IN THE NOOKSACK TRIBAL COURT

FRANCINE ADAMS; et al., individually and on behalf of their minor children, enrolled members of the Nooksack Indian Tribe,

Plaintiffs,

v.

ROBERT KELLY, et al., in their personal and official capacities,

Defendants.

NO. 2014-CI-CL-006

AMENDED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs respectfully request that Defendants' Motion to Dismiss be denied. Under clear guidance from the Nooksack Court of Appeals, Defendants must be enjoined from acting in furtherance of any law or resolution that mandates the disenrollment of persons who "possess 1/4 Indian blood" and are "lineal descendants of a person who was enrolled after January 1, 1942."[1] Defendants' continued focus upon Article II, Section 1(a) of the Constitution and an unconstitutional post-2005 statutory "base enrollee" requirement is misplaced. Indeed, with the sole exception of Article II, Section 1(b), no part of the Nooksack Constitution says anything about a census requirement. The statutory "base enrollee" requirement is unconstitutional. Plaintiffs' claims cannot be dismissed.

[1] *Lomeli v. Kelly*, No. 2013-CI-APL-002, at 19 n.24 (Nooksack Ct. App. Jan. 15, 2013) (citing Const., art. II, § 1(c)).

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I. FACTS

A. Background.

Some historical perspective is in order. The original area inhabited by the Nooksack includes northern Washington State, in and around the North Puget Sound and the city of Bellingham, as well as southern British Columbia.[2] The Nooksack traditional village sites, at times up to 25 of them, were situated between the mouth of the South Fork River, above Deming, Washington, and up into southern British Columbia. One of the northern sites was named "Matsqui Reserve No. 4." This site was "one of the many Nooksack place names in British Columbia, but the only definite village located in Canada."[3]

The Nooksack were one of many Indian groups which were party to the United States Point Elliott Treaty of 1855, in which title to the land of much of western Washington was exchanged for recognition of fishing, hunting, and gathering rights, and a guarantee of certain government services. The Nooksack were not granted a reservation, however. Then, in the late 1800s, many tribal members were able to gain legal title to small portions of their traditional lands, including many of their southern traditional village sites, by filing "homestead claims" with the federal government. By 1877, 37 homestead claims were filed, with 29 total trust titles — known as "public domain allotments" — eventually granted to individual Nooksack families. **At the time that these public domain allotments were granted, there were roughly 200 members of the Nooksack Indian tribe — meaning that roughly 170 Nooksacks were *not***

[2] Unless otherwise indicated, all of the information in this section comes from the Tribe itself. Second Declaration of Michelle Roberts ("Second Roberts Decl."), Ex. H [hereinafter "Tribe's Website"]

[3] ALLAN RICHARDSON, NOOKSACK PLACE NAMES 191-92 (2011). "The Nooksack identity" of the Matsqui Nooksack Village was "emphasized by the elders and backed up with statements that [a village ancestor] spoke 'real Nooksack.'" *Id.* The 300-plus Nooksack members now targeted by disenrollment are the direct descendants of the village's namesake: Chief Matsqui (also known as Matsqui George), a full-blooded Nooksack. Roberts Decl., Ex. A.

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granted public domain allotments.[4]

In the 1920s and 1930s, traditional Nooksack berry gathering became a worthwhile trade for many Nooksack women. Off-reservation berry farmers hired Nooksack women as laborers on their farms.[5] These berry farmers also hired Filipino men, who came to the Northwest to look for work.[6] In time, romances sprang up between Filipino men and Nooksack women, and they were married, had children, and a large group of Filipino-Nooksacks came home to populate the traditional Nooksack lands beside full-blooded Nooksacks.[7] In the interim, though, in 1941-42, the U.S. Census Bureau conducted a census listing the names of those Nooksacks who were currently living on the Nooksack traditional village sites. **Thus, many of the Filipino-Nooksacks did not make it onto the January 1, 1942 census roll**, despite being obvious lineal descendants of Nooksack tribal members.[8]

In 1973, full federal recognition was finally granted to the Nooksack Indian Tribe. In 1984, roughly 2,400 acres of unallotted and allotted lands were transferred into trust status, and are now owned by the United States and administered on behalf of the Tribe by the BIA.[9]

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[4] *See* SMITHSONIAN INSTITUTION BUREAU OF AMERICAN ETHNOLOGY, HANDBOOK OF AMERICAN INDIANS NORTH OF MEXICO 81 (Frederick W. Hodge, ed., 1912) ("About 200 Nooksak were officially enumerated in 1906 . . . ."); 2 United States Dep't of the Interior, Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974, at 1480 (1979) (opinion of Dec. 9, 1947) (same).

[5] Second Roberts Decl., Ex. I.

[6] *Id.*

[7] *Id.* Specifically regarding the targeted Nooksacks' ancestry, Chief Matsqui and Marie Samiat, "a woman of his tribe according to [Canadian] Oblate records," had a daughter who they named Annie George, in 1875. Second Roberts Decl., Ex. A. Annie George in turn gave birth to three daughters, each of whom "fell in love working in the fields" with, and in turn bore children with, Filipino migrant farmworkers during the Great Depression. What followed are several generations of mixed Filipino-Nooksacks, who are either affectionately or pejoratively known as "Indipinos." Second Roberts Decl., Ex. I.

[8] This was a common problem with census rolls. *See* Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 457 (2002) ("[T]hese federally-mandated lists are sometimes inadequate and incomplete, excluding some people with deep and continuous tribal connections, whose ancestors failed to show up for the sign-ups . . . .").

[9] Nooksack Indian Tribe; Adding Certain Land to the Reservation, 50 Fed. Reg. 351 (Jan. 3, 1985).

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B. Resolution 13-02.

On February 12, 2013, Defendants passed Resolution No. 13-02 — a Resolution to disenroll over 300 Nooksacks.[10] Resolution 13-02 states the following, in relevant part:

> Title 63, the membership ordinance of the Nooksack Indian Tribe, Section 63.00.004 defines a Base Enrollee as those individuals from whom all persons applying for membership must prove direct descent. For the Nooksack Tribe, these base enrollees are these persons who are original Nooksack Public Domain allottees and/or all persons of Indian blood whose names appear on the official census roll of the Nooksack Tribe dated January 1, 1942 . . . .
>
> Annie James (George) or Andrew James are not original Nooksack Public Domain allottees or lineal descendants of an original Nooksack Public Domain allottee living on January 1, 1942.
>
> NOW THEREFORE BE IT RESOLVED, that the Nooksack Tribal Council initiates involuntary disenrollment proceedings [against] each member who descended from Annie James (George) or Andrew James and clam right to membership based through lineal descendancy of an original Nooksack Public Domain allottee . . . .[11]

Notices of Intent to Disenroll ("Notices") were thereafter sent out to roughly 306 enrolled tribal members, including Plaintiffs.[12]

Critically, the Notices were **not** exclusively sent to those members who "clam right to membership based through lineal dependency of an original Nooksack Public Domain allottee" under Article II, Section **1(a)** of the Constitution, as required by Resolution 13-02. They were instead sent to Plaintiffs, such as Norma Aldredge and Sonia Lomeli, who were enrolled pursuant to Article II, Section **1(c)** of the Nooksack Constitution.[13] Article II, Section 1(c) has nothing to do with Nooksack Public Domain allottees.[14]

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[10] Second Roberts Decl., Ex. B.
[11] *Id.*
[12] Second Roberts Decl., Exs. C-D.
[13] *Id.*; *see also Lomeli*, No. 2013-CI-APL-002, at 19.
[14] *See* Const, art. II, § 1(c); *cf. Lomeli v. Kelly*, 2013-CI-CL-001 (Nooksack Tribal Ct.), CP 4, Declaration of Sonia Lomeli, at 2 ("I am the niece of Louisa Rapada"), with Second Roberts Decl., Ex. E (Current Membership Roll Supplemental Nooksack Indian Tribe as of September 30, 1983, listing Louisa Rapada as an enrolled member with 4/4 Indian blood).

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Plaintiffs are not subject to disenrollment because they "did not meet the requirements of enrollment at the time of enrollment."[15] Rather, they have been targeted for disenrollment because they did not identify a "base enrollee" at the time of enrollment, as unconstitutionally required by N.T.C. §§ 63.00.004, 63.02.001(B)(9), and 63.02.001(D)(5).[16]

To be clear, lineal descendancy to a public domain allottee and/or a person named on a census has never been a **constitutional** requirement for membership.[17] Nor was it a **statutory requirement** — albeit an unconstitutional one — prior to 2005, at which time a large majority of the targeted Nooksacks were enrolled.[18] This argument was first raised by Plaintiffs in *Lomeli* in March 2013, but contrary to Defendants' current misrepresentations to this Court, the merits of this argument has never been ruled upon by this Court of the Nooksack Court of Appeals.[19]

Indeed, each and every Plaintiff undoubtedly met the requirements of enrollment at the time of enrollment pursuant to Article II, Section 1(c) of the Constitution because their parents were enrolled after January 1, 1942 and they possessed *at least* 1/4 Indian blood. That Plaintiffs

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[15] *Lomeli*, No. 2013-CI-APL-002, at 19.

[16] *See* Second Roberts Decl., Ex. C, at 6 ("[Your ancestor] was the daughter of Annie George and Andrew James who were not original Nooksack Public Domain allottees or a descendant of an original Nooksack Public Domain allottee living on January 1, 1942.").

[17] *Id.* at 19 n.24. Again, with the exception of the census requirement in Constitution Article II, Section 1(b), which is not at issue here.

[18] *See* N.T.C. § 63.04.001(B)(1)(a) (disenrollment may be initiated if it is "discover[ed]" that a Nooksack did not "me[e]t the constitutional membership criteria **at the time of enrollment**.") (emphasis added).

[19] *See Lomeli*, Complaint, at 11 (Mar. 15, 2013):

> Nooksack Tribal Code § 63.00.04 states that in determining the "direct descent" requirement of . . . the Constitution, "base enrollees" are "those persons who are original Nooksack Public Domain allottees and/or all persons of Indian blood whose names appear on the official census roll of the Nooksack Tribe dated January 1, 1942." **Although the Constitution says nothing about a "base enrollee," TTC § 63.02.001(D)(5) requires that persons applying for Nooksack membership . . . must submit "[d]ocumentation providing the direct descent of each Nooksack Tribe ancestor from a base enrollee . . . .**" *See also* N.T.C. § 63.06.001 ("[T]he blood listed on the official census roll of 1942 will be used in computing Indian blood for lineal descendants.").") (emphasis added).

While Plaintiffs then cited Article II, Section 1(h) to make this point, the constitutional challenge bears equally on any Section 1(c), and again, has never been substantively ruled upon in this litigation. *See also Lomeli*, No. 2013-CI-APL-002, Opening Brief of Appellants, at 33, n.22 (Oct. 18, 2013). The issue now requires a ruling on the merits.

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met these requirements is not at issue.[20] **Plaintiffs have been subjected to disenrollment based exclusively upon the unconstitutional "base enrollee" requirement**; not due to any legitimate claim that they did not "me[e]t the constitutional membership criteria at the time of enrollment."[21]

C. Resolution Nos. 14-03 and 14-04.

In furtherance of Defendants' disenrollment agenda, on three occasions over the Martin Luther King, Jr., three-day weekend, Defendant Tribal Council Chairman Robert Kelly called the first in-person Special Meetings of the Tribal Council in months. On each occasion, Chairman Kelly called the meeting, on an emergency basis, for the next day, 24 hours and five minutes before each meeting was to be scheduled.

The Special Meetings were called over the course of the three-day weekend, ostensibly to address a "youth basketball tournament," "budgets for the canoe journey" during the summer of 2014, and "the need for additional tribal cemetery space."[22] Chairman Kelly did not even explain why the third Special Meeting was called for Martin Luther King, Jr. Day.[23]

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[20] If Plaintiffs were being subjected to disenrollment because an alleged erroneous enrollment in that, for instance, they submitted fraudulent birth certificates, they would be properly subjected to disenrollment proceedings for failing to "submit adequate documentation proving he/she met the constitutional membership criteria at the time of enrollment." N.T.C. § 63.04.001(B)(1)(a). In that case, it would be the Tribal Council's burden to prove that the birth certificate was indeed fraudulent. N.T.C. § 63.04.001. The Tribal Council, not this Court, would "have the final say" on this determination. *Id.* But that is not what has occurred here.

[21] N.T.C. § 63.04.001(B)(1)(a); *see e.g.* Second Roberts Decl., Ex. C, at 6 ("[Your enrolled parent] was the daughter of Annie George and Andrew James who were not original Nooksack Public Domain allottees or a descendant of an original Nooksack Public Domain allottee living on January 1, 1942.").

[22] Declaration of Chairman Robert Kelly, Jr. ("Kelly Decl."), ¶¶5.f, 6.f.

[23] The actual reason for the meetings, however, was quite apparent: Defendants were out of town during the three-day weekend. What is more, Secretary St. Germain's son went missing on January 12, 2014, and was not located until the afternoon of Saturday, January 18, 2014. *See generally* Declaration of Tribal Council Secretary Rudy St. Germain ("St. Germain Decl."). Defendants knew these facts, and decided to take advantage of them in order to create a pretext for Plaintiffs' removal from office. In truth, the three consecutive Special Meetings were called by Chairman Kelly so that Councilmembers Roberts and St. Germain would "come and get served [their] disenrollment," after the Court of Appeals temporarily lifted a stay of disenrollment on Wednesday, January 15, 2014. Declaration of Nooksack Tribal Councilwoman Michelle Joan Roberts ("Roberts Decl."), at ¶ 10; Ex. A. Those disenrollment notices were initiated the very next day. And it was not enough that both Councilmembers Roberts and St. Germain communicated to Chairman Kelly that they would each be back to Deming or otherwise make themselves available for service by the Tribal Police immediately after the three-day holiday weekend, or by Tuesday, January 21. *See id.*, at ¶ 4 ("I called Rory after the first time they stopped by and told him I would let him know when I was back in town to arrange for them to come over"); St. Germain Decl., at ¶9 ("If I was to be served

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Chairman Kelly called the first meeting on the afternoon of Thursday, January 16.[24] On January 17, Councilwoman Roberts emailed Chairman Kelly: "Thank you for the invite Bob, I will be available by teleconference only, please provide me with an access code. Also, could you tell me what is on the agenda."[25] Neither Chairman Kelly nor anybody from his office replied.[26] Secretary St. Germain sent a similar email to the Tribal Council, indicating he was also available for the Special Meeting that Friday afternoon via conference call.[27] Neither Chairman Kelly nor anybody from his office replied.[28] Councilmembers Roberts and St. Germain took that to mean that the Tribal Council could not get quorum for the Special Meeting that day.[29] Still, Councilmembers Roberts and St. Germain attempted to call the Chairman's office that Friday afternoon at 3:40 PM. There was no answer.[30] Since at least the spring of 2013, all Special Meetings have been held telephonically.[31]

At close of business on Friday, January 17, Chairman Kelly sent out another email, calling a Special Meeting for Saturday at 3:40 PM.[32] Tribal Council meetings are generally not called on the weekend or on holidays.[33] Councilwoman Roberts responded as follows:

> With your spontaneous call of council meetings at the Chairmanship office, I am feeling uncomfortable being there with all the hate going on right now and the unprofessional on how terminations have been carried out and other actions this council has taken to hurt my family. I still have not received an agenda and I noticed that things have been approved by council that have been posted on the communications page so it is obvious that you have been conducting meetings without Rudy or me.
> I will be AVAILABLE for this afternoons meeting by teleconference, please provide me with an access code or I will just call into the chairmans office. I am assuming this is an open meeting.

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with disenrollment papers by the Tribal Police, or if I needed to attend a Council meeting in person, though, it needed to wait until Tuesday, when the holiday weekend was over and I knew my son was safe and stable.").

[24] Roberts Decl., at 2.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 3.
[31] *Id.* at 4.
[32] *Id.* at 3.
[33] *Id.*

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> Thank you
> Michelle Roberts
> Council Member[34]

Again, Chairman Kelly did not reply.[35] Tribal Council Secretary St. Germain sent a similar email, indicating he was also available for the Special Meeting that Saturday afternoon via conference call.[36] Later that night, Councilwoman Roberts' family was harassed "at all hours of the day and night" by the Tribal Police, at Chairman Kelly's directive, in an attempt to urgently serve her with a disenrollment papers after the appellate stay temporarily lifted.[37]

Councilmembers Roberts and St. Germain tried calling the Chairman's office on Saturday afternoon at 3:15 PM to get the teleconference information, but again, there was no answer.[38] Later that Saturday afternoon, Councilwoman Roberts emailed Chairman Kelly once again:

> What is the reason why the other two meetings did not take place? I called into the chairmans office yesterday because I did not get a response from you that it was canceled, also the same as the meeting that was scheduled on Friday. If the meetings are going to be canceled I would appreciate a courtesy message of the cancelation and the reason why. I have made myself available on both occasions just to be ignored. Also, please provide the agenda for this meeting.
>
> Michelle Roberts[39]

Once again, Chairman Kelly did not reply.[40]

On Sunday evening, Chairman Kelly, for the third time, attempted to call another Special Meeting of the Tribal Council, for Monday, January 20, 2014 — the Martin Luther King, Jr., holiday — at 10:40 AM.[41] Chairwoman Roberts once again called the Chairman's office at the time requested.[42] The person who answered the phone said that the Special Meeting was already

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Kelly Decl., Ex. F.
[38] Roberts Decl., at 3.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 3-4.
[42] *Id.* at 4.

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in session, and that she was specifically instructed to not patch in Councilmembers Roberts or St. Germain to the meeting.[43] At 10:47 AM, Chairwoman Roberts emailed Chairman Kelly:

> I called I to the council office at 10:40 and asked to join the meeting. The message given was you were in session already why would you prevent me from attending when you have allowed Abby and others to walk in late. You have set the precedence of teleconference this year so why are you disallowing it now.
>
> Michelle Roberts[44]

Yet again, Chairman Kelly did not reply.[45]

On the afternoon of January 20, 2014, Councilmembers Roberts and St. Germain's Tribal cell phone service and their @nooksack-nsn.gov email accounts were shut down.[46] It was not until receiving Defendants' response papers days later when Plaintiffs learned that the Martin Luther King, Jr., Day meeting was called in order to pass Resolution Nos. 14-03 and 14-04, which Defendant Councilpersons passed to remove Councilmembers Roberts and St. Germain from office, purportedly pursuant to Article V, Section 1 of the Nooksack Constitution.[47] Defendant Councilmembers' removal of Councilmembers Roberts and St. Germain, and appointment of two allies (including Defendant Roy Bailey), was designed to render moot the March 15, 2014 Nooksack Tribal Council General Election — i.e., "to maintain a four-person voting majority on the Tribal Council no matter what happens during the election."[48]

II. LAW AND ARGUMENT

In their Complaint, Plaintiffs make three claims, seeking injunctive relief, a declaratory judgment, and a writ of mandamus.[49] The first claim asserts that the "base enrollee" requirement,

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[43] *Id.* at 4.
[44] *Id.* at 4.
[45] *Id.*
[46] *Id.*
[47] Kelly Decl., Exs. K-L.
[48] St. Germain Decl., at ¶12. The Court can be sure that Defendants are currently hatching a similar unconstitutional "three strikes" plan to oust brand new Councilwomen Nadene Rapada and Carmen Tangent, unless the Court restores some constitutional order.
[49] Complaint, at 13; *see also Lomeli*, No. 2013-CI-APL-002, at 19 n.24.

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defined at N.T.C. § 63.00.04, is inconsistent with the Nooksack Constitution and is therefore unconstitutional.[50] Second, Plaintiffs assert the Defendants have acted outside of the scope of authority by initiating involuntary disenrollment proceedings against members that Resolution No. 13-02 does not grant them authority to initiate.[51] Finally, Plaintiffs assert that Resolution Nos. 14-03 and 14-04 violate Article V, Section 1, and Article IX of the Nooksack Constitution.[52] Plaintiffs have not asked this Court to determine whether Plaintiffs have been properly enrolled.[53]

A. This Court Does Not Lack Jurisdiction.

1. Plaintiffs' Claims Are Ripe.

Defendants' argument that Plaintiffs' claims are not ripe because the "base enrollee" requirement has not fully and finally permanently disenrolled Plaintiffs is clearly misguided. If this factual contingency rendered the dispute so impermissibly speculative that it failed to meet the "case or controversy" requirement, it is difficult to see how any injunction might issue in any case.[54]

Here, this matter comes before the Court in the same procedural posture as did *Lomeli*[55] and *Roberts v. Kelly*,[56] both of which were ripe for review. Not only have Defendants enacted into law an unconstitutional "lineal descendant" requirement, but they are currently enforcing it upon Plaintiffs. Thus, not only does a credible threat of direct injury to the Plaintiffs exist, but **Plaintiffs are currently being injured** by subjection to the enforcement of this unconstitutional provision. Plaintiffs' claims are clearly ripe for review.

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[50] Complaint, at 6-8.
[51] *Id.* at 8-9.
[52] *Id.* at 9.
[53] *Cf.* Defendants' Brief in Support of Motion to Dismiss ("MTD"), at 7.
[54] *See e.g. New York State Club Ass'n v. City of New York*, 487 U.S. 1, 8-10 (1988) (immediate or threatened injury to plaintiffs' associational rights because of the enactment of a law); *Epperson v. Arkansas*, 393 U.S. 97, 98–102 (1968) (same).
[55] No. 2013-CI-APL-002.
[56] No. 2013-CI-CL-003, at 10 n.10 (Mar. 18, 2014).

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2. Plaintiffs' Claims Are Not Barred By Sovereign Immunity.

Sovereign immunity does not protect member-suits against officers, employees, or agents of the Tribe acting in their official capacity if a plaintiff can make a minimal "threshold" showing that that the acts of the officer, employee, or agent has violated the Nooksack Constitution or superior Nooksack law.[57] The Nooksack Court of Appeals has recently held that when a tribal member properly pleads under this exception, this Court possesses a "constitutional grant of jurisdiction."[58]

There are two types of challenges to a court's subject matter jurisdiction: facial challenges, and factual challenges.[59] Facial challenges merely require the court to analyze whether the plaintiff has properly alleged in the complaint a basis for subject matter jurisdiction.[60] In a facial challenge, the complaint is viewed as true[61] and the court "need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation'" of law.[62]

The other type of attack — a factual challenge — occurs when a motion involves factual questions that pierce the face of the pleadings.[63] These inquiries become "intertwined," when there is a factual attack on subject matter jurisdiction that implicates the merits of the underlying claim.[64] When this occurs, the court must analyze a motion to dismiss under the summary

[57] *Lomeli*, No. 2013-CI-APL-002, at 14.
[58] *Id.* at 12.
[59] *Safe Air for Everyone*, 373 F.3d at 1039.
[60] *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 164 (1st Cir. 2007).
[61] *Id.* at 162.
[62] *Verizon Maryland v. Public Service Com'n of Maryland*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)). Appellants urged this standard in *Lomeli*, but it was rejected. *See Lomeli,* No. 2013-CI-APL-002, at 14 ("[W]here a Tribal member files such a suit, the Tribal Court must make a threshold finding on the constitutionality of the law . . . . That finding dictates whether the Tribal Court has jurisdiction . . . .").
[63] *Torres-Negron*, 504 F.3d at 163.
[64] *Safe Air for Everyone*, 373 F.3d at 1039 (citing *Thornhill Publ'g Co. v. Gen. Tel. Co.*, 594 F.2d 730, 734 (9th Cir. 1979)).

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judgment standards.[65] This analysis is necessary when, for example, a court is faced with determining whether an official was acting "within the scope of authority" for the purpose of establishing jurisdiction.[66] To offer one on-point example, in *Murgia v. Reed*[67] the trial court failed to analyze an intertwined motion to dismiss under the summary judgment standard when determining whether the defendant Tribal Councilmembers were acting "within the scope of their authority." The Ninth Circuit Court of Appeals reversed, holding:

> If the Defendants were acting for the tribe within the scope of their authority, they are immune from Plaintiff's suit . . . . This jurisdictional issue, however, is clearly intertwined with the merits . . . . [W]hen a factual jurisdictional issue is intertwined with the merits of an action, a Rule 12(b)(1) motion must be converted into a motion for summary judgment. We therefore vacate the district court's order denying the Defendants' motion to dismiss for lack of jurisdiction, and remand this matter to the district court with instructions to treat the motion as one for summary judgment.[68]

Here, as in *Murgia*, because Defendants have asserted a sovereign immunity defense that intertwines the facial and factual challenges, their Motion to Dismiss must be analyzed under the summary judgment standard. Dismissal under this standard is appropriate when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[69] The principal purpose of summary judgment is to isolate and dispose of factually

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[65] *Id.*; *Torres-Negron*, 504 F.3d at 163; *see also EduMoz, LLC v. Republic of Mozambique*, No. 13-2309, 2013 WL 5040937, at *14 (C.D. Cal. Sept. 10, 2013) ("[T]he district court should apply a standard similar to that used in deciding summary judgment motions when asked to decide a factual attack under Rule 12(b)(1). Evidence outside the pleadings may be considered, but all factual disputes must be resolved in favor of the non-moving party."). The summary judgment standard is implicated in these instances because it provides plaintiffs with procedural safeguards insofar as the defendant attacks the plaintiff's underlying cause of action, rather than merely the court's jurisdiction. *See Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981) ("[N]o purpose is served by indirectly arguing the merits in the context of . . . jurisdiction."). The conversion strikes the proper balance between a government-defendant's constantly having to ward off unmeritorious lawsuits and the right of a citizen-plaintiff to pursue his or her legitimate grievance. *Id.* at 412-13 (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)).

[66] *Shirk v. U.S. ex rel. Dept. of Interior*, No. 09-1786, 2010 WL 3419757, at *6 (D. Ariz. Aug. 27, 2010). The *Shirk* court was applying an "intertwined" jurisdictional analysis pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346, *et seq*. *See generally id.* Defendants have urged the Court to do so here as well. Response Brief of Appellees, *Lomeli v. Kelly*, No. 2013-CI-CL-001, at 16 n.12 (Nooksack Ct. App. Nov. 1, 2013).

[67] 338 Fed.Appx. 614 (9th Cir. 2009).

[68] *Id.* at 616 (citing *Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.*, 711 F.2d 138, 139 (9th Cir. 1983)).

[69] Fed. R. Civ. Proc. 56(a).

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unsupported claims or defenses.[70] Thus, summary judgment functions to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."[71] The moving party bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact.[72] If the moving party meets its burden with a properly supported motion, the burden then shifts to the opposing party to present specific facts that show there is a genuine issue.[73] In making this determination, the court does not determine witness credibility. "It believes the opposing party's evidence, and draws inferences most favorably for the opposing party."[74] If reasonable minds could differ on material facts at issue, dismissal is inappropriate.[75]

Defendants have not demonstrated absence of a genuine issue of material fact as it pertains to at two three of Plaintiffs' claims. But even if Defendants had demonstrated absence of a genuine issue of material fact, they are still not entitled to judgment as a matter of law on any of Plaintiffs' claims.

3. Defendants Are Not Entitled To Judgment As A Matter Of Law On Plaintiffs' "Base Enrollee" Requirement Claim.

While Plaintiffs surely attempted to make the "base enrollee" argument in *Lomeli*,[76] the Court of Appeals held that it was not properly raised in that litigation. Defendants argue that the "base enrollee" requirement "asks no more than what a person is required to submit when

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[70] *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986).
[71] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986) (quotation omitted).
[72] *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc).
[73] *Auvil v. CBS "60 Minutes"*, 67 F.3d 816, 819 (9th Cir. 1995).
[74] *Chatman v. Felker*, No. 06-2912, 2013 WL 3833046, at *3 (E.D. Cal. Jul. 23, 2013).
[75] *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).
[76] Defendants' argument that the Court of Appeals has addressed and rejected Plaintiffs' "base enrollee" claim is clearly unmeritorious in light of the Appeals Court's decision in *Lomeli v. Kelly*, No. 2013-CI-APL-002 (Nooksack Ct. App. Feb. 14, 2014). Defendants fail to disclose that contrary, controlling authority. While Plaintiffs surely attempted to make the "base enrollee" argument in *Lomeli* a year ago (*see* Complaint, at 11, quoted at n. 19, *supra*) the Court of Appeals held that the argument was not squarely before it on appeal. *But see Lomeli*, No. 2013-CI-APL-002, Opening Brief of Appellants, at 33, n.22 (Oct. 18, 2013). In any event, the issue now required a clear ruling.

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applying for enrollment."[77] This statement could not be further from the truth. First, the "base enrollee" requirement did not even exist prior to 2005, at which time a large majority of the targeted Nooksacks were enrolled. The "base enrollee" prerequisite necessarily asks for more than what was required when these members were applying for enrollment — the "base enrollee" requirement did not exist at that time.

Second, Article II, Section 1(c) of the Constitution requires that an applicant provide proof that (1) his or her parents were enrolled after January 1, 1942; and (2) he or she possesses at least 1/4 Indian blood.[78] In order to properly be subjected to disenrollment, Article II, Section 4 of the Constitution requires that the Tribal Council provide some quantum of evidence that either one of these requirements were not met by the applicant. Providing proof of lineage to a "base enrollee" simply is not one of these requirements under any reading of Article II, Section 1(c).

Third, when it comes to enrollment, the onus is on the applicant to prove that he or she meets the requirements for enrollment at that time. It is *not* the job of the applicant to ensure that his or her parent/grandparent/great-grandparent were all "properly enrolled."[79] This is the job of the Enrollment Department. Indeed, per N.T.C. § 63.05.001(b)(2) an applicant does not even have access to his or her ancestor's enrollment file.[80] If the Enrollment Department has

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[77] MTD, at 7 (quotation omitted).

[78] *Lomeli*, No. 2013-CI-APL-002, at 19 n.24 (citing Const., art. II, § 1(c)). Plaintiffs do not argue that nothing more than "a mere assertion of an enrolled parent" is required to make this showing. MTD, at 7.

[79] MTD, at 8. Neither the Constitution nor Title 63 mention the word "proper," nor do Defendants explain where this notion is derived. Under the plain words of the Constitution, meeting the constitutional requirements for enrollment at the time of enrollment is "proper" — nothing more, nothing less.

[80] Here, for instance, Plaintiffs have not even been given access to their ancestors' enrollment files that Defendants rely upon to initiate disenrollment. *See* Second Roberts Decl., Ex. F; *id.* at ¶ 7. This likely violates the due process provisions of the Nooksack Constitution. As noted by the Court of Appeals in *Roberts*:

> Because of the strong interest in retaining tribal membership, and no discernable Council interest in withholding information supporting its decision to conduct a disenrollment hearing, we would not hesitate to find a violation of due process notice requirements if, along with its notice of the scheduled hearing, Council failed to provide a person with copies of the documentary evidence it intends to rely on and its reasons supporting its belief that the person did not meet the criteria for enrollment.

No. 2013-CI-CL-003, at 10 n.10.

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determined that an applicant has submitted sufficient documentation to prove that he or she is entitled to enrollment, it is not the job of every lineal descendant to second-guess this determination or to re-prove the same. Clearly, the "base enrollee" requirement asks for much more than "what a person is required to submit when applying for enrollment."[81]

Fourth, the Court of Appeals has held that "the burden of proving *a member* did not meet the requirements of enrollment *at the time of enrollment* rests with the Tribe."[82] This requires that the Tribal Council provide some evidence that the enrolled member — not his parent or grandparent — did not meet the requirements of enrollment. Even if the Tribal Council had the authority to posthumously disenroll a parent or grandparent — it does not, and Defendants point to no place in the Constitution or Title 63 that says otherwise[83] — Defendants have not taken this step. But even if they had, the Tribal Council is required to look back to "the time of enrollment," at which time *the member* would have met the constitutional requirements for enrollment.[84] Additionally, Defendants misstate the law in arguing that it matters which box was checked on a previous generation's claim to membership.[85] The standard for disenrollment, even posthumous disenrollment to the extent such a notion exists under Nooksack law, relates back to "the time of enrollment" and looks not to the box checked on an application but to whether the individual met "the requirements of enrollment" at that time.[86]

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[81] MTD, at 7 (quotation omitted).
[82] *Lomeli*, No. 2013-CI-CL-001, at 19 (emphasis added).
[83] *Cf.* MTD, at 10 (arguing that the Tribal Council "plainly" possesses "the power to address erroneous enrollments even if the 'enrolled member' error occurred in a previous generation," but citing to no authority).
[84] *Id.*
[85] *Id.* at 10, n.6 ("[P]otential disenrollees who claimed membership through Section 1(c) of the Constitution relied upon a previous generation's claim to a Public Domain Allottee.").
[86] *Lomeli*, No. 2013-CI-CL-001, at 19 (emphasis added). While arguing that it is not at issue here, Defendants go to great lengths to show that Plaintiffs' ancestors' applications claimed ancestry to a public domain allottee. MTD, at 8-10. Regardless of what boxes were checked on these now deceased Nooksacks' applications, Mary Louisa Rapada (James), daughter of Andrew Mack James and Annie George; Elizabeth Eugenio (James), daughter of Andrew Mack James and Annie George; and Frances Anne Narte (Gladstone), daughter of Rose Gladstone (James), and

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Finally, N.T.C. 63.04.001(B)(1)(a) states that "[a] tribal member shall be disenrolled when it is discovered that **he/she** was erroneously enrolled."[87] The tribal member subject to disenrollment under this provision may be disenrolled if "**he/she**" made fraudulent submissions or there were errors on his/her enrollment application.[88] The statute says nothing about disenrollment because of an alleged error in ancestor or lineal descendant's enrollment status. Thus, if the Enrollment Department has determined that an applicant has submitted sufficient proof that he or she is entitled to enrollment, and if the Enrollment Department does not initiate disenrollment proceedings against that member within his or her lifetime, the Enrollment Department is barred from revisiting the issue. This provides stability in membership and prevents enrolled members from being punished for the mistakes of the Enrollment Department.[89]

All of this goes to show that, clearly, the "base enrollee" requirement is not a sufficient reason to initiate disenrollment proceedings — it is not a "requirement[] set forth for membership in th[e] constitution."[90] Defendants, however, argue that Title 63's "base enrollee" requirement is not a new requirement, but instead that it merely "construes the Constitution . . . in order to prevent against erroneous enrollments."[91] While this may well have been Defendants' intent in passing the law, in application the requirement is overly broad because it excludes those Nooksacks who meet the requirements of Article II, Section 1(c) and trace their lineal descendancy to one of the many Nooksacks who were neither a public domain allottee nor included on the January 1, 1942, census roll. Indeed, as drafted, the Constitution was expressly intended to include these members.

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granddaughter of Andrew Mack James and Annie George were undoubtedly enrolled Nooksacks. Second Roberts Decl., Ex. E.

[87] Emphasis added.

[88] *Id.*

[89] *Henrickson v. Ho-Chunk Nation Office of Tribal Enrollment*, No. SU-02-06 (Ho-Chunk Sup. Ct. Mar. 21, 2003).

[90] *Lomeli*, No. 2013-CI-APL-002, at 19 n.24.

[91] MTD, at 8.

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As discussed above, given the unique history of the Tribe this comes as no surprise — hundreds of lineal descendant Nooksacks would be excluded from membership were this the case. While it is certainly within a tribal government's prerogative to add a census or allottee requirement to their constitutional membership requirements,[92] Defendants' attempt to end-around a constitutional amendment to give effect to these additional requirements cannot be upheld. Indeed, Defendants' argument to the contrary was made, and rejected, in *Carpenter v. Las Vegas Paiute Tribal Council*:

> The Tribal Constitution therefore establishes a constitutional right to membership that tribal [laws] can implement but not alter. . . . Tribal ordinances and resolutions enacted by the Tribal Council can implement th[e] right [to membership] and establish membership procedures . . . , but they cannot change, enlarge, or limit the membership requirements. . . . [S]uch changes can be made only through the procedures for constitutional amendment specified by . . . the [Las Vegas Paiute] Tribal Constitution, which include both approval of the tribal voters in a ballot called and conducted by the Secretary of the Interior and ultimately approved by the Secretary of the Interior.[93]

The *Carpenter* court's logic applies here with equal force. Defendants' "base enrollee" requirement unconstitutionally changes and limits the Constitution's membership requirements. Plaintiffs, not Defendants, are entitled to judgment as a matter of law on this claim.

4. Defendants Are Not Entitled To Judgment As A Matter Of Law On Plaintiffs' Resolution No. 13-02 Claim, Nor Have Defendants Demonstrated The Absence Of A Genuine Issue Of Material Fact.

By its express terms, Resolution No. 13-02 initiates disenrollment only against those members "who descended from Annie James (George) or Andrew James ***and*** clam right to membership based through lineal descendancy of an original Nooksack Public Domain

[92] *See e.g.* Bethany R. Berger, *Race, Descent, and Tribal Citizenship*, 4 CAL. L. REV. CIRCUIT 23, 23 n.31 (2013) (listing various tribes' constitutional requirements for enrollment, many of which include descent from a person listed on a census roll).

[93] No. CA-01-02, at 18 (Las Vegas Paiute Ct. App. Feb. 14, 2002).

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allottee."[94] In direct contravention of this mandate, Plaintiffs have initiated disenrollment proceedings against *hundreds* of Nooksacks who do **not** clam right to membership based on lineal descendancy of an original Nooksack Public Domain allottee.[95] At minimum, a genuine issue of material fact exists as to this claim.

5. Defendants Are Not Entitled To Judgment As A Matter Of Law On Plaintiffs' Special Resolution Nos. 14-03 and 14-04 Claims, Nor Have Defendants Demonstrated The Absence Of A Genuine Issue Of Material Fact.

Defendants argue that Plaintiffs' third claim must be dismissed because "the decision to remove a Tribal Council Member . . . rests solely with the Tribal Council."[96] Be that as it may, Plaintiffs are not asking the Court to review a decision of the Tribal Council, to insert itself into the Tribe's decision-making, or to second-guess discretionary decisions of the Tribal Council.[97] This is not the kind of political question *Lomeli* contemplates as nonjudiciable.[98]

In *Lomeli*, this Court held as follows, in relevant part:

> The Nooksack Tribal Council is the Tribe's governing body and acts through its officers elected by the Tribe's voting members. . . . The Tribe's voting members delegate to the Council its legislative and executive powers and authority. . . . The Council's legislative and executive power and authority is not unfettered but subject to the limitations imposed by the Constitution. . . . Simply put, the actions of the Tribal Council must conform to the Constitution. . . . Our role, "to abide by the clear and unambiguous language" of the constitutional and statutory provisions, requires we determine the Constitution's meaning. . . . The failure of the Tribe's officers to perform a constitutional required act is a "civil matter[] concerning the members of the Nooksack Indian Tribe" and subject to the Tribal Court's jurisdiction to compel the officers to perform the constitutionally required act. . . . Where a Tribal member sues a Tribal officer, employee, or agent in their official capacity alleging the law or policy is unconstitutional, the Tribal Court has jurisdiction to afford declaratory or injunctive relief. . . . [W]here a Tribal member files such a suit, the Tribal Court ***must*** make a threshold finding on the constitutionality of the law or policy the member seeks to have the Tribal officers

[94] Second Roberts Decl., Ex. B (emphasis added).
[95] *See e.g. Id.*, Ex. G.
[96] MTD, at 11.
[97] Numerous tribal courts have rejected wooden tribal adoption of the political questions doctrine, derived from the limited jurisdiction of federal courts, because it does not properly transfer to tribal courts of general jurisdiction. *See e.g. Rave v. Reynolds*, 23 Indian L. Rep. 6150 (Winnebago Sup. Ct. 1996).
[98] *Cf. Lomeli*, No. 2013-CI-CL-APL-002, at 21 n.26.

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or employees enjoined from enforcing.[99]

Here, it is clear that Plaintiffs have filed the exact type of suit allowed by *Lomeli*. Plaintiffs sued numerous members of the Tribal Council in their official capacity, seeking injunctive relief. Plaintiffs have requested that the Tribal Court "determine **the Constitution's** meaning"[100] in regard to its requirements that (1) a Councilmember subject to removal be allowed an opportunity to present a "sufficient reason" for his or her "absence"[101]; and (2) a Councilmember subject to removal be afforded "due process of law."[102] Plaintiffs have asked the Court to enjoin Defendants from acting in furtherance of Resolution Nos. 14-03 and 14-04 if it answers either of these questions in the affirmative and finds that the Defendants did not do as **the Constitution** required.

Contrary to Defendants' strained reading of the Complaint, "whether Plaintiffs' reasons for failing to attend three consecutive special meetings" is simply not before the Court.[103] "The failure of the Tribe's officers to perform a constitutional required act" is not a nonjudiciable political question.[104] It is "a 'civil matter[] concerning the members of the Nooksack Indian Tribe' and subject to the Tribal Court's jurisdiction."[105] While this Court in *Lomeli* did hold that "adherence to the Bylaws is a political question not subject to judicial review," the questions before the Court today do not involve the Nooksack Bylaws. **They involve the individual rights guaranteed to Appellants by Articles VI and IX of the Nooksack Constitution.** Articles VI and IX of the Nooksack Constitution "do not merely establish procedures regulating how the

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[99] *Id.* at 7-9, 11, 13-14 (emphasis added).
[100] *Id.* at 9 (emphasis added).
[101] Const., art. V, §1.
[102] Indian Civil Rights Act, 25 U.S.C. § 1302(a)(8). When applicable law "gives the elected official a property interest in the office for the given length of time, and that the official must receive due process before being removed from office." *East St. Louis Federation of Teachers v. East St. Louis School Dist.*, 687 N.E.2d 1050, 1060 (Ill. 1997) (*citing Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979).
[103] MTD, at 12.
[104] *Lomeli*, No. 2013-CI-CL-APL-002, at 11.
[105] *Id.*

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Council conducts its own business."[106]

"Determining whether a person's constitutional rights have been violated and fashioning appropriate relief is a core, traditional function" of the judiciary.[107] Plaintiffs have not asked the Court to "review" a decision of the Tribal Council or otherwise act beyond its constitutionally prescribed role and institutional competence.[108] Plaintiffs have not asked the Court insert itself into the Tribe's decision-making, second-guessing discretionary decisions of the Tribal Council.[109] Nor are Plaintiffs asking the Court to discover or evaluate, as a factual matter, the bases on which the Tribal Council might make its decision.[110] The mere fact that the controversy involves a decision of the Tribal Council does not render it a nonjusticiable political question.[111]

At minimum, a material question of fact exists as to whether and to what extent (1) Plaintiffs were allowed to present a "sufficient reason" for their alleged absence; and (2) whether and what extent Plaintiffs were afforded due process of law. This material question of fact must be construed in the light most favorable to the Plaintiffs.[112] Plaintiffs' have clearly met their burden as to this claim.

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[106] *Roberts*, No. 2013-CI-CL-003, at 4.
[107] *U.S. v. Ghailani*, 686 F.Supp.2d 279, 290 (S.D.N.Y. 2009) (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 783 (1982)).
[108] *Id.* at 294.
[109] *Id.*
[110] *Id.*
[111] *Id.*; *see also Carpenter*, No. CA-01-02, at 10; *Owens v. City of Greenville*, 722 S.E.2d 755, 757-58 (Ga. 2012) (holding that whether city council complied with regulations in removing an elected official is not an elected official and stating that "'[t]he fact that a controversy has political overtones does not place it beyond judicial review.'") (quoting *Bowen v. Griffith*, 163 366 S.E.2d 293 (1988)).
[112] *Hitt v. Harsco Corp.*, 356 F.3d 920, 923–34 (8th Cir. 2004).

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II. CONCLUSION

Plaintiffs respectfully request that Defendants' Motion to Dismiss be denied.

DATED this 3rd day of April, 2014.

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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.

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

A copy was emailed to:

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 3rd day of April, 2014.

GABRIEL S. GALANDA

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