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NO. 2013-CI-APL-003

NOOKSACK COURT OF APPEALS
FOR THE NOOKSACK INDIAN TRIBE

MICHELLE ROBERTS, ET AL.,
Appellants,

v.

ROBERT KELLY, ET AL.,
Appellees

ON APPEAL FROM THE NOOKSACK TRIBAL COURT
No. 2013-CI-CL-003

RESPONSE BRIEF OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Nooksack Tribe Constitution

SUMMARY OF ARGUMENT

The Trial Court properly ruled that Appellees retain sovereign immunity as officials of the Tribe acting within the scope of their authority. Appellants allege that *Ex parte Young* strips Appellees of their sovereign immunity, but this doctrine, if it even applies in the Nooksack tribal context, fails to allow Appellants to bring suit against tribal officials when they have acted within the scope of their authority. Appellants assert that the Trial Court should not have evaluated the merits of the case, but the federal courts have evaluated the merits of cases in determining sovereign immunity applicability, and Appellants forced the Court to consider the merits by filing two Motions for Temporary Restraining Orders. Appellants fully litigated this case below without objection. Appellants cannot complain that the Trial Court erred in responding to Appellants' requests for a determination of the tribal officials' authority.

Oddly, Appellants now allege that Appellees acted within the scope of their duties even though Appellants alleged that Appellees acted beyond the scope of their authority below. The cases related to official-capacity suits merely confuse matters. Appellees have not violated Nooksack law, and the Disenrollment Procedures are constitutional.

This case was fully and fairly litigated in the Trial Court, and the Trial Court's rulings should be upheld.

STATEMENT OF CASE

On August 8, 2013, the Tribal Council convened a Special Meeting to consider the Tribal Council Procedures for Involuntary Disenrollment Meetings

(Disenrollment Procedures) and various individual disenrollments. *Adams v. Kelly*, Case No. 2013-CI-CL-004, Decl. of R. George, at ¶4 (Nov. 4, 2013).[1] Given the subject matter of the meeting, the Council voted to excuse Secretary St. Germain and Councilmember Roberts from the meeting due to a conflict of interest. *Id.* The Council passed a total of 25 actions with a quorum, including the Disenrollment Procedures and certain individual disenrollments. *Id.*; *see, e.g.*, CP 13, Second Decl. of G. Galanda, Exh. E.

On August 13, 2013, Appellants filed their Complaint in this action with the Trial Court. CP 12, Defs.' Mot. to Dismiss 5:5. Appellants also filed an Emergency Motion for Temporary Restraining Order (TRO) on August 13, 2013. *Id.* at 5:6.

On August 20, 2013, the Tribe announced via the Nooksack Indian Tribe Communications Page on Facebook that eligible children would receive $275 for school clothing and supplies. CP 33, Decl. of G. Hurley ¶10. In order to be immediately eligible for the funds, children must (1) be enrolled tribal members, (2) not be subject to disenrollment proceedings, and (3) either be age 3-4 and enrolled in head start, age 5-14, or age 15-19 with proof of high school or GED enrollment. *Id.* If a child that is subject to disenrollment proceedings is not ultimately disenrolled, that child will then be eligible for the $275. *Id.* at ¶10 and Exh. 4.

On August 21, 2013, Appellants filed their First Amended Complaint for Prospective Equitable Relief, which added over 250 plaintiffs. CP 11, First Am.

[1] This declaration is not in the record, but it is available upon request.

Compl. Also on August 21, 2013, the Trial Court denied Appellants' Emergency Motion for TRO. CP 10, Amended Order Den. Emergency TRO Hearing. The Tribal Council scheduled certain disenrollment meetings for August of 2013, but on August 27, 2013, this Court stayed all disenrollment proceedings for those persons on the April 12, 2013 list submitted by Appellants' counsel. *Lomeli v. Kelly*, No. 2013-CI-CL-001, Order Extending Stay. This stay remains in effect to this day.

On August 27, 2013, the Council convened a Special Meeting in response to the requests of Secretary St. Germain and Councilmember Roberts. CP 42, Decl. of C. Bernard ¶4.

On November 22, 2013, the Council passed Resolution 13-163, which approved amending the Disenrollment Procedures to allow a potential disenrollee to be represented by an advocate, attorney, or authorized representative during a disenrollment meeting.[2]

ARGUMENT

I. The Nooksack Indian Tribe, the Council, and Tribal Officials Retain Sovereign Immunity in this Suit.

This Court lacks jurisdiction because the Nooksack Indian Tribe, the Council, and tribal officials are immune from suit. An Indian tribe is immune from suit because it is a sovereign entity with common law immunity. *Cline v. Cunanan*, Case No. NOO-CIV-02/08-5, 5-6 (Nooksack Ct. App. 2009); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Sovereign immunity acts as a jurisdictional bar to bringing suits against tribes unless Congress has authorized

[2] Resolution 13-163 and the amended Disenrollment Procedures are not in the record, but they are available upon request.

the lawsuit or a tribe has waived its immunity. *Martinez*, 436 U.S. at 58-59; *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Waivers of immunity must be clear, express, unequivocal, and cannot be implied. *Olson v. Nooksack*, 6 NICS App. 49, 52-53 (Nooksack Ct. App. 2001) (citing *Martinez*, 436 U.S. at 60). Sovereign immunity also applies to tribal officials and employees acting within the scope of their authority. *Cline*, Case No. NOO-CIV-02-08-5, at 6 (citing *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)); *see also Mitchell v. Pequette*, CV-07-38, 2008 WL 8567012 at *7-9 (Leech Lake Tribal Court May 9, 2008) (holding that tribal employees retained sovereign immunity even though the plaintiff alleged that the employees acted outside the scope of their authority, because the plaintiff failed to support this allegation). Tribal sovereign immunity "extends to actions brought against tribes in tribal court." *Olson*, 6 NICS App. at 51.

In *Cline*, the plaintiff-appellants sued the Council Chairman and the Council for declaratory relief based on allegations of civil rights violations and a challenge to the Nooksack Tribal Election Ordinance. *Cline*, Case No. NOO-CIV-02-08-5, at 1. The Nooksack Court of Appeals found that the defendant-appellees retained sovereign immunity even though the complaint named individual officers. *Id.* at 7. Importantly the Court found that, "[t]he Nooksack Tribal Council and its officers need to be able to enact ordinances and conduct business without constantly having to defend themselves against suit."

Appellants misconstrue *Cline*; they allege that the *Cline* Court applied a different test, because it was a "personal capacity" suit.[3] *See* Opening Br. 14 n.36. This attempt to dismiss *Cline* fails, as there was no legislative or qualified immunity at issue in *Cline*. On the contrary, the Nooksack Court of Appeals found that the Council members and the Council Chairman retained *sovereign immunity* because there was no waiver, they did not act beyond the scope of their authority, and the plaintiff-appellants' conclusory allegations did not suffice to strip them of sovereign immunity. *Cline*, Case No. NOO-CIV-02-08-5, at 5-8.

Appellants further confuse matters by arguing that "Appellees were sued in their official capacities for acts committed ***inside*** the scope of their duties as tribal officers[,]" and that this is an "official capacity" suit and not a "personal capacity" suit. Opening Br. 14-15. They state that "[i]f Appellants were concerned with acts that Appellees had taken 'outside the scope of' their official capacities, they would have sued Appellees in their personal capacities and argued that the suit was not 'barred by the doctrine of absolute (not sovereign)

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[3] Appellants again urge that the terms "individual" and "personal" change the test used, but the federal Supreme Court and the Tenth Circuit have incorporated the words "personal" and "individual" into analysis regarding suits against individuals in their official capacities. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997) ("To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism . . . ."); *Starkey ex rel. A.B. v. Boulder Cnty. Soc. Servs.*, 569 F.3d 1244, 1262 (10th Cir. 2009) ("under the Starkeys' complaint, BCDSS and the individual Defendants in their official capacities could be held liable only if there was an underlying constitutional violation-that is, only if at least one of the Defendants in a personal capacity had violated at least one of the Starkeys' constitutional rights."); *see also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701-02 (1949). Additionally, Appellants utilized an entirely different interpretation of *Cline* below. *See* CP 39, Supplemental Memo Opposing Motion to Dismiss 5-6.

immunity....'" *Id.* at 15 n.37. This is a new argument that was not considered below, and it is meritless.[4]

Appellants rely on *Kentucky v. Graham*, 473 U.S. 159 (1985), and its progeny, but those cases do not stand for the proposition that an official capacity action does not involve analyzing whether an official has acted within the scope of his or her authority.[5] As the federal Supreme Court explained,

> Proper application of this principle in damages actions against public officials requires careful adherence to the distinction between personal- and official-capacity action suits. Because this distinction apparently continues to confuse lawyers and confound lower courts, we attempt to define it more clearly through concrete examples of the practical and doctrinal differences between personal and official capacity actions.
>
> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only

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[4] Defendants are perplexed by Plaintiffs' inclusion of this new material. Plaintiffs' First Amended Complaint states, "under Nooksack law, when 'an official commits an act prohibited by law, *he acts beyond his authority* and is not protected by sovereign immunity.'" CP 11, First Am. Compl. 5:16-18 (emphasis added). Appellants' Opposition to Appellees' Motion to Dismiss states, "Defendants have, as Plaintiffs allege, *acted outside the scope of the laws that bind and limit their authority*...." CP 39, Supplemental Memo Opposing MTD 2: 5-6 (emphasis added). Plaintiffs apparently no longer adhere to this line of argument, and instead they rely on new, federal material to fault the Trial Court for its determination that Appellees acted within the scope of their authority.

[5] Under *Ex parte Young*, an official capacity action is expressly not treated as an action against the government. This is the fiction of *Young*, but courts do not ignore this fiction as Appellants allege. *See* Opening Br. 16. This fiction is essential to *Young*'s applicability in federal court. *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000).

> against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Graham, 473 U.S. at 165-66 (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n. 55 (1978) (internal citations omitted)). Additionally, "in an official-capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law." *Id.* at 167. Finally, the *Graham* Court noted that,

> [t]here is no longer a need to bring official-capacity actions against local government officials, for under *Monell, supra,* local government units can be sued directly for damages and injunctive or declaratory relief. Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, however, a State cannot be sued directly in its own name regardless of the relief sought. Thus, implementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the State. *See Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L. Ed. 714 (1908).

Id. at 167 n.14 (some internal citations omitted). The Court went on to explain that the Eleventh Amendment of the federal Constitution prohibits a damages action against a State in federal court even "when State officials are sued for damages in their official capacity...[,] because ... 'a judgment against a public servant in his official capacity imposes liability on the entity that he represents....'" *Id.* at 169 (internal citations omitted). However, in "an injunctive or declaratory action grounded on federal law, the State's immunity *can* be overcome by naming state officials as defendants." *Id.* at 169 n.18.

Appellants sued Appellees in their official capacity in an attempt to utilize the *Ex parte Young* doctrine to avoid sovereign immunity. The *Young* doctrine

continues to include an inquiry into scope of authority. *See infra* Section II(A). Appellants engaged the question of whether Appellees acted within the scope of their authority below, and Appellants cannot now claim that official capacity actions do not involve this inquiry.

Under Article VI, § 2(A)(3) of the Constitution, a suit against the Tribal Government and the Council can only proceed when there is an express waiver of sovereign immunity. *Cline*, Case No. NOO-CIV-02/08-5, at 6. Additionally, the Tribal Court has limited civil and criminal subject matter jurisdiction only as to matters "specifically enumerated in the Nooksack Code of Laws." Title 10, § 10.00.030. Title 10, § 10.00.050 provides for exclusive, original jurisdiction in the Tribal Court in any matter where the Tribe or its officers and employees are parties in their official capacities, but this jurisdiction is limited by the following sentence:

> Nothing contained in the preceding sentence or elsewhere in this Code shall be construed as a waiver of the sovereign immunity of the Tribe or its officers or enterprises unless specifically denominated as such and the court is expressly prohibited from exercising jurisdiction over the Nooksack Indian Tribe without an express wavier [sic] of sovereign immunity.

Title 10, § 10.00.050. Title 10 also contains a provision explaining that nothing in Title 10 or any other law waives the Tribe's, its officials', its entities', or its employees' immunity without an express waiver enacted by the Council. Title 10, § 10.00.100.[6] Neither Congress[7] nor the Council has expressly waived the

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[6] In addition, § 63.00.003 of the enrollment ordinance expressly bars tribal court jurisdiction over enrollment matters.

[7] Inclusion of the Indian Civil Rights Act in the Constitution does not constitute a waiver of sovereign immunity. *Cline*, Case No. NOO-CIV-02/08-5,

Tribe's sovereign immunity, as required under the Constitution, Title 10, and federal law. The Trial Court correctly found that "the cloak of sovereign immunity protects the Defendants." CP 64, Order Granting Defs.' Motion to Dismiss (MTD Order) 12:9-10.

II. The *Ex parte Young* Doctrine, to the Extent it Applies in the Tribal Context, Does Not Strip Appellees of Their Sovereign Immunity.

Under *Ex parte Young*, 209 U.S. 123 (1908), state officials may be sued in their official capacity for violating a federal law when the Appellant seeks prospective, equitable relief. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). This doctrine is based on the need to protect the supremacy of federal law, and it expressly does not apply against a state official when that official is accused of violating a state law. *Pennhurst State Sch. & Hosp. v. Halderman* (*Pennhurst*), 465 U.S. 89, 105-06 (1984); *AUTO v. Washington*, 175 Wn. 2d 214, 231, n.3 (2012). When a state official is accused of violating a state law, the "entire basis for the doctrine of *Young* . . . disappears." *Pennhurst*, 465 U.S. at 106. Similarly, there is no basis to apply *Ex parte Young* when a tribal official is accused of violating tribal law.

Appellants make clear that they have sued Appellees for acts "that are repugnant to superior Nooksack law." Opening Br. 1. Nooksack law is the only law at issue here. Thus, case law applying *Ex parte Young* to individuals

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at 6; *Martinez*, 436 U.S. at 58-73; *Gallegos v. Jicarilla Apache Nation*, 97 F. App'x 806, 811 (10th Cir. 2003).

violating *federal* law is simply inapplicable.[8] The Trial Court rightly found that in "the tribal context, the [*Ex parte Young*] analogy is inelegant and, quite frankly, fairly tortured."[9] CP 64, MDT Order 5:1-2. As the Trial Court noted, there are six qualifications for *Ex parte Young* to apply,[10] and many simply do not fit in the tribal context. *Id.* at 5:4-5 and n.1.

In *Cline*, the Nooksack Tribal Court of Appeals explained that the *Ex parte Young* doctrine allows "individual governmental officers [to] be sued for

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[8] *See Burlington Northern & Santa Fe Railway Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993); *Northern Arapahoe Tribe v. Harnsberger*, 697 F.3d 1272, 1281-82 (10th Cir. 2012); *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians*, 177 F.3d 1212, 1225-26 (11th Cir. 1999); *Vann v. Kempthorne*, 534 F.3d 741, 749-50 (D.C. Cir. 2008); *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 310 (N. Dist. N.Y. 2003) (citing *CSX Transp., Inc. v. New York State Office of Real Prop. Servs.*, 306 F.3d 87, 98 (2nd Cir. 2002)).

[9] Appellants argue that application of the *Young* analogy is in fact quite routine, but they rely on federal cases where state officials allegedly violated federal law. For example, in *Diaz*, the trial court held that the plaintiffs were likely to succeed on the merits under the preliminary injunction standard, because the law being enforced likely violated Equal Protection principles, and it was not rationally related to legitimate government interests. *Collins v. Brewer*, 727 F.Supp.2d 797 (D. Ariz. 2010). Here, the Trial Court found that Appellees did not violate Nooksack law. *See* CP 64, MTD Order 12-13.

[10] In order to apply:

> (1) the state officer sued must have a duty to enforce the challenged state law; (2) the action by the state officer under state law must constitute an alleged violation of federal law; (3) the federal law allegedly violated must be the 'supreme law of the land'; (4) *Young* will not apply if federal law provides such an intricate remedial scheme that the court concludes that Congress did not intend for cases under Ex Parte Young [sic]; (5) Young will not apply if allowing suit would interfere with special state sovereignty interests; and (6) the Court has imposed significant restrictions on the remedies available under Ex parte Young.

Avoiding Sovereign Immunity: The Doctrine of Ex parte Young, 13 Fed. Prac. & Proc. Juris. § 3524.3, at 2 (3d ed.)

declaratory or injunctive relief where the actions taken exceed his or her authority." Case No. NOO-CIV-02/08-5, at 6. However, the *Cline* Court did not hold that the *Ex parte Young* doctrine would ever apply in the Nooksack tribal context.[11] Case No. NOO-CIV-02/08-5. Even if a *Young*-like doctrine does apply in this Court, it would not allow Appellants to continue this suit, because Appellees acting within the scope of their authority under tribal law retain sovereign immunity,[12] which means this Court lacks jurisdiction.

A. Importing the Federal Courts' Confused *Young* Analyses Is Unnecessary and Is Contrary to Nooksack Case Law.

Appellants assume that *Ex parte Young* applies in the Nooksack tribal context, and – through incorporation of their *Lomeli* brief – they rely on the federal Supreme Court's *Verizon Maryland v. Public Service Commission* (*Verizon*), 535 U.S. 635 (2002) decision to allege that the *Young* doctrine waives Appellees' immunity here regardless of whether Appellees have acted beyond the scope of their authority. While *Verizon* found that "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the

[11] The Trial Court did not apply *Ex parte Young* in this case despite Plaintiffs' allegations to the contrary. Opening Br. 6 (citing CP 18, Hearing Order, at 4); *see also* CP 18, Hearing Order at 3-10.

[12] Because *Ex parte Young* is concerned with the supremacy of federal law, the issue of a state official's authority under state law rarely arises. However, in the tribal context, the scope of a tribal official's authority is often the issue that determines whether sovereign immunity protects the official. Thus the sovereign immunity inquiry in the tribal context is somewhat analogous to proceedings under the Federal Tort Claims Act where the question of the employee's scope of authority is intertwined with sovereign immunity and the courts' jurisdiction. *E.g., Hamm v. United States,* 483 F.3d 135, 137 (2d Cir. 2007). Appellees have not acted beyond the scope of their authority, which means *Young* does not strip them of immunity. *See* discussion *infra* Section III.

claim[,]"[13] the Supreme Court, in *Idaho v. Coeur d'Alene Tribe of Idaho*, also found that:

> [t]o interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe,* that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction.[14]

In another case, the Supreme Court expressly evaluated whether state officials acted beyond the scope of their authority when deciding whether the *Young* doctrine stripped the officials of their immunity. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 688-92 (1982) (plurality).

The Ninth Circuit also recently delved into the merits of whether tribal officials acted within the scope of their authority to assess tribal taxes. *Miller v. Wright*, 705 F.3d 919, 927-28 (9th Cir. 2013) *cert. denied,* 133 S. Ct. 2829 (U.S. 2013). In *Miller*, the plaintiffs alleged that tribal officials were not immune from suit, because they were allegedly assessing unconstitutional taxes and therefore acting outside the scope of their authority. *Id.* at 927. The Court found that the "Tribe's sovereign immunity . . . extend[ed] to its officials who were acting in their official capacities and within the scope of their authority when they taxed transactions occurring on the reservation." The Ninth Circuit specifically determined that the tribal officials were acting within the scope of their authority, which is exactly what the Nooksack Trial Court found here. Despite *Verizon*, the

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[13] 535 U.S. at 646.

[14] *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997).

federal application of *Young* is anything but clear, and it cannot detract from the Tribal Court's clear reasoning here.

Cline, which was decided well after *Verizon*, found that naming individual officers in a complaint does not automatically allow a case to proceed. Case No. NOO-CIV-02/08-5, at 7. The Nooksack Court of Appeals explained that the "Nooksack Tribal Council and its officers need to be able to enact ordinances and conduct business without constantly having to defend themselves against suit." *Id.* Sovereign immunity means immunity from suit and not simply a "defense to liability," which means it is "effectively lost if a case is erroneously permitted to go trial." *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 144 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). To allow *Verizon* to dictate the outcome of this case would mean importing confusing and seemingly contradictory federal standards developed to assure the supremacy of federal law – which does not apply here – and it would ignore *Cline*'s concerns about protecting tribal officials from constant suit.

Additionally, Plaintiffs' claims regarding the Trial Court's holding on the potential Disenrollees' right to have a representative at the disenrollment meeting are moot irrespective the *Young* doctrine. *See* Opening Br. 18-19. On November 22, 2013, the Tribal Council amended the Disenrollment Procedures to allow for representation at disenrollment meetings.[15] Plaintiffs have thus received the relief they seek on this issue.

[15] The Amended Disenrollment Procedures are available upon request and will be provided to each potential Disenrollee when their respective meetings are scheduled.

B. Appellants Requested that the Trial Court Consider the Merits of the Case By Filing Motions for TRO, and Appellants Fully Litigated the Merits.

Appellants sought two Motions for TRO in the Trial Court. CP 3, Emergency Motion for TRO and CP 21, Second Motion for TRO. In order to obtain a preliminary injunction or TRO, a plaintiff must show a likelihood of success on the merits. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). That is, the Trial Court had to consider whether Appellants were likely to succeed *on the merits* because Appellants requested two Motions for TRO. Having requested the Court's determination of the merits, Appellants now complain that examining the merits of the case to determine the scope of Appellees' authority was error. This is nonsensical. In this proceeding the Court was forced to review numerous declarations and attached materials; the Court properly considered the merits of Appellees' authority under Nooksack law.

Appellants also fully litigated the merits of the case without objection. As the Trial Court stated, "[t]hough this case has been open less than two months, volumes of filings have come in from both sides and the Court has issued several orders." CP 64, MTD Order 1:19-20. Appellants cannot come at this late hour and complain that the Trial Court should not have examined the merits when Appellants themselves engaged the merits from the beginning of the litigation.[16]

[16] Appellants allege that Appellees "recognize that the Trial Court should not have ruled on the merits...." Opening Br. 20. Appellants' reference to CP 32, Defs.' Resp. in Opp'n to Pls.' Second Motion for TRO misconstrues Appellees' argument summary. In fact, the Trial Court properly considered whether Appellees have acted within the scope of their authority.

III. The Trial Court Correctly Held That Appellees Acted Within the Scope of Their Authority.

Article II of the Constitution concerns tribal membership, and it grants the Council the authority to govern membership matters. Article II, § 2 states that the "Tribal Council shall have the power to enact ordinances in conformity with this constitution, subject to the approval of the Secretary of the Interior, governing future membership in the tribe, including adoptions and loss of membership." Article II, § 4 addresses loss of membership and mandates that the Council, "shall, by ordinance, prescribe rules and regulations governing involuntary loss of membership." The reason for loss of membership must be a "failure to meet the requirements set forth for membership in this constitution[] . . . ." *Const.*, art. II, § 4. Sections 2 and 4 grant the Council the exclusive authority over enrollment and loss of membership. *Const.*, art. II, §§ 2 and 4. The Council has acted within this authority in all its actions related to this case.

A. The Disenrollment Procedures Meet Procedural Due Process Standards.

Appellants allege that the Disenrollment Procedures do not meet the *Matthews* test for procedural due process.[17] Opening Br. 20-30. The *Matthews* test requires the Court to balance three factors: (1) the private interest at stake, (2) the risk of erroneous deprivation and any value in providing additional safeguards, and (3) the government's interest, which includes the function involved and any monetary and administrative burdens in providing additional

[17] Appellants rely on some cases (*e.g.*, *Davisson v. Colville Confederated Tribes*, 10 Am. Tribal Law 403 (Colville Tribal Ct. App. 2012)) dealing with Substantive Due Process, but these cases are inapposite.

procedures. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). In *Matthews*, the plaintiff's social security benefits had been terminated, and the plaintiff alleged that due process considerations required a pre-termination hearing. *Id.* at 323-25. The federal Supreme Court held that no pre-termination hearing was necessary, because the procedures provided the plaintiff: (1) an adequate opportunity to assert his claim prior to any administrative action, (2) a post-deprivation hearing, and (3) judicial review before denial of the claim became final. *Id.* at 349.

In *Prosser v. Butz*,[18] a pre-*Matthews* decision, the Iowa District Court determined the plaintiff was entitled to notice of the specific allegations in time to prepare a defense, the right to retain counsel, and the right to present argument and evidence at a hearing. 389 F. Supp. 1002, 1004 (D.C. Iowa 1974).[19] The Disenrollment Procedures here only concern disenrollment meetings, and they provide for notice of the meeting in time for Appellants to prepare a defense, the right to retain counsel, and the right to present documentary evidence and oral testimony at a hearing. Amended Disenrollment Procedures §§ IV, V, VI.[20]

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[18] Appellees note that this case has been cited in a total of five other court opinions, but Appellants claim that it is "oft-cited." *See* Opening Br. 21.

[19] Appellants state that *Gardner v. Pierce County Bd. of Com'rs*, 617 P.2d 743, 745 (Wash. Ct. App. 1980) cites "*Prosser* for the proposition that a mere ten days does not constitute sufficient notice...[,]" but *Gardner* does not cite *Prosser* for such a proposition. Instead, *Gardner* found that the County did not give notice of a negative declaration until the hearing, which meant it was unreasonable to expect the petitioner to file an appeal 10 days before the hearing. *See* Opening Br. 21. When a petitioner does not have notice of allegations, there can be no requirement to file an appeal. *Gardner*, 617 P.2d at 745. Here, Appellants have had notice of their potential disenrollment for almost one year.

[20] The Amended Disenrollment Procedures are not in the record, but they are available upon request. The former Disenrollment Procedures may be found at CP 13, Second Decl. of G. Galanda, Exh. F.

Appellants allege that "the Procedures do not provide notice at a time reasonably prior to the hearing in order to allow preparation of a defense." Opening Br. 22. Procedural Due Process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). In *City of Los Angeles v. David*, the federal Supreme Court found that a 27-day delay in holding a post-deprivation hearing did not violate due process concerns. 538 U.S. 715, 719 (2003). In *Application of Gault*, the federal Supreme Court held that due process required written notice "of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given... sufficiently in advance of the hearing to permit preparation." 387 U.S. 1, 33 (1967).

The former Disenrollment Procedures and the Amended Disenrollment Procedures provide:

> The Tribal Council shall provide a Disenrollee written notice of the time, date, and method of the Meeting. The date and time of the Meeting may be subject to change by the Tribal Council. Notice will be provided by personal service or registered mail, return receipt requested (or its Canadian equivalent), to the last known address of the Disenrollee, no later than twenty-one (21) calendar days prior to the scheduled Meeting date.
>
> Tribal Council may elect to shorten the time required in instances where the Disenrollee was personally served and the Tribal Council finds that the Disenrollee has sufficient time to arrange appearance by telephone. In such cases, Tribal Council may, in its sole discretion, proceed with the Meeting making such accommodations as necessary to permit the Disenrollee the opportunity to be heard.

See, e.g., CP 13, Second Decl. of G. Galanda, Exh. F at § IV. In addition to the notice of a meeting, the Tribal Council has provided Appellees with detailed genealogical histories explaining the basis for commencing disenrollment proceedings. *See, e.g.*, CP 6, Post-Hearing Decl. of G. Galanda, Exh. A (Notice of Basis for Commencement for Disenrollment Proceedings). These genealogical histories lay out the facts underlying the disenrollment proceedings; a defense would involve nothing more than challenging these factual allegations.

Providing 21 days' notice certainly meets any due process requirements here. Appellants have had knowledge of impending disenrollment proceedings since at least February of 2013,[21] a very limited universe of facts is relevant, and those facts are found in documentary evidence. While the Council may shorten the notice timeframe, it can only do so when a Disenrollee is personally served and the Council finds that the Disenrollee has adequate time to appear by telephone. CP 13, Second Decl. of G. Galanda, Exh. F at § IV. In order to further protect a Disenrollee, the Council may make accommodations to allow the Disenrollee the opportunity to be heard. *Id.*

While the private interest at stake here, Tribal membership, is very important, there is no risk of erroneous deprivation under the Disenrollment Procedures' current notice standards. Providing additional notice, however, would substantially burden the Tribal Council, because there are over 270 meetings to schedule. Additionally, the Council's equally important interests in

[21] *See* CP 6, Post-Hearing Decl. of G. Galanda, Exh. A (Notice of Basis for Commencement for Disenrollment Proceedings).

tribal sovereignty and ensuring that only those eligible for enrollment are enrolled counsel against adding additional notice procedures.

Again, the Amended Disenrollment Procedures expressly allow Appellants to retain counsel, which moots Appellants' claim related to the former Disenrollment Procedures' restricted right to representation in disenrollment meetings. An issue is moot if a change in circumstance has "forestalled any occasion for meaningful relief." *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir. 2007). Voluntary cessation moots an issue as long as "subsequent events [have] made it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur." *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1238 (9th Cir. 1999) (internal citations omitted). Appellants have received the relief they requested related to counsel, and there is no possibility of recurrence.

Section V of the former Disenrollment Procedures and the Amended Disenrollment Procedures specifies requirements for written responses to the Tribe's Notice of Involuntary Disenrollment and evidence supporting the potential Disenrollee's case. CP 13, Second Decl. of G. Galanda, Exh. F at § V. Appellants allege that the requirements are unduly burdensome. Opening Br. 23. The requirements are not onerous, and they are necessary to ensure that each potential Disenrollee has a real opportunity to respond to the Tribe's allegations. Responses must be typed, because the Council may not be able to read a

handwritten response. Footers[22] containing the Disenrollee's name, enrollment number, and page number are necessary to keep documents organized – particularly when over 270 people will likely be submitting documentation around the same time.[23] Similarly, exhibit lists and exhibit numbers are necessary to organize evidence submitted by potential Disenrollees. These requirements help ensure against an erroneous deprivation, because they minimize the potential for losing documents or not being able to attribute a document to the correct Disenrollee.

Telephonic hearings provide just as meaningful an opportunity to be heard as in-person meetings – especially due to safety concerns and practical considerations for those living far away from the Reservation. Appellants fail to point to any law, Nooksack or otherwise, that requires in-person meetings.[24] The 10-minute time limit on presentation of oral argument fits well within due process standards as well. The Tribe bears the burden of proof, and the Tribe must demonstrate that the potential Disenrollee is ineligible for membership under Article II, Section 1(A)-(G) of the Constitution. Title 63, § 63.04.001(B). A written statement, documentary evidence, and 10 minutes of oral argument and/or testimony provide ample opportunity for potential Disenrollees to challenge the

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[22] Any basic word processing program allows the user to create footers, so a bates-numbering program is unnecessary despite Appellants' allegations to the contrary. *See* Opening Br. 24. Basic word processing programs should be available through Appellants' counsel and/or the local library.

[23] Appellants cite to Section V(B)(2)(d) of the Disenrollment Procedures, but this Section does not exist. Section V(B)(3) states that "[u]ntimely submissions may result in rejection."

[24] Appellants' counsel have routinely utilized telephonic hearings themselves in this matter as well as related matters.

evidence presented by the Tribe through the Tribal Council. Again, there is essentially no risk of erroneous deprivation under these circumstances.[25] On the other hand, requiring in-person meetings risks the safety of the Tribal Council, and it would be more difficult for those Disenrollees living far away from the Reservation to participate in a meeting. Allowing each Disenrollee more than 10 minutes for oral argument would impose substantial monetary and administrative burdens on the Tribe, because there are over 270 Disenrollees. The balance plainly tips in favor of upholding the Trial Court's determination that the Disenrollment Procedures comply with Procedural Due Process.

B. The Disenrollment Procedures Are Procedurally Constitutional.

Appellants allege that passage of the Disenrollment Procedures violated the Constitution because: (1) Secretary St. Germain and Councilmember Roberts were not notified of the August 8, 2013 Special Meeting, (2) Chairman Kelly only allowed five members of the Council to participate in the Special Meeting, (3) the Special Meeting took place via teleconference, (4) the Special Meeting was not a public meeting, and (5) the Council has not convened a regular meeting in 2013. Opening Br. 28.

The Council's passage of the Disenrollment Procedures did not violate the Nooksack Constitution or Bylaws. The Tribal Council passed the Disenrollment Procedures on August 8, 2013, at a Special Meeting. *See, e.g.*, CP 13, Second

[25] Appellants allege that the Trial Court found that additional oral argument and/or testimony time was likely necessary, but the Trial Court in fact stated, "[i]f the Court could impose "additional safeguards," the only one it might imagine imposing would be additional time for hearings." CP 18, Hearing Order 9. The Trial Court unequivocally held that the 10-minute time limit does not violate Procedural Due Process. CP 64, MTD Order 11:1-12 (stating "[t]he risk of erroneous deprivation under these circumstances is minimal.").

Decl. of G. Galanda, Exh. F. Article II, Section 4 of the Bylaws states that, "[a]t any special or regular meeting of the tribal council, five (5) members present shall constitute a quorum, and the tribal council may proceed to transact any business that may come before it." The Council[26] voted to excuse Secretary St. Germain and Councilmember Roberts from the August 8 meeting, because the meeting only concerned matters related to disenrollment, and Secretary St. Germain and Councilmember Roberts are conflicted out of such meetings under Title 65. *Adams*, Case No. 2013-CI-CL-004, Decl. of R. George, at ¶4. Absence of two members of Council does not make passage of the Disenrollment Procedures unconstitutional when a quorum is present.

Nothing in the Constitution or the Bylaws prohibits Special Meetings from being held telephonically, including Article III of the Bylaws.[27] Article II, Section 6 of the Bylaws specifies that "[a]ll sessions of the tribal council (except executive) shall be open to all members of the tribe." As such, all meetings of the Tribal Council are public meetings except executive sessions. The August 8, 2013 meeting was therefore open to the public. Appellants again raise the issue of canceled "First Tuesday" meetings, but this issue is already before this Court in the related *Lomeli v. Kelly*, No. 2013-CI-APL-002 matter. The Council's passage of the Disenrollment Procedures complied with the Nooksack Constitution and Bylaws.

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[26] A quorum of the Council voted to excuse Secretary St. Germain and Councilmember Roberts. *Adams*, Case No. 2013-CI-CL-004, Decl. of R. George, at ¶4. Chairman Kelly did not make the decision as Appellants allege. *See* Opening Br. 28.

[27] Article III of the Bylaws concerns adoption and ratification of the Bylaws.

The Trial Court properly held that the Constitution grants the Council authority over involuntary loss of membership. *See* CP 64, MTD Order 6; *Const.* art. II, §§ 2, 4 and art. VI, § 1(J). Appellants allege that the Council can only adopt ordinances governing involuntary loss of membership,[28] but Article VI, Section 1(J) of the Constitution grants the Council the power to "adopt resolutions regulating the procedures of the tribal council itself and of other tribal agencies and officials." The Council properly adopted the Disenrollment Procedures through Resolution No. 13-111 on August 8, 2013. Since the Disenrollment Procedures are just meeting procedures, and they do not alter or amend Title 63 in any way, they need not be approved by the Secretary of the Interior.

C. Appellees Have Not Denied Substantive Due Process or Equal Protection.

Appellants appear to conflate Substantive Due Process and Equal Protection,[29] but they protect different interests. *Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004). Substantive Due Process "'provides heightened protection against government interference with certain fundamental rights and liberty interests[]' even when the challenged regulation affects all persons equally." *Id.* (quoting *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997)) (internal citations omitted). However, "the essence of the equal protection requirement is that the state treat all those similarly situated similarly[.]" *Id* (quoting *Bartell v. Aurora Pub. Schs.,* 263 F.3d 1143, 1149 (10th Cir. 2001)).

Appellants fail to adequately allege a violation of Substantive Due Process. The federal Supreme Court has explained that "only the most egregious

[28] Opening Br. 30.
[29] Opening Br. 30-31.

executive action can be said to be 'arbitrary' in the constitutional sense,... [and] the cognizable level of executive abuse of power is that which shocks the conscience[.]" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 834-35 (1998). For example, only an extreme intrusion such as forced stomach pumping has been found to violate Substantive Due Process. *See Rochin v. California*, 342 U.S. 165, 172-73 (1952).

Here, the Council determined that students subject to pending disenrollment proceedings would not be immediately eligible for discretionary Back to School Support until the Council makes a final decision that such a student will not be disenrolled. *See* CP 33, Decl. of G. Hurley, Exh. 4. This decision fulfills the Council's authority to "administer any funds or property within the control of the tribe...." *Const.* art. VI, §1(K). The Nooksack Indian Housing Authority, an arm of the Tribal Government and not a party to this action,[30] notified Appellant, Maxina Rabang, that her tribal membership status is uncertain due to pending disenrollment proceedings, and that her tribal housing application will be categorized as ineligible until her membership status is certain. *See* CP 52, Fifth Decl. of G. Galanda, Exh. A. Appellant Rabang was not denied housing; rather, she was removed from the housing waiting list. *Id.* Moreover, Appellant Rabang will be placed back on the housing waiting list in the same position she was in before her application was deemed ineligible if she is not disenrolled. *Id.* The Housing Authority properly acted under Sections 4.2.4, 4.2.4.1, and 4.2.3.2.2 of their Operating Procedures. *See id.* These decisions are

[30] The Housing Authority possesses the same immunity as the Tribe and tribal officials. *See supra* Section I.

not arbitrary, and they do not shock the conscience, because the Council and the Housing Authority are administering funds and property in a responsible manner by reserving them for eligible recipients; if the potential Disenrollees are not disenrolled, then they will be able to receive these benefits.

Appellants also assert Equal Protection claims related to School Support funds and the Housing Authority notification of ineligibility sent to Appellant Rabang.[31] Opening Br. 31-33. Importantly, "the equal protection clause of the ICRA is not coextensive with the equal protection clause of the fourteenth amendment to the United States Constitution." *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079, 1082 (8th Cir. 1975). Federal Equal Protection analyses may not be forced upon Tribes. *Id.* at 1083. Even if federal Equal Protection principles are applied, however, there has not been an Equal Protection violation here.

Under federal law, when a suspect class is not involved, Equal Protection review requires that legislation "be rationally related to a legitimate governmental purpose." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Under rational basis review, legislation must not be "enacted for arbitrary or improper purposes." *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 996 (N.D. Cal. 2012).

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[31] Appellants state that "[a]s to public housing, Appellees have adopted a policy of outright denying targeted Nooksacks simply because they have been targeted...." Opening Br. 32. As explained above with respect to Substantive Due Process, the Housing Authority and not Appellees notified one Appellant that her housing application would be deemed ineligible unless and until the Council determines that she should not be disenrolled. *See* CP 52, Fifth Decl. of G. Galanda, Exh. A. Appellees have not targeted Appellants, and they have not adopted any policy related to Appellants and public housing.

Here, the Council determined that students subject to pending disenrollment proceedings are not immediately eligible for the Back to School Support funding.[32] *See* CP 33, Decl. of G. Hurley, Exh. 4. Plainly, only properly enrolled members of the Tribe are eligible to receive tribal funding, and limiting disbursement of funds to those members who are not subject to disenrollment proceedings is at least rationally related to responsibly administering tribal funds. *See Const.* art. VI, § 1(K). The Council did not intend any harm by this limitation, as evidenced by the fact that students subject to disenrollment proceedings who are found to be properly enrolled will receive the Back to School Support funds at that time. *See* Decl. of G. Hurley, Exh. 4. Similarly, the Housing Authority moved Appellant Rabang's application status to ineligible under its governing rules until such time as her membership status is certain. *See* CP 52, Fifth Decl. of G. Galanda, Exh. A. This action is rationally related to responsible administration of property. *See Const.* art. VI, § 1(K). The Council has not targeted Appellants; rather, the Council's actions fulfill its duty to govern responsibly.

[32] Appellants falsely allege that a special committee told the Council to include the provision related to students subject to pending disenrollment proceedings. *See* Opening Br. 32; *see also* CP 33, Decl. of G. Hurley, Exh. 4.

IV. The Trial Court Fully Disposed of This Case.

Appellants allege that the Trial Court failed to dispose of two claims. Opening Br. 33. Appellants first claim that the Trial Court failed to address their allegation that Appellees have employed counsel without Secretarial approval in violation of Article VI, Section 1(D) of the Constitution. *Id.* Appellants raised this claim in their Second Amended Complaint for Prospective Equitable Relief (Second Amended Complaint),[33] but the Trial Court denied leave to file the Second Amended Complaint. CP 49, Order Denying Plaintiffs' Motion to Amend. Thus, this issue was not properly before the Trial Court, and the Trial Court correctly abstained from ruling on it.[34]

Appellants also claim that the Trial Court failed to address its allegation of vagueness,[35] but the Trial Court determined that the "Procedures adopted lay out, in detail, the manner in which disenrollment proceedings will be heard." CP 64, MTD Order 6:16-17. The Trial Court rightly concluded that the Disenrollment Procedures are clear and detailed.

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[33] Opening Br. 33 n.75.

[34] Appellants also claim that the Trial Court's Order Denying Motion for Reconsideration was error, but they rely on inapposite case law. *Griffin-El v. Beard*, 411 Fed. Appx. 517, 520 (3d Cir. 2011) required further analysis from the District Court because a previous Third Circuit case demanded that district courts specify which material facts are disputed and explain their materiality. No such Nooksack precedent or requirement exists. In *Bell v. Hershey Co.*, 557 F.3d 953, 959 (8th Cir. 2009), the Eighth Circuit required lower court analysis, because the inquiry was fact intensive, and the lower court was in a better position to analyze jurisdictional facts. Here, the Trial Court explained its rationale in CP 49, Order Denying Plaintiffs' Motion to Amend, so it did not need to repeat itself.

[35] Opening Br. 33.

V. The Trial Court Rightly Denied Appellants' Motions for TRO.

Appellants filed two Motions for TRO in this case – one on August 19, 2013 and one on August 22, 2013. CP 3, Emergency Motion for TRO and CP 21, Second Motion for TRO. In their first Motion for TRO, Appellants alleged that certain scheduled disenrollment meetings were unlawful and that the Disenrollment Procedures are unconstitutional. *See* CP 3, Emergency Motion for TRO. The Trial Court denied Appellants Motion, because Appellants are not entitled to attorneys in civil hearings, telephonic hearings do not violate Nooksack law, 10-minute limitations on argument and/or testimony do not violate Nooksack law, there was no violation of Procedural Due Process, and the claims related to scheduled disenrollment meetings were moot due to the stay issued in *Lomeli*. CP 18, Second Amended Order Den. Emergency TRO. Appellants' second Motion for TRO also alleged that scheduled disenrollment meetings were unlawful and that Appellees violated Procedural Due Process and Substantive Due Process. CP 21, Second Motion for TRO. The Trial Court denied Appellants' Second Motion, because this Court extended the *Lomeli* stay to all Appellants on August 27, 2013, which rendered Appellants' second Motion moot. CP 66, Order Den. Second Motion for TRO. On October 21, 2013, Appellants filed a Motion for Reconsideration pertaining to the Trial Court's denial of their Second Motion for TRO. CP 67, Motion for Reconsideration of Post Hoc Order. The Trial Court denied Appellants' Motion for Reconsideration, because it sought enforcement of the Stipulation at issue in *Lomeli*, which is a distinct matter with different parties. CP 68, Order Den. Motion for Reconsideration.

Abuse of discretion is the standard of review employed by federal courts for decisions denying injunctive relief. *Hunt v. Imperial Merch. Servs., Inc.*, 560 F.3d 1137, 1140 (9th Cir. 2009); *see also Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131 (9th Cir. 2011); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) (Amended). "An abuse of discretion will be found if the District Court based its decision 'on an erroneous legal standard or clearly erroneous findings of fact.'" *Cottrell,* 632 F.3d at 1131 (citation omitted). Reviewing courts look to "whether the District Court reaches a result that is illogical, implausible, or without support in inferences that may be drawn from facts in the record." *United States v. Hinkson,* 585 F.3d 1247, 1262 n.21 (9th Cir. 2009) (*en banc*). Under these standards, the Trial Court must be affirmed.

Appellants allege that the Trial Court in fact should have enforced the *Lomeli* Stipulation. Opening Br. 35. Appellants rely on federal case law that allowed a trial court to enforce an injunctive order issued in a separate proceeding. *Id.* The *Lomeli* Stipulation was a scheduling agreement between the *Lomeli* parties—not an injunction—and it cannot be enforced in a separate suit. *See, e.g., Rice v. Glad Hands, Inc.*, 750 F.2d 434, 438 (5th Cir. 1985) ("the general rule is that a stipulation is only enforceable by a party to the stipulation against other parties thereto."). In addition, the *Lomeli* Stipulation applied only to those individuals on Galanda Broadman's April 12, 2013 list. *See* CP 6, Decl. of G. Galanda, Exh. D. The four Appellants that have been disenrolled were not

included in the April 12, 2013 list, and they therefore cannot benefit from Stipulation. *See* CP 13, Second Decl. of G. Galanda, Exh. B.

The Trial Court properly denied Appellants' Motions for TRO and Motion for Reconsideration. The standard for issuing a TRO is essentially the same as that for issuing a preliminary injunction. *Beaty v. Brewer*, 649 F.3d 1071 (9th Cir. 2011). To be entitled to injunctive relief, a movant must demonstrate (1) that s/he is likely to succeed on the merits, (2) that s/he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his or her favor, and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *National Meat Ass'n v. Brown*, 599 F.3d 1093, 1097 (9th Cir. 2010); *see also Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). The burden of persuasion falls on the movant, who must make "a clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (*per curiam*). An injunction is an "extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24.

A plaintiff may obtain a preliminary injunction by demonstrating either: "(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [the movant's] favor." *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993). The Trial Court correctly found that Appellants were not likely to succeed on the merits because Appellees are immune from suit, Appellees did not violate Nooksack law, Appellants' claims related to disenrollment meetings were mooted by this Court's stay in *Lomeli*, and

the *Lomeli* Stipulation could not be enforced in this matter. *See* CP 18, Second Amended Order Den. Emergency TRO; CP 66, Order Den. Second Motion for TRO; and CP 68, Order Den. Motion for Reconsideration. The Trial Court did not find that there were serious questions going to the merits either. *See See* CP 18, Second Amended Order Den. Emergency TRO; CP 66, Order Den. Second Motion for TRO; and CP 68, Order Den. Motion for Reconsideration. The Trial Courts Orders related to Appellants' Motions for TRO should be upheld.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the Trial Court's dismissal of Appellants' First Amended Complaint and both of Appellants' Motions for TRO.[36]

Respectfully submitted this 16th day of December, 2013.

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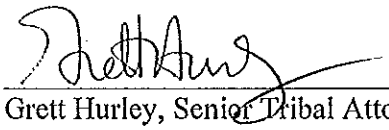
[36] Appellees note that their Motion to Dismiss included several other grounds for dismissal, which would need to be reached if the Court were to remand the case.



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IN THE TRIBAL COURT OF APPEALS FOR THE NOOKSACK INDIAN TRIBE

ROBERTS, et al., Plaintiffs, and KELLY, et al., Defendants.	Case No. 2013-CI-CL-003 App. No. 2013-CI-APL-003 DECLARATION OF SERVICE COPY

I Declare:

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

On December 16, 2013, I duly mailed by first class mail, a copy of the Response Brief of the Appellees to Galanda Broadman PLLC, Attn: Gabriel S. Galanda, P.O. Box 15146, Seattle, Washington 98115.

Also, on December 16, 2013, I emailed Gabriel Galanda at gabe@galandabroadman.com a courtesy copy of the Response Brief of the Appellees.

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

Signed at Deming, Washington on December 16, 2013.

CBernard

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