

05-30-14 A10:01 IN

Betty Hunter

IN THE NOOKSACK TRIBAL COURT

ELEANOR J. BELMONT & OLIVE T.
OSHIRO, et al.,

Plaintiffs,

v.

ROBERT KELLY, Chairman of the Nooksack
Tribal Council; RICK D. GEORGE, Vice-
Chairman of the Nooksack Tribal Council;
AGRIPINA SMITH, Treasurer of the Nooksack
Tribal Council; BOB SOLOMON,
Councilmember of the Nooksack Tribal
Council; KATHERINE CANETE,
Councilmember of the Nooksack Tribal Council
and Nooksack General Manager; and
AGRIPINA "LONA" JOHNSON,
Councilmember of the Nooksack Tribal
Council; ELIZABETH KING GEORGE,
Enrollment officer of the Nooksack Tribal
Council; ROY BAILEY, Enrollment officer of
the Nooksack Tribal Council, in their personal
and official capacities,

Defendants.

NO. 2014-CI-CL-006

MOTION FOR PRELIMINARY
INJUNCTION

I. INTRODUCTION

The above-named Defendants are violating or will violate the Nooksack Constitution and laws. Defendants have not issued formal rules governing disenrollment proceedings, nor had any rules approved by the Secretary. The result is the inevitable violation of the Tribe's Constitution. First, if the policies under which the Tribe is currently operating constitute

MOTION FOR PRELIMINARY INJUNCTION - 1

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1 disenrollment rules or regulations, they are unconstitutional because they have not been
2 approved by the Secretary, as required by Article II of the Constitution. Second, if the Notice
3 and Basis documents do not constitute disenrollment rules and regulations, the disenrollment
4 proceedings do not pass muster under Article IX of the Nooksack Constitution.

5 Because Plaintiffs allege that the policies that Defendants, in their official capacities, are
6 enforcing or threatening to enforce are unconstitutional and otherwise illegal, and because
7 Plaintiffs seek nonmonetary declaratory and injunctive relief, the Court has jurisdiction pursuant
8 to *Lomeli v. Kelly*, No. 2013-CI-APL-002, at 14 (Nooksack Ct. App. Jan. 15, 2013).

9 IV. FACTS

10 On August 8, 2013, Defendants passed Resolution No. 13-111, which adopted roughly
11 eight pages of rules and regulations for disenrollment proceedings. *Roberts v. Kelly*, No. 2013-
12 CI-CL-003, at 1 (Nooksack Ct. App. Mar. 18, 2014). These procedures were adopted by
13 Defendants in order to “adopt more specific procedural rules than what are specified in current
14 Title 63,” because Title 63, on its own, is “lacking and indeed may not meet due process
15 requirements.” *Id.* at 9. On March 18, 2014, the Nooksack Court of Appeals struck down
16 Resolution No. 13-111 because the rules and regulations therein were not approved by the
17 United States Secretary of the Interior (“Secretary”), as required by the Nooksack Constitution.
18 *Id.* at 3. Defendants have submitted the rules and regulations contained in Resolution No. 13-
19 111 to the Secretary for approval, but that approval has yet to be granted.

20 On or about May 16, 2014, Defendants issued a Notice of Meeting (“Notice”) to
21 Nooksack Tribal Elders Eleanor Belmont and Olive Oshiro. Complaint, Appendixes 1-2. In
22 addition to the Notices, Plaintiffs were provided a copy of (1) a document titled “Basis for
23 Commencement for Disenrollment Proceedings” (“Basis”), and (2) Title 63, under cover of
24 Nooksack Tribal Council Resolution No. 05-05, dated January 24, 2004. *Id.* Each Notice

schedules a “meeting to contest a Notice of Intent to Disenroll, which you received in 2013” for July 1, 2014. Plaintiff Belmont’s meeting is scheduled for 9:30 a.m.; Plaintiff Oshiro’s meeting is scheduled for 10:30 a.m. In the Notice, Defendants dictate how Plaintiffs can submit a response brief and supporting documents, and to whom such materials must be provided; when such response may be provided; what format the response must take; who may speak during the disenrollment meeting; whether attorneys can be present; how long Plaintiffs may speak; how disenrollment determinations will be made, how Plaintiffs will be informed of such determinations, who will have the burden of proof in the meeting, and the procedure for requesting a meeting with Defendants regarding disenrollment. *Id.* Neither the Notice nor the Basis have been approved by the Secretary. *But see Roberts*, No. 2013-CI-CL-003, at 9 (“[A]ny procedural rules governing disenrollment proceedings must be adopted by ordinance and the ordinance approved by the Secretary of Interior as provided for in the Nooksack Constitution.”).

Aside from the Notice and Basis documents, Defendants have not issued rules and regulations governing disenrollment proceedings, nor had any rules approved by the Secretary. On May 19, 2014, Thomas P. Schlosser, counsel for Defendants, admitted that the Tribe is proceeding under Title 63 and Nooksack Tribal Council Resolution No. 05-05 only — notwithstanding the Notice and Basis documents, there are no disenrollment rules or regulations.

V. LAW AND ARGUMENT

A. Preliminary Injunction Standard

The applicable inquiry for determining whether to issue a preliminary injunction is as follows:

(1) is there an adequate remedy at law in the form of money damages? (2) does the threatened harm to plaintiff outweigh the threatened harm to defendant(s)? (3) does the plaintiff have a reasonable likelihood of success on the merits? and (4) would the issuance of a[n injunction] disserve the public interest?

1 *Lone Tree v. Garvin*, 1 Am. Tribal Law 189, 195 (Ho-Chunk Tribal Ct. 1997) (citing *Merrill*,
2 *Lynch, Pierce, Fenner & Smith v. Salvano*, 999 F.2d 211 (7th Cir. 1993)). “The purpose of a
3 preliminary injunction is to preserve the *status quo*, so that upon a final hearing, the rights of the
4 parties may be determined without injury to either.” *Preliminary, Temporary, or Interlocutory*
5 *Injunctions*, 10 Fletcher Cyc. Corp. § 4852 (2014) (citing *Tom Doherty Associates, Inc. v. Saban*
6 *Entertainment, Inc.*, 60 F3d 27 (2nd Cir. 1995)).

7 **B. There Is No Adequate Remedy At Law In The Form Of Money Damages.**

8 Plaintiffs are seeking an injunction that will prevent the defendants, in their official
9 capacities, from subjecting them to unconstitutional law and procedure. Per the Nooksack Court
10 of Appeals’ decision in *Lomeli*, money damages are not available to remedy a violation of
11 constitutional rights by agents of the Tribe. No. 2013-CI-APL-002, at 14.

12 **C. The Threatened Harm To Plaintiffs Outweighs The Threatened Harm To**
13 **Defendants.**

14 The policies and disenrollment procedures that Plaintiffs will be subjected to are
15 preempted by the Constitution. Plaintiffs’ Nooksack constitutional rights would be damaged if
16 the acts and actions proposed by Defendants were enforced against them. The loss of these
17 rights is permanent and “constitutes an irreparable injury that cannot be compensated by
18 remedies at law.” *United Food & Commercial Workers Local 99 v. Bennett*, No. 11-0921, 2013
19 WL 1289781, at *39 (D. Ariz. Mar. 29, 2013); *see also Am. Trucking Ass’n, Inc. v. City of Los*
20 *Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) (“Unlike monetary injuries, constitutional
21 violations cannot be adequately remedied through damages and therefore generally constitute
22 irreparable harm.”); *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (“It has
23 long been established that the loss of constitutional freedoms, ‘for even minimal periods of time,
24 unquestionably constitutes irreparable injury.’”) (quoting *Elrod v. Burns*, 427 U.S. 347, 373

(1976)); 11A Wright & Miller, FED. PRAC. & PROC. § 2948.1 (2d ed. 2004) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”).

The balance of hardships among Plaintiffs and Defendants thus tips *sharply* in favor of injunction. Plaintiffs seek only to preserve the *status quo*. There is no hardship on Defendants if the *status quo* prevails pending trial. Plaintiffs have been tribal members for decades. Defendants would suffer absolutely no harm in being temporarily enjoined from subjecting Plaintiffs to unconstitutional policies and an unconstitutional disenrollment proceeding. The balance of hardships tips in favor of the Plaintiffs. *Bennett*, 2013 WL 1289781, at *39.

D. Plaintiffs Have A Reasonable Likelihood Of Success On The Merits.

Aside from the Notice and Basis documents, Defendants have not issued rules or regulations governing disenrollment proceedings, nor had any rules or regulations approved by the Secretary. In other words, notwithstanding the Notice and Basis documents, there are no disenrollment rules or regulations. The result is the inevitable violation of the Tribe’s Constitution. First, if Notice and Basis documents constitute disenrollment rules or regulations, they are unconstitutional because they have not been approved by the Secretary, as required by Article II of the Constitution. Second, if the Notice and Basis documents do not constitute disenrollment rules and regulations, the disenrollment proceedings do not pass procedural due process muster under Article IX of the Nooksack Constitution.

1. The Procedural Rules Governing Disenrollment Do Not Comply With Article II Of The Nooksack Constitution.

Article II, Section 4 of the Nooksack Constitution mandates that “[t]he tribal council *shall* proscribe the rules and regulations governing the involuntary loss of membership” that must be approved by the Secretary. Const., art. II, §4 (emphasis added). As the Nooksack Court

1 of Appeals noted in *Roberts*, a “rule” is “a general norm mandating or guiding conduct or action
2 in a given type of situation”; a “regulation” is “an act or process of controlling by rule or
3 restriction.” No. 2013-CI-CL-003, at 3 (citation and quotation omitted). When a policy
4 “proscribes what is required of both the potential disenrollee and the Council in a disenrollment
5 proceeding . . . [and] guide[s] how the proceeding is conducted, how evidence must be
6 submitted, and address[es] the rights and obligations of the person subject to the proceeding,” *id.*,
7 the policy is a “rule[] and regulation[] governing the involuntary loss of membership” that must
8 be approved by the Secretary. Const., art. II, §4.

9 Here, the Notice and Basis clearly fit within the definition of a “rule” or “regulation”
10 governing the involuntary loss of membership — they dictate how to submit a response brief and
11 supporting documents; to whom such materials must be provided; when such response may be
12 provided; what format the response must take; who may speak during the disenrollment meeting;
13 whether attorneys can be present; how long Plaintiffs may speak; how disenrollment
14 determinations will be made; how disenrollees will be informed of determinations; who will
15 have the burden of proof in the meeting; and the procedure for requesting a meeting. *See*
16 *generally* Appendixes A-B. Indeed, the Notice and Basis accomplish — in some instances word-
17 for-word — the exact same purpose that Resolution No. 13-111 had served to accomplish. Of
18 course, Resolution No. 13-111 was stricken down by the Court of Appeals in *Roberts*, as should
19 be the new disenrollment policies. Advancing with disenrollment hearings under rules and
20 regulations that have not been approved by the Secretary — be they informally adopted, penned
21 into a Notice document, or codified by Tribal Council resolution — comports with neither the
22 letter nor the spirit of the Constitution.

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1 2. *In The Alternative, Defendants’ Lack Of Disenrollment Procedures Violates Article IX Of*
2 *The Nooksack Constitution.*

3 Article IX of the Constitution requires that “the Nooksack Indian Tribe in exercise of its
4 powers of self-government” afford its citizens the rights and privileges codified in the Indian
5 Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. §§ 1302, *et seq.* (“ICRA”). Pursuant to ICRA
6 Section 1302(a)(8), a tribe may not “deny to any person within its jurisdiction the equal
7 protection of its laws or deprive any person of liberty or property without due process of law.”
8 25 U.S.C. § 1302(a)(8). This provision of the ICRA “incorporate[s] . . . the safeguards of the
9 Bill of Rights to fit the unique needs of tribal governments.” *Long v. Mohegan Tribal Gaming*
10 *Authority*, 1 Am. Tribal Law 385, 398 (Mohegan Gaming Trial Ct. 1997) (citing *Santa Clara*
11 *Pueblo v. Martinez*, 436 U.S. 49, 62 n.14 (1978)).

12 Here, Plaintiffs will be denied their due process rights if Defendants are allowed to
13 proceed as indicated. Again, Article II, Section 4 of the Nooksack Constitution mandates that
14 “[t]he tribal council shall proscribe the rules and regulations governing the involuntary loss of
15 membership.” The tribal council exercised part of this duty in adopting Title 63. *Roberts*, No.
16 2013-CI-CL-003, at 3. Title 63 does not, however, provide “specific procedural rules.” *Id.* at 9.
17 In *Roberts*, the Court noted — without explicitly holding — that without these “specific
18 procedural rules” Title 63 on its own was likely “lacking and indeed may not meet the due
19 process requirements.” *Id.* at 9. Plaintiffs now request that this Court reduce the Court of
20 Appeals’ statements to law.

21 Due process requires “the opportunity to be heard and notice reasonably calculated, under
22 all the circumstances, to apprise interested parties of the pendency of the action and afford them
23 an opportunity to present their objections.” *Id.* at 5 (quotations and citations omitted). Such
24 process “must be granted at a meaningful time and *in a meaningful manner.*” *Id.* at 6 (quotation

omitted). “[W]hen no recognized liberty or property interest” is at issue, the government ““is free to use any procedures it chooses, or no procedures at all.”” *Richardson v. Brown*, No. 11-0161, 2013 WL 5093801, at *5 (S.D. Ind. Sept. 11, 2013) (*Montgomery v. Anderson*, 262 F.3d 641, 644 (7th Cir. 2001)). Conversely, when a liberty or property interest *is* at issue, “some formal procedures” are generally required. *Los v. Wardell*, 771 F.Supp. 266, 270 (C.D. Ill. 1991).

Here, Plaintiffs undoubtedly “have a strong interest in maintaining their membership,” which “is a constitutionally protected property right.” *Roberts*, No. 2013-CI-CL-003, at 6. Because a property interest is at issue, “some formal procedures” are required. *Los v. Wardell*, 771 F.Supp. 266, 270 (C.D. Ill. 1991). Surely, if formal procedures are required before one can be legally expelled from school, at minimum, the same is required before one can be legally expelled from tribal membership. *See Los*, 771 F.Supp. at 270 (citing *Goss v. Lopez*, 419 U.S. 565, 584 (1975)); *Barnett v. Tipton County Bd. of Educ.*, 601 F.Supp.2d 980, 985 (W.D. Tenn. 2009) (“A student’s right to procedural due process requires formal procedures for student disciplinary hearings involving expulsion or suspensions of more than ten days.”). Title 63 does not provide “specific procedural rules.” *Roberts*, No. 2013-CI-CL-003, at 9. And without “specific procedural rules” Title 63 does “not meet the due process requirements.” *Id.* at 9.

E. The Issuance Of An Injunction Would Not Disserve The Public Interest.

The Nooksack People have a profound interest in the constitutional and even application of Nooksack Laws, the protection of individuals from the power of Nooksack Tribal Government, and the orderly review by the Court of Defendants’ actions. It is thus in the public interest to enjoin laws that violate Nooksack Constitutional rights.

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1 **VI. CONCLUSION**

2 Plaintiffs respectfully move that this Court enjoin Defendants from proceeding with their
3 planned disenrollment meetings until they have enacted rules and procedures governing those
4 meetings that meet the constitutional requirements required under Nooksack and law.

5 DATED this 29th day of May, 2014.

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DECLARATION OF SERVICE

I, Molly Jones, say:

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

2. Today, I caused the foregoing document to be served via U.S. certified mail, return receipt requested, upon:

Chairman Robert Kelly
Nooksack Tribal Council
Nooksack Indian Tribe
P.O. Box 157
Deming, WA 98244

and served via U.S. certified mail, return receipt requested, and emailed to:

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

and 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 29th day of May, 2014.


MOLLY JONES