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JUN 27 2014

Galanda Broadman PLLC

IN THE NOOKSACK TRIBAL COURT OF APPEALS

ELEANOR J. BELMONT & OLIVE T. OSHIRO

Plaintiff-Appellees,

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; AGRIPINA "LONA" JOHNSON, former 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

Defendant-Appellants.

Case No. 2014-CI-CL-007

DEFENDANT-APPELLANTS' NOTICE
FOR PERMISSION TO FILE AN
INTERLOCUTORY APPEAL

COPY

COME NOW Defendant-Appellants¹ in the above-entitled action, by and through the Office of Tribal Attorney, without waiving other defenses and objections, to seek permission to file an interlocutory appeal of the Tribal Court's Decision and Order Granting Plaintiffs' Motion

¹ Plaintiff-Appellees erroneously included Agripina "Lona" Johnson as a Defendant Councilmember, but Ms. Johnson is no longer on the Tribal Council. Plaintiffs-Appellees did not include current Councilmembers Nadene Rapada, David Williams, or Carmen Tageant as Defendants.

1 for Preliminary Injunction (June 12, 2014) (PI Order) (attached as Exh. 1).² The Tribal Court
2 obviously erred below by finding that: (1) the Tribal Council is not proceeding solely under Title
3 63, (2) the Notices and Bases constitute rules and/or regulations requiring Secretarial approval,
4 (3) compliance with due process standards automatically turns the Notices and Bases into rules
5 and/or regulations, and (4) Plaintiff-Appellees³ are entitled to a preliminary injunction without
6 analyzing the preliminary injunction requirements.

7
8 **I. INTRODUCTION**

9 On May 29, 2014, Plaintiff-Appellees initiated a sixth lawsuit against Defendants in
10 Tribal Court for equitable relief and filed a Motion for Preliminary Injunction (PI Motion).
11 Plaintiff-Appellees' PI Motion argued that documents, specifically two Notices of Meeting
12 (Notice(s)) and Bases for Commencement for Disenrollment Proceedings (Basis (Bases)), setting
13 two disenrollment meetings are unconstitutional because they have not been approved by the
14 Secretary of the Interior. PI Motion at 5-6. Alternatively, Plaintiff-Appellants alleged that a lack
15 of "formal procedures" related to the two disenrollment meetings violates due process standards.
16 *Id.* at 7-8. The Tribal Court granted Plaintiff-Appellants' Motion for Preliminary Injunction—
17 holding that the Notices and Bases must be approved by the Secretary of the Interior (Secretary).
18 PI Order at 6.

19 In *Roberts*, this Court held that the procedures adopted by Resolution No. 13-111
20 provided due process,⁴ but they had to be approved by the Secretary pursuant to Article II, § 2 of
21

22 ² Defendant-Appellants have attached certain documents from the Tribal Court
proceedings since there is no appellate record.

23 ³ Plaintiffs-Appellees included additional parties in their Complaint, but explained that
only Plaintiffs-Appellees Eleanor Belmont and Olive Oshiro sought preliminary injunctive relief.
24 See PI Order at 2 n.1. Plaintiffs-Appellees are represented by Galanda Broadman PLLC.

25 ⁴ Except the provisions prohibiting representation by counsel and allowing for a notice
period of less than 21 days.

1 the Constitution. *Roberts v. Kelly*, 2013-CI-APL-003, Opinion at 9 (March 18, 2014). The
2 Tribal Court erred here by finding that the Notices and Bases constitute rules or regulations
3 requiring Secretarial approval. The Notices merely set the time and place of each respective
4 meeting and allow for a written response and representation. The Bases explain the evidence
5 indicating erroneous enrollment for Ms. Belmont and Ms. Oshiro. The Tribal Council has
6 elected to proceed under Title 63, § 63.04.001(B)(2) alone just as this Court contemplated in
7 *Roberts*, and the Tribal Court's issuance of a preliminary injunction should be overturned.

8 II. FACT STATEMENT

9 The Nooksack Constitution gives the Tribal Council the "power to enact ordinances in
10 conformity with this constitution, subject to the approval of the Secretary of the Interior,
11 governing future membership in the tribe, including adoptions and loss of membership." *Const.*
12 art. II, § 2. The Constitution also states that the Tribal Council "shall, by ordinance, prescribe
13 rules and regulations governing involuntary loss of membership." *Const.* art. II, § 4. Title 63
14 was approved by the Secretary in 2006. Decl. of S. Steadle, Exh. A at 5. Title 63 governs
15 involuntary disenrollment, and it provides for a meeting, when properly requested, with the
16 Tribal Council to contest an involuntary disenrollment:

17 Procedure for disenrollment: A member identified as subject to disenrollment
18 pursuant to the above sub-section shall be notified by certified mail, return receipt
19 requested, of the intent to disenroll. Included in the notice shall be the option to
20 request a meeting with the Tribal Council within thirty (30) days of the receipt of
21 the letter. If no request is received within thirty (30) days the person is
automatically removed from the roll book by resolution. If a meeting is requested
with the Tribal Council, the member must contact the Tribal Council secretary to
obtain a date for the meeting. The Tribal Council shall determine if the member
is to be disenrolled. The decision of the Nooksack Tribal Council is final.

22 § 63.04.001(B)(2).

23 Eleanor Belmont and Olive Oshiro requested individual meetings with the Tribal Council
24 to contest their respective disenrollment.

1 On August 8, 2013, the Tribal Council adopted Resolution No. 13-111, which provided
2 detailed procedures for meetings described under Title 63, § 63.04.001(B)(2). *See Roberts,*
3 2013-CI-APL-003, Opinion at 1. On November 22, 2013, the Tribal Council amended
4 Resolution No. 13-111 through adoption of Resolution No. 13-163B. *Id.* On March 18, 2014,
5 this Court upheld nearly all of the “details of the procedures” in Resolution No. 13-111, and the
6 Court found that the procedures had to be approved by the Secretary. *Id.* at 9. The Tribal
7 Council rescinded Resolution No. 13-111 and Resolution No. 13-163B on June 5, 2014 pursuant
8 to Resolution No. 14-084. Decl. of C. Bernard, Exh. B.

9 On May 16, 2014, the Tribal Council mailed separate Notice and Basis documents to
10 Ms. Belmont and Ms. Oshiro.⁵ Decl. of S. Steadle, Exh. A at 1-4 and Exh. B at 1-4. The Notice
11 and Basis sent to Ms. Belmont only applies to Ms. Belmont. *See id.* at Exh. A at 1-4. Similarly,
12 the Notice and Basis sent to Ms. Oshiro only applies to Ms. Oshiro. *See id.* at Exh. B at 1-4.
13 Each respective Notice and Basis merely initiates the meeting outlined in Title 63. On June 12,
14 2014, the Tribal Court preliminarily enjoined the Tribal Council from proceeding under the two
15 Notices and Bases sent to Ms. Belmont and Ms. Oshiro, holding that they are rules and/or
16 regulations requiring Secretarial approval. *See* PI Order at 3-6.

17 **III. LEGAL ARGUMENT**

18 An aggrieved party may seek permission to file an interlocutory appeal. Title 80,
19 § 80.03.020. This Court must grant permission to file the appeal “if the Nooksack Tribal Court
20 has committed an obvious error which a) would render further proceedings useless; or b)
21 substantially limits the freedom of any party to act.” *Id.* The Nooksack Tribal Court obviously
22 erred here by finding that the Notices and Bases constitute rules and/or regulations requiring

23 ⁵ Defendant-Appellants have omitted the 17 attachments initially included in Exhibits A
24 and B to the Declaration of S. Steadle as well as Exhibits C-E to the Declaration of S. Steadle,
25 but they are available upon request. Defendant-Appellants have also omitted the copy of Title 63
initially included in Exhibit B to the Declaration of S. Steadle because it is included in Exhibit A.

1 Secretarial approval. The Tribal Court also obviously erred by conflating this Court's Secretarial
2 approval analysis and due process analysis. The preliminary injunction substantially limits the
3 Tribal Council's freedom to fulfill its constitutional and statutory duty regarding disenrollment
4 meetings. Defendant-Appellants request that this Court review pages 3-6 of the PI Order.

5 **A. The Tribal Court's Errors.**

6 1. The Tribal Council is proceeding solely under Title 63.

7 The Tribal Court obviously erred by finding that the Council "is not proceeding solely on
8 [Section 63.04.001(B)(2)], because the Notices set out details regarding the way both hearings
9 will be conducted." PI Motion at 5:2-3. Each respective Notice solely and expressly relies on
10 Section 63.04.001(B)(2)—stating, "[c]arefully read this Notice as it contains important
11 information related to your Title 63, Section 63.04.001(B)(2) Disenrollment Meeting
12 ('Meeting'). This Notice supersedes any previous Notice or instructions you may have received
13 concerning a Meeting." Each Notice sets the time and place of a meeting, allows the recipient to
14 submit a response to the Tribal Council's evidence, and allows the recipient to bring a
15 representative to the meeting. A memorandum providing specific notice regarding a meeting
16 requested by the recipient does not mean the Council has proceeded under any authority other
17 than Section 63.04.001(B)(2). On the contrary, Section 63.04.001(B)(2) provides for a meeting,
18 and each Notice simply gives effect to that Section.

19 2. The Notices and Bases are not rules or regulations subject to Secretarial approval.

20 The Tribal Court obviously erred by holding that the two Notices constitute rules and/or
21 regulations requiring Secretarial Approval.⁶ It is plain that no law, including Nooksack case law,
22 requires Secretarial approval of the Notices and Bases at issue, and they do not constitute rules or
23

24 ⁶ The Tribal Court states that this Court held that "disenrollment procedures that set out
25 the time, place, and manner of disenrollment hearings must be approved by the Secretary of the
Interior...[.]" but this Court held no such thing. *See Roberts*, 2013 CI-APL-003, Opinion at 3-5.

1 regulations governing disenrollment. In *Roberts*, this Court looked to Black's Law Dictionary to
2 determine whether the former Disenrollment Procedures were rules or regulations. 2013-CI-
3 APL-003, Opinion at 3. This Court noted that "Black's defines 'rule' as generally, 'an
4 established and authoritative standard or principle; a general norm mandating or guiding conduct
5 or action in a given type of situation.'" *Id.* (quoting Black's Law Dictionary 1330 (7th ed.
6 1999)). A regulation "is defined as the 'act or process of controlling by rule or restriction.'" *Id.*
7 (quoting Black's Law Dictionary 1330 (7th ed. 1999)). The Notices and Bases here are simply
8 unlike administrative laws providing general norms or standards.

9 Section 63.04.001(B)(2) governs the disenrollment procedures, and it was approved by
10 the Secretary in 2006. Decl. of S. Steadle, Exh. A at 5. In *Roberts*, this Court stated that
11 § 63.04.001(B)(2) "includes procedures governing disenrollment, including notice of the intent
12 to disenroll, the manner the notice is served, a deadline for a response, provisions for a meeting
13 to contest the disenrollment, and requests for reconsideration of an adverse decision." *Roberts*,
14 2013-CI-APL-003, Opinion at 4. The Notices and Bases merely initiate the meeting described in
15 § 63.04.001(B)(2) for Ms. Belmont and Ms. Oshiro.⁷ Neither Notice nor the Basis is applicable
16 to anyone other than the addressee. There are no general norms prescribing conduct in a certain
17 type of situation. Rather, the Notices and Bases inform Ms. Belmont and Ms. Oshiro about the
18 meeting and the reasons for the involuntary disenrollment proceedings. The meeting described
19 in § 63.04.001(B)(2) would become meaningless if the Tribal Council could not provide notice
20 of the meeting date, including basic information about the meeting, without obtaining Secretarial

21 ⁷ Title 63 must be interpreted "in order that the substantive intent of the Tribal Council is
22 ensured." Title 10, § 10.01.020. The Tribal Court must not "indulge in highly technical or
23 legalistic interpretations of tribal ordinances, regulations, and policies when such interpretation
24 would defeat the overall legislative goals of the Tribal Council." *Id.* By analogy, the Notices
25 and Bases should not be interpreted through a highly technical or legalistic lens either. Section
63.04.001(B)(2) calls for a disenrollment meeting when properly requested. The Notices set two
meetings that were properly requested, which simply gives effect to the Council's intent to
provide disenrollment meetings.

1 approval. Moreover, if the Notices and Bases constitute rules or regulations, every memorandum
2 of the Council related to Title 63, no matter how limited in scope, will turn into a rule or
3 regulation, which is an absurd result that is contrary to this Court's decisions in *Lomeli* and
4 *Roberts*.

5 The former Disenrollment Procedures spanned seven pages and delineated, in great
6 detail, how all disenrollment meetings would be conducted in an expedited fashion. The former
7 Disenrollment Procedures applied "to all meetings described in Title 63, sections [sic]
8 63.04.001(B)(2) and requests for reconsideration under section 63.04.001(C) of the Membership
9 Ordinance of the Nooksack Indian Tribe." *Roberts*, 2013-CI-APL-003, CP 6, Post-Hearing
10 Decl. of G. Galanda at Exh. C. The former Disenrollment Procedures also included definitions,
11 specific format requirements—including footer and font and exhibit list requirements, mandatory
12 meeting confirmation calls prior to the meeting date, mandatory attendance at the meeting, and
13 conduct requirements, among other detailed procedural requirements. *Id.* In addition, the former
14 Disenrollment Procedures stated that they were "binding upon any and all Disenrollees, Eligible
15 Parties, and Attendees and Participants." *Id.* The inclusion of typical statutory language further
16 supported this Court's finding that the former Disenrollment Procedures were rules; the former
17 Disenrollment Procedures explained that headings were not to be used to interpret the provisions
18 in the Procedures, allowed for amendment, and provided a jurisdictional statement. *Id.*

19 In contrast, the Notices are less than two pages and merely give notice to Ms. Belmont
20 and Ms. Oshiro of the date, time, and place of the meetings they requested. *See* Decl. of S.
21 Steadle, Exh. A at 1-2 and Exh. B at 1-2. The Notices do not include any of the above details
22 found in Resolution No. 13-111. The only information in the Notices not related to the time and
23 place of the meeting allows Ms. Belmont and Ms. Oshiro to provide a response to the Tribal
24 Council and allows representation by counsel at the meeting. *Id.* Those two permissive
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1 statements certainly do not rise to the level of a rule or regulation requiring Secretarial approval.
2 Similarly, each Basis is particular to the addressee and only explains the evidence the Council
3 has indicating erroneous enrollment. Nothing in the Notices or Bases resembles regulatory
4 language. The vast differences between the former Disenrollment Procedures and the Notices
5 here demonstrate that the Tribal Court made an obvious error in finding that “the Notices in this
6 case mirror the procedural rules set out in 13-111, which this Court has enjoined the use of
7 absent Secretarial approval.”⁸ See PI Order at 5 n.3.

8 The Notices and Bases do not constitute rules under federal law. The federal Supreme
9 Court has established a test for determining whether agency action is reviewable. Among other
10 requirements, “the action must be one by which ‘rights or obligations have been determined,’ or
11 from which ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S. 154, 178 (1997). With
12 respect to that prong of the test, “if the practical effect of the agency action is not a certain
13 change in the legal obligations of a party, the action is non-final for purposes of judicial review.”
14 *National Ass’n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005). At issue in
15 *National Ass’n of Home Builders* was Fish and Wildlife Service’s “recommended service
16 protocol” for certain butterflies. *Id.* at 12. The D.C. Circuit found the protocol to be non-final
17 and non-reviewable despite some mandatory language in the protocol because no one was
18 compelled to follow the protocol in the first place. *Id.* at 14. The Notices here do not change
19 any party’s legal right or obligation, and they do not compel adherence. The Tribal Council
20 continues to carry the burden of proof regarding enrollment eligibility under Title 63, Section

21 ⁸ The Tribal Court quoted the *Roberts* Opinion’s statement that Article II of the
22 Constitution “mandates that ‘all rules and regulations regarding the disenrollment of members
23 be established by ordinance approved by the Secretary of the Interior . . . it is difficult to discern
24 what could properly be termed a ‘procedure’ that would not be a rule or regulation for purposes
25 of a disenrollment hearing.” PI Order at 4:6-9 (quoting *Roberts*, 2013-CI-APL-003, Opinion at
5). The Notices, however, are not rules or regulations, and they are not procedures—particularly
not procedures that remotely resemble the former Disenrollment Procedures under Resolution
No. 13-111.

63.04.001(B). Each respective recipient may request a meeting, may submit a response, and may bring counsel to the meeting. Failure to comply with any aspect of the Notice does not alter or affect a recipient's enrollment eligibility. A rule under the Administrative Procedure Act "affects the rights of broad classes of unspecified individuals" and has "legal consequences 'only for the future[.]'" *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994). The two Notices only affect each respective recipient and have no past or future legal consequences. The Notices are not rules.

This Court has held that the "Tribal Council has the sovereign authority to determine its meeting procedures[]" under Article VI, § 1(j) of the Constitution. *Lomeli*, 2013-CI-APL-002, Opinion at 21. Under the Bylaws, "[s]pecial meetings of the tribal council shall be held at such times as are designated by the chairman" Bylaws, art. II, § 3. During special meetings, "the tribal council may proceed to transact any business that may come before it." Bylaws, art. II, § 4. The two scheduled disenrollment meetings are special meetings, and Article VI, § 1(j) of the Constitution and Article II, §§ 3-4 of the Bylaws demonstrate the Council's authority to set its meeting procedures.⁹ See *Lomeli*, 2013-CI-APL-002, Opinion at 21-22. Importantly, Ms. Belmont and Ms. Oshiro requested the meetings to contest their disenrollment, and there could be no meetings without scheduling them.

In *Cline*, this 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." *Cline v. Cunanan*, Case No. NOO-CIV-02/08-5, 1 (Nooksack Ct. App. 2009). Here, the Council must be able to give effect to § 63.04.001(B)(2) by providing notice to potential disenrollees without a constant court battle. The Council's actions lie within its "authority to determine 'loss of membership[]'" under Nooksack law. *Lomeli*, 2013-CI-APL-

⁹ Given the sensitive nature of these meetings and the confidentiality of enrollment files, these special meetings are not open to all members of the Tribe. See Title 63, § 63.05.001(B)(2).

1 002, Opinion at 19. Nooksack law does not require Secretarial approval for Council actions
2 giving effect to previously approved disenrollment procedures. The Council has acted within the
3 scope of its authority under Title 63, which means it is immune from suit, and Plaintiff-
4 Appellees are unlikely to succeed on the merits of their case.

5 3. The fact that the Notices and Bases comply with due process requirements does
6 not turn them into rules or regulations requiring Secretarial approval.

7 The Tribal Court committed an obvious error by conflating this Court's holdings in
8 *Roberts* regarding Secretarial approval and due process. The Tribal Court erroneously found
9 "that the Notices attempt to provide the appropriate due process to the Plaintiffs required by
10 *Roberts*, and in so doing, they violate the injunction issued in *Roberts* as ordered by the Court of
11 Appeals." PI Order at 5 n.2. This Court held that "[b]ecause Resolution 13-111 was not
12 constitutionally adopted by ordinance, or amendment to an ordinance, and was not approved by
13 the Secretary, the Council cannot use the procedural rules in Resolution 13-111 in Appellants'
14 disenrollment proceedings." *Roberts*, 2013 CI-APL-003, Opinion at 5. The injunction
15 concerned Secretarial approval and was not issued on due process grounds. This Court
16 separately held that "the details of the procedures in Resolution 13-111 do not violate due
17 process under the Nooksack Constitution, except for the provisions that prohibit representation
18 and give the Council the discretion to shorten time." *Id.* at 9. Whether the Notices meet due
19 process requirements is a question distinct from whether the Notices constitute rules and/or
20 regulations requiring Secretarial Approval.

21 Article IX of the Constitution incorporates the Indian Civil Rights Act, which imposes
22 due process standards on the Tribe. Article IX applied to the former Disenrollment Procedures,
23 and Article IX equally applies to Title 63, the Notices, and the Bases. A previous version of
24 Title 63 provided Secretarial review of the Tribal Council's disenrollment decisions, stating:

25 An involuntary disenrollment proceeding may be initiated by the Council. In the

1 case of involuntary disenrollment, the burden of proof shall rest upon the Council,
2 and the member who is the subject of the proceeding shall be given not less than
3 30 days written notice, by personal service, or certified mail of a hearing before
4 the Committee on the proposed disenrollment. Actions of the Council to disenroll
5 a tribal member shall be submitted to the Superintendent of the Bureau of Indian
6 Affairs for review and approval. Such review shall be limited to determination of
7 whether due process was granted the affected tribal member. Proceedings shall
8 otherwise be governed by this Ordinance.

9 Former Title 63, § 6.1.5 (1989).¹⁰ The current version of Title 63 provides that the Council's
10 disenrollment determination is final. *See* Title 63, § 63.04.001(B)(2). When the Secretary
11 approved the current version of Title 63, the Secretary had to ensure due process requirements
12 were met. By approving Title 63 with a reduced role for the Bureau of Indian Affairs related to
13 disenrollment proceedings, the Secretary demonstrated that due process does not require
14 Secretarial approval. It would be an absurd result to require the Tribal Council to obtain
15 Secretarial approval of a notice scheduling a meeting under Section 63.04.001(B)(2) when the
16 approval requirement was expressly removed from Title 63 and approved by the Secretary.

17 The Notices and Bases also meet due process standards. This Court held that "due
18 process demands that a deprivation of a right be preceded by 'notice and opportunity for hearing
19 appropriate to the nature of the case.'" *Id.* at 6 (quoting *Mullane v. Cent. Hanover Bank & Trust*
20 *Co.*, 339 U.S. 306, 313 (1950)). Additionally, "[t]his opportunity 'must be granted at a
21 meaningful time and in a meaningful manner.'" *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545,
22 552 (1965)). This Court also adopted the *Mathews* test "for analyzing procedural due process
23 claims under the Nooksack Constitution, absent a showing Nooksack custom or tradition favors a
24 different test." *Id.* The *Mathews* test requires the Court to balance three factors: (1) the private
25 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 procedures. *Mathews v. Eldridge*,

¹⁰ This former version of Title 63 is not attached but is available upon request.

1 424 U.S. 319, 335 (1976).

2 While this Court has not decided whether Title 63's disenrollment proceedings comply
3 with due process, the *Roberts* Opinion provides due process guidance. There, this Court
4 explicitly stated that:

5 If the Tribe decides to adopt these or similar procedure by ordinance, *or revert to*
6 *the procedures in the current Title 63*, the due process issue will likely result in
7 future litigation straining the resources of the Tribe, the parties, and the judiciary.
We find in the interest of justice it is appropriate that we address the due process
issues raised in this case to provide the Tribe, litigants and Tribal Court guidance.

8 *Id.* at 5 (emphasis added).

9 This Court has decided that though Plaintiff-Appellees have a strong interest in retaining
10 membership in the Tribe, the Tribe and its members have an equally strong interest in ensuring
11 that those who fail to meet the membership requirements are disenrolled. *Id.* at 6-7.

12 Furthermore, this Court's holdings related to the former Disenrollment Procedures demonstrate
13 that Title 63's provisions related to disenrollment proceedings, the Notices, and the Bases meet
14 procedural due process requirements.

15 Section 63.04.001(B)(2) provides notice of intent to disenroll, the option of a meeting
16 with the Tribal Council to contest the disenrollment, the deadline for requesting such a meeting,
17 the consequence of not timely requesting such a meeting, how to obtain a date for the meeting,
18 and that the Council will determine whether the potential disenrollee will be disenrolled. Thus,
19 Title 63, § 63.04.001(B)(2) provides notice and an opportunity to be heard.

20 The Notices schedule the requested meeting and provide basic information about the
21 meeting so as to execute the procedure outlined in § 63.04.001(B)(2). The Notices allow for a
22 documentary response to the Tribe's evidence of erroneous enrollment; this Court ruled that
23 documentary response requirements related to the former Disenrollment Procedures met due
24 process standards. *See Roberts*, 2013-CI-APL-003, Opinion at 7-8. The Notices provide 15
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1 minutes each for Ms. Belmont and for Ms. Oshiro to make their responses to the Tribal Council;
2 this Court has upheld a ten minute oral presentation. *See id.* at 8. The Notices provide for
3 telephonic hearings; this Court has held telephonic hearings meet due process requirements. *See*
4 *id.* The Notices explain that Ms. Belmont and Ms. Oshiro may be represented by counsel during
5 the meeting, and the Notices give 45 days' notice of the meeting;¹¹ this Court has held
6 prohibiting representation by counsel at a requested meeting violates due process and providing
7 21 days' notice satisfies due process requirements. *See id.* at 8-9. The Bases demonstrate the
8 evidence indicating erroneous enrollment.

9 Section 63.04.001(B)(2), the Notices, and the Bases meet due process requirements. Yet,
10 the mere fact that due process standards are met does not automatically turn the Notices and
11 Bases into rules or regulations. This Court should overturn the Tribal Court's error in logic.

12 4. Plaintiff-Appellees do not meet the preliminary injunction requirements.

13 The Tribal Court also made an obvious error by granting a preliminary injunction without
14 properly analyzing the preliminary injunction requirements. To be entitled to injunctive relief, a
15 movant must demonstrate (1) that s/he is likely to succeed on the merits, (2) that s/he is likely to
16 suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in
17 his or her favor, and (4) that an injunction is in the public interest. *Lomeli v. Kelly*, 2013-CI-CL-
18 001, CP 69, Order Denying Permission for Interlocutory Appeal at 5 n.7; *Winter v. Natural Res.*
19 *Def. Council, Inc.*, 555 U.S. 7 (2008); *National Meat Ass'n v. Brown*, 599 F.3d 1093, 1097 (9th
20 Cir. 2010); *see also Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). The burden of
21 persuasion falls on the movant, and the movant must make "a clear showing." *Mazurek v.*
22 *Armstrong*, 520 U.S. 968, 972 (1997) (*per curiam*). An injunction is an "extraordinary remedy
23 never awarded as of right." *Winter*, 555 U.S. at 24.

24
25 ¹¹ Plaintiff-Appellees have not objected to the date of either meeting.

1 A plaintiff may obtain a preliminary injunction by demonstrating either: “(1) a likelihood
2 of success on the merits and the possibility of irreparable injury, or (2) the existence of serious
3 questions going to the merits and the balance of hardships tipping in [the movant’s] favor.”
4 *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993). The Tribal Court did
5 not analyze the preliminary injunction requirements in its decision. *See* PI Order.

6 *i. Plaintiff-Appellees are not likely to succeed on the merits.*

7 Plaintiff-Appellees are unlikely to succeed on the merits of their claims because: (1) the
8 Tribal Council has proceeded under Title 63, which was approved by the Secretary, (2) the
9 Notices and Bases do not constitute rules or regulations subject to Secretarial approval, and (3)
10 the fact that Title 63, the Notices, and the Bases comply with due process requirements does not
11 turn them into rules or regulations. *See supra* Subsections 1-3.

12 *ii. Plaintiff-Appellees have not demonstrated irreparable harm.*

13 Plaintiff-Appellees have a right to due process, but they do not have the right to block the
14 holding of the meeting they requested. The outcome of that meeting is speculative. The alleged
15 irreparable injury “must be both certain and great; it must be actual and not theoretical.” *Wis.*
16 *Gas Co. v. Fed. Energy Regulatory Comm’n*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also*
17 *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d
18 1401 (9th Cir. 1991) (a plaintiff seeking injunctive relief must do more than merely allege
19 imminent harm sufficient to establish standing; s/he must demonstrate immediate, threatened
20 injury as a prerequisite).

21 The Tribal Court did not find any actual harm nor find that Plaintiff-Appellees raised any
22 “serious questions going to the merits” *MAI Sys. Corp.*, 991 F.2d at 516. Ms. Belmont and
23 Ms. Oshiro have meetings to contest their disenrollment scheduled for July 1, 2014. *See* Decl. of
24 S. Steadle, Exh. A at 1 and Exh. B at 1. They have had ample time to prepare a full defense of
25

1 their claimed right to enrollment and to correct any errors in the Bases if they exist.

2 Additionally, if Ms. Belmont and/or Ms. Oshiro are disenrolled, they can reapply for
3 membership under Title 63, § 63.04.001(B)(3) or request reconsideration under Title 63,
4 § 63.04.001(C). There can be no injury when the Tribal Council has adhered to Nooksack law
5 and the Tribal Court has not found any demonstrated harm from the operation of that law.

6 *iii. The Tribal Court did not make a public interest finding.*

7 The public interest weighs heavily in favor of denying injunctive relief here. The Tribal
8 Court's preliminary injunction thwarts the Council's authority to disenroll those who were
9 erroneously enrolled. *See Const. art. II, §§ 2, 4; Title 63, § 63.04.001(B)(2).* As this Court has
10 explained, the "Tribe as well as its members have a vital interest in ensuring only those who
11 meet the criteria for enrollment are entitled to share the rights and privileges of membership, and
12 conversely that those who have been erroneously granted membership be divested of those rights
13 and privileges." *Roberts*, 2013-CI-APL-003, Opinion at 7. Title 63, the Notices, and the Bases
14 comply with Nooksack law, and this Court must not prevent the Council from fulfilling its duty.
15 The Tribal Court's lack of analysis related to the public interest was an obvious error.

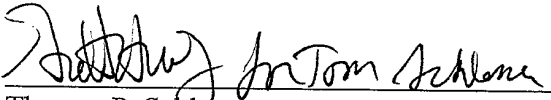
16 **B. The Effects of the Tribal Court's Errors on the Outcome of the Case.**

17 The Tribal Court's obvious errors "substantially limit the freedom" of the Tribal Council
18 to fulfill its duty under the Constitution and Title 63 regarding loss of membership. Title 80,
19 § 80.03.020; *see Const. art. II, §§ 2, 4; Title 63, § 63.04.001(B).* The Tribal Council has adhered
20 to the Tribal Court's and this Court's orders regarding the Council's rights and responsibilities
21 related to disenrollment. The Tribal Court's erroneous preliminary injunction strips the Council
22 of its authority to conduct disenrollment meetings under Title 63, and this Court should review
23 and reverse the Tribal Court's clear errors.

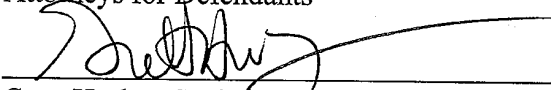
1 **IV. CONCLUSION**

2 For the foregoing reasons, Defendants request that this Court grant Defendant-Appellants
3 permission to file interlocutory appeal.

4 Respectfully submitted this 26th day of June, 2014.

5 

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