furthermore, by its very nature, the direct mailing to each individual voter should be considered is the primary method of notice because it is the most specific, individualized, and targeted. The other more general notice methods that are directed at the public as a whole – including public posting, social media, website, and the newsletter – appear to function as backups to the more direct method.

Additionally, the Election Code clearly sets forth the location and date of the General Election that would otherwise be included in the notice. Section 13.02.08(a) provides that the General Election “shall occur on the first Saturday of May,” which in 2022 was Saturday, May 7, 2022. Section 13.02.08(c) likewise requires that the General Election take place at the Billy Frank Jr. Gymnasium, where the General Election in fact took place. The Election Code and longstanding past practice are themselves a sixth and most powerful standing notice of the election.

Pursuant to the foregoing, although one of the five forms of statutory notice delivery did not occur during the 2022 election cycle due to an administrative error, the absence of this one form of publication notice did not materially affect the outcome of the election. Next Voting accomplished the primary and most important method of notice when it timely and properly mailed notice of the General Election to the last known address of every Eligible Voter *twice* during the 2022 election cycle. Significantly, Eligible Voters’ last known address is the same address at which they receive the Tribal newsletter. If an Eligible Voter were relying on the Tribal newsletter for notice of the election, they necessarily received the targeted, mailed notice twice. Next Voting, moreover, successfully executed every other statutory form of notice except for publication in the Tribal Newsletter, and some of the social media posts. Eligible Voters had ample notice of the General Election.

Further, there has been no allegation of fraud or wrongdoing related to the failure to publish in the newsletter. *See* 29 C.J.S. Elections § 24. Likewise, neither the plain language nor the context of the Election Code suggests that publication of the notice in the Tribal newsletter is a mandatory provision that should void an otherwise valid election. The statute does not expressly state that it is mandatory. *See* 29 C.J.S. Elections § 22. Further, newsletter publication is a non-targeted, redundant form of notice that is plainly intended as a safeguard and not a primary form of notification.

Finally, fluctuations in voter turnout have occurred in every Nisqually election, regardless of who is on the ballot. The absence of the one redundant form of notice publication is not the clear culprit, especially since Big Fire has confirmed that the majority of the signatories to both Election Protests in fact **voted in the General Election**.

Therefore, I cannot conclude that the lack of one form of broad publication notice delivered to the same address as the individual notices of election materially affected the outcome of this election. Allegation #1 does not warrant scheduling a new General Election.

2. Allegation #2 – Whether the Lack of Additional Informational Notices Violated Title 13

Section 13.02.09(f) of the Election Code requires that “[i]nformational reminders and updates shall continue to go out to voters throughout the election process. All notifications shall be clearly marked ‘ELECTIONS.’” The two Election Protests allege that because additional informational reminders and updates did not occur, there was insufficient notice of the General Election, which resulted in low voter turnout.

Section 13.02.09 (f) ensures that “reminders and **updates**” are distributed during the election cycle in order to keep the electorate up to date on any changes or developments that occur outside of the typically issued notices. During the 2022 election cycle, no “updates” were necessary because no changes were made to the time, date, or location of the elections or General Counsel Nominations Meeting, or any changes to how the elections or nominations meeting were conducted during this cycle.

Moreover, Big Fire’s review of past practices revealed that the Nisqually Tribe has **never** issued any “reminder or update” in any election cycle that was not related to an actual change in the elections process. To the contrary, in the 2020 and 2021 election cycles, the Nisqually Tribe did issue reminders and updates when there were changes in various election processes necessitated by the COVID-19 pandemic. As above, this “reminder and updates” provision is not explicitly mandatory in the Election Code. It could not be a mandatory provision because it is too vague. It does not advise when a reminder or update should be sent, by what method, or what information the reminder or update should contain. sent any unnecessary update. As above, I conclude Eligible Voters received ample notice of the General Election. As a result, there is no violation of § 13.02.09(f).

Therefore, I cannot conclude that the lack of additional notices of the statutorily scheduled and duly noticed General Election resulted in a material impact to the General Election. Allegation #2 does not warrant scheduling a new General Election.

CONCLUSION

In conclusion, I do not find that either Allegations #1 or #2 materially impacted the outcome of the General Election results for either Tribal Council Vice Chairman or Tribal Council Treasurer. While the election notices were not published in the Squalli Absch News, the other methods of statutorily required notice sufficiently noticed the General Election, especially since it occurred on the statutorily mandated date in the statutorily mandated location. As a result, it is my recommendation that the General Election results for these two positions should not be invalidated.