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-007

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION, AND MOTION FOR SANCTIONS

I. INTRODUCTION

This suit was filed roughly a year and a half ago, on May 29, 2014, seeking to enjoin the Defendants' scheme to disenroll Plaintiffs without Secretarially approved rules and regulations for disenrollment proceedings.[1] Also on May 20, 2014, Plaintiffs filed a Motion for Preliminary

[1] *See generally* Compl.

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Injunction, seeking the same relief.[2] Plaintiffs' Motion for Preliminary Injunction was granted on June 12, 2014, and Defendants' Motion for Permission to File an Interlocutory Appeal was denied on July 11, 2014.[3] As a result, Defendants are currently enjoined from initiating disenrollment hearings until, in keeping with the Nooksack Constitution, the U.S. Secretary of the Interior has finally approved "the time, place, and manner of disenrollment hearings."[4]

On December 18, 2015—almost a year and a half late—the Defendants filed an Answer to the Plaintiffs' Complaint in this matter, denying that Plaintiffs are entitled to any of the relief requested (and ignoring that the injunctive relief requested has already been granted).[5] The Defendants also filed a Counterclaim[6] and a Motion for Preliminary Injunction seeking to enjoin Plaintiffs "from voting in the February 20, 2016 primary election and March 19, 2016 general tribal election."[7]

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[2] *See generally* Pl. Mot. Prelim. Inj.

[3] *Belmont v. Kelly*, No. 2014-CI-CL-007 (Nooksack Tribal Ct. Jun, 12, 2014); *Belmont v. Kelly*, No. 2014-CI-APL-003 (Nooksack Ct. App. Jul. 11, 2014).

[4] *Belmont*, No. 2014-CI-CL-007, at 6; *see also Belmont v. Kelly*, No. 2014-CI-CL-007 (Nooksack Tribal Ct. Feb. 26, 2015) (enjoining Defendants from initiating disenrollment proceedings until a decision approving the disenrollment proceedings is final for the Secretary, per 25 C.F.R. § 2.6). Defendants' suggestion that Plaintiffs are purposefully delaying a decision on the merits of their appeal to the Secretary of the Interior is misleading. Pl. Mot. Prelim. Inj., at 7. Plaintiffs are merely exercising their rights to ensure that the Department of the Interior does right by all of its fiduciaries. This is how a system of checks and balances works. And it is the Northwest Regional Director—not Plaintiffs—that has been at least twice dilatory in that Interior Board of Indian Appeals ("IBIA") appeal. *See, e.g.*, Declaration of Ryan D. Dreveskracht ("Dreveskracht Decl."), Exs. A, B. The truth of the matter is that Defendants, as the Nooksack Court of Appeals observed, have been "fast-tracking the disenrollment process at nearly every turn," since 2013. *Lomeli v. Kelly*, No. 2013-CI-APL-2013-002 (Nooksack Ct. App. Aug. 27, 2013). To that end, "Defendants have relentlessly passed new or amended Nooksack laws in order to hasten and ensure Plaintiffs' disenrollment." Pl. Br. Re: Order Extending Stay, *Lomeli v. Kelly*, No. 2011-CI-CL-001, at 10 n.1 (Nooksack Tribal Ct. Sept. 16, 2013). For example, Defendants have amended the Nooksack Constitution, and currently propose to do so for a second time in order to moot the IBIA appeal they complain about, by the Spring of 2016. Dreveskracht Decl. Ex. C. Defendants have also amended Title 10, in part to prevent complaint amendments, which in turn caused Plaintiffs, in the face of countless civil rights violations, to file "six lawsuits"—rather than amend one suit—as they also complain. NTC § 10.05.035; Def. Answer & Counterclaim., at 6. And just last Friday, Defendants amended Title 62, the Nooksack Tribal Election Ordinance, the mere timing of which reeks of gerrymandering, especially when coupled with the Motion at bar. Dreveskracht Decl. Ex. D.

[5] *See generally* Def. Answer & Countercl.

[6] Defendants' filing of a Counterclaim subjects them and the "joined" Nooksack Tribe to equitable recoupment not protected by the defense of sovereign immunity. *Berrey v. Asarco, Inc.*, 439 F.3d 636, 643 (10th Cir. 2006); *Cayuga Indian Nation of N Y. v. Village of Union Springs*, 293 F.Supp.2d 183, 194 (N.D.N.Y. 2003); *Swanda Bros., Inc. v. Chasco Constructors, Ltd.*, L.L.P., 2013 WL 4520203, *8 (W.D. Okla. Aug. 26, 2013).

[7] Def. Answer & Countercl., at 9.

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The facts and the law are largely not in dispute. Plaintiffs agree that "only enrolled members of the Nooksack Indian [T]ribe have the right to vote."[8] Indeed, Article VI, Section 1 of the Nooksack Constitution guarantees that all enrolled members over the age of eighteen "***shall*** have the right to vote."[9] Plaintiffs also agree that they have been "subject[ed] to pending disenrollment proceedings" and that they "intend to vote in the upcoming primary election on February 20, 2016 and the general tribal election on March 19, 2016."[10] What Plaintiffs disagree with is the conclusion that Defendants erroneously draw from these premises—that they can treat Plaintiffs different from other Nooksacks because of their pending disenrollment hearings. This Court has already held that that they cannot.

"The Plaintiffs who are proposed for disenrollment are tribal members."[11] These tribal members are entitled to all of the rights and privileges that come with that status.[12] This includes the right to vote—the "most basic and fundamental of our constitutionally protected rights."[13]

Defendants' Motion for Preliminary Injunction is patently frivolous, as is their Counterclaim. Plaintiffs respectfully request that the Court deny the Defendants' Motion for Preliminary Injunction and award Plaintiffs' attorney's fees and costs incurred in defending Defendants' frivolous filings.[14]

II. RESPONSE TO DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION

A. Preliminary Injunction Standard

"A [party] seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the

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[8] Pl. Mot. Prelim. Inj., at 1-2 (citing CONST. ART VI, §1).
[9] Const. art VI, §1 (emphasis added).
[10] *Id.* at 2.
[11] *St. Germain v. Kelly*, No. 2013-CI-CL-005, at 7 (Nooksack Tribal Ct. Dec. 18, 2013).
[12] *See generally id.*
[13] *Roshandel v. Chertoff*, 554 F. Supp. 2d 1194, 1201 (W.D. Wash. 2008) (citing *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).
[14] *See, e.g., Soares v. Lorono*, No. 12-5979, 2015 WL 3826795, at *3 (N.D. Cal. Jun. 19, 2015).

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balance of equities tips in his favor, and that an injunction is in the public interest."[15] "The purpose of a preliminary injunction is to preserve the *status quo*, so that upon a final hearing, the rights of the parties may be determined without injury to either." [16]

Here, Defendants cannot meet the preliminary injunction standard because they have no chance to succeed on the merits. But even if Defendants had some chance to prevail on the merits—they do not—the extraordinary relief that they request—to disenfranchise over 200 enrolled tribal members—is not allowed. Defendants do not seek to maintain the *status quo*; they seek to segregate and ostracize a large group of political adversaries. This is not allowed.

B. The Threatened Harm To Plaintiffs Outweighs The Threatened Harm To Defendants.

Plaintiffs' Nooksack constitutional rights would be damaged if the Defendants were allowed to prevent the Plaintiffs from voting. The loss of this constitutional right is permanent and "constitutes an irreparable injury that cannot be compensated by remedies at law."[17] The loss of the right to vote is particularly punitive, considering that "[t]he right to vote is a most important one in our form of government."[18]

The balance of hardships among Plaintiffs and Defendants thus tips *sharply* in favor of the Defendants. Plaintiffs wish only to preserve the *status quo*. There is no hardship on Defendants if the *status quo* prevails. Plaintiffs have been voting for decades. They are

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[15] *Winter v. Nat. Res. Defense Council*, 129 S.Ct. 365, 374 (2008).
[16] *Preliminary, Temporary, or Interlocutory Injunctions*, 10 Fletcher Cyc. Corp. § 4852 (2014) (citing *Tom Doherty Assoc., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27 (2nd Cir. 1995)).
[17] *United Food & Commercial Workers Local 99 v. Bennett*, No. 11-0921, 2013 WL 1289781, at *39 (D. Ariz. Mar. 29, 2013); *see also Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm."); *Mills v. Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, 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.").
[18] *Maxwell v. Dow*, 176 U.S. 581, 592 (1900).

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Nooksack and, until that changes, the Nooksack Constitution commands that they be allowed to participate politically. The balance of hardships tips in favor of the Plaintiffs.

Defendants' argument that "[t]here would be no damage" to Plaintiffs if they are disenfranchised does not pass the laugh test.[19] While it is well taken that the Tribe "must protect its election process and can only allow eligible voters to participate in tribal elections,"[20] this Court has explicitly held that "[t]he Plaintiffs who are proposed for disenrollment are tribal members."[21]

C. Defendants Have No Likelihood Of Success On The Merits.

The right to equal protection protected by Article IX of the Nooksack Constitution is essentially a direction that "'all persons similarly situated should be treated alike.'"[22] The U.S. Supreme Court has developed a tripartite structure for evaluating equal protection challenges. First, where the act in question substantially burdens fundamental rights, such as the right to vote, "strict scrutiny applies and the statute will be upheld only if the state can show that the statute is narrowly drawn to serve a compelling state interest."[23] Second, where the state action draws distinctions based on certain other suspect classifications, such as gender, an intermediate level of scrutiny applies and the statute will be upheld if the government can demonstrate that the classification "substantially furthers an important government interest."[24] All other government actions are subject to the third and least exacting type of scrutiny, rational basis review, and will be upheld "if they are rationally related to a legitimate governmental purpose."[25]

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[19] Pl. Mot. Prelim. Inj., at 10.
[20] *Id.*
[21] *St. Germain*, No. 2013-CI-CL-005, at 7.
[22] *Id.* at 6 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)).
[23] *Green v. City of Tucson*, 340 F.3d 891, 896 (9th Cir. 2003) (citing *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627-28 (1969)).
[24] *Kirchberg v. Feenstra*, 450 U.S. 455, 460 (1981).
[25] *Green*, 340 F.3d at 896 (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

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Here, the injunction sought by the Defendants—to deny Plaintiffs the right to vote—does not pass equal protection muster, for at least two reasons. First, while Defendants note that the Court has in the past held "the Tribe can withhold membership benefits from . . . Plaintiffs during the pendency of the disenrollment hearings," Defendants fail to advise the Court of the limitations on this directive that were announced in *St. Germain v. Kelly*.[26]

In *St. Germain*, the Court held that Article X of the Nooksack Constitution requires that the decision to exclude those proposed for disenrollment from certain benefits of membership must be reparable. Thus, the Court ruled that the withholding of a "Christmas Support" check would be allowed where there was "a means by which the proposed disenrollees could access the Christmas Support" if, at a later date, they were ultimately not disenrolled.[27] Absent reparability, though, Defendants targeting of proposed disenrollees could not pass rational basis review. According to the Court:

> The key problem with the Defendants' [rational basis] argument here is that it assumes that those proposed disenrollees are not properly enrolled. . . . The Court rejects the argument that these individuals may be treated differently because they are proposed for disenrollment. These individuals may or may not be eligible for enrollment. That determination has yet to be made. What is clear to this Court, however, is that those who are enrolled with the Tribe must be provided equal treatment by the Defendants . . . under the Nooksack Indian Tribe's Constitution.[28]

What is more, the benefit that Defendants are attempting to deny Plaintiffs is not a "Christmas Check." It is the right to vote.[29] And if Defendants cannot meet the rational basis test for Christmas checks, they surely cannot meet the strict scrutiny standard applicable to the Plaintiffs right to vote.[30] While Defendants certainly have an interest in protecting the sanctity of the voting process, disenfranchising over 200 eligible voters because of some suspicion that they

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[26] 2013-CI-CL-005.
[27] *Id.* at 9.
[28] *Id.* at 8-9.
[29] *See Agholor v. Holder*, 454 F. App'x 360, 364 (5th Cir. 2011) (the right to vote is a "benefit").
[30] *Kramer*, 395 U.S. at 627-28; *Evans v. Cornman*, 398 U.S. 419, 422 (1970).

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are not properly enrolled is not "narrowly drawn." The fact of the matter is that Plaintiffs are enrolled Nooksacks. They have not been disenrolled. They are entitled to vote.[31] Unless or until they are disenrolled, this cannot change.

D. 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 keep Defendants from violating Nooksack Constitutional rights by disenfranchising tribal members.

III. MOTION FOR ATTORNEY'S FEES

"Under the rules of practice applicable in federal court and the courts of virtually every state, an attorney may not knowingly fail to disclose controlling authority directly adverse to the position it advocates."[32] The Ninth Circuit has observed that this rule "is an important one, especially in the district courts, where its faithful observance by attorneys assures that judges are not the victims of lawyers hiding the legal ball."[33] Time and time again, courts have approved disciplinary action against attorneys who knowingly fail to disclose controlling authority.[34] These cases recognize that "while courts should encourage attorneys to assert novel legal

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[31] CONST. ART VI, §1 (emphasis added).

[32] NTC § 10.01.020(d); *Cont'l Lab. Products, Inc. v. Medax Int'l, Inc.*, No. 97-0359, 1999 WL 33116499, at *15 (S.D. Cal. Aug. 12, 1999) (citing Cal. Rules Prof. Conduct, Rule 5–200(B); ABA Model Code Prof. Responsibility, DR 7–106(B)(1); ABA Model Rules Prof. Conduct, Rule 3.3).

[33] *Transamerica Leasing, Inc. v. Compania Anonima Venezolana de Navegacion*, 93 F.3d 675, 675-76 (9th Cir. 1996).

[34] *See, e.g., S. Pac. Transp. Co. v. Public Utilities Comm'n. of State of Cal.*, 716 F.2d 1285, 1291 (9th Cir. 1983); *United States v. Stringfellow*, 911 F.2d 225, 226 (9th Cir. 1990); *Malhiot v. S. Cal. Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984); *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 212 (9th Cir. 1987); *McEnery v. Merit Sys. Protection Bd.*, 963 F.2d 1512, 1516-17 (Fed. Cir. 1992); *DeSisto Coll., Inc. v. Line*, 888 F.2d 755, 766 (11th Cir. 1989).

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theories, attorneys must nonetheless acknowledge controlling authority directly adverse to their positions."[35]

Courts also award sanctions where a pleading filed with the court is for an improper purpose or if it is frivolous.[36] The standard governing whether a motion is "frivolous" is an objective one.[37]

Here, from an objective standpoint, Defendants have filed frivolous pleadings that unnecessarily consume the Court's and the Plaintiffs' resources and interferes with the just and speedy administration of justice. Defendants' has also failed to disclose on-point authority. Plaintiffs are entitled to an award of attorney's fees and costs.

V. CONCLUSION

Defendants' Motion for Preliminary Injunction is patently frivolous, as are their Counterclaims. Plaintiffs respectfully request that the Court deny the Defendants' Motion for Preliminary Injunction and award Plaintiffs' attorney's fees and costs incurred in defending Defendants' frivolous filings.

DATED this 22nd day of December, 2015.

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[35] *Cont'l Lab. Products*, 1999 WL 33116499, at *15.
[36] NTC § 10.01.020(d); Fed.R.Civ.Proc. 11; *G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1109 (9th Cir. 2003); *Townsend v. Holman Consulting*, 929 F.2d 1358, 1362 (9th Cir. 1990).
[37] *G.C. & K.B*, 326 F.3d at 1109; *Galekovich v. City of Vancouver*, No. 11-5736, 2012 WL 5511782, at *1 (W.D. Wash. Nov. 14, 2012).

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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 filed with the referenced court, via U.S. certified mail, return receipt requested and to be served via U.S. certified mail, return receipt requested, and emailed to

Ray Dodge
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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 22nd day of December, 2015.

MOLLY JONES

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