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2 *Betty Greathead*
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7 **IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE**
8 **NOOKSACK INDIAN TRIBE**

9 7 LOMELI, et al.,

8 v. Plaintiffs,

9 Case No. 2013-CI-CL-001

10 10 KELLY, et al., Defendants.

11 DEFENDANTS' RESPONSE TO
12 PLAINTIFFS' EMERGENCY
13 MOTION FOR STAY PENDING
14 APPEAL

15 **COPY**

16 COMES NOW, Defendants in the above-entitled action, by and through the Office of
17 Tribal Attorney, without waiving other defenses and objections, and hereby submits its response
18 to the Plaintiffs' Emergency Motion for Stay Pending Appeal (Motion) as follows:

19 **I. INTRODUCTION**

20 Defendant members of the Nooksack Tribal Council and employees urge the Court to
21 deny Plaintiffs' Motion. Defendants previously addressed the issues stated in this motion in
22 Defendants' Brief in Opposition to Plaintiffs' Emergency Motion for a Temporary Restraining
23 Order which provides support for the Court to deny this Motion. On May 20, 2013, the
24 Nooksack Tribal Court agreed with the Defendants' arguments in the Order Denying Motion for
25 Preliminary Injunction because sovereign immunity protects the Defendants and the Tribal Court
also lacked subject matter jurisdiction over Title 63, the Tribe's enrollment ordinance. Plaintiffs'

1 Motion is nearly verbatim restatement of the arguments the Plaintiffs have already presented to
2 this court in their Reply in Support of Plaintiffs' Emergency Motion for Temporary Restraining
3 Order. *For example compare* Emer. Mot. for Stay Pend. App. at 6:5-11 *with* Reply in Supp. of
4 Pls.' Emer. Mot. for T.R.O. at 6-7. "Plaintiffs' motion for stay seeks the very injunctive relief
5 that this Court has denied. Just as they are not entitled to injunctive relief they are not entitled to
6 a stay." *Democratic National Committee v. Watada*, 198 F.Supp.2d 1193, 1197 (D. Haw. 2002).

7 Plaintiffs' Motion must be denied because (1) the Nooksack Tribal Code does not grant
8 the Tribal Trial Court the authority to grant Plaintiffs' Motion and (2) the Plaintiffs fail to
9 demonstrate the underlying factors necessary to obtain a stay or preliminary injunction.
10 Plaintiffs have not provided any new legal basis to defeat sovereign immunity or lack of subject
11 matter jurisdiction, and therefore, this Court does not have the jurisdiction to review the
12 Plaintiffs' motion and enforce a stay against the Tribe. Plaintiffs' Motion should be denied.
13 Defendants' response is based on the files, records and Decisions in this action.
14

15 II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

16 Defendants incorporate the Procedural History, Statement of Facts and Arguments set
17 forth in Defendants' Motion to Strike, Defendants' Brief in Opposition to Plaintiffs' Emergency
18 Motion for a Temporary Restraining Order, Defendants' Response to Motion for Leave to
19 Amend Complaint, Defendants' Response Brief in Opposition to Plaintiffs' Second Emergency
20 Motion for Temporary Restraining Order and Defendants' Motion to Dismiss Plaintiffs' Second
21 Amended Complaint including all supporting Declarations and exhibits.
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III. ARGUMENT

A. THE NOOKSACK TRIBAL CODE DOES NOT GRANT THE NOOKSACK TRIBAL COURT THE AUTHORITY TO GRANT PLAINTIFFS' MOTION AND PLAINTIFFS FAILED TO OBTAIN PERMISSION FROM THE COURT OF APPEALS TO FILE AN INTERLOCUTORY APPEAL

The Plaintiffs' motion for stay fails because: (1) Plaintiffs failed to obtain permission to file an interlocutory appeal and (2) the trial court lacks authority to grant a stay pending appeal under tribal law. The Nooksack Tribal Court has determined that in this case, when Title 10 fails to provide a clear rule, the Federal Rules of Civil Procedure shall govern this proceeding. Decision and Order Den. Defs.' Mot. to Strike at 2-3 (April 23, 2013). The Plaintiffs' Motion begs for relief under Federal Rules of Civil Procedure 62(c), but tribal law is clear on this point and the federal rules do not apply. Title 10, § 10.05.020(d); Title 80, § 80.08.050.

Title 10 is not the appellate code and does not discuss the trial court's authority to grant stays pending appeal because Title 80, the Nooksack Appellate Code, places the authority to hear Plaintiffs' Motion with the Nooksack Court of Appeals. Title 80, §§ 80.06.010, 80.08.050. The Nooksack Appellate Code, Chapter 80.06 Stay of Judgment, specifically § 80.06.010, "Automatic Stay –Exception" governs the Plaintiffs' request.¹ Section 80.06.010 provides:

The judgment or order of the Nooksack Tribal Court appealed from shall not be carried out unless and until the Court of Appeals upholds the judgment or dismisses the appeal. An exception to this rule is that injunctions, including restraining orders and orders in child custody cases shall take effect unless the Court of Appeals suspends them. *Either party may petition the court to be heard on the issue of staying the orders and judgments of the trial court prior the case being heard on appeal under § 80.08.050.* (emphasis added).

¹ Plaintiffs' do not address Title 80 in the body of their motion but give it passing reference by way of footnotes. Motion at 2, Footnote 1 and 3.

1 Title 80, § 80.08.050 "Hearing-Scheduling" states the "[t]he Court of Appeals
2 shall schedule a hearing for oral argument to take place within thirty (30) days of the date
3 the last brief allowed by the Court is filed. The Court shall serve notice on all parties."
4 The Nooksack Tribal Code does not vest the Nooksack Tribal Court with the decision
5 making authority to determine whether a stay will be granted, it is with the Nooksack
6 Court of Appeals. The trial court lacks the authority to grant the requested stay and
7 Plaintiffs' Motion must fail.

8 The Plaintiffs' request also fails because the Order Denying Motion for
9 Preliminary Injunction on May 20, 2013 is not a final decision dismissing the Plaintiffs'
10 Second Amended Complaint for Equitable Relief, and therefore, the Plaintiffs must first
11 be granted permission to appeal. Title 80, § 80.03.010. If the Court of Appeal denies
12 the request for an interlocutory appeal, then a court – whether it be the trial court or
13 appellate court - certainly cannot issue a stay for an appeal where an appeal does not
14 exist. In sum, the Plaintiffs' request for stay fails because: (1) tribal law does not grant
15 the trial court authority to grant stays pending appeals and (2) the appellate court has not
16 granted Plaintiffs permission to file an interlocutory appeal.

17 B. PLAINTIFFS FAIL TO DEMONSTRATE ANY LIKELIHOOD OF SUCCESS ON
18 THE MERITS.

19 The Plaintiffs' Emergency Motion for Temporary Restraining Order dated March 15,
20 2013 sought injunctive relief and stated the following U.S. Supreme Court standard the Plaintiffs
21 must meet: (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer
22 irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the
23 movant's favor; and (4) that the injunction is in the public's interest. *Winter v Natural Res. Def.*
24 *Council, Inc.* 555 U.S. 7, 20 (2008). Pls.' Emer. Mot. for Stay Pend. App. at 10:15-18. The
25 Plaintiffs have now decided to insert a Ninth Circuit ruling by a three judge panel that has a

1 lesser standard for granting a preliminary injunction and one that arguably conflicts with *Winter*
2 to make their old arguments sound new. Plaintiffs' suggested standard allows for a "sliding
3 scale" approach to preliminary injunctions, such that, the elements are balanced and that a
4 stronger showing of likely success may offset a weaker showing of harm. *Alliance for the Wild*
5 *Rockies v Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Under this approach, a preliminary
6 injunction could issue where Plaintiffs demonstrate only that "serious questions going to the
7 merits were raised and the balance of the hardships tips sharply in the plaintiff's favor", as
8 opposed to the *Winter* standard of a showing of likelihood of success on the merits. *Id.* (citing
9 *Clear Channel Outdoor Inc. v City of L.A.*, 340 F.810, 813 (9th Cir. 2003)(abrogated by *Stormans*
10 *Inc. v Selecky*, 586 F.3d 1109 (9th Cir. 2009)).

11 The Plaintiffs' cited authority does not appear to be the governing rule for the Ninth
12 Circuit and is definitely a lesser standard than that mandated by the Supreme Court in *Winter*.
13 Further, the Ninth Circuit determined that in "[a]pplying *Winter*, we have since held that "to the
14 extent that our cases have suggested a lesser standard they are no longer controlling or even
15 viable." *Stormans Inc. v Selecky*, 586 F.3d at 1127 (quoting *Am. Trucking Ass'nns, Inc. v City of*
16 *Los Angeles*, 559 F.3d 1046, 1152 (9th Cir. 2009)). "Thus the district court's appropriate
17 application of our pre-*Winter* approach in granting relief is now error." *Id.* The proper legal
18 standard for preliminary injunctive relief is the *Winter* standard. *Id.* (quoting *Winter*, 129 S. Ct.
19 at 374). "To the extent *Cottrell's* interpretation of *Winter* is inconsistent with *Selecky*, *Selecky*
20 controls." *Winnemucca Indian Colony v United States*, 837 F.Supp.2d 1184, 1189 (D. Nev
21 2011) (citing *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003)(en banc) ("holding that, in the
22 absence of an intervening Supreme Court decision, only the en banc court may overrule a
23 decision by a three-judge panel.")) The Winnemucca Court attempted to reconcile *Cottrell's*
24 "serious questions" factor with *Winter/Selecky* "likelihood standard" saying that a "[s]erious
25 questions going to the merits" must mean that there is at least a reasonable probability of success

1 on the merits.” *Id.* at 1190. Regardless of Ninth Circuit decision, it is clear as day that the
2 standard in *Winter* is the law.

3 Although Plaintiffs urge the Court to accept the relaxed Ninth Circuit standard for
4 issuance of an “Emergency Motion for Stay,” (here, in what is actually a Motion for
5 Reconsideration re: Order Denying Motion for Preliminary Injunction), the standard set forth in
6 *Winters* still applies. In any event, the Plaintiffs cannot demonstrate either (1) a likelihood of
7 success on the merits or (2) that serious questions going to the merits exist. Plaintiffs have no
8 likelihood of success on the merits of the issues upon which they focus: (1) whether initiation of
9 the disenrollment proceedings was in violation of Nooksack law and (2) whether Defendants are
10 acting in furtherance of unconstitutional laws. Emer. Mot. for Stay Pend. App. at 4:9-13. Both
theories fail.

12 1. This Court lacks Subject Matter Jurisdiction under Article VI, § 2(A)(3) because the
13 Tribal Council has not Granted a Waiver of its Sovereign Immunity.

14 Plaintiffs’ contention that this Court has jurisdiction vested by Article VI, § 2(A)(3) of the
15 Nooksack Constitution was previously rejected and should be rejected here. Order Den. Mot. for
16 Prelim. Inj. at 5. As well documented in Defendants’ briefing and this Court’s Order Denying
17 Motion for Preliminary Injunction, Article VI, §2(A)(3) establishes this Court’s jurisdiction over
18 the functions and establishment of the Nooksack Tribal Council **and requires a waiver of its**
19 **sovereign immunity.** To avoid rearguing previously briefed issues, the Defendants will rely
20 upon its briefing and this Court’s order on the issue of subject matter jurisdiction under Article
21 VI, § 2(A)(3). *See* Defs.’ Br. in Opp. to Pls.’ Emer. Mot. for a T.R.O. at 13-17; Order Den. Mot.
22 for Prelim. Inj. at 12-13. Defs.’ Resp. Br. to Pls.’ Second Emer. Mot. for T.R.O. at 6; Defs.’
23 Mot. to Dismiss Pls.’ Second Am. Compl. for Lack of Jurisdiction, Failure to Join Indispensable
24 Parties, and Unripe Claims (“Mot. to Dismiss”) at 9-14, 21-22. The Plaintiffs’ attempt to
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1 sidestep sovereign immunity -their continued complaint that the *Young* exception applies – fails
2 to establish that *Young* is appropriate in the current case, especially given the questionable
3 existence of *Young* in the Nooksack-tribal context.

4 a. *The Ex Parte Young doctrine, if it applies in the Nooksack-tribal context, is*
5 *inapplicable in the case at bar.*

6 Plaintiffs' claims are foreclosed because the Tribe has not waived its sovereign immunity, no
7 implied waiver could be found in the tribal code, and the *Young* exception is inapplicable.

8 Plaintiffs' most recent briefing finally acknowledges the *Cline* holding, but fails to make any
9 legitimate distinction between the facts establishing immunity in *Cline* and the facts in the
10 present case. Emer. Mot. for Stay Pend. App. at 5-6. The simple fact is, if *Young* applies in the
11 Nooksack-tribal context, the Plaintiffs failed to demonstrate that *Young* is applicable in the
12 current case.

14 Since the filing of the Original Complaint, the Plaintiffs have not put forth any relevant facts
15 that would demonstrate that *Young* should apply in the current context. Their grievance lies with
16 official Tribal Council action, not with the administrative acts of an individual. The facts in this
17 case have remained relatively unchanged since the outset and the Court previously determined
18 that the Plaintiffs failed to demonstrate a set of facts that would entitle them to relief in the event
19 that *Young* applied. Order Den. Mot. for Prelim. Inj. at 12-13. The Defendants have supplied
20 lengthy briefing on this point and will rely on previous briefing for the purposes of this
21 responsive brief. *See* Defs.' Br. in Opp. To Pls.' Emer. Mot. for a T.R.O. at 17-19; Resp. to
22 Mot. for Leave to Am. Compl. at 4-12; Order Den. Mot. for Prelim. Inj. at 12-13; Defs.' Resp.
23 Br. in Opp. To Pls.' Second Emer. Mot. for T.R.O. at 6; Mot. to Dismiss at 8-9.

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2. Plaintiffs' Contention that an Initial Showing of Evidence Must Occur Prior to
Commencing Disenrollment Proceedings Was Rejected.

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4 Plaintiffs continue to argue that an initial showing of evidence is required to commence a
5 disenrollment hearing fails for lack of legal support. *See* Emer. Mot. for Stay Pend. App. at 7-8,
6 footnote 8. Plaintiffs' attempts to impose the probable cause standard into a non-criminal
7 hearing fails. This Court previously found that the named defendants acted within the confines
8 of their constitutional authority and that of Title 63 in commencing the disenrollment process.
9 Order Den. Mot. for Prelim. Inj. at 12-13. Defendants previously provided argument that the
10 probable cause requirement of the 4th Amendment does not apply to tribal disenrollment
11 proceedings and that Plaintiffs' statement regarding when the burden is applied to the Tribe
12 misses the mark and is not ripe for review. This Court already found that the named
13 councilmember defendants have not violated Title 63 or the Constitution in initiating the
14 disenrollment proceedings. *See* Defs.' Br. in Opp. To Pls.' Emer. Mot. for a T.R.O. at 30-34;
15 Order Den. Mot. for Prelim. Inj. at 12-13.

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3. The Court Previously Rejected the Plaintiffs' Unsupported Legal Theories that the
Defendants Acted Outside the Scope of their Powers.

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19 Plaintiffs continue to allege the magic language of *Ex Parte Young* of "acting beyond the
20 scope of power" without legitimate factual support. *See* Emer. Mot. for Stay Pend. Appeal at 8-
21 10. The Plaintiffs currently reargue that the Constitution prohibits the Tribal Council from
22 commencing the disenrollment process. *Id.* The Court previously found that "[t]he Constitution
23 plainly reserves the authority to determine membership and loss of membership to the Tribal
24 Council. Order Den. Mot. for Prelim. Inj. at 12:13-14. This Court was correct in its previous
25

1 Order and nothing in the wording of the Constitution has changed to make the Court's previous
2 determination less than the law of this case. Plaintiffs' arguments that the Tribal Council does
3 not possess the authority to commence disenrollment are without merit. The simple reality is
4 that the Tribal Council possesses the sole power to disenroll. *See* Defs.' Br. in Opp. To Pls.'
5 Emer. Mot. for a T.R.O. at 13-17, 19-22; Order Den. Mot. for Prelim. Inj. at 12-13.

6 4. Resolution 13-02 does not violate ICRA or Article IX of the Constitution

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8 Plaintiffs argue again that Resolution 13-02 violates Article IX of the Nooksack Constitution.
9 Resolution 13-02 is constitutional and is consistent with Tribal law as applied; the Nooksack
10 Tribal Court determined that Resolution 13-02 was properly enacted and Defendants' actions
11 after the passage of Resolution 13-02 were within the scope of their official duties. Order Den.
12 Mot. for Prelim. Inj. at 13. Defendants' previously provided argument that Resolution 13-02 is
13 consistent with Article IX. *See* Defs.' Br. in Opp. To Pls.' Emer. Mot. for a T.R.O. at 34-35.

14
15 Plaintiffs are unable once again to establish a likelihood of success because this Court lacks
16 jurisdiction over the subject matter (enrollment) and the Defendants are immune from suit.

17 C. PLAINTIFFS FAIL TO DEMONSTRATE IRREPARABLE HARM

18
19 As highlighted in the Defendants' Motion to Dismiss, the facts in this case have remained
20 relatively unchanged since the outset. Plaintiffs were unable to demonstrate irreparable harm in
21 their earlier briefing, because it is non-existent, and remain unable to establish irreparable harm
22 now. *See* Defs.' Br. in Opp. To Pls.' Emer. Mot. for a T.R.O. at 36-40; Mot. to Dismiss at 27-28.
23 No plaintiff has been disenrolled. As previously stipulated: "[n]o person will be disenrolled prior
24 to completion of the meetings before the Tribal Council regardless of whether that individual has

1 requested a meeting with the Tribal Council." Further, the requested meetings have not been
2 scheduled as of this date.

3 D. IMPOSITION OF A PRELIMINARY INJUNCTION HOWEVER WOULD
4 SUBSTANTIALLY HARM THE NOOKSACK PUBLIC INTEREST

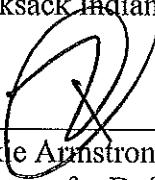
5 A preliminary injunction is an extraordinary remedy never awarded as of right. In each
6 case, courts "must balance the competing claims of injury and must consider the effect on each
7 party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (quoting
8 *Amoco Production Co. v. Gambell*, 480 U.S. 531 (1987). "In exercising their sound discretion,
9 courts of equity should pay particular regard for the public consequences in employing the
10 extraordinary remedy of injunction." *Id.* at 24 (quoting *Weinberger v. Romero-Barcelo*, 456
11 U.S. 305 (1982). Defendants provided previous briefing on the harm to the Tribe caused by an
12 injunction on the Nooksack tribal public and will not burden the Court with repetitive briefing.
13 See Defs.' Br. in Opp. To Pls.' Emer. Mot. for a T.R.O. at 40-46.

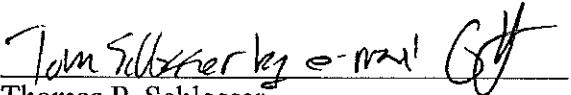
15 IV. CONCLUSION

17 The Plaintiffs motion for a stay is a poorly disguised third motion for a preliminary
18 injunction. "Plaintiffs' motion for stay seeks the very injunctive relief that this Court has denied.
19 Just as they are not entitled to injunctive relief they are not entitled to a stay." *Democratic*
20 *National Committee v. Watada*, 198 F.Supp.2d 1193, 1197 (D. Haw. 2002). The Court should
21 deny this request because under the Nooksack Tribal Code, the trial court lacks authority to grant
22 the requested relief. Plaintiffs must take their case to the Court of Appeals. However, even if this
23 Court could grant the requested relief, a stay is inappropriate because the Plaintiffs have given
24 this court nothing new with regards to circumventing sovereign immunity and establishing the
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1 Defendants acted outside the scope of their authority. Instead, the Plaintiffs present the exact
2 same arguments previously rejected by this Court, as such, Plaintiffs' Motion should be denied.
3
4

5 Respectfully submitted this 30th day of May, 2013.
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2 05-30-13 03:28 IN
3 *Betty Lomeli*
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7 **IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE**
8 **NOOKSACK INDIAN TRIBE**

9
10 LOMELI, et al.,

Plaintiffs,

Case No. 2013-CI-CL-001

and

11 KELLY, et al.,

Defendants.

12 DECLARATION OF SERVICE

COPY

13 I Declare:

14 That I am over the age of 18 years, competent to be a witness, and not a party to this action.

15 On May 30, 2013, I duly mailed by first class mail, a copy of the following:

16 1. Defendants' Response to Plaintiffs' Emergency Motion for Stay Pending Appeal; and
17 2. (this) Declaration of Service

18 to Galanda Broadman PLLC, Attn:

19 Gabriel S. Galanda, P.O. Box 15146, Seattle, Washington 98115.

20 Also, on May 30, 2013, I emailed Gabriel S. Galanda at gabe@galandabroadman.com a courtesy
21 copy of the Motion and Declaration.

22 I declare under the penalty of perjury, under the laws of Nooksack Indian Tribe, that the
23 foregoing is true and correct.

24 Signed at Deming, Washington on May 30, 2013.

Charity Bernard

25 Charity Bernard, Paralegal
Office of Tribal Attorney, Nooksack Indian Tribe

DECLARATION OF SERVICE – Page 1 of 1

Nooksack Indian Tribe
Office of Tribal Attorney
P.O. Box 63
5047 Mt. Baker Hwy.
Deming, WA 98244
Tel. (360) 592-4158
Fax (360) 592-2227