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IN THE NOOKSACK TRIBAL COURT

MICHELLE JOAN ROBERTS,
Councilmember of the Nooksack Tribal
Council, RUDY ST. GERMAIN, Secretary of
the Nooksack Tribal Council, ROBERT JAMES
RABANG SR.; enrolled members of the
Nooksack Indian Tribe,

Plaintiffs,

v.

ROBERT KELLY, Chairman of the Nooksack
Tribal Council; RICK D. GEORGE, Vice-
Chairman of the Nooksack Tribal Council;
AGRIPINA SMITH, Treasurer of the Nooksack
Tribal Council; BOB SOLOMON,
Councilmember of the Nooksack Tribal
Council; KATHERINE CANETE,
Councilmember of the Nooksack Tribal Council
and Nooksack General Services Executive; and
AGRIPINA "LONA" JOHNSON,
Councilmember of the Nooksack Tribal
Council, in their official capacities,

Defendants.

NO. _____

EMERGENCY MOTION FOR
TEMPORARY RESTRAINING ORDER

*Telephonic Hearing Requested By
Wednesday, August 14, 2013*

I. INTRODUCTION

Temporary restraining orders ("TRO") are justified if a party establishes four elements:

(1) a likelihood of success on the merits of the underlying action; (2) a probability of irreparable harm if no TRO is issued; (3) the equities at stake in the request for a TRO tip in the moving party's favor; and (4) the TRO is in the public interest. In this case, plaintiffs face imminent

MOTION FOR TEMPORARY RESTRAINING ORDER - 1

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disenrollment at hearings set to commence by telephone this coming Friday, August 16, 2013 at 10:00 AM, under liberty-depriving procedures that were enacted in secret on August 8, 2013.

Under these sham procedures, the Defendants have already set the hearings on “shortened time” and with virtually no notice; Defendants deprive targeted Nooksacks of legal counsel although having previously assured Plaintiffs that their lawyers could appear at the hearings; Defendants afford targeted Nooksacks no more than ten minutes on a telephone to present a case to the Tribal Council; and the standards promulgated by Defendants governing whether the government has met its burden of proof for disenrollment of Nooksacks are entirely arbitrary. The list of Defendants’ rights-violating actions goes on and on. And it will be apparent to any impartial tribunal examining the facts and applicable law set forth in this Motion that Plaintiffs have met their burden, and that a TRO is required to immediately preserve fundamental rights and prevent certain irreparable harm that will result if this Court fails to act.

Because of the Friday, August 16, 2013 telephonic disenrollment proceedings Defendants have unilaterally scheduled and the due-process-violating rules and procedures governing these hearings Plaintiffs bring this motion on an emergency basis and request immediate relief in the form of an explicit order enjoining Defendants disenrollment proceedings by no later than Wednesday, August 14, 2013.

II. FACTS

Plaintiffs learned late on Friday, August 9, 2013, that Defendants have unilaterally scheduled what appear to be omnibus disenrollment meetings for Friday, August 16, 2013, at 10:00 a.m. “via teleconference” — without any consideration for the schedules and commitments of either the affected Plaintiffs or their legal counsel. It is no coincidence these notices were dated *and served* upon Plaintiffs on the very same day the Tribal Court issued its final judgment in *Lomeli v. Kelly*, Nooksack Tribal Court Case No. 2013-CI-CL-001, a separate action

1 regarding the disenrollment agenda Defendants have advanced against Plaintiffs for several
2 months. The notices did not arrive to Plaintiffs' counsel of record until yesterday, August 12,
3 2013 — leaving merely three complete working days prior to the omnibus meeting.

4 Also, yesterday Plaintiffs' counsel first learned of the "TRIBAL COUNCIL
5 PROCEDURES FOR INVOLUNTARY DISENROLLMENT MEETINGS," which appear to
6 have been tailor-made by Defendants, and without any public rulemaking, on Thursday, August
7 8, 2013. Among other things, those "procedures":

- 8 • Forbid a Disenrollee from being represented by counsel during his or her disenrollment
9 meeting (*id.*, Sec. VI, C) – in contravention of a March 20, 2013 Tribal Court-entered
10 Stipulation¹ whereby the Tribe acknowledged that Galanda Broadman, PLLC was
11 "authorized to act in . . . the related proceedings regarding disenrollment" on behalf of
12 Plaintiffs;
- 13 • Allow a Disenrollee "a maximum of ten (10) minutes to present his or her case" (*id.*, Sec.
14 VI, H) – which is a wholly insufficient amount of time for a Tribal Member to, on their
15 own, prepare and advocate a final defense against disenrollment;
- 16 • Require a Disenrollee's response papers and supporting evidence to be filed "no later
17 than five (5) calendar days prior to the scheduled Meeting" (*id.*, Sec. V, A(3), (C))² –
18 which time has already lapsed for Plaintiffs; and
- 19 • Require that meetings "be held v [sic] telephonically via conference call," rather than in
20 person (*id.*, Sec. VI, B) – thereby practically depriving the Disenrollee from his or her
21 proverbial day in court.

22 ¹ The subject "procedures" and referenced Stipulation are appended to the accompanying Complaint For Prospective
23 Equitable Relief.

24 ² Although a document titled, "What to expect for your meeting," provides: "At least three (3) hours prior to your
25 meeting you must provide a written response, or any documentation you wish the Tribal Council to consider in
anticipation of your meeting (no documentation or response will be accepted after this deadline). So which is it: five
days or three hours?"

Given the imminent and permanent disenrollment Plaintiffs face under rules that deprive Plaintiffs of the most fundamental of substantive and procedural due process rights, the TRO requested in this Emergency Motion is absolutely and immediately necessary to ensure that the Plaintiffs' rights are not further irreparably violated.

III. ARGUMENT

A. Legal Standard

"A [party] seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 129 S.Ct. 365, 374 (2008).

B. Plaintiffs Are Likely To Succeed On The Merits.

1. Sovereign Immunity Does Not Bar This Action.

Because Nooksack Tribal Council Members and their agents are being sued for nonmonetary injunctive relief in their official capacities and have acted beyond the scope of their authority as tribal officers, the Tribe's sovereign immunity is not implicated in this action. *Lomeli v. Kelly*, Order Denying Permission For Interlocutory Appeal (Nooksack Ct. App. 2013), 4, fn. 4 (under Nooksack law, when "an official commits an act prohibited by law, he acts beyond his authority and is not protected by sovereign immunity."); *Olson v. Nooksack*, 6 NICS App. 49 (Nooksack Tribal Ct. App. June 20, 2001) ("Various tribal courts as well as the Ninth Circuit have adopted [the *Ex parte Young*] rule in order to ensure that the requirements of ICRA and other federal and tribal statutes are enforceable against tribal officials."). Plaintiffs are suing Defendants, *in their official capacities*, for prospective injunctive relief that does not require affirmative acts. Such relief is necessary to prevent illegal acts and the application of unconstitutional official action and does not implicate the Tribe's sovereign immunity. *Id.*

2. Defendants' Have Violated Nooksack Law And Plaintiffs' Constitutional Rights.

The August 9, 2013 Notices of Disenrollment Meetings open with the generic salutation “Dear Disenrollee,” and dictate that the Disenrollee’s “meeting with Tribal Council to consider the current Notice of Intent to Disenroll will be scheduled as follows: DATE: August 16, 2013 — TIME: 10:00 am — PLACE: Teleconference . . .” The Notice concedes that it “is called on shortened time,” but warns that a “failure to attend [the] meeting at the designated time and date, may result in [the targeted Nooksack’s] disenrollment from the Nooksack Indian Tribe.” Further, these Notices of Disenrollment Meetings appear to be set in omnibus fashion. Thus, these targeted Plaintiffs are deprived of their own individually set meeting before Tribal Council on a matter of such fundamental importance, as is their right under Nooksack law.

The omnibus hearings on August 16, 2013, also expressly contradict the process promised by the Nooksack Senior Tribal Attorney Grett Hurley. On April 19, 2013, Mr. Hurley ensured that before any disenrollment meetings against Plaintiffs were held, there would be an “[i]nformation exchange” and that “rules for the meetings will be addressed in the Disenrollment Meeting Rules and Procedures” would be furnished to undersigned counsel for Plaintiffs. Second, Mr. Hurley promised that “reasonable accommodations will be made” in scheduling disenrollment meetings with Tribal Council.

The rules promised in April 2013, were never furnished to Plaintiffs and their counsel of record until yesterday, four business days prior to their unilaterally set August 16, 2013 hearings. The rules offer no process through which to request “reasonable accommodations” for scheduling problems, and no such accommodations have otherwise been made for Plaintiffs’ or their counsel. More troublingly, the brand new “TRIBAL COUNCIL PROCEDURES FOR INVOLUNTARY DISENROLLMENT MEETINGS” passed by Defendants in secret:

- Forbid a Disenrollee from being represented by counsel during disenrollment (*id.*, Sec. VI, C) – in contravention of the afore-mentioned Trial Court-entered Stipulation;
- Allow a Disenrollee only ten minutes to present his or her case (*id.*, Sec. VI, H);
- Disallow a Disenrollee adequate time to provide response papers and supporting evidence (*id.*, Sec. V, A(3), C); and
- Deprive the Disenrollee from his or her proverbial day in court by requiring telephonic appearance (*id.*, Sec. VI, B).

The entire manner in which Tribal Council has devised and scheduled these disenrollment meetings violates the express mandates of Nooksack Law.

At a minimum, Nooksack members targeted for disenrollment have the statutory right within thirty days of receiving a notice of intent to disenroll to request a meeting with the Tribal Council. N.T.C. § 63.04.001(B)(2). The law does not allow Defendants to unilaterally set a meeting on “shortened time” as they, by their own admission, have done. Instead, the applicable law allows the targeted Nooksack set a meeting date with the Tribal Council Secretary that ensures the potential disenrollee has reasonable time to make scheduling arrangements and, for example, seek time to be absent from their place of employment. *Id.*³ Outrageously, Defendants have set disenrollment meetings that may force Plaintiffs to choose between their job and their tribal identity and/or their family commitments and their tribal identity on no more than four days’ notice. Defendants openly mock basic fairness.

The August 16, 2013 omnibus disenrollment hearings also flagrantly violate Plaintiffs’ fundamental due process rights. Article IV of the Constitution requires that all governmental agencies and agents comply with Title II of the Civil Rights Act of 1968, 82 Stat. 77 (“ICRA”).

³ The applicable law provides that “[i]f a meeting is requested with the Tribal Council, the member must contact the Tribal Council secretary to obtain a date for the meeting.” N.T.C. § 63.04.001(B)(2).

1 Relevant sections of ICRA state that the Tribe may not: (a) “deny to any person within its
2 jurisdiction the equal protection of its laws or deprive any person of liberty or property without
3 due process of law”; or (b) “make or enforce any law prohibiting . . . the right of the people
4 peaceably to assemble and to petition for a redress of grievances” or “pass any bill of attainder or
5 ex post facto law” 25 U.S.C. §§ 1302(a)(1),(8)-(9). Defendants are violating these
6 provisions of constitutional and federal law.

7 The Supreme Court requires that where a person’s “‘good name, reputation, honor, or
8 integrity is at stake because of what the government is doing to him,’ the minimal requirements
9 of [due process] must be satisfied.” *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975), *quoting*
10 *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510 (1971). Disenrollment is the
11 act of stripping a person of their tribal identity and therefore, in a sense, such a process is
12 analogous to stripping a person of their national identity or citizenship. The Supreme Court
13 holds that the “mere filing of a proceeding for denaturalization [i.e., stripping someone of
14 citizenship] results in serious consequences to a defendant. Even if his citizenship is not
15 cancelled, his reputation is tarnished and his standing in the community damaged.” *U.S. v.*
16 *Zucca*, 351 U.S. 91, 99-100 (1956). Accordingly, it cannot be reasonably denied that the
17 Nooksack government’s actions to disenroll Plaintiffs have already harmed Plaintiffs’ “good
18 name, reputation, honor, or integrity” and, therefore, the Nooksack government must satisfy the
19 minimal requirements of due process.

20 When serious constitutional rights are at stake, the Supreme Court has interpreted basic
21 procedural due process protections as the provision of notice and an opportunity to be heard to
22 the person facing such adverse action. These bedrock principles are not optional when it comes
23 to rights-stripping government action:

24 For more than a century the central meaning of procedural due process has been
25 clear: ‘Parties whose rights are to be affected are entitled to be heard; and in

1 order that they may enjoy that right they must first be notified.’ It is equally
2 fundamental that the right to notice and an opportunity to be heard ‘must be
3 granted at a meaningful time and in a meaningful manner. These essential
4 constitutional promises may not be eroded.

5 *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633 (2004). The “TRIBAL COUNCIL
6 PROCEDURES FOR INVOLUNTARY DISENROLLMENT MEETINGS” do not provide
7 meaningful notice; nor do they allow any meaningful opportunity to be heard.

8 The foregoing shows Plaintiffs are likely to succeed on the merits of all claims raised in
9 their Complaint.

10 **C. Plaintiffs Will Be Irreparably Harmed Absent Immediate Injunctive Relief.**

11 It is black letter law that any government action depriving citizen of constitutional rights
12 “unquestionably constitutes irreparable injury.” *Rodriguez v. Robbins*, 715 F.3d 1127, 1143 (9th
13 Cir. 2013) (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012), in turn quoting *Elrod*
14 *v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673 (1976)). Hence, a moving party shows a probability
15 that constitutional rights will be violated in the absence of injunctive relief, the irreparable harm
16 is considered *per se*, and consequently the motion for injunctive relief will turn on whether the
17 moving party has met the other elements required for TROs. *Cf. Latino Officers Ass’n, New*
18 *York, Inc. v. City of New York*, 196 F.3d 458, 462 (2nd Cir. 1999) (citing *Beal v. Stern*, 184 F.3d
19 117, 123-24 (2nd Cir. 1999)).

20 Article II of the Nooksack Constitution reserves an absolute right of membership to all
21 persons meeting the requirements therein. *See Terry–Carpenter v. Las Vegas Paiute Tribal*
22 *Council*, Nos. 02-01, 01-02, 10 (Las Vegas Paiute Ct. App. 2003). Plaintiffs have alleged —
23 and submitted incontrovertible evidence supporting their allegations that Defendants are now
24 determined to hastily complete a disenrollment process in complete derogation of Plaintiffs’ due
25 process rights, in order to purge the Nooksack rolls of hundreds of tribal members who will

thereafter stand bereft of recourse or remedy. Accordingly, without this Court’s affirmative and immediate injunctive relief, Plaintiffs will suffer irreparable harm.

D. The Equities Tip Sharply In Plaintiffs’ Favor.

The Ninth Circuit has determined that injunctive relief may be warranted to prevent removal proceedings of non-citizens. *Leiva-Perez*, 640 F.3d at 963-64. Balancing the equities, that court observed that they weighed “heavily” in the movant’s favor because: (1) the government had an interest in ensuring that its actions did not result in unnecessary and irreparable harm — in the movant’s case, that the government did not “deliver aliens into the hands of their persecutors”; and (2) the government was incurring “no expense while [the movant] seeks judicial review.” *Id.* at 971. The situation before this Court is nearly identical with respect to the governmental and personal interests at stake.

Here, it cannot be questioned that the Nooksack government has an interest in ensuring that people are not unnecessarily and wrongly forcibly disenrolled. Nor will the Defendants incur any significant expense due to a temporary moratorium of their efforts to purge Tribal Members. Hence, the equities weigh sharply — if not entirely — in Plaintiffs’ favor.

E. The Nooksack Public Interest Favors Injunction.

The Nooksack People have a profound interest in the constitutional application of their laws, the protection of individuals from abuse of governmental power, and the orderly review by this Court of Defendants’ actions. Indeed, there is no apparent public interest weighing in favor of permitting the Defendants to continue bulldozing their way towards the disenrollment of Plaintiffs. There is no legitimate purpose in expediting a process certain to result in profound and far-reaching injuries.

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DATED this 13th day of August, 2013.

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DECLARATION OF SERVICE

I, Gabriel S. Galanda, say:

1. I am over eighteen years of age and am competent to testify, and have personal knowledge of the facts set forth herein. I am counsel of record for Plaintiffs.

2. Today, I caused the attached documents to be delivered to the following:

Grett Hurley
Rickie Armstrong
Tribal Attorney
Office of Tribal Attorney
Nooksack Indian Tribe
5047 Mt. Baker Hwy
P.O. Box 157
Deming, WA 98244

Thomas Schlosser
Morisset, Schlosser, Jozwiak & Somerville
1115 Norton Building
801 Second Avenue
Seattle, WA 98104-1509

The foregoing statement is made under penalty of perjury under the laws of the Nooksack Tribe and the State of Washington and is true and correct.

DATED this 13th day of August, 2013.



GABRIEL S. GALANDA