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IN THE NOOKSACK TRIBAL COURT

MICHELLE JOAN ROBERTS, et al. Plaintiffs, v. ROBERT KELLY, Chairman of the Nooksack Tribal Council, et al. Defendants. BELMONT, et al., Plaintiff, v. ROBERT KELLY, Chairman of the Nooksack Tribal Council, et al. Defendants.	Case No. 2013-CI-CL-003 Case No. 2014-CI-CL-007 PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' "NOTICE OF COMPLIANCE"

I. FACTS

A. The Injunction Orders

On March 31, 2014, this Court "issue[d] a permanent injunction against the Defendants enjoining them from undertaking disenrollment proceedings under Resolution 13-111, in accordance with the Nooksack Court of Appeals' Opinion in [*Roberts v. Kelly*, No. 2013- CI-

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CL-003 (Nooksack Ct. App. Mar. 18, 2014) [hereinafter *Roberts* Opinion]." *Roberts v. Kelly*, No. 2013-CI-CL-003 (Nooksack Tribal Ct. Mar. 31, 2014) [hereinafter *Roberts* Permanent Injunction Order]. This Court ruled in full that: "The Nooksack Court of Appeals held that because Resolution 13-111 was not constitutionally adopted by ordinance, or amendment to an ordinance, as was not approved by the Secretary [of the Interior], the Council cannot use the procedural rules in Resolution 13-111 in Appellant's disenrollment proceedings." *Id.* (citing *Roberts* Opinion, at 5) (brackets in original).

Notwithstanding the *Roberts* Permanent Injunction Order, in May 2014, Defendants attempted to recommence disenrollment against Plaintiffs Eleanor Belmont and Olive Oshiro. *Belmont v. Kelly*, No. 2014-CI-CL-007 (Nooksack Tribal Ct. Jun. 12, 2014), at 2 [hereinafter *Belmont* Preliminary Injunction Order"]. Defendants had issued Mrs. Belmont and Mrs. Oshiro (1) a document titled "Notice of Meeting" ("Notice"); (2) a document titled "Basis for Commencement for Disenrollment Proceedings"; and (3) Title 63, under cover of Nooksack Tribal Council Resolution No. 05-05, dated January 24, 2004. Motion for Preliminary Injunction, Belmont, No. 2014-CI-CL-007 (Nooksack Tr. Ct. May 29, 2014), Appendices 1-2. As this Court explained, Defendants described the Notices as follows:

> The Notices explain that a response to the Basis may be submitted prior to the meeting, that Ms. Belmont and Ms. Oshiro may be represented by counsel at the meeting, that Ms. Belmont and Ms. Oshiro will each have 15 minutes to present oral testimony to the Tribal Council, and that the Council will provide written notice of its determination regarding disenrollment . . . The Bases [plural] note that the Tribal Council has the burden of proof in disenrollment meetings under Title 63, Section 63.04.001(B) and explain the evidence obtained by the Council indicating erroneous enrollment. *Defendants' Response in Opposition*, 4.

Belmont Preliminary Injunction Order, at 2. This Court rejected Defendants' argument that "the Notices are like 'memos'" and thus not subject to Secretarial approval as disenrollment rules or ordinance as required by the *Roberts* Opinion. *Id*, at 5-6; *see also Roberts* Opinion, at 9 ("[A]ny

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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.").

On June 12, 2014, this Court ruled that Defendants' "approach appears to be an attempt to circumvent the very clear holdings of the Court of Appeals that disenrollment procedures . . . must be approved by the Secretary of the Interior." *Belmont* Preliminary Injunction Order, at 6.[1] Accordingly, this Court issued a preliminary injunction, enjoining Defendants from recommencing disenrollment. *Id.*

B. The Interior Secretary's Approval of Nooksack's Disenrollment Rules

On September 23, 2014, Defendants promulgated "Polling Resolution" 14-110, which adopted an amended version of Title 63 that incorporated the "Disenrollment Procedures pursuant to Resolution 13-111," as modified in hope of rectifying certain constitutional deficiencies in those procedures that were identified in the *Roberts* Opinion (in addition to the Secretarial approval deficiency). Declaration of Gabriel S. Galanda ("Galanda Decl."), Ex. A. Defendants forwarded Resolution 14-110 and the amended Title 63 to the Department of Interior for approval as required by the Nooksack Constitution and the *Roberts* Opinion. *Id.* Defendants "tentatively approved, through a polling process, Resolution #14-110 and the attached amended Enrollment Ordinance." *Id.*, Ex. B. Consequently, Interior rejected Resolution 14-110 and the amended Title 63. *Id.*

On October 10, 2014, Defendants passed Resolution 14-112 and readopting amended Title 63, at a Tribal Council meeting, by a vote of "3 FOR, 2 OPPOSED and 0 ABSTENTIONS." *Id.*, Ex. C. Like the federally rejected Resolution 14-110, Resolution 14-111 sought to remedy the constitutional deficiencies in the incorporated disenrollment procedures per

[1] Defendants' approach last May was consistent with the Court of Appeals' criticism of Defendants' ways of "fast-tracking the disenrollment process at nearly every turn" and otherwise acting "with haste," since 2013. *Lomeli v. Kelly*, No. 2013-CI-APL-2013-002, at 8 n.7 (Nooksack Ct. App. Aug. 27, 2013).

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the *Roberts* Opinion. *Id*; *see also* Exs. D, E. The Acting Superintendent of the Bureau of Indian Affairs Puget Sound Agency ("BIA") received Resolution 14-112 and amended Title 63 papers on October 14, 2014, and approved them on October 24, 2014. *Id.*[2]

The Acting Superintendent cited the U.S. Supreme Court's decision in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 62-64 (1978), as the basis for approving the "disenrollment rules and regulations" in Title 63, even though *Santa Clara* has nothing to do with disenrollment. *Id.* Instead, in *Santa Clara*, "the Supreme Court held that federal court enforcement of the [federal Indian Civil Rights Act of 1968] is limited to *habeas corpus* jurisdiction on behalf of persons in tribal custody [and that] the ICRA cannot be directly enforced against Indian tribes because they are shielded from suit by sovereign immunity." *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 515 (8th Cir. 1989). In other words, *Santa Clara* was decided on procedural/jurisdictional grounds under ICRA, without anything to do with tribal disenrollment power. *Id.*[3]

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[2] Although in 2005-2006, the BIA Puget Sound Agency took fourteen months to approve the original Title 63, the Acting Superintendent took only eight working days to initially approve the latest Title 63 amendments in October of 2014. Galanda Decl., Exs. G, H.

3 Indeed, until at least 1988—ten years after *Santa Clara*—Interior continued to acknowledge that, while tribes do possess the authority to set tribal membership standards, their authority has always been subservient to the Secretary of the Interior:

> [W]hile it is true that membership in an Indian tribe is for the tribe to decide, that principle is dependent on and subordinate to the [DOI]. A tribe does not have authority under the guise of determining its own membership to include as members persons who are not maintaining some meaningful sort of political relationship with the tribal government. The DOI has concluded that it has broad and possibly nonreviewable authority to disapprove or withhold approval . . . regarding membership . . . .

Memorandum from Scott Keep, Ass't Solicitor, U.S. Dep't of the Interior, to the Chief of the Division of Tribal Government Services 6 (Mar. 2, 1988) [hereinafter Keep Memo]). The Keep Memo was cited as persuasive authority for the position that the BIA possesses the authority to regulate tribal membership in *Masayesva for & on Behalf of Hopi Indian Tribe v. Zah*, 792 F. Supp. 1178, 1181 (D. Ariz. 1992); *see also* KIRSTY GOVER, TRIBAL CONSTITUTIONALISM: STATES, TRIBES, AND THE GOVERNANCE OF MEMBERSHIP 126 (2010) (citing the Keep Memo for the proposition that the federal executive may determine for itself whether or not to maintain a political relationship with certain individuals). Thus, as "a delegated authority" from the United States, any tribal authority to disenroll tribal members "must necessarily be subservient to the [agency] by which the delegation was made"—here, the BIA. *State v. Overton*, 16 Nev. 136, 137 (1881). In other words, any tribal inherent "right to define its

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C. Plaintiffs' Federal Administrative Appeal, and Stay, of the Secretary's Approval

On January 7, 2015, the BIA Northwest Regional Director approved Resolution 14-112 and the amended Title 63 with disenrollment procedures on behalf of the Interior Secretary. Galanda Decl., Ex. F. In turn, the BIA Acting Superintendent informed Defendants of the Secretarial approval of those latest Nooksack laws on January 13, 2014. *Id.*, Ex. G. Plaintiffs, specifically "the currently enrolled 271 Nooksack Indians" known as the Nooksack 306,[4] appealed the Secretarial decision to approve to the BIA Acting Superintendent and U.S. Department of the Interior Board of Indian Appeals pursuant to 25 C.F.R. § 2.9 and 43 C.F.R. § 4.332, for violation of "both federal and Nooksack law." *Id.*, Ex H; *see also id.*, Ex. I (approval would be "arbitrary or capricious, or violat[ive of] federal constitutional civil rights protections or international human rights norms."); *id.*, Ex. J ("the proposed amendment is 'contrary to applicable law.' 25 U.S.C. § 476(c)(2)-(3).").[5]

Critically, as Plaintiffs explained in their federal appeal notice, by operation of federal law, "any legal effect of the decision under appeal is stayed pursuant to 25 C.F.R. § 2.6(b) and 43 C.F.R. § 4.314(a)." *Id.* Because the Secretary's approval of Resolution 14-112 and the amended Title 63 remains without legal effect pending Plaintiffs' federal administrative appeal, this Court must refrain from dissolving or vacating the *Roberts* Permanent Injunction Order or *Belmont* Preliminary Injunction Order. 25 C.F.R. § 2.6(b).

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own membership," Galanda Decl., Ex. E (quoting *Santa Clara*, 436 U.S. 49), is materially different than the federally delegated tribal right to disenroll Indians. The Secretary *qua* Acting BIA's Superintendent's reliance upon *Santa Clara* is misplaced, and her approval is otherwise unlawful. *See* Galanda Decl., Exs.. H-J.

[4] *See* Sanford Levinson, *"Who Counts?" "Sez Who?"*, 58 St. Louis U. L.J. 937, 945, 981 (2014) (discussing the plight of the "Nooksack 306" generally).

[5] Among other things, the Secretary and her subordinates failed to in any way consult with Plaintiffs relative to their review of the Title 63 amendments, as Plaintiffs formally requested on March 21, 2014 and August 19, 2014. *See generally* Galanda Decl., Ex. J. The United States breached the trust fiduciary duty owed to Plaintiffs, of "moral obligations of the highest responsibility and trust." *Seminole Nation v. U.S.*, 316 U.S. 286, 296-97 (1942).

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Meanwhile, on January 30, 2015, Defendants recommenced disenrollment proceedings by issuing "meeting" Notices to at least seven of the Plaintiffs. Galanda Decl., Ex. K. Those seven Plaintiffs' hearings are scheduled to occur at the same time as each other's hearings, at either 10:00 AM and 1:00 AM, March 4, 2015, via teleconference. *Id.*; *see also* Title 63, § 63.10.005B ("Meetings will be held telephonically via conference call . . ."). [6] Each of those Tribal members will be given "a maximum of ten (10) minutes to present his or her case to the Tribal Council" Defendants. *Id.*, § 63.10.005H. [7]

True to form, it was only *after* Defendants noticed the disenrollment of those seven Plaintiffs, when, on February 3, 2015, their counsel filed Notices of Compliance with this Court in each of the above-captioned matters. Notice of Compliance With order Enjoining Disenrollment Proceedings, *Roberts*, No. 2013-CI-CL-003 (Nooksack Tribal Ct. Feb. 3, 2015); Notice of Compliance with Decision and Order Granting Plaintiffs' Motion for Preliminary Injunction, *Belmont*, No. 2014-CI-CL-007 (Nooksack Tribal Ct. Feb. 3, 2015). But, as discussed below, Defendants should have instead filed motions to dissolve or vacate the *Roberts* Permanent Injunction Order and *Belmont* Preliminary Injunction Order. Defendants are once again guilty of

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[6] In May 2014, Plaintiffs were notified of the "important" nature of their teleconference-hearing: "**If your call is dropped, you will lose your Meeting**"; "You will immediately hear music while on hold. Stay on hold until you are prompted by Tribal Council. **There may be a wait of 10 minutes to 2 hours** . . . Failure to stay on the line until your Meeting commences will result in loss of your Meeting."; "**No questions will be entertained.**" *Belmont*, Motion for Preliminary Injunction, Appendices 1-2 (documents titled, "What to expect for your meeting") (emphasis added). Plaintiffs presume these logistical ground-rules still apply, but are not sure as matters of dropped calls, lengthy hold times, and elevator music are not addressed in the most recent Notices. Galanda Decl., Ex. K.

[7] Also, each "may submit a Written Response" and "may present evidence supporting his or her case," so long as that information submitted "no later than five (5) calendar days prior to the scheduled Meeting date." *Id.*, §§ 63.10.005B, .005C. "Responses must be typed; hand written responses may be rejected." *Id.*, § 63.10.005B. Supporting evidence can only be presented under cover of "an Exhibit List"; provided, the "Exhibits must be marked with a label on the lower right corner . . . [that] must include the Disenrollee's name and enrollment number, exhibit number, and total number of pages for each exhibit." *Id.*, § 63.10.005B(2). Any "[f]ailure to comply with these format requirements will result in the rejection of submissions." *Id.*, § 63.10.005B(2)(d). Meanwhile, by way of glaring double standard, Defendants may take "official notice" of "any tribal historical fact within the Enrollment Department's specialized knowledge" that staff offer in testimony—*i.e.*, of hearsay. *Id.*, § 63.10.005C(4); ER 401. Plaintiffs appreciate that these "rules" have been upheld by the Tribal Appeals Court; nevertheless, for a people of oral tradition, they violate Nooksack customs, traditions, and norms.

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"fast-tracking the disenrollment process" and acting "with haste." *Lomeli*, No. 2013-CI-APL-2013-002, at 8 n.7. Technically, Defendants now stand in contempt of Court.

On February 4, 2015, Plaintiffs' undersigned counsel wrote Defendants' counsel:

> Thanks for the courtesy copies of these court notices, the related disenrollment hearing notices (which we note predate the court notices by a few days), and the partial federal correspondence regarding Interior's approval of Title 63.
>
> We believe that the administrative disenrollment process has recommenced prematurely.
>
> Our understanding of law on injunction practice is that a permanent injunction order must be obeyed until it is dissolved or vacated. Barring such relief, the enjoined party is not at liberty to perform the acts that the Court prohibited. And the remedy for doing so is contempt of court.
>
> Here, we do not believe that your clients are at liberty to recommence disenrollment, unless and until the Tribal Court's permanent injunction order is dissolved or vacated. Are you willing to file a motion with the Tribal Court for such relief?
>
> If you would, please let us know either way by close of business tomorrow [February 5, 2015]. We apologize for the short fuse on this inquiry but that is driven by the reality that disenrollment hearings are suddenly scheduled to recommence in about 30 days.

Galanda Decl., Ex. L. On February 6, 2015, having received no reply from defense counsel, Plaintiffs' counsel asked: "Can we expect to hear from you?" *Id.* Having still not received the courtesy of any response, Plaintiffs file this Opposition, and accompanying Emergency Motion.

Plaintiffs hereby request that the *Roberts* Permanent Injunction Order and *Belmont* Preliminary Injunction Order be enforced, as soon before March 4, 2015, to prevent Defendants from carrying out the latest disenrollment "process" then—or from otherwise recommencing Plaintiffs' disenrollment until the Secretary's approval is of legal effect.

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II. ARGUMENT

A. The Injunction Orders Continue, Absent Dissolution or Vacature

It is well-established that injunctions "remain in effect until dissolved by an order of th[e] court." *Gammoh v. City of La Habra*, 168 F.3d 498 (9th Cir. 1999). As the California Federal Circuit Court made clear as far back as 1879, compliance with the underlying ruling does not relieve a party from a finding of contempt if the injunction is violated:

> The injunction should be obeyed until it is dissolved by the authority which granted it. Undoubtedly, if a proper showing were made, if the court were satisfied that the injunction should be dissolved, it would be dissolved; but until that is done, the party himself has no right to determine the fact that he has authority to proceed, in violation of the injunction of this court, to perform the acts which have been prohibited.

Muller v. Henry, 17 F. Cas. 978, 981 (Cir. Cal. 1879); *see also Pokegama Sugar-Pine Lumber Co v. Klamath River Lumber & Improvement Co.*, 86 F. 538, 540 (N.D. Cal. 1898) ("[P]arties can only be relieved from the operation of an injunction absolutely prohibiting the performance of a specific act by the court granting the injunction.").

Here, neither the *Roberts* Permanent Injunction Order nor the *Belmont* Preliminary Injunction Order have been dissolved or vacated by this Court. Unless or until Defendants dissolve or vacate those injunctions—as discussed below, they cannot at this time—they remain in effect and must be enforced.

B. The Legal Effect of the Secretary's Approval is Stayed Pending Federal Appeal

The disenrollment procedures have not been "approved by the Secretary of the Interior." *Belmont* Preliminary Injunction Order, at 6. Rather, the disenrollment procedures have been tentatively approved by Don Chambellan, Acting Superintendent for the Bureau of Indian Affairs' Puget Sound Agency, and Stanley Speaks, Northwest Region Director. Galanda Decl., Exs. F,G. Their decision is not final, as far as Secretarial approval is concerned, until "the time

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for filing a notice of appeal has expired and no notice of appeal has been filed." 25 C.F.R. § 2.6(b). If a Notice of Appeal is filed, the decision will "remain ineffective during the appeal period." *Wichita and Affiliated Tribes v. Acting Southern Plains Regional Director*, 58 IBIA 263, 266, 2014 WL 2417633, at *2 n.6 (2014) *see also Yakama Nation v. Northwest Regional Director*, 47 IBIA 117, 119, 2008 WL 2802991, at *2 (2008) (noting that an appeal of the Regional Director's decision "would automatically be stayed" by § 2.6(b)). More specifically, it will remain "ineffective pending a decision on appeal," if any, by the Interior Board of Indian Appeals. *Miami Tribe of Oklahoma v. United States*, No. 03-2220, 2008 WL 2906095, at *5 (D. Kan. July 24, 2008) (43 C.F.R. § 4.314(a)); *see also Del Rosa v. Acting Pacific Regional Director*, 51 IBIA 317, 319, 2010 WL 2679074, at *2 (2010) (same).

Here, Appellants have timely filed a Notice of Appeal of the approval(s) rendered by Acting Superintendent Chambellan and Director Speaks' on behalf of the Interior Secretary, as contemplated by 25 C.F.R. § 2.6(b). Galanda Decl., Ex. H. Until that appeal has been decided, said approval(s) are of no legal effect. 25 C.F.R. § 2.6(b); *Wichita and Affiliated Tribes, supra.* In others words, Therefore, at this time, neither the *Roberts* Permanent Injunction Order nor the *Belmont* Preliminary Injunction Order can be dissolved or vacated by this Court.

III. CONCLUSION

Plaintiffs respectfully request that this Court find that for the time being, the *Roberts* Permanent Injunction Order and the *Belmont* Preliminary Injunction Order remain in full force and effect.

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DATED this 9th day of February, 2015.

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DECLARATION OF SERVICE

I, Molly A. 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 with Galanda Broadman, PLLC.

2. Today, without waiver of any objection regarding the illegality of Appellees' recent amendments to the service requirements in N.T.C. Titles 10 and 80, I caused the following documents:

A. Note for Motion

B. Motion For Emergency Hearing

C. Plaintiffs' Response In Opposition to Defendants' "Notice of Complaince"

D. Declaration of Gabriel S. Galanda

E. (Proposed) Order

to be filed with the above referenced court via US Mail, Return Receipt Requested, and to be delivered via U.S. Mail and email to,

Rickie Armstrong
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Nooksack Indian Tribe
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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 February, 2015.

Molly Jones

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