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IN THE NOOKSACK TRIBAL COURT

BELMONT, et al., Plaintiffs, v. KELLY, et al., Defendants.	NO. 2014-CI-CL-007 REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. LAW AND ARGUMENT[1]

Defendants are caught in a catch–22, caused by the due process standards imposed by Article IX of the Nooksack Constitution and the Secretarial approval clause found in Article II of the Nooksack Constitution. On the one hand, Defendants argue that the disenrollment meeting rules and regulations provided to Plaintiffs Eleanor J. Belmont and Olive T. Oshiro provide sufficient due process because they are the same as those that the Court of Appeals approved of in *Roberts v. Kelly*, No. 2013- CI-CL-003 (Nooksack Ct. App. Mar. 18, 2014). Response, at 10-11. On the other hand, Defendants argue that these same rules and regulations need not be approved by the Secretary of the Interior ("Secretary") because they are ***not*** the same as those that the Court of Appeals approved of in *Roberts*, No. 2013- CI-CL-003.

[1] Defendants argument that "Plaintiffs failed to properly serve the Office of Tribal Attorney" is misplaced. Plaintiffs properly served all Defendants. Declaration of Ryan D. Dreveskracht ("Dreveskracht Decl."), Exhibit A.

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The simple solution to Defendants' predicament would have been to obtain Secretarial approval of the disenrollment procedures at issue in *Roberts* (now presented under the auspices of the "Notice of Meeting" ("Notice") and "Basis for Commencement for Disenrollment Proceedings" ("Basis") documents), as required by Article II of the Nooksack Constitution. Instead, though, for reasons that are not at all clear,[2] Defendants have chosen to walk the tightrope. For the reasons discussed below, Defendants must be enjoined.

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

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

Defendants argue that the Notice and Basis "do not constitute rules or regulations governing disenrollment" because they are not "general norms prescribing conduct in a certain type of situation." Response, at 6-7. Instead, according to Defendants, the Notice and Basis "simply give notice" and provide "basic information about the meeting." *Id.* at 7. Defendants go on to acknowledge, however, in addition to merely providing notice and basic information, the Notice and Basis delineate: "documentary response requirements"; the time allowed for meetings; the means under which a defense may be presented; the time limit by which to respond to the meeting request; and whether or not a disenrollment may be represented by counsel. *Id.* at 10-11. Indeed, Defendants justify their inclusion of these procedural provisions in the Notice and Basis by reference to the Court of Appeals' approval of the exact same procedures in *Roberts* — which, of course, were stricken down for a failure to comply with Article II. *Id.* at 11; *see also id.* (arguing that ***procedural*** due process has been provided by N.T.C. 63.04.001(B)(2) ***and*** the Notice and Basis).

[2] Plaintiffs initially believed that Defendants had sought Secretarial approval, as required by *Roberts*. Motion for Preliminary Injunction, at 2. Plaintiffs have since learned that Defendants, audaciously, have never even bothered to do this. *See generally* Dreveskracht Decl., Ex. C.

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When a governmental policy — be it embodied in a formal Resolution, appended to a Notice, posted in a flyer, or otherwise — "proscribes what is required of both the potential disenrollee and the Council in a disenrollment proceeding . . . [and] guide[s] how the proceeding is conducted, how evidence must be submitted, and address[es] the rights and obligations of the person subject to the proceeding," *Roberts*, No. 2013-CI-CL-003, at 3 (citation and quotation omitted), the policy is a "rule[] and regulation[] governing the involuntary loss of membership" that must be approved by the Secretary. Const., art. II, §4. Here, the Notice and Basis clearly fit within the definition of a "rule" or "regulation" governing the involuntary loss of membership. Because they were not approved by the Secretary of the Interior, the Notice and Basis are unconstitutional per *Roberts*, No. 2013-CI-CL-003.

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

Defendants argue that N.T.C. 63.04.001(B)(2) and the Notice and Basis, *together*, provide the requisite procedural due process required by Article IX of the Constitution. Response, at 11. But, if Defendants' argument as to Secretarial approval is correct, the Notice and Basis do not "proscribe[] what is required of both the potential disenrollee and the Council in a disenrollment proceeding . . . [or] guide how the proceeding is conducted, how evidence must be submitted, and address the rights and obligations of the person subject to the proceeding." *Roberts*, No. 2013-CI-CL-003, at 3 (citation and quotation omitted). They are, in other words, some type of discretionary statements as to processes, and nothing more. This is too shaky a ground to base constitutionally guaranteed procedural protections.

The amount of procedural due process that must be afforded is determined by the extent to which a person "may be 'condemned to suffer grievous loss,'" and whether a person's "interest in avoiding that loss outweighs the governmental interest in summary adjudication."

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Romero v. Schauer, 386 F.Supp. 851, 856 (D. Colo. 1974) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). In *Roberts*, the Court of Appeals found that Plaintiffs' interest in retaining their membership is equally strong to Defendants' interest in disenrollment. *Roberts*, No. 2013-CI-CL-003, at 7. Still, though, the *Roberts* court held that some sort of documentary response procedure, a guaranteed sufficient time for telephonic oral argument, a minimum of 21 days notice, and the ability to be represented by counsel were ***necessary*** in order for a disenrollment proceeding to provide sufficient due process protections. *Id.* at 8-10. Here, though, according to Defendants themselves, the Notice and Basis are not Nooksack law and therefore cannot guarantee these procedural safeguards. Response, at 6. Indeed, according to Defendants, the Notice and Basis do not "guide how the proceeding is conducted" at all — N.T.C. § 63.04.001(B)(2) itself provides the only process guaranteed to Plaintiffs. *Roberts*, No. 2013-CI-CL-003, at 3 (citation and quotation omitted); Response, at 6. This leaves Defendants in the same situation they were in in *Roberts*: due process protections do not exist when there are "no standards to guide the Council in its exercise of . . . discretion." *Roberts*, No. 2013-CI-CL-003, at 9; *see also id.* at 7 (due process requires "procedural safeguards") (citing *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970)); *Holman v. City of Warrenton*, 242 F.Supp.2d 791 (D. Or. 2002) (city's "internal appeals procedure" did not offer sufficient procedural safeguards because it only applied in limited circumstances); *Gascoe, Ltd. v. Newtown Tp., Bucks County*, 699 F.Supp. 1092 (E.D. Pa. 1988) (city ordinance unconstitutional for "lack of procedural safeguards").

The opportunity to be heard "in a meaningful manner" is a "fundamental requirement of due process." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Defendants have admitted that "**Title 63 does not provide a description of 'a meeting' or how it will be conducted**." Resolution No. 13-111 (emphasis added). Defendants have admitted that "the Tribe is

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proceeding under the provisions of the previously approved ordinance," Title 63 alone, and not the Notices and Basis. Dreveskracht Decl., Ex. B. Defendants have admitted that the Notice and Basis "do not constitute rules or regulations governing disenrollment." Response, at 6. In their attempt to create an end-around the Court of Appeals' ruling in *Roberts*, Defendants have promulgated procedural safeguards that may have provided Defendants with sufficient due process protection — were they to govern disenrollment proceedings. Instead of utilizing these procedural safeguards, though, Defendants have opted to proceed under the provisions of Title 63 alone, which "does not provide a description of 'a meeting' or how it will be conducted," Resolution No. 13-111; does not guarantee that a disenrollee is heard "in a meaningful manner," *Mathews*, 424 U.S. at 333; and does not sufficiently "allow an individual to prepare a defense." *Reyes v. Horel*, No. 08-4561, 2012 WL 762043, at *7 (N.D. Cal. Mar. 7, 2012). Without even a "description of 'a meeting' or how it will be conducted," it cannot possibly be said that Title 63 alone can provide sufficient procedural protections. Resolution No. 13-111. Plaintiffs are certain to succeed on the merits.

B. Plaintiffs Will Suffer Irreparable Harm.

Defendants argue that Plaintiffs "fail to allege any actual damage." Clearly, Defendants are mistaken. Plaintiffs here possess the same standing as those Plaintiffs in *Roberts*. They have been subjected to disenrollment proceedings that do not provide adequate constitutional protections, and have therefore suffered procedural injuries. Defendants' tautology, that "[t]here can be no injury when the Tribal Council has adhered to Nooksack law," is off-base. Response, at 13. Defendants have not adhered to Nooksack law — Defendants are subjecting Plaintiffs to unconstitutional disenrollment proceedings, and the requested relief seeks to prevent that harm. As it stands, depending on which ball Defendants are hiding, Plaintiffs are either (1) being subjected to disenrollment rules and procedures that have not been approved by the Secretary of

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the Interior, or (2) being subjected to disenrollment proceedings that totally lack any procedural protection whatsoever. *See* Resolution No. 13-111 ("Title 63 does not provide a description of 'a meeting' or how it will be conducted."). Plaintiffs have clearly demonstrated irreparable harm.

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

The Nooksack membership has 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. Defendants' argument, that "[g]ranting Plaintiffs' requested relief would thwart the Council's authority to disenroll those who were erroneously enrolled" is based on the faulty assumption that Defendants' authority to disenroll is limitless. Response, at 13. It is not. Defendants' acts and omissions must comply with the Nooksack Constitution, *especially* when exercising its authority to disenroll. *See Wabsis v. Little River Band of Ottawa Indians, Enrollment Com'n*, No. 04-185-EA, 2005 WL 6344603, at *1 (Little River Tribal Ct. Apr. 14, 2005) (tribal membership is the "most important civil right" and procedural due process must be honored when that civil right is subjected to scrutiny); *see also generally Lomeli v. Kelly*, No. 2013-CI-APL-002 (Nooksack Ct. App. Jan. 15, 2014). Here, because Defendants have failed to comply with the Constitution, allowing them to proceed with disenrollment in the current posture would actually *harm* the public interest.

D. Defendants' Standing Argument Is Misplaced.

Defendants argue that "Ms. Belmont and Ms. Oshiro have not alleged any concrete injury, which means they lack standing." Response, at 12. Defendants are mistaken. Both Ms. Belmont and Ms. Oshiro are about to be subjected to disenrollment proceedings that do not comport with the Constitution's due process requirement. The fact that the proceeding has yet to occur, and that an ultimate determination has not yet been rendered, does not affect the validity

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of a procedural injury such as that alleged by Plaintiffs. The right to procedural due process is "absolute," and "the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978). "Thus, the 'absolute' right to adequate procedures stands independent from the ultimate outcome of the hearing." *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 333 (9th Cir. 1995). Here, Plaintiffs Belmont and Oshiro have alleged that they are being subjected to inadequate procedures. This is all that is required to create standing.[3]

VI. CONCLUSION

Plaintiffs respectfully reiterate their request that this Court enjoin Defendants from proceeding with their planned disenrollment meetings until they have enacted rules and procedures governing those meetings that meet the constitutional requirements required by Nooksack law.

DATED this 9th day of June, 2014.

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[3] As to the remaining Plaintiffs, because they have all at some point received Notices of Disenrollment, it is likely that they will, at some point during the pendency of this proceeding, suffer a similar fate. Because of the changes made to Title 10 by Defendants last year, combined with rulings made by this Court that result in the inability of to file a representative suit, it is with an abundance of caution that the named Plaintiffs have been included as parties to this suit. If Defendants are concerned that the remaining Defendants do not possess standing, they are more than welcome to file a motion to dismiss. Defendants' standing arguments pertaining to these Plaintiffs, however, have no bearing on the motion at bar, which necessarily seeks relief only for those parties that are subject to proceedings that lack adequate procedural protections.

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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. mail, upon:

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and served via U.S. mail, and emailed to:

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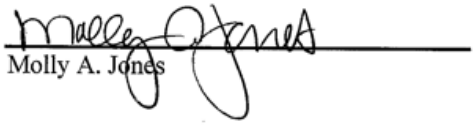
The foregoing statement is made under penalty of perjury under the laws of the Nooksack Tribe and the State of Washington and is true and correct.

DATED this 9th day of June, 2014.



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