IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE NOOKSACK INDIAN TRIBE

BELMONT, *et al.*,

Plaintiff-Appellees,

v.

KELLY, *et al.*,

Defendant-Appellants.

v.

BELMONT, *et al.*

Case No. 2014-CI-CL-007

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

ORIGINAL

Defendant-Appellants in the above-entitled action seek permission to file an interlocutory appeal of the Tribal Court's Order Denying Defendants' Motion for Preliminary Injunction (Jan. 26, 2016) (PI Denial) (attached as Exh. 1) and Order Denying Defendants' Motion for Reconsideration of 1/26/16 Order Denying Defendants' Motion for Preliminary Injunction (Feb. 29, 2016) (Reconsideration Denial) (attached as Exh. 2).[1] The Tribal Court obviously erred by: (1) finding that the Election Board cannot confer with the Enrollment Department regarding voter eligibility, (2) finding that the Election Board's voter eligibility determination under a provisional ballot process would amount to an improper enrollment eligibility determination, (3) conflating enrollment eligibility and voting eligibility, (4) misinterpreting Tribal Court

[1] Defendant-Appellants have attached certain documents from the Tribal Court since there is no appellate record.

precedent, (5) finding that Defendant-Appellants are not likely to suffer irreparable harm because certain Plaintiff-Appellees were allowed to vote in the 2014 elections, (6) finding that Defendant-Appellants cannot obtain equitable relief because they have unclean hands due to missing deadlines for the 2016 elections, and (7) finding that it is not in the public interest to prevent ineligible voters from voting in Nooksack elections.

I. INTRODUCTION

On December 18, 2015, Defendant-Appellants answered the Complaint in this case, counterclaimed for injunctive relief, and moved for a preliminary injunction to enjoin certain Plaintiff-Appellees from voting in the 2016 Nooksack primary and general elections. Defendant-Appellants explained that they have evidence that certain Plaintiff-Appellees are not properly enrolled and must be enjoined from voting to protect the integrity of Nooksack elections. Plaintiff-Appellees raised an equal protection challenge, and Defendant-Appellants replied with an alternative instead of enjoining Plaintiff-Appellees from voting. Defendant-Appellants explained that a provisional ballot system, as described in the *Crawford* case, would provide a straightforward method to protect Nooksack elections without risking disenfranchisement of eligible voters. On January 26, 2016, the Tribal Court held that Defendant-Appellants did not meet the four requirements for injunctive relief, and on February 29, 2016, the Tribal Court denied Defendant-Appellants' Motion for Reconsideration of the January 26, 2016 Order. PI Denial; Reconsideration Denial.

The Tribal Government has a compelling interest in protecting the integrity of its elections and only allowing eligible voters to vote. The provisional ballot system would be a narrowly tailored solution, which would allow all eligible voters to vote and prevent ineligible voters from voting. The Tribal Court's obvious errors substantially limit the Tribal Council's ability to protect Nooksack elections.

II. FACT STATEMENT

In December of 2012, Terry St. Germain, one of the Plaintiff-Appellees here, sought to have his children enrolled in the Nooksack Tribe by submitting applications for enrollment. On December 19, 2012, the Tribal Council heard the enrollment applications for others applying for enrollment at a special meeting. Roy Bailey, Enrollment Officer, did not present the St. Germain children's applications to the Tribal Council at that meeting. *Lomeli v. Kelly*, Case No. 2013-CI-APL-002, Opinion at 2 (January 15, 2014). Rudy St. Germain, then Tribal Council Secretary, asked why the St. Germain children were not presented for enrollment, and Mr. Bailey responded that the applications did not provide information that would make the children eligible for enrollment. Rudy St. Germain noted that if the St. Germain children were not eligible for enrollment, neither was he. *Id.*

Tribal Council Chairman Kelly and Mr. Bailey did further research at the Bureau of Indian Affairs' (BIA) Regional Office regarding the enrollment status of the St. Germain children. The research revealed that there were not any documents to support enrollment of the St. Germain children or approximately 300 enrolled Nooksack members. *Id.* at 2-3. As such, the Tribal Council adopted Resolution No. 13-02 and sent Notice of Intent to Disenroll to approximately 300 tribal members in early 2013, which explained that those 300 were erroneously enrolled and notified them of their rights under Title 63. *Id.* at 3.

On March 13, 2013, six people who received Notices of Intent to Disenroll filed suit in this Court seeking to enjoin the Tribal Council from conducting disenrollment proceedings. The Tribal Court dismissed that case, and this Court upheld the Tribal Court's Dismissal. *See Lomeli*, Case No. 2013-CI-APL-002, Opinion.

On March 15, 2013, Plaintiff-Appellees began requesting disenrollment meetings with the Tribal Council pursuant to Title 63, § 63.04.001(B)(2). Exhibit 1 to Decl. of K. Canete

(Letter Requesting Meetings). Title 63 makes clear that the Nooksack Tribe bears the burden of proof in disenrollment actions. *Title 63*, § 63.04.001(B). The Tribe, through the Tribal Council, furnished proof of erroneous enrollment (Basis Packets) to Plaintiff-Appellees Eleanor Belmont and Olive Oshiro when it attempted to schedule the meetings that Plaintiff-Appellees requested. Decl. of K. Canete at ¶5. The Basis Packets demonstrate that Ms. Belmont and Ms. Oshiro (like other Plaintiff-Appellees) claimed enrollment solely through Annie George, and the Basis Packets show that Annie George was never a member of the Nooksack Tribe and did not qualify for membership. *See id.*

While there are some Plaintiff-Appellees who have not yet received Basis Packets due to Plaintiff-Appellees' own efforts to delay and avoid disenrollment meetings, Plaintiff-Appellees are aware of the reasons for their ineligibility since the reasons are described in Resolution No. 13-02 and Plaintiff-Appellees have had the same counsel as Ms. Belmont and Ms. Oshiro (and others who have received Notice and Basis Documents). *Id.* at ¶6. The Tribal Council has requested that Plaintiff-Appellees provide documentation showing that they are properly enrolled. *Id.* The vast majority of Plaintiff-Appellees have refused to provide such information or explain how they could qualify for enrollment.[2] *Id.* at ¶7.

In addition to the *Lomeli* case, Plaintiff-Appellees filed five other lawsuits in the Tribal Court generally seeking to enjoin the Tribal Council from completing disenrollment proceedings or holding the hearings that Plaintiff-Appellees requested. *See* Defendant-Appellants' Counterclaim at Paragraphs 12-17 (describing the five additional lawsuits). Plaintiff-Appellees also filed three interlocutory appeals seeking to prevent the holding of disenrollment proceedings, all of which were denied, and four appeals seeking to prevent completion of the disenrollment proceedings.

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[2] 23 Plaintiff-Appellees provided responses to meeting Notices and Basis Packets, but none of those responses demonstrate that Plaintiff-Appellees are properly enrolled.

Two Plaintiff-Appellees also filed suit in the federal District Court in the Western District of Washington on May 31, 2013. *St. Germain v. United States Department of the Interior*, 13-cv-00945-RAJ (May 31, 2013). The Western District of Washington dismissed that suit with prejudice on October 30, 2015 (Dkt 71). These same two Plaintiff-Appellees improperly filed an appeal of the 2013 Secretarial Election with the Interior Board of Indian Appeals (IBIA), which was later dismissed. *Rudy St. Germain, et al. v. Stanley Speaks, et al.*, No. IBIA ___-___, Pre-Docketing Notice and Order for Appellants to Show Cause (September 30, 2013); *Rudy St. Germain, et al. v. Stanley Speaks, et al.*, No. IBIA 14-011, Order Docketing and Dismissing Appeal (November 15, 2013).

Importantly, this Court has upheld the Tribal Council's authority to implement disenrollment proceedings, upheld Resolution No. 13-02, and has upheld specific provisions as meeting due process requirements.[3] *See Lomeli*, Opinion; *Roberts v. Kelly*, Case No. 2013-CI-APL-003, Opinion (March 18, 2014). After multiple lawsuits, motions for preliminary injunction, motions for reconsideration, motions to disqualify the judge and undersigned counsel, and appeals, the Tribal Court and this Court have upheld the Tribal Council's actions regarding disenrollment proceedings but have required Secretarial approval of rules governing final hearing proceedings. *See Roberts*, Opinion. The Tribal Court issued an injunction in the *Roberts* case and this case, which enjoined the Tribal Council from utilizing disenrollment proceeding rules that were not approved by the Secretary of the Interior (Secretary). *Roberts*, 2013-CI-CL-003, Order Enjoining Disenrollment Proceedings (March 31, 2014); Decision and Order Granting Plaintiffs' Motion for Preliminary Injunction (June 12, 2014). As explained below, the disenrollment proceeding rules, incorporated into Title 63, have been Secretarially approved.

The Tribal Council passed Resolution No. 14-112 on October 10, 2014, which amended

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[3] This Court, in *Roberts*, found two provisions failed to meet due process—the restriction on representation and the ability to shorten the timeframe to prepare for disenrollment meetings.

Title 63 to include the disenrollment procedures that were approved by this Court in *Roberts* and requested Secretarial approval.[4] Decl. of K. Canete at ¶8. The BIA Superintendent approved Resolution No. 14-112 and the amended Title 63 on October 24, 2014. *Id.* at ¶9. The Superintendent also sent Resolution No. 14-112 and the amended Title 63 to the BIA Regional Director for review. *Id.* On January 7, 2015, the Regional Director concurred with the Superintendent's approval of Resolution No. 14-112 and the amended Title 63 and explained that the effective date of the approval was October 24, 2014. On January 13, 2014, the Superintendent informed the Tribal Council of the Regional Director's concurrence and stated that the approval was effective October 24, 2014. *Id.*

On February 3, 2015, Plaintiff-Appellees initiated litigation once again by appealing the Superintendent's approval of Resolution No. 14-112 and the Title 63 amendments.[5] *Id.* at ¶10. Plaintiff-Appellees sent their notice of appeal to the Superintendent and the IBIA. The IBIA issued a narrow decision finding that the Superintendent's approval of Title 63 was appealable, and the Regional Director erred in failing to address the appeal and in making the Superintendent's approval effective when it should have been subject to the automatic stay in 25 C.F.R. § 2.6. *Two Hundred and Seventy-One Enrolled Nooksack Indians v. Northwest Regional Director*, 61 IBIA 77, 83-85 (2015). The IBIA only found it had jurisdiction over "the Regional Director's procedural determination regarding the effectiveness of the Superintendent's decision and appeal rights within BIA." *Id.* at 84 n.11. The IBIA remanded the matter to the Regional Director for consideration of Plaintiff-Appellees' appeal of the Superintendent's approval. *Id.* at 84-85.

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[4] Resolution No. 14-112 only included the disenrollment procedures that this Court approved and not the two provision that were found to offend due process.

[5] It is unclear whether Plaintiff-Appellees constitute exactly the same individuals who are listed as Appellants in the Notice of Appeal, but it appears that each Appellant on the Notice of Appeal is also a party here; regardless, Plaintiff-Appellees are certainly in privity with the Appellants.

On November 17, 2015, the Regional Director upheld the Superintendent's approval of Resolution No. 14-112 and the amendments to Title 63. Exhibit 2 to Decl. of K. Canete (Regional Director's Appeal Decision). The disenrollment procedures have been Secretarially approved. Plaintiff-Appellees have appealed the Regional Director's decision upholding Title 63 to the IBIA. *See* Decl of K. Canete at ¶¶6, 12.

On January 23, 2014, after the 2014 Nooksack elections were well underway, Plaintiff-Appellees disavowed their membership by admitting that they "do not 'clam [sic] right to membership based through lineal descendancy of an original Nooksack Public Domain allottee under Article II, Section 1(a) of the Constitution...." *See* Exhibit B to Decl. of R. Dodge (Jan. 13, 2016) (attached as Exh. 3). Plaintiff-Appellees claim that they were enrolled pursuant to Section 1(c) of the Constitution, but the Tribe has no evidence that Plaintiff-Appellees are related to anyone on the Tribe's official census roll dated January 1, 1942, which is required by Resolution No. 13-02 and Title 63. *See id.*; Title 63, §§ 63.00.004 (Base Enrollee definition), 63.02.001(C)(9). Despite disavowing membership and having received Notices of Intent to Disenroll, at least some Plaintiff-Appellees voted in the 2014 primary and general tribal elections. *See* Decl of K. Canete at ¶13. Plaintiff-Appellees admit that they intend to vote in the 2016 Nooksack primary and general elections. Plaintiff-Appellees Response to Defendants' Motion for Preliminary Injunction, and Motion for Sanctions at 3:4-6.

III. LEGAL ARGUMENT

An aggrieved party may seek permission to file an interlocutory appeal. Title 80, § 80.03.020. This Court must grant permission to file the appeal "if the Nooksack Tribal Court has committed an obvious error which a) would render further proceedings useless; or b) substantially limits the freedom of any party to act." *Id.* The Nooksack Tribal Court obviously erred here by limiting the Election Board's ability to determine voter eligibility and confer with

the Enrollment Department regarding voter eligibility, conflating enrollment eligibility and voting eligibility, and dismissing the harm to the Tribe if ineligible voters vote. The Tribal Court's PI Denial and Reconsideration Denial substantially limit the Tribal Council's ability to protect Nooksack elections.

A. The Tribal Court's Errors.

1. The Court Cleary Erred Regarding the Election Board's Ability to Confer with the Enrollment Department and Determine Voter Eligibility.

The Tribal Court clearly erred by finding that the Election Board could not confer with the Enrollment Department regarding voter eligibility and could not determine voter eligibility. *See* Reconsideration Denial at 9-11. The Court stated that conferring with the Enrollment Department "would compromise the independence of the Election Board." *Id.* at 10. The Constitution states that the Election Board is to "resolve all election disputes." *Const. Art. IV*, § 4. The Nooksack Election Ordinance requires the Election Board to certify candidates, which involves determining candidate eligibility. Title 62, § 62.05.010. The "Enrollment Department will confirm and certify to the Election Board the Nooksack Tribal Enrollment status and age of the prospective candidates and of the persons who signed the Petition Form." *Id.* If the Election Board "deems a potential candidate to be ineligible, the Election Board shall notify the potential candidate by personal service or U.S. certified mail...." *Id.* A person the Election Board deems ineligible may appeal to the Election Board and then to the Tribal Court pursuant to Sections 62.05.020 and 62.05.030. Thus the Election Board must confer with the Enrollment Department, contrary to what the Court thought.

Similarly, under the provisional ballot system, the Enrollment Department would confirm and certify to the Election Board the enrollment status of voters. Any voter that the Election Board deemed ineligible would be notified, and such a person could appeal under the process outlined in Sections 62.07.020 and 62.07.030 with deadlines extended until at least three days

after the person receives notice of the Election Board's eligibility determination. This process mimics the process already in place for candidates, and it does not require the Election Board or Enrollment Department to complete any task outside their ordinary duties.

The Tribal Court obviously erred by suggesting that those whom the Election Board deem ineligible to vote should obtain the same types of hearings required for disenrollment. Disenrollment is an entirely different process with far greater consequences; the only consequence of being deemed ineligible to vote is the inability to vote in the 2016 elections. *See* Reconsideration Denial at 10. This is the same consequence that was at issue in the Supreme Court's *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) decision—where a failure to obtain and present proper identification resulted in a person's inability to vote. The Tribal Court also obviously erred by stating that each Election Board decision on voter eligibility would effectively be an enrollment decision. *See* Reconsideration Denial at 11. Voter eligibility and enrollment eligibility are two separate determinations, and the Election Board would not weigh in on enrollment eligibility.

2. The Court Conflated Voting Eligibility and Enrollment Eligibility.

The Tribal Court obviously erred by finding that "[h]ere, the issue—whether Plaintiffs are eligible for enrollment—impacts many benefits and privileges besides the right to vote."[6] PI Denial at 13; *see also id.* at 8 ("Defendants' counterclaim and motion for preliminary injunction implicate the constitutional question whether, for purposes of voting in Tribal elections, 'enrolled members' include members subject to disenrollment proceedings"); Reconsideration Denial at 11 ("The issue here—whether Plaintiffs are eligible for enrollment—implicates many benefits and

[6] In the Tribal Court's Reconsideration Denial, the Tribal Court states that "the Court is well aware that the only issue before the Court is the Plaintiffs' right to vote in the 2016 Tribal Council elections[,]" but the Court proceeds to analyze the case as if the consequences are commensurate with the consequences of being disenrolled. *See* Reconsideration Denial at 2, 11-12. Preventing ineligible Plaintiff-Appellants from voting is not the same as disenrolling ineligible Plaintiff-Appellants.

privileges beyond the right to vote and threatens repercussions well beyond the consequences of *Crawford*"). The Tribal Court stated that Defendant-Appellants merged the issues of enrollment eligibility and voting eligibility, but the issue here is not whether Plaintiff-Appellees must be disenrolled nor whether other benefits are due; rather, the issue is whether Plaintiff-Appellees are eligible to vote. In conflating these issues, the Court mischaracterized the relief Defendant-Appellants seek and exaggerated the consequences of granting that relief.

In *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), the Supreme Court upheld an Indiana law requiring in-person voters to provide government-issued photo identification against an equal protection challenge. The Indiana law provided that if a voter did not have the proper photo identification, the voter could submit a provisional ballot, which would be counted if the voter presented proper identification within 10 days of the election. *Crawford*, 553 U.S. at 185-86. The *Crawford* Court clarified the balancing test to be applied to government-imposed burdens on the voting process. Courts "must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Id.* at 190; *see also ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008) ("the appropriate test when addressing an Equal Protection challenge to a law affecting a person's right to vote is to "weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule").

Importantly, the *Crawford* provisional ballot process does not determine whether a person actually is a U.S. citizen who meets all the requirements for voting (i.e., whether s/he lives in Indiana, is over age 18, and is not otherwise prohibited from voting); instead, the process merely provides a means for the state to obtain sufficient information to protect its interests. This is all that Defendant-Appellants seek in this case—a means to protect Nooksack elections

from ineligible voters. If a Plaintiff-Appellant cannot present documentation showing s/he meets the voting requirement (i.e., valid membership in the Nooksack Indian Tribe), the only consequence would be that that Plaintiff-Appellant's vote would not be counted in the 2016 elections. Just as in *Crawford*, no other consequence would result. The Tribal Court obviously erred in finding that the ripple effect of the provisional ballot process would "implicate many benefits and privileges…[,]" including the "potential disenrollee's 'cultural, familial and spiritual identity.'" Reconsideration Denial at 11 (quoting *Roberts*, Opinion at 6).

The Seventh, Ninth, Tenth, and Eleventh Circuits—as well as many other courts—have followed *Crawford* in upholding voter photo identification requirements against equal protection challenges. *See, e.g., Frank v. Walker*, 768 F.3d 744, 751 (7th Cir. 2014); *Gonzalez v. Ariz.*, 677 F.3d 383, 409-10 (9th Cir. 2012); *ACLU of N.M.*, 546 F.3d at 1325; *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1345 (11th Cir. 2009); *S.C. v. United States*, 898 F. Supp. 2d 30, 42 (D.D.C. 2012). As the Ninth Circuit explained, the burden of obtaining proper photo identification is not heavy enough to support an attack on the law's constitutionality in light of the state's interests in "deterring and detecting voter fraud, modernizing election procedures, and safeguarding voter confidence." *Gonzalez*, 677 F.3d at 410.

Courts have pointed out that *Crawford* upheld Indiana's law "even absent specific evidence of in-person voter fraud" due to the "general history of voter fraud and the risk that in-person voter fraud 'could affect the outcome of a close election….'" *Green Party of Tenn. v. Hargett*, No. 2:13-cv-224, 2014 U.S. Dist. LEXIS 102706, at *18 (E.D. Tenn. Feb. 20, 2014); *see also Common Cause/Ga.*, 554 F.3d at 1353-54 (upholding Georgia voter photo identification requirement without evidence of voter fraud).

Here, the Tribe has specific evidence of voter ineligibility, and Plaintiff-Appellees are aware of that evidence. *See* Decl. of K. Canete (Dec. 18, 2015) at ¶¶5-6. The Tribal Council

disenrolled 24 former members (Disenrollees) on August 8, 2013 due to failure to meet the Tribe's membership requirements and failure to request a meeting with the Tribal Council or present any evidence of membership eligibility. *See* Exhibits A-X to Decl. of C. Bernard (Feb. 5, 2016). Those Disenrollees' enrollment applications claimed enrollment through Annie George just as Plaintiff-Appellees' enrollment applications do. Exhibit Y to Decl. of C. Bernard (Feb. 5, 2016) (tree chart attached to Sonia Lomeli Decl. of March 15, 2013). Annie George was not Nooksack to any degree. *See* Exhibit K to Decl. of G. Galanda (Feb. 9, 2015) (Belmont Notice and Basis documents). The Tribal Court dismissed the evidence of the Disenrollees' disenrollments as irrelevant because they did not request a meeting before the Tribal Council, but this finding was an obvious error. *See* Reconsideration Denial at 12-13. The relevance of Disenrollees' disenrollments is that they claimed membership through the same ancestor as Plaintiff-Appellees, and that ancestor was not Nooksack within the meaning of the Constitution's definition of membership. Even if this Court agrees with the Tribal Court's finding of irrelevance, Plaintiff-Appellees have also admitted that they do not claim a right to membership through a Public Domain Allottee, and the Tribe has no evidence that Plaintiff-Appellees descend from any person listed on the Nooksack Tribe's official census roll dated January 1, 1942 or meet any other membership requirement in the Constitution. *See* Exhibit B to Decl. of R. Dodge (Jan. 13, 2016). Defendant-Appellants do not recite this information to pre-adjudicate Plaintiff-Appellees' enrollment status; rather, Defendant-Appellees recite it to demonstrate that they have concrete evidence of Plaintiff-Appellees' ineligibility to vote in Nooksack elections.[7]

The Tribe seeks to protect the integrity of the Nooksack election process, deter and detect voter fraud, and ensure that only eligible voters are able to vote. The Tribe shares the same

[7] In order to vote in Indiana, a person must prove they are a U.S. citizen. Failure to provide that proof would affect a person's right to vote in Indiana, but it would not affect whether the person is in fact a citizen. Similarly, requiring proof of Nooksack membership eligibility for voting would not affect a person's membership status.

interests as Indiana in *Crawford*. The Tribe also seeks the same solution: requiring confirmation of voter eligibility through presentment of proof and the provisional ballot process. The Tribe does not seek "to extinguish Plaintiffs' right to vote entirely." PI Denial at 12. The provisional ballot process allows Plaintiff-Appellees to come forward with proof of eligibility to vote.[8] If Plaintiff-Appellees show that they meet voter requirements, then their vote would count. If Plaintiff-Appellees do not show that they meet voter requirements, then their vote would not count. Again, Plaintiff-Appellees would not lose any other benefit or privilege, because failure to show voter eligibility is not equivalent to being disenrolled.

The Tribal Court obviously erred by finding that the burden on Plaintiff-Appellees is not equivalent to the burden on voters in *Crawford*. Reconsideration Denial at 7-8. The Court erroneously suggested that Plaintiff-Appellees would have to provide all proof required to enroll in the Nooksack Indian Tribe. *Id.* Plaintiff-Appellees would only need to show documentation sufficient to prove proper enrollment; a tree chart and the enrolling resolution would indicate the ancestor through whom the Plaintiff-Appellee claims the right to membership and the constitutional provision under which the Plaintiff-Appellee was enrolled. Again, an enrollment determination is not at issue here.

Even if Plaintiff-Appellees were required to provide all the information and documentation listed in Title 63, Section 63.02.001(C) and (D), the burden would be equivalent to the burden in *Crawford*. Section 63.02.001(C) requires such basic information as the person's name, name changes, gender, contact information, birthplace, ancestor through whom the person claims enrollment rights, and two yes or no answers to relevant questions. This is exactly the type of information a person must provide in order to obtain government-issued identification. Section 63.02.001(D) requires a family tree chart and a birth record. The addition of a family

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[8] Those seeking to become candidates or sign candidate petitions must be eligible to vote and could present the same proof to the Election Board.

tree chart does not substantially increase the burden on Plaintiff-Appellees as opposed to those seeking government-issued identification.[9]

The Seventh Circuit explained that voters who lack photo identification can only be described as "disenfranchised" if the state made it impossible or at least difficult for them to obtain photo identification; if, however, photo identification is available for those "willing to scrounge up a birth certificate and stand in line at the office that issues drivers' licenses, then all we know from the fact that a particular person lacks a photo ID is that he was unwilling to invest the necessary time." *Frank*, 768 F.3d at748. Inconveniences such as gathering documents and making a trip to a government office do "not quality as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198. In other words, governments do not have to count the votes of those who may well be qualified voters if those persons do not make the effort to obtain government-issued identification. Here, Plaintiff-Appellees have free access to their enrollment files and have always had such access—including during the entire pendency of the disenrollment litigation. It is not onerous to ask Plaintiff-Appellees to present documentation, such as an enrollment resolution and family tree chart, showing voter eligibility.

The Tribal Court obviously erred by conflating enrollment eligibility and voting eligibility. The Court also obviously erred by failing to find that the Tribe's interest in protecting the integrity of Nooksack elections warrants the provisional ballot system. Indeed, a government "indisputably has a compelling interest in preserving the integrity of its election process." *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009) (internal quotations

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[9] Subsection D requires additional information only if certain conditions apply (e.g., if the father is not listed on the birth documentation and the father is a Nooksack descendant, the person must include a signed and notarized paternity affidavit). Obtaining any such additional material would not be so onerous as to significantly change the burden for Plaintiff-Appelllees.

omitted). The burden of the provisional ballot process is minimal in comparison to the Tribe's interests in avoiding voter fraud and protecting the integrity of the election process.

3. The Court Misinterpreted *St. Germain v. Kelly*, 2013-CI-CL-005, Order Granting Defendant's Motion to Dismiss and Denying Plaintiffs' Motion for Summary Judgment (Jun. 24, 2014).

The *St. Germain* Court held that the Tribe's withholding of Christmas support payments from certain Plaintiff-Appellees did not violate equal protection principles as long as the Tribe saved the funds in case those Plaintiff-Appellees are not disenrolled (the carve-out). Here, the Tribal Court obviously erred by holding that the *St. Germain* "Court approved the carve-out approach only because the Court was unable to fashion other relief." *See* PI Denial at 15. The Court in fact held that the carve-out for Back to School and Christmas Support payments "sufficiently protect[] the interests of the potential disenrollees." *St. Germain*, Order Granting Defs.' Mot. to Dismiss and Den. Pls.' Mot. for Summ. J. at 2-3. The Tribal Court wrongfully found that the "sufficiently protects" language must be read "in light of the Court's inability to order 'specific relief.' The carve-out was 'sufficient' in that context." Reconsideration Denial at 6. The *St. Germain* Order, which dismissed Plaintiff-Appellees' claims, did not rely on the Court's inability to order specific relief; rather, the *St. Germain* Order found that holding potential disenrollees' Christmas Support funds until after disenrollment proceedings are completed passed equal protection scrutiny even though the potential disenrollees would not have access to the funds during the pendency of the disenrollment proceedings. Surely the *St. Germain* Order would not have stated that the Resolution regarding Christmas Support funds sufficiently protected the potential disenrollees' interests if the Court in fact found that equal protection principles were violated but it could not fashion "specific relief."

4. The Court Wrongfully Held that the Tribe Would Not Suffer Irreparable Harm Because Some Plaintiff-Appellees Voted in the 2014 Elections.

The Tribal Court obviously erred in finding that the Tribe is not irreparably harmed by certain Plaintiff-Appellees' voting because the Tribe ignored the evidence of certain Plaintiff-Appellees' ineligibility to vote in the 2014 elections. *See* Reconsideration Denial at 13-14. It is the Court that ignored the facts of this case. The Tribe did not seek to enjoin certain Plaintiff-Appellees from voting in the 2014 elections because the elections were already underway by the time Plaintiff-Appellees disavowed their membership in the *Adams II* Complaint. *See* Exhibit B to Decl. of R. Dodge (Jan. 13, 2016). In addition, this Court had not yet ruled on the *Lomeli* or *Roberts* appeals by the time the 2014 election process commenced. The Tribal Court erroneously dismissed those reasons as disingenuous and found that the date that mattered was the date that the Tribal Council viewed its membership rolls as corrupted. *See* Reconsideration Denial at 13-14.

The Tribe obtained evidence that certain Plaintiff-Appellees were not properly enrolled in January of 2013, but those Plaintiff-Appellees did not disavow their membership until January 23, 2014, which was after the 2014 election process was underway. *See* attached Exh. 3. The Tribal Council also did not know whether this Court was going to uphold the Tribal Court's decision finding the Tribal Council has the authority to commence disenrollment proceedings. That phase of litigation was entirely different than the current phase. Now, two years later, the Tribal Council's authority to commence disenrollment proceedings has been upheld, but those proceedings have been delayed by further litigation. After two years of delay and this Court's and the Secretary's approval of the disenrollment procedures, the Tribe must be able to address its corrupted rolls. In addition, a failure to address voter fraud and ineligible voting in the past does not diminish the harm to the Tribe of present and future voter fraud and ineligible voting. There is no doubt that the Tribe will be irreparably harmed if it is forced to ignore voter fraud and ineligible voting.

5. The Court Erred By Finding that Defendant-Appellants Could Not Obtain Equitable Relief Due to Unclean Hands.

The Tribal Court obviously erred by finding that the balance of equities tipped in Plaintiff-Applees' favor due to Defendant-Appellees missing "several constitutional and statutory deadlines regarding the 2016 Tribal Council elections." *See* Reconsideration Denial at 14. While it would have been better for Defendant-Appellees to file their Motion for Preliminary Injunction prior to any of the 2016 election deadlines, Defendant-Appellants filed it well before the scheduled dates of the 2016 elections. A delay in filing their Motion for Preliminary Injunction should not bar the Tribe from obtaining equitable relief to protect the integrity of Nooksack elections. Additionally, the only deadline that had passed was for the Chairman to appoint a Superintendent. The Tribe and other Tribal Council members should not be deemed to have unclean hands when it is only the Chairman who missed an election deadline.

6. The Court Wrongfully Found that It Is Not in the Public Interest to Grant Injunctive Relief.

The Tribal Court obviously erred by failing to recognize that it is in every Nooksack tribal member's interest to ensure the integrity of Nooksack elections. The provisional ballot process allows the Tribe to protect against voter fraud and ineligible voting without disenfranchising eligible voters. The Tribal Court stated that all Nooksack tribal members "have a strong interest in fair and timely elections." PI Denial at 20-21. Defendant-Appellants agree with the Court, but a fair election cannot include ineligible voting. The public interest weighs strongly in favor of utilization of the provisional ballot process to protect the integrity of Nooksack elections.

B. The Effects of the Tribal Court's Errors.

The Tribal Court's PI Denial and Reconsideration Denial are not in accordance with the Election Ordinance, conflate enrollment eligibility and voting eligibility, misinterpret Tribal

Court precedent, summarily dismiss the harm the Tribe is likely to suffer, unfairly bar the Tribe from equitable relief, and fail to understand the public interest in preventing voter fraud and ineligible voting. These obvious errors "substantially limit the freedom" of the Tribal Council to protect Nooksack elections from voter fraud and ineligible voting.

IV. CONCLUSION

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

Respectfully submitted this 14th day of March, 2016.

/s/ Thomas P. Schlosser (approved telephonically)
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IN THE NOOKSACK TRIBAL COURT
NOOKSACK INDIAN TRIBE
DEMING, WASHINGTON

ELEANOR J. BELMONT, et al.,	
Plaintiffs and Counterclaim Defendants,	No. 2014-CI-CL-007
vs.	ORDER DENYING DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION, GRANTING PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT, AND DENYING MOTIONS FOR SANCTIONS AND TO STRIKE
ROBERT KELLY, Chairman of the Nooksack Tribal Council, et al.,	
Defendants and Counterclaimants.	

Defendants, who are members of the Nooksack Tribal Council and Tribal employees, filed a counterclaim and motion for preliminary injunction seeking to prevent Plaintiffs, who are potential disenrollees, from voting in the 2016 Tribal Council elections. Plaintiffs moved for leave to amend their complaint, adding a cause of action seeking to compel Defendants to hold the elections in accordance with the Nooksack Constitution and Nooksack Election Code. Both sides made motions for sanctions and to strike. After oral argument on all matters, the Court denies Defendants' motion for preliminary injunction, grants Plaintiffs' motion for leave to amend complaint, and denies all motions for sanctions and to strike.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Beginning in March 2013, seven lawsuits have been filed in this Court related to pending disenrollment proceedings. Five have been disposed of by this Court, with some going up to the Court of Appeals. This lawsuit is one of two cases pending currently.

Plaintiffs are 272 enrolled members of the Nooksack Indian Tribe who are subject to disenrollment proceedings, suing on behalf of themselves and their minor children. Defendants are members of the Nooksack Tribal Council and employees of the Tribe, sued in both their official and personal capacities.

For purposes of addressing matters currently at issue, the court need not recount the history of all disenrollment

EXHIBIT 1

litigation. In order to fully understand the instant case, however, it is useful to look back to *Roberts v. Kelly*, No. 2013-CI-APL-003 (Nooksack Ct. App. 3/18/14).

In August 2013, the Tribal Council passed Resolution 13-111, setting forth procedures for disenrollment. The plaintiffs in *Roberts* challenged the validity of Resolution 13-111 on various grounds and sought to enjoin disenrollments. The Court of Appeals held that "any 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." *Roberts* at 9 (footnote omitted). Further, "[b]ecause Resolution 13-111 was not constitutionally adopted by ordinance, or amendment to an ordinance, and was not approved by the Secretary, the Council cannot use the procedural rules in Resolution 13-111 in Appellants' disenrollment proceedings." *Roberts* at 5. The appellate court remanded to this Court for the sole purpose of enjoining defendants from applying the procedures in Resolution 13-111 to disenrollment proceedings. This Court entered a permanent injunction to that effect on March 31, 2014.

Although not obligated to do so under the circumstances, the Court of Appeals went on in their opinion, in the interests of justice and judicial efficiency, to evaluate the procedures established under Resolution 13-111, which the parties had already extensively briefed. The appellate court "conclude[d] the details of the procedures in Resolution 13-111 do not violate due process under the Nooksack Constitution, except for the provisions that prohibit representation and give the Council the discretion to shorten time." *Roberts* at 9. The appellate court did not decide whether the procedures for disenrollment then contained in the Nooksack Tribal Code, Title 63 - Enrollment, satisfied due process.

Following the appellate decision in *Roberts*, the Tribal Council passed Resolution 13-163 in November 2013 in order to correct deficiencies in Resolution 13-111. Next, on May 16, 2014, Defendants issued "Notice of Meeting" ("Notice") and "Basis for Commencement for Disenrollment Proceedings" ("Basis") to Tribal members Eleanor J. Belmont and Olive T. Oshiro. Each "Notice" set forth disenrollment procedures previously appearing in Resolution 13-111, as amended.

Plaintiffs Belmont, Oshiro, et al., filed the instant lawsuit on May 30, 2014, alleging the "Notice" and "Basis" were vague and did not satisfy due process requirements pursuant to the Nooksack Constitution. Moreover, neither "Notice" nor "Basis" had been approved by the Secretary of the Interior. Plaintiffs sought injunctive relief and a declaratory judgment. At the same time they filed their complaint, Plaintiffs filed a motion for preliminary injunction seeking to halt disenrollment proceedings until Defendants complied with constitutional requirements.

This Court granted Plaintiffs' motion in an order entered June 12, 2014, rejecting Defendants' view that the "Notice" was simply a memo and not an ordinance requiring the Secretary's approval.

> This approach appears to be an attempt to circumvent the very clear holdings of the Court of Appeals that disenrollment procedures that set out the time, place, and manner of disenrollment hearings must be approved by the Secretary of the Interior, so long as that requirement exists in the Nooksack Constitution. That requirement exists and the Tribal Council must comply with it before proceeding.

Decision and Order Granting Plaintiffs' Motion for Preliminary Injunction at 6 (footnotes omitted).

Thereafter, Defendants petitioned the Nooksack Court of Appeals for permission to file an interlocutory appeal, which was denied on July 11, 2014.

On October 10, 2014, the Tribal Council passed Resolution 14-112, amending Nooksack Tribal Code, Title 63 - Enrollment, to include the disenrollment procedures previously appearing in Resolution 13-111, as amended, and previously approved by the Court of Appeals in *Roberts*. Resolution 14-112 and the amended Title 63 were then submitted for approval by the Secretary of the Interior.

By letter dated January 13, 2015, but effective as of October 24, 2014, the BIA Acting Superintendant and the BIA Regional Director, on behalf of the Secretary, approved Resolution 14-112 and the amended Title 63. On February 3, 2015, Plaintiffs appealed the decisions of the Acting

Superintendant and the Regional Director. Their appeal of the Acting Superintendant's decision went before the Regional Director. Their appeal of the Regional Director's decision went before the Interior Board of Indian Appeals (IBIA). The IBIA disposed of the appeal by remanding to the Regional Director for consideration of the Acting Superintendant's approval of Resolution 14-112 and amended Title 63.

On November 17, 2015, the Regional Director affirmed the Acting Superintendant's approval of Resolution 14-112 and amended Title 63. On November 23, 2015, Plaintiffs appealed the Regional Director's decision to the IBIA. That appeal is still pending.

Meanwhile, relying upon the Acting Superintendent's and Regional Director's approvals of Resolution 14-112 and amended Title 63, effective October 24, 2014, Defendants recommenced disenrollment proceedings on January 30, 2015. After a seven-month hiatus in this case, on February 2, 2015, Defendants filed a Notice of Compliance with this Court's order of June 12, 2014, granting Plaintiffs' motion for preliminary injunction.

Plaintiffs responded in opposition to the Notice of Compliance and moved for continuing enforcement of the preliminary injunction in this case, as well as the permanent injunction in *Roberts*. Plaintiffs contended Defendants were obliged formally to move to dissolve the injunctions before recommencing disenrollments. Moreover, due to the pendency of Plaintiffs' appeals, the decisions by the Acting Superintendant and Regional Director were without legal effect in the interim pursuant to 25 C.F.R. § 2.6(b) and 43 C.F.R. § 4.314(a).

In an order entered February 26, 2015, this Court agreed with Plaintiffs that the injunctions remained in effect and directed the parties to maintain the status quo pending final decision on Resolution 14-112 and amended Title 63.

The next action in this case occurred nearly ten months later, on December 18, 2015, when Defendants filed their answer to the complaint, asserted a counterclaim, and moved for a preliminary injunction to prevent Plaintiffs from voting in the 2016 Tribal Council elections. On January 11, 2016, Plaintiffs filed a motion for leave to amend their complaint, along with an amended complaint, seeking to compel Defendants to hold the elections in accordance with the Nooksack Constitution and

Nooksack Election Code. Both motions have drawn opposition and, along the way, both sides have moved for sanctions and to strike.

On January 14, 2016, the Court conducted oral argument on all pending matters. Plaintiffs were represented by Gabriel Galanda. Defendants were represented by Raymond Dodge and Thomas Schlosser, assisted by Rickie Armstrong. The Court set deadlines for further briefing on issues raised by the Court and on Plaintiffs' motion for leave to amend complaint. The Court took all matters under advisement.

DISCUSSION

Jurisdiction

Defendants' requests for injunctive relief – through their motion for preliminary injunction and in their counterclaim seeking a permanent injunction – concern the 2016 Tribal Council elections for Vice-Chairman, Treasurer, and Council Positions C and D. By law, the Primary Election is scheduled for Saturday, February 20, 2016, and the Regular Election is scheduled for Saturday, March 19, 2016. Nooksack Const. art. III, § 4; NTC §§ 62.02.020, 62.02.030(B).

Nooksack Constitution, Article IV, Section 1, provides: "All enrolled members of the Nooksack Indian Tribe, eighteen (18) years of age or over, shall have the right to vote." *See also* NTC § 62.04.020. Defendants ask the Court to enjoin Plaintiffs, 18 years of age or over, from voting.

Election season begins at Nooksack every other year with the Tribal Council Chairman's appointment of an Election Superintendant by the first Thursday in December in the year preceding the election. Nooksack Const. art. IV, § 4; NTC § 62.03.010(A). Next, the Election Superintendant appoints two Ballot Clerks. Nooksack Const. art. IV, § 4; NTC § 62.03.010(B). Together, the three positions constitute the Election Board. *Id.* "The duties of this election board shall be to supervise and certify the election, and resolve all election disputes." Nooksack Const. art. IV, § 4 (emphasis added). Decisions of the Election Board may be appealed to this Court, sitting as an appellate court, and this Court's decisions are final. NTC §§ 62.01.030, 62.03.030, 62.05.030, 62.07.010-030.

At oral argument on January 14th, the Court pointed to the constitutional provision stating that the Election Board shall "resolve all election disputes." The Court queried whether an issue regarding eligible voters is an "election dispute" requiring determination in the first instance by the Election Board, subject to appeal to this Court. The Court noted that whether the issue properly goes before the Election Board and then this Court, rather than this Court and potentially the Court of Appeals, may have a significant impact upon the proper record, the standard of review, and the length of proceedings.

Because neither side had anticipated the jurisdictional issue, the Court permitted supplemental briefing after the hearing. In their supplemental filing, Plaintiffs view the dispute now before the Court – whether Plaintiffs should be allowed to vote – as an "election dispute" that must be resolved in the first instance by the Election Board. Plaintiffs cite decisions from several Tribal jurisdictions with similar constitutional or statutory provisions requiring a final determination by an election board prior to court involvement. If the court in each case found the matter to be an "election dispute," then the premature lawsuit was dismissed. By the same token, Plaintiffs argue, this Court lacks jurisdiction over this "election dispute" and Defendants' motion for preliminary injunction should be denied.

In their supplemental filing, Defendants argue the opposite: "This is not an election dispute. The election process is not yet underway." Defendants' Supplemental Brief Regarding Jurisdiction at 2. Defendants cite a decision by the Nooksack Court of Appeals in support of their argument. *Campion v. Swanaset*, No. NOO-C-496-004 (Nooksack Ct. App. 11/12/96), was a post-election challenge to the 1996 Tribal Council elections, involving the same positions as the 2016 elections. Without going first to the Election Board, the plaintiff voters sued the Tribal Council, the Election Board, and various Tribal officials, contending changes to the Election Code violated the plaintiffs' constitutional rights and that the Election Board failed to comply with notice requirements. This Court concluded jurisdiction was lacking due to the constitutional requirement that the Election Board "resolve all election disputes" at the outset.

The Court of Appeals reversed and remanded for trial. The court noted that the trial court had reached conflicting

decisions regarding jurisdiction in other election cases just two years earlier. The court held that the trial court had subject matter jurisdiction pursuant to Nooksack Constitution, Article VI, Section 2(A)(3), providing for jurisdiction "over all civil matters concerning members of the Nooksack Indian Tribe." Finding jurisdiction under that provision, the court declined to decide whether the trial court also had jurisdiction under the provision in Article VI, Section 2(A)(3), conferring jurisdiction "over all matters concerning the establishment and functions of the trial government, provided that nothing herein shall be construed as a waiver of sovereign immunity by the tribal government."

The *Campion* court cautioned:

> In now finding subject matter jurisdiction, this Court strictly limits its conclusion to the facts of this case. We leave it to further cases to develop the parameters of this source of subject matter jurisdiction for cases that go beyond the strict confines of this case.
>
> . . . .
>
> This case raises many important issues which directly touch upon the essence of government – the ability of tribal members to elect their governmental leaders.

Campion at 6-7. From the last sentence quoted, it appears the appellate court reached its decision, in part, based upon the importance of the issues raised. The plaintiffs challenged amendments to the Election Code on constitutional grounds, which the appellate court apparently considered outside the ambit of the Election Board. But, at the same time, the court narrowed its ruling to the facts of *Campion*.

Likewise, in *Cline v. Cunanan*, No. NOO-CIV-02/08 (Nooksack Ct. App. 1/12/09), the Court of Appeals looked to the nature of the election-related dispute in order to decide whether the trial court had subject matter jurisdiction. The plaintiffs challenged a provision in the Election Code requiring tribal members seeking election to Tribal Council to submit to drug testing prior to receiving a candidate packet. At that time, the Election Code contained a provision no longer appearing in the code: "The Nooksack Tribal Court shall not have subject

matter jurisdiction to hear cases under this ordinance." As a result of that provision and the constitutional provision regarding "all election disputes," this Court determined it lacked subject matter jurisdiction. The Court also found that defendants had not waived tribal sovereign immunity.

On appeal, the *Cline* court distinguished between a dispute over election results versus a constitutional challenge to a provision in the Election Code, finding the latter to be outside the ambit of the Election Board. The Court relied, in part, on the decision in *Campion*, although the *Cline* court found subject matter jurisdiction based upon Article VI, Section 2(A)(3), conferring jurisdiction "over all matters concerning the establishment and functions of the trial government." Like the *Campion* court, the *Cline* court reversed the trial court's decision regarding subject matter jurisdiction. However, the *Cline* court affirmed the trial court decision dismissing the action based on tribal sovereign immunity.

In a sense, the question now before the Court concerns who will receive the Notice of Election required by Election Code § 62.04.010(A), which the Election Superintendant mails "to all Tribal members who will be eligible to vote on the scheduled election days." The issue currently before the Court might arrive as an appeal from a challenge to the Election Board regarding the Notice of Election. Perhaps the issue would be most "ripe" at that point. But deciding who will receive the Notice of Election is tantamount to deciding who is entitled to vote. Defendants' counterclaim and motion for preliminary injunction implicate the constitutional question whether, for purposes of voting in Tribal elections, "enrolled members" include members subject to disenrollment proceedings. The determination whether potential disenrollees are "enrolled members" for purposes of voting is likely outside the ambit of the Election Board.

Notably, while the Election Code sets out a step-by-step process for disqualified candidates to seek pre-election redress from the Election Board, the Election Code is silent concerning compilation of the voter list and a process for disenfranchised voters to seek redress pre-election. Nor is there necessarily a process for redress post-election. Chapter 62.07 of the Election Code, governing "Contests, Appeals and Certification of Election Results," sets forth procedures for a post-election challenge by "[a]ny qualified voter or candidate." NTC §

62.07.020. It is not clear whether "[a]ny qualified voter" includes voters disenfranchised from the outset.

Moreover, one can envision a situation where the Election Board obtains a list of enrolled members from which the Enrollment Department has already redacted the names of potential disenrollees. The Court will not speculate as to what sort of challenge might ensue, but it would surely be something beyond the "election dispute" anticipated in the Nooksack Constitution. One can also envision a situation where the elections are held hostage, with election-related issues viewed as "election disputes" but with no Election Board appointed to decide the disputes. As discussed in more detail below, the Court is troubled by Defendants' statement: "This is not an election dispute. The election process is not yet underway." Defendants' Supplemental Brief Regarding Jurisdiction at 2. In fact, the election process should be underway. By Defendants' own admission, they have already missed several statutory deadlines pertaining to the 2016 elections, including appointment of an Election Superintendant who then appoints other members of the Election Board. More than seven weeks after the statutory deadline for appointment, there is no Election Superintendant. There is no Election Board.

Under the circumstances, it is prudent to follow the precedent of the *Cline* court and the lead, if not the precedent, of the *Campion* court and exercise jurisdiction now. Thus, the Court may exercise subject matter jurisdiction over Defendants' counterclaim under either provision in Nooksack Constitution Article VI, Section 2(A)(3), as a "civil matter[] concerning members of the Nooksack Indian Tribe" or as a "matter[] concerning the . . . functions of the tribal government." Because the counterclaim and motion are brought by Defendants, tribal sovereign immunity is not an issue.

Defendants' Motion for Preliminary Injunction

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 24 (2008)(citation omitted). "A plaintiff 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 balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20 (citations omitted).

(1) Defendants' Likelihood of Success on the Merits

Defendants believe Plaintiffs who will be at least 18 years of age on election day intend to vote in the 2016 Tribal Council elections. Plaintiffs agree. Defendants contend Plaintiffs should be enjoined from voting because they are not eligible to be enrolled members and because they continue to be enrolled only because they have delayed disenrollment proceedings through protracted litigation. Of course, Plaintiffs do not agree.

Plaintiffs respond that, despite the pendency of disenrollment proceedings, Plaintiffs remain enrolled members and that denying them the right to vote would violate their right to equal protection under the Nooksack Constitution, Article IX, which provides: "All members of the Nooksack Indian Tribe shall be accorded equal rights pursuant to tribal law." Article IX also expressly guarantees to all members of the Nooksack Tribe protections contained in the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1304 (ICRA). Pursuant to ICRA, "No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(a)(8).

The United States Supreme Court has established a three-tiered approach to analyzing equal protection cases. Laws or actions that impact certain suspect classes or infringe on a fundamental right are subject to strict scrutiny and must serve a compelling state interest. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 216 (1944)(racial class); *United States v. Guest*, 383 U.S. 745, 759 (1966)(right to interstate travel). Laws or actions that discriminate based on other suspect classes must withstand an intermediate level of scrutiny, assessing whether they serve important governmental objectives and substantially relate to achievement of those objectives. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197-98 (1976)(gender). Laws or actions that do not target a suspect class or burden a fundamental right are subject to rational basis review, requiring that they be rationally related to a legitimate state interest. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631 (1996)(sexual orientation).

Plaintiffs assert the right to vote is a fundamental right and any infringement on their right to vote is subject to strict

scrutiny and may be upheld only if it serves a compelling interest of the Tribe.

The Supreme Court has not treated election cases consistently. Sometimes the Court labels the right to vote fundamental and applies strict scrutiny. *E.g., Burson v. Freeman*, 504 U.S. 191, 194-95 (1992)(law restricting advertising around polling place); *Kramer v. Union Free School District*, 395 U.S. 621, 627-28 (1969)(law limiting who could vote in school district election); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966)(law requiring voter to pay a poll tax). *See* Douglas, *"Is the Right to Vote Really Fundamental?,"* 18 Cornell Journal of Law and Public Policy 143, 143 (2008) ("Regulations involving direct burdens on individuals – such as laws about the value of one's vote or who is eligible for the franchise – impact the fundamental right to vote and deserve strict scrutiny review.") At other times the Court views the right to vote as something less, as illustrated by the two cases upon which Defendants rely in their reply memorandum.

In *Burdick v. Takushi*, 504 U.S. 428 (1992), a registered voter sued Hawaii officials, claiming the state's prohibition on write-in voting violated his rights of expression and association under the First and Fourteenth Amendments to the United States Constitution. Rejecting the voter's contention, the Supreme Court held that the prohibition did not impermissibly burden the right to vote. The Court recognized that elections must be regulated and that election laws invariably impose some burden upon voters. *Id.* at 433. "[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* The Court distinguished between "severe restrictions" on a voter's First and Fourteenth Amendment rights versus "reasonable, nondiscriminatory restrictions." *Id.* at 434.

The instant case is readily distinguishable from *Burdick*. Although implicating constitutional rights, *Burdick* is not an equal protection case. Petitioner did not contend he was treated differently from other registered voters. He was not denied the franchise but, like all other Hawaii voters, he was simply limited in his choices. The prohibition on write-in

votes was a reasonable, nondiscriminatory restriction, justified by the state's regulatory interest, and not a severe restriction on petitioner's constitutional rights.

In this case, Defendants do not seek simply to limit Plaintiffs' choices. Rather, they seek to extinguish Plaintiffs' right to vote entirely. That is surely a severe restriction, requiring strict scrutiny.

Defendants also rely upon *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), in which the Supreme Court upheld an Indiana election law requiring in-person voters to present government-issued photo identification as a means of avoiding election fraud. Complainants contended the law substantially burdened the right to vote, arbitrarily disenfranchised voters unable to show identification, and was not a necessary or appropriate method of avoiding fraud. The Court disagreed. "For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.* at 198 (footnote omitted). Under the Indiana law, an in-person voter without government-issued photo ID was allowed to file a provisional ballot and then correct the problem within ten days.

Crawford is more on-point with the instant case than *Burdick* in that voters — those with government-issued ID and those without — were treated differently. Defendants suggest Nooksack elections could proceed along the same lines approved by the Supreme Court in *Crawford*. Thus, Plaintiffs could file provisional ballots, which would be counted if Plaintiffs proved their eligibility for enrollment to the Election Board within ten days thereafter. Defendants maintain they have already met their burden of proof, as required under Section 63.04.001(B) of the Enrollment Code, through the "Basis" issued to Belmont, Oshiro, and other Plaintiffs, demonstrating Plaintiffs are not eligible for enrollment by any means. Defendants insist this disenrollment saga could end quickly if Plaintiffs would just step forward with proof they are eligible.

Although this Court has seriously considered the *Crawford* approach, the Court has concluded that provisional ballots are

not a viable option under the circumstances here. In *Crawford*, the only right impacted was the right to vote, and a voter could readily cure the deficiency. Here, the issue – whether Plaintiffs are eligible for enrollment – impacts many benefits and privileges besides the right to vote.

Moreover, the procedures for addressing the enrollment issue are the subject of Plaintiffs' pending appeal to the IBIA. Unless and until the IBIA says otherwise, Plaintiffs have a right to address their due process concerns in that forum. And they have a right to present their evidence regarding enrollment in a setting that comports with the Nooksack Constitution, Nooksack ordinances, and ICRA. The critical enrollment issue cannot be shifted to another forum, from the Tribal Council to the Election Board, to be resolved in an election context under the Election Code, rather than in a disenrollment context under the Enrollment Code.

Defendants rely upon *Shakopee Mdewakanton Sioux Community v. Babbitt*, 906 F. Supp. 513 (D. Minn. 1995), aff'd, 107 F.3d 667 (8th Cir. 1997), for the proposition that "[w]hen 'members' do not meet the Tribe's membership criteria, they cannot vote in tribal elections." Defendants' Motion for Preliminary Injunction at 8. In that case, the Court upheld the decision by the Secretary of the Interior to reject the results of a Secretarial Election to amend the tribal constitution due to questions about voter eligibility. The Secretary ordered an administrative law judge to determine whether certain individuals possessed sufficient blood lineage to be eligible to vote in a second election. The case is not useful here because it concerned a Secretarial Election and the Secretary's unique responsibilities under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479, and federal regulations. Nor was it an equal protection case.

In a sense, the equal protection question has already been answered in the course of this disenrollment litigation. In December 2013, the Tribal Council passed a resolution providing Christmas Support of $250 to each tribal member not subject to disenrollment proceedings. In *St. Germain v. Kelly*, No. 2013-CI-CL-005, Plaintiffs argued they were deprived of equal protection guaranteed by the Nooksack Constitution and ICRA. The Court agreed, rejecting Defendants' argument "that the proposed disenrollees are not similarly situated to those not proposed for disenrollment because they are a group of

individuals [whose] enrollment eligibility is in question." Order Granting Motion for Temporary Restraining Order at 7. The Court was "explicit" that Defendants violated equal protection guarantees by treating Plaintiffs differently regarding Christmas Support. *Id.* at 12-13. But, at the same time, the Court recognized its inability to fashion any relief requiring expenditure of tribal funds. The Court went as far as it could, issuing a temporary restraining order to preserve the status quo, which "means ordering that the Defendants act in accordance with the status quo, by treating the Plaintiff proposed disenrollees as enrolled tribal members." *Id.* at 11.

Later, the Court granted Defendants' motion to dismiss the complaint in *St. Germain*. The Tribal Council had passed a resolution superseding the resolution under which the Christmas Support checks were issued. The new resolution included a carve-out provision ensuring that potential disenrollees would receive checks if they were not disenrolled ultimately. The Court had already approved a carve-out provision regarding Back to School Support checks, which passed muster in the Court of Appeals.

> The children that have been temporarily denied payment of benefits may in fact receive the benefits in the future. This undisputed fact leads to the conclusion that the only relief available to the children is a court order that the Nooksack Tribe make immediate financial payment to Appellants while disenrollment proceedings are pending or stayed. Under our holding in *Lomeli*, the sovereign immunity of the Tribe prevents the Nooksack courts from ordering an immediate payment of funds, or any other remedy that creates a money judgment in favor of Appellants.

Roberts at 10.

In the instant case, Defendants rely upon the decisions regarding Christmas Support and Back to School Support for the proposition that privileges and benefits can be withheld pending the outcome of disenrollment proceedings. Thus, Plaintiffs can be denied the right to vote entirely or they can be required to file provisional ballots, to be counted only after proving they are eligible for enrollment. Putting aside the fact that the fundamental right to vote is hardly equivalent to Christmas Support or Back to School Support, to which no one has a

fundamental right, Defendants' reliance is still misplaced. The Court expressly found that withholding the support monies violated Plaintiffs' right to equal protection. The Court approved the carve-out approach only because the Court was unable to fashion other relief. Here, the Court is able to fashion relief by denying Defendants' motion for preliminary injunction.

When Defendants seek to withhold Plaintiffs' franchise entirely or pending proof of enrollability, the right to vote is fundamental and subject to strict scrutiny. Unequivocally, Plaintiffs are enrolled members of the Nooksack Indian Tribe and, pursuant to the Nooksack Constitution, Article IV, Section 1, "[a]ll enrolled members of the Nooksack Indian Tribe, eighteen (18) years of age or over, shall have the right to vote." *See also* NTC § 62.04.020. As enrolled members, Plaintiffs have the right to vote in the 2016 elections. Whether Defendants have a compelling interest in curtailing Plaintiffs' right to vote is answered by the discussion below related to the other prongs of the test for a preliminary injunction.

(2) Likelihood of Irreparable Harm to Defendants Absent Injunctive Relief

Defendants contend that permitting Plaintiffs to vote in the 2016 elections will irreparably damage the elections and the Nooksack Tribe.

The weak thread running through the fabric of Defendants' arguments, now and throughout the litigation, is the assumption that Plaintiffs are not eligible for enrollment. In fact, in their filings, Defendants have begun referring to Plaintiffs as "Ineligible Plaintiffs," although the matter is yet to be settled. As observed by this Court previously,

> The key problem with the Defendants' argument here is that it assumes that those proposed disenrollees are not properly enrolled. This also impacts their argument that the Plaintiff proposed disenrollees are not similarly situated in relationship to other tribal members. 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 accorded equal treatment by the Defendants with respect to the Christmas Distribution, under the Nooksack Indian Tribe's Constitution.

St. Germain, Order Granting Motion for Temporary Restraining Order at 8-9.

What is clear to this Court is that Plaintiffs fervently believe they are eligible for enrollment, and Defendants fervently believe they are not. Plaintiffs' counsel noted during oral argument that two experts have declared Plaintiffs are Nooksack. Defendants counter that Plaintiffs are not eligible for enrollment under any category listed in the Nooksack Constitution, Article II, Section 1. Defendants contend Plaintiffs even disavowed their enrollment in complaints filed in two prior disenrollment cases, *Lomeli v. Kelly*, No. 2013-CI-CL-001, and *Adams v. Kelly*, No. 2014-CI-CL-006. Of course, Plaintiffs view things otherwise.

This judge has no preconception and has minimal knowledge of the pros and cons regarding Plaintiffs' eligibility for enrollment. It is not the Court's call to make, now or later. *See* Nooksack Enrollment Code, § 63.00.003 ("The Nooksack Tribal Court shall not have subject matter jurisdiction to hear cases under this ordinance."). Nor is it advisable or appropriate for the Court to consider the constitutional issues raised here with an eye towards the eventual outcome of disenrollment proceedings before the Tribal Council. The process that is due and the equality of protection to be afforded are not dependent upon how things might turn out.

It appears to the Court that the real harm Defendants fear is the outcome of the 2016 elections. Defendants' counsel made statements to that effect during oral argument, and Defendants have submitted a newspaper account of exhortations by Plaintiffs' counsel to his clients regarding the elections. Moreover, as Defendants freely acknowledge, Plaintiffs have been allowed to vote previously, during the pendency of disenrollment proceedings. Disenrollment proceedings began more than a year before the 2014 Tribal Council elections. Defendants already believed Plaintiffs were not eligible for enrollment, well before Plaintiffs' alleged disavowals in *Lomeli* and *Adams*, yet

Plaintiffs voted without issue. It appears Defendants were not worried about the outcome of the 2014 elections. Now, based upon the particular open seats and the incumbents who occupy those seats, Defendants are worried, and they push the envelope of irreparable harm.

Speculative injury is not enough. 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, at 153-54 (2d ed. 1995). In *Winter*, the Supreme Court disapproved the Ninth Circuit's "possibility" standard as too lenient.

> Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction. . . . Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

Winter, 555 U.S. at 22 (citations omitted; emphasis in original).

In order to reach irreparable harm here, Defendants must jump two hurdles: First, Defendants must be correct in assuming Plaintiffs are not eligible for enrollment and, therefore, not entitled to vote. If Plaintiffs are eligible for enrollment, then they are entitled to vote, and that is the end of it. Second, assuming Defendants are correct that Plaintiffs are not eligible for enrollment and not entitled to vote, the outcome of the elections, with Plaintiffs voting, must be injurious to Defendants.

The Court is not tasked with the job of examining the assumption regarding enrollment. Even assuming Plaintiffs are not eligible for enrollment and not entitled to vote, whether harm will ensue from their vote is mere speculation. Candidates who are sympathetic to Plaintiffs' cause may or may not run. Individual Plaintiffs 18 or over may or may not vote. Plaintiffs' candidates may or may not win.

(3) Balance of Equities

Injunctive relief – whether temporary restraining order, preliminary injunction, or permanent injunction – is an

equitable remedy. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982). A court sitting in equity may look to equitable maxims in order to assess the balance of equities between the parties. Of particular application here, as described by the Supreme Court, is

> the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith.

Precision Instrument Mfg. Co. v. Automotive Co., 324 U.S. 806, 814 (1945).

In their motion for preliminary injunction, Defendants refer repeatedly to the "upcoming" elections, which would seem to suggest the 2016 elections are proceeding apace. In fact, it appears otherwise.

On January 8, 2016, Plaintiffs filed a declaration of Plaintiff Michelle Roberts, with attached Facebook postings by two Tribal Council members indicating Defendants have cancelled the 2016 elections until after conclusion of disenrollment proceedings. For that reason, Plaintiffs have filed an amended complaint and a motion for leave to amend, adding a prayer for a writ of mandamus directing Defendants to go forward with the elections. Plaintiffs have also filed a new lawsuit with the same aim. *Kelly v. Kelly*, No. 2016-CI-CL-001 (complaint filed 1/14/16, first amended complaint filed 1/21/16).

At oral argument on January 14th, Defendants' counsel took umbrage at Plaintiffs' allegation and their reliance on Facebook postings but, at the same time, responses by Defendants' counsel to the Court's questions seemed to support the truth of the matter. In fact, in post-hearing briefing, Defendants candidly admit the truth. "This is not an election dispute. The election process is not yet underway." Defendants' Supplemental Brief Regarding Jurisdiction at 2.

Pursuant to the Nooksack Election Code, the Tribal Chairman was required to appoint an Election Superintendant by December 3, 2015. NTC § 62.03.010(A); *see also* Nooksack Const. art. IV, § 4. It appears that did not occur. The Superintendant was required to mail a Notice of Election to eligible voters by December 28, 2016. NIT § 62.04.010(A). With no Superintendant appointed, that did not occur. Candidate Packets were to be filed with the Tribal Council Secretary or designee by January 4, 2016, and then transmitted to the Superintendant within one day. NTC § 62.04.060. With no Superintendant to prepare, distribute, and receive packets, the deadline passed without filings. And so on. Plainly, the 2016 elections are not on track as required by Nooksack law, and Defendants do not come to this Court, requesting equitable relief, with "clean hands."

Although it is Defendants who seek equitable relief and must have "clean hands," they accuse Plaintiffs of bad faith. They accuse Plaintiffs of delaying disenrollment through frivolous litigation. When egregious, there are ways for courts to respond — through aggressive case management, through dismissal of frivolous claims, through speedy resolution of issues, through sanctions, and so forth. Although new to the Nooksack Tribal Court, this judge has developed familiarity with all aspects of the cases related to disenrollment. There has certainly been vigorous litigation, resulting in delay, but much of it through no fault of Plaintiffs, e.g., Plaintiffs have little control over the length of IBIA proceedings.

But, Defendants insist, Plaintiffs already got what they wanted and the current appeal to the IBIA is frivolous. In fact, what Plaintiffs got was the scheduling of hearings. What Plaintiffs did not get was the scheduling of hearings that they believe comport with due process. On Plaintiffs' previous appeal, the IBIA simply remanded to the Regional Director to dispose of Plaintiffs' appeal from the Acting Superintendant's decision. Now, Plaintiffs have appealed to the IBIA from the Regional Director's decision on remand, affirming the Acting Superintendant's approval of Resolution 14-112 and amended Title 63. Now, Plaintiffs seek IBIA's review of the merits of the decisions below.

In Defendants' view, the merits were already decided in *Roberts v. Kelly*, in which the Nooksack Court of Appeals examined the procedures now incorporated into the amended Title 63. The court found the procedures complied with due process,

with just two exceptions that were corrected in the amended Title 63 now before the IBIA. Although the appellate court's discussion in *Roberts* is arguably dicta, it is possible the IBIA will defer to the Nooksack Court of Appeals' views, even upon application of different, federal standards. Whatever the possible outcome, however, Plaintiffs have a right to proceed through the BIA hierarchy. Although lengthy, the current appeal to the IBIA does not strike the Court as frivolous.

Defendants seek injunctive relief related to the 2016 elections, but they have already violated several constitutional and statutory mandates regarding the timing of events leading up to the elections. Defendants' counsel stated at the hearing on January 14th that, so far as he is aware, although deadlines have been missed, the primary election will occur on February 20, 2016, and the regular election will occur on March 19, 2016. As of January 14th, more than half the time had already elapsed between the date the Election Superintendant was to be appointed (12/3/15) and the date of the primary election (2/20/16). Given the intricate chain of events in the Election Code, time requirements and deadlines, it is difficult to imagine how voting will take place on schedule.

But even if Defendants are able to make up for lost time and the elections do occur on schedule, they have already violated the law. When Defendants filed their motion for a preliminary injunction on the afternoon of Friday, December 18, 2015, seeking to enjoin Plaintiffs from voting, they had already missed the deadline for appointing the Election Superintendant by 15 days. In the language of *Precision Instrument* quoted above, Defendants are "tainted with inequitableness or bad faith relative to the matter in which [they] seek[] relief." The balance of equities tips sharply against Defendants.

(4) Public Interest

Having already determined Defendants are unlikely to prevail on the merits of their counterclaim, that the likelihood of irreparable harm is too speculative, and that the equities balance against Defendants, the Court will not belabor the public interest prong.

Suffice to say that the public – that is, all enrolled members of the Nooksack Tribe, including those old enough to vote and those not – has a strong interest in fair and timely

elections. Like Defendants, Plaintiffs are still members of that public.

As an alternative to provisional voting, Defendants suggest the Court stay the 2016 elections until disenrollment proceedings have concluded. Perhaps disenfranchising all voters, and not just Plaintiffs, would solve the equal protection problem, but it would certainly not serve the public interest.

Assuming this Court has authority to stay elections, a stay pending the outcome of disenrollment proceedings could be very lengthy. Plaintiffs filed their appeal to the IBIA on November 23, 2015. Plaintiffs' counsel reports he has been informed IBIA proceedings are currently taking one year. With the injunction now in force, Defendants cannot recommence disenrollment proceedings until after the IBIA decision, at the very earliest. With the length of IBIA proceedings, two cases currently pending in this Court, and the possibility of other issues cropping up, it is not a stretch to imagine a scenario in which the 2016 elections, if stayed, could run up against the 2018 elections.

Moreover, as the Court noted at the January 14th hearing, delay of elections may pose other problems. The four members who currently serve as Tribal Council Vice-Chairman, Treasurer, and Council Positions C and D have four-year terms that, presumably, expire sometime in March 2016. *See* Nooksack Const. art. III, § 4. "In the event that any elective tribal office becomes vacant between elections, the tribal chairman, subject to the approval of the tribal council, shall appoint an eligible tribal member to fill the vacant position until the position term." Nooksack Const. art. V, § 3. Questions abound as to the extent of the chairman's authority, when that authority may be exercised, and whether the chairman will have an agreeable Council at that time.

In sum, Defendants have failed to satisfy any of the four prongs for issuance of a preliminary injunction, all of which must be met. Defendants' motion for preliminary injunction, filed December 18, 2015, is denied.

Plaintiffs' Motion to Amend Complaint

Plaintiffs filed their initial complaint in this lawsuit, along with a motion for preliminary injunction, on May 30, 2014.

The Court granted the motion for preliminary injunction less than two weeks later, on June 12, 2014, and later confirmed the ongoing status of the injunction by order entered February 26, 2015. Although not formally stayed, the case has been dormant on the Court's docket for long periods due to the injunction and due to BIA proceedings.

The lawsuit sprang back to life on December 18, 2015, when Defendants filed their answer and counterclaim, along with the motion for preliminary injunction discussed in this order. On December 28, 2015, Plaintiffs filed their answer to the counterclaim. On January 11, 2016, Plaintiffs filed a motion for leave to file an amended complaint, along with an amended complaint. Then, on January 14, 2016, as amended on January 21, 2016, Plaintiffs filed a new lawsuit, *Kelly v. Kelly*, No. 2016-CI-CL-001. In both the sixth cause of action in the amended complaint in this case and the complaint in the new suit, Plaintiffs pray for injunctive relief, declaratory judgment, and writ of mandamus to put the 2016 elections on track.

NTC § 10.05.035(b) provides:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading, motion to dismiss, or motion for summary judgment is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires . . . .

Because Plaintiffs seek to amend their complaint after Defendants filed an answer, they must have Defendants' consent or leave of court. Defendants oppose Plaintiffs' motion for leave to amend complaint on two grounds.

First, Plaintiffs did not comply with NTC § 10.05.050(e), which requires such a motion to be filed at least six court days before being heard and requires counsel to contact the court clerk and coordinate with opposing counsel to schedule the hearing. The Court had already scheduled the January 14th hearing on other pending matters. Although the motion for leave to amend was filed fewer than six court days before the scheduled hearing, Plaintiffs assumed the motion would be heard that day and did not see the need to follow procedures under NTC § 10.05.050(e).

The Court agrees with Defendants that Plaintiffs' counsel should have followed the rules by properly noting the motion for hearing. At a minimum, he should have contacted the Court Clerk and opposing counsel to ascertain whether January 14th would work. During the January 14th hearing, Defendants' counsel cited a history of non-compliance with NTC § 10.05.050(e) on the part of Plaintiffs' counsel. The Court does not condone such conduct but this single instance, or even a pattern of such conduct, does not override the lenient standard for amendment of pleadings under NTC § 10.05.035(b).

Second, Defendants contend the motion for leave to amend the complaint in this case is moot as a result of the filing of the new lawsuit. As Defendants note, the Court expressed concern during the January 14th hearing that adding 2016 election issues to the instant lawsuit, a longstanding disenrollment case, muddied the litigation waters. Indeed, it appears Plaintiffs' counsel had similar thoughts in that he arrived at the January 14th hearing prepared to file the new suit.

In the Court's view, the filing of the new lawsuit did not moot the motion for leave to amend the complaint in this case. The motion and the amendment would be rendered moot through disposition of the new case, which has not occurred. In their reply regarding the motion to amend, Plaintiffs present sufficient reasons for proceeding along parallel tracks as a protective measure. Although the Court expressed a preference for separate proceedings and the two matters – the new suit and the sixth cause of action in this case – cannot proceed along separate tracks forever, the Court will not force a choice now. Moreover, as Plaintiffs note, it was Defendants who first appended election matters to the instant case through their counterclaim and motion for preliminary injunction.

Plaintiffs' motion for leave to amend complaint, filed January 11, 2016, is granted.

Motions for Sanctions / Motions to Strike

In their response to Defendants' motion for preliminary injunction, Plaintiffs request an award of attorney fees and costs as a sanction against Defendants for filing a frivolous motion and for failing to disclose adverse controlling authority. It appears Plaintiffs view the motion as frivolous based upon Defendants' position that Plaintiffs can be treated

differently from other enrolled members due to the pending disenrollment proceedings. It appears the adverse controlling authority they believe is missing from Defendants' motion is the determination by the Court in *St. Germain* that Defendants violated Plaintiffs' right to equal protection by withholding Christmas Support.

In fact, Defendants do rely upon the cases concerning Christmas Support and Back to School Support in their motion for preliminary injunction although, predictably, from a different perspective than Plaintiffs. As discussed above, the Court believes Defendants' reliance is misplaced, but they were not trying to hide the ball. Nor is it likely they would be successful in doing so regarding a decision from this Court in this very series of disenrollment cases.

Plaintiffs apparently believe Defendants were obliged to bring to the Court's attention a particular passage from the Court's "Order Granting Motion for Temporary Restraining Order," entered December 18, 2013. Thus, as already quoted above in the context of the irreparable harm discussion, the Court said at pages 8-9 of the order in *St. Germain*:

> The key problem with the Defendants' argument here is that it assumes that those proposed disenrollees are not properly enrolled. This also impacts their argument that the Plaintiff proposed disenrollees are not similarly situated in relationship to other tribal members. 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 accorded equal treatment by the Defendants <u>with respect to the Christmas Distribution</u>, under the Nooksack Indian Tribe's Constitution.

(Emphasis added.)

The emphasis added is intended to demonstrate a portion of the quote omitted, with ellipsis substituted, in Plaintiffs' response to the motion for preliminary injunction. Defendants failed to acknowledge the passage and probably should have.

Plaintiffs quoted the passage but were a bit disingenuous in their editing. The fact is both sides wished to use the *St. Germain* case to their best advantage. In the balance between candor to the Court and zealous representation of the client, both sides may have stepped a bit over the advocacy line. But the Court does not find conduct outside the bounds of reason. Nor does the Court view Defendants' motion for preliminary injunction as frivolous, despite the Court's conclusion that Defendants have failed all four prongs of the test. A preliminary injunction is extraordinary relief, and a party requesting such relief faces a heavy burden.

Finally, motions to strike:

In a surreply concerning Defendants' motion for preliminary injunction, Plaintiffs move to strike from Defendants' reply their alternative proposal for provisional ballots. Indeed, Defendants stated in their motion that "[i]f Ineligible Plaintiffs vote, there would be no way to adjust the outcome of the elections once Ineligible Plaintiffs are disenrolled." Defendants' Motion for Preliminary Injunction at 10. But in their reply, Defendants suggest a "way to adjust," proposing provisional ballots for the first time. Likely this occurred because, at the outset, Defendants did not view disenfranchisement as an instance of unequal protection. They made various arguments why Plaintiffs should be foreclosed from voting but did not drill down to the equal protection issue raised by Plaintiffs in their response. It was reasonable for Defendants to suggest provisional ballots for the first time in their reply, in response to Plaintiffs' equal protection argument, and Plaintiffs took the opportunity to respond to the proposal in their surreply.

At the beginning of the January 14th hearing, Defendants moved to strike Plaintiffs' suggestions, particularly in Facebook postings, that the 2016 elections have been cancelled, insisting there is no truth to the matter. Perhaps the correct word would be "postponed" rather than "cancelled" but, as discussed above, even Defendants acknowledged in their reply that "[t]he election process is not yet underway," although several statutory deadlines have come and gone.

Also at the beginning of the January 14th hearing, Defendants sought to strike and entirely remove from the record footnote 4 in Plaintiffs' surreply concerning Defendants' motion

for preliminary injunction. The footnote relates to skirmishes over the proper noting of motions, the scheduling of the January 14th hearing, and communications between counsel. The Court fully agrees with Defendants that Plaintiffs went beyond the pale in the footnote, even claiming opposing counsel "lied." Similar accusations appear in emails between counsel, which are attached to a declaration of Plaintiffs' counsel cited in footnote 4. At the January 14th hearing, Defendants' counsel provided a declaration of Nooksack IT staff along with phone records disproving Plaintiffs' claim. While insisting his own office staff and records indicate otherwise, Plaintiffs' counsel apologized and struck the egregious statements. Because the statements are intertwined with other materials necessary to maintain a complete and accurate record, the Court declines to remove the statements from the record entirely.

To a significant degree, the parties and the Court have entered uncharted territory in these lawsuits related to the disenrollment proceedings, and perhaps even more so as disenrollment issues intersect with Tribal Council elections. Plainly, there are high stakes and intense emotions on both sides, and it stands to reason counsel for both sides will sometimes push the envelope as they handle cases and address issues that are sui generis. Going forward, the Court urges counsel to treat one another with both professional and common courtesy.

CONCLUSION

The Court has subject matter jurisdiction over Defendants' counterclaim regarding the 2016 Tribal Council elections as a "civil matter[] concerning members of the Nooksack Indian Tribe" and as a "matter[] concerning the . . . functions of the tribal government." Nooksack Const. art. VI, § 2(A)(3). Defendants' motion for preliminary injunction, filed December 18, 2015, is denied. Plaintiffs' motion for leave to amend complaint, filed January 11, 2016, is granted. All pending motions for sanctions and to strike are denied.

SO ORDERED this 26th day of January, 2016.

Susan M. Alexander
Chief Judge

IN THE NOOKSACK TRIBAL COURT
NOOKSACK INDIAN TRIBE
DEMING, WASHINGTON

ELEANOR J. BELMONT, et al.,	
Plaintiffs and Counterclaim Defendants,	No. 2014-CI-CL-007
vs.	ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION OF 1/26/16 ORDER DENYING DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION; ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION RE. SURREPLY FOOTNOTE 4
ROBERT KELLY, Chairman of the Nooksack Tribal Council, et al.,	
Defendants and Counterclaimants.	

On December 18, 2015, Defendants Robert Kelly, Chairman of the Nooksack Tribal Council, et al., filed their answer to the complaint in this action, asserted a counterclaim, and moved for a preliminary injunction to prevent Plaintiffs, Eleanor J. Belmont, et al., from voting in the 2016 Tribal Council elections. After briefing, oral argument, and additional briefing, the Court entered an order on January 26, 2016, denying Defendants' motion for preliminary injunction.

On February 5, 2016, Defendants filed a motion for reconsideration of the January 26th decision. After response,[1/] amended response, and reply, the Court heard oral argument on February 22, 2016. Plaintiffs were represented by Gabriel Galanda. Defendants were represented by Raymond Dodge and Rickie Armstrong.

In the January 26th order, the Court found that Defendants failed to satisfy each and every prong of the four-part test governing an application for preliminary injunction. The United States Supreme Court set forth the test in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008), as follows: "A plaintiff 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 balance of equities tips in his favor, and that an injunction is in the public interest."

In the conclusion to their motion for reconsideration, Defendants quote from a 1993 decision by the Ninth Circuit Court

EXHIBIT 2

of Appeals suggesting that injunctive relief may be available if a party demonstrates "'either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [the movant's] favor.'" *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993)(quoting from *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990)). While still contending they have satisfied every prong of the four-part test, Defendants rely upon the first option in the Ninth Circuit version of the test, maintaining "Defendants have at least demonstrated a likelihood of success and the possibility of irreparable injury." Defendants' Motion for Reconsideration at 12.

In fact, the sliding scale standard adopted by some federal circuits, including the Ninth, was disapproved by the Supreme Court in *Winter*.

> [T]he Ninth Circuit's "possibility" standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. . . . Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

Winter at 22 (emphasis in original)(citations omitted). Thus, Defendants must fully satisfy each and every prong of the four-part test.

Defendants' Motion for Preliminary Injunction

(1) Defendants' Likelihood of Success on the Merits

In the January 26th order, the Court observed that "the issue – whether Plaintiffs are eligible for enrollment – impacts many benefits and privileges besides the right to vote." Order Denying Defendants' Motion for Preliminary Injunction at 13. Defendants contend the Court conflated the issues regarding voting and enrollment. To the contrary, the Court is well aware that the only issue before the Court is Plaintiffs' right to vote in the 2016 Tribal Council elections. That issue does not arise in a vacuum, however. Moving along a parallel track are

the disenrollment proceedings themselves, with a case currently pending before the Interior Board of Indian Appeals.

In point of fact, it is Defendants who have "conflated" the issues. Plaintiffs' eligibility for enrollment serves as the basis for Defendants' effort to disenfranchise Plaintiffs. Thus, although Defendants claim on page 2 of their Motion for Reconsideration that they "do not seek to determine the enrollment status of any Plaintiff," they state more candidly at page 5 that "a voter must merely show proof of proper enrollment in order to have their vote count." The 2014 Tribal Council elections proceeded without intersection of the two matters – enrollment and voting. But now, through their counterclaim and motion for preliminary injunction, Defendants have merged the two matters in the context of the 2016 Tribal Council elections.

Defendants contend the Court erred in the January 26th order by giving short shrift to *Shakopee Mdewakanton Sioux Community v. Babbitt*, 906 F. Supp. 513 (D. Minn. 1995), aff'd, 107 F.3d 667 (8th Cir. 1997). In their motion for preliminary injunction, Defendants relied upon the case for the proposition that "[w]hen 'members' do not meet the Tribe's membership criteria, they cannot vote in tribal elections." Defendants' Motion for Preliminary Injunction at 8. In *Shakopee*, the District Court and the Eighth Circuit upheld the decision by the Secretary of the Interior to reject the results of a Secretarial Election due to questions about voter eligibility. The Secretary ordered an administrative law judge to determine whether certain individuals possessed sufficient blood lineage to be eligible to vote in a second election concerning amendment of the tribal constitution.

Regarding *Shakopee*, the Court stated in the January 26th order that "[t]he case is not useful here because it concerned a Secretarial Election and the Secretary's unique responsibilities under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479, and federal regulations." Order Denying Defendants' Motion for Preliminary Injunction at 13. In their motion for reconsideration, Defendants argue that "Secretarial elections are not inherently distinguishable from tribal elections. While this Court does not have to follow *Shakopee*, it is plainly relevant and provides persuasive authority for ensuring that only eligible voters vote in tribal elections." Defendants' Motion for Reconsideration at 6.

The Court views *Shakopee* of no use here because, as evidenced by the majority and dissenting opinions in the Eighth Circuit, the case boiled down to the degree of deference courts must pay to the Secretary's interpretation of federal regulations. Prior to a Secretarial election, pursuant to 25 C.F.R. §§ 81.12, 81.13, an election board consisting of one BIA officer and two members of the tribal government must post a list of registered voters and resolve any challenges to the list. 25 C.F.R. § 81.13 provides that the election board's eligibility determinations "shall be final" although 25 C.F.R. § 81.22 provides, generally, that any qualified voter may challenge election results to the Secretary. Despite the "final" language in Section 81.13, the Secretary interpreted Section 81.22 to permit him to examine voter eligibility.

Interestingly, no member of the appellate panel in *Shakopee* agreed with the Secretary. The majority stated:

> We hold that the Secretary's interpretation of the interaction between § 81.13 and § 81.22 is not plainly erroneous. Although we believe that the election board's composition was a carefully constructed regulatory compromise between federal authority and tribal sovereignty, and that perhaps a more reasonable interpretation of § 81.13 would be that it precludes Secretarial review of the board's eligibility determinations, we may not substitute our interpretation for that of the Secretary. See *Miller v. United States*, 65 F.3d 687, 689 (8th Cir. 1995). The district court therefore did not err in holding that the Secretary had discretion to review eligibility disputes.

Shakopee, 107 F.3d at 671.

While the majority reluctantly deferred to the Secretary, the dissenting judge did not.

> This finality rule [in Section 81.13] recognizes that determining tribal membership is the very essence of sovereignty and such decisions should be made according to tribal law by a body with at least a majority Indian vote. The Secretary's interpretation of the rule — that the Department's duty to resolve challenges to election results includes revisiting questions of voter eligibility previously decided by the election board — is plainly

> erroneous and inconsistent with the language of the regulations.

Shakopee, 107 F.3d at 672 (citation omitted).

This Court stands by its initial view of *Shakopee*. Defendants are correct that *Shakopee* provides support for a general proposition that only eligible voters may vote in a tribal election. That is undoubtedly true of any election anywhere: only eligible voters may vote. But the question here is whether Plaintiffs are eligible voters under Nooksack law. *Shakopee* does not advance Defendants' position in that regard.

Defendants contend the Court also misinterpreted *St. Germain v. Kelly*, 2013-CI-CL-005, by observing in the January 26th order that "[t]he Court approved the carve-out approach only because the Court was unable to fashion other relief." Order Denying Defendants' Motion for Preliminary Injunction at 15. Again, the Court stands by its view of the case.

In *St. Germain*, this Court explicitly held that a resolution denying Christmas Support checks to proposed disenrollees violated their right to equal protection guaranteed by the Nooksack Constitution and the Indian Civil Rights Act.

> *The Court orders that the Defendants be enjoined from treating the proposed disenrollees differently from other tribal members with respect to the Christmas Support distribution. However, the Court finds that the Court cannot order specific relief requiring the expenditure of tribal funds.* The Court hopes, however, that the Defendants will consider the implications of Resolution 13-171 and treat the Plaintiff proposed-disenrollees fairly, despite the fact that the Court is prohibited by the law from ordering them to do so.

St. Germain, Order Granting Motion for Temporary Restraining Order at 13 (emphasis in original).

Quite obviously, after finding Defendants' actions in violation of Plaintiffs' equal protection rights, the Court would have gone on to order "specific relief" if the law allowed. The Court later declared that the carve-out provision in a substitute resolution, setting aside funds for Plaintiffs' Christmas distribution if they were not ultimately disenrolled,

"sufficiently protects the interests of the potential disenrollees." *St. Germain*, Order Granting Defendants' Motion to Dismiss and Denying Plaintiffs' Motion for Summary Judgment at 3. That statement must be read, however, in light of the Court's inability to order "specific relief." The carve-out provision was "sufficient" in that context.

Next, the Court turns to *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). In their counterclaim and motion for preliminary injunction, Defendants sought to disenfranchise Plaintiffs entirely. It was only after Plaintiffs responded with an equal protection argument that Defendants proposed the alternative of provisional balloting approved by the Supreme Court in *Crawford*. Now, in their motion for reconsideration, Defendants fully embrace the provisional ballot approach, with Plaintiffs casting ballots to be counted only after they demonstrate their enrollment eligibility to the Election Board. Again at oral argument, rather than seeking entirely to disenfranchise Plaintiffs, Defendants urged provisional balloting as the solution to the equal protection problem.

The Court noted Defendants' evolving position, with a new feature appearing in their reply: "Title 62 does not currently provide for provisional ballots, but the Tribal Council could amend Title 62, Chapter 62.06 to include provisional balloting in compliance with this Court's approval." Defendants' Reply to Plaintiffs' Response in Opposition to Defendants' Motion for Reconsideration at 4. The Court queried whether pre-approval of a code amendment would constitute an advisory opinion and whether such opinions are permitted under Nooksack law. Federal courts may not issue advisory opinions due to the "case or controversy" requirement under Article III of the United States Constitution. *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 471 (1982). The "case or controversy" requirement was not at issue in *Crawford*, which was a challenge to an election law already on the books. While "case or controversy" language appears in Article VI, Section 2(A)(3), of the Nooksack Constitution, it is not clear whether the limitation applies to all bases for jurisdiction in this Court.

In any event, the Court declines to pre-approve a code amendment or, otherwise, to approve provisional balloting in the current circumstances before the Court. The Court briefly discussed provisional balloting in the January 26th order, before Defendants relied so heavily on that approach. In the interest

of justice and to provide guidance in the event the Tribal Council intends to proceed with a code amendment, the Court will now address the provisional ballot approach in more depth. *See Roberts v. Kelly*, No. 2013-CI-CL-003, p. 5 (Nooksack Ct. App. 3/18/14)(in the interest of justice and to provide guidance, the appellate court examined the procedures in Resolution 13-111 for compliance with due process after holding that the procedures could not be used in Appellants' disenrollment proceedings because they were not constitutionally adopted or approved by the Secretary of the Interior).

Provisional Balloting: Burden on Voter

Because there is a larger context here, with much more at stake, this case is dramatically different from *Crawford*. In *Crawford*, pursuant to an Indiana election law, an in-person voter had to present government-issued photo identification at the polls as a means of preventing fraud. A voter without such ID could file a provisional ballot, which would be counted only after the voter presented such ID within 10 days thereafter. The Supreme Court upheld the law: "For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford* at 198.

In *Crawford*, obtaining an ID was a relatively simple matter, requiring presentation of just one "'primary' document, which can be a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport. Ind. Admin. Code, tit. 140, §7-4-3 (2008)." *Crawford* at 198 n.17. Proof of proper enrollment is far more complex, as demonstrated by the Nooksack Enrollment Code, Title 63. Pursuant to Section 63.02.001(C), "[e]ach enrollment application must be completed in its entirety and must contain sufficient personal information to properly determine the applicant's eligibility for enrollment." The statute lists 16 specific pieces of personal information. Next, Section 63.02.001(D) lists six items of "[d]ocumentation to accompany all applications."

At oral argument, counsel for Defendants stated that, in order to demonstrate eligibility for enrollment and, therefore, entitlement to vote, an individual Plaintiff would have to

submit to the Election Board only a family tree chart and a resolution. In fact, "[f]amily tree chart (as complete as possible)" is just the first of the six items listed in Section 63.02.001(D). Eligibility for enrollment is far more complex than that, as demonstrated by the other five items listed in Section 63.02.001(D). The sheaf of documents related to Plaintiff Belmont's initial enrollment, mailed to her as attachments to the "Basis for Commencement for Disenrollment Proceedings" on May 16, 2014, is nearly one-half inch thick. *See* Declaration of Sue Steadle Re: Mailings, filed 6/6/14.

Moreover, if Plaintiffs were to submit only a family tree chart and a resolution, the outcome is foreordained in that Plaintiffs trace their lineage to Annie George. Defendants have already concluded that "Annie George was never a member of the Nooksack Tribe and did not qualify for membership." Defendants' Motion for Preliminary Injunction at 3. In order to persuade the Election Board of eligibility for enrollment, Plaintiffs would be obliged to submit substantially more than a family tree chart and a resolution. For example, at oral argument, Plaintiffs submitted copies of anthropological opinions, previously filed with the Court in *Lomeli v. Kelly*, No. 2013-CI-CL-001, and *Adams v. Kelly*, No. 2014-CI-CL-006, attesting to Annie George's Nooksack bona fides.

The Court's point is not that Plaintiffs are eligible for enrollment. The Court has not determined that, and the Court does not know. The point is that it is a complex matter. The burden upon a voter to demonstrate eligibility for enrollment is not equivalent to "the inconvenience of making a trip to the BMV" in *Crawford*.

Provisional Balloting: Election Board as Forum

Nooksack Constitution, Article IV, Section 4, provides: "The duties of this election board shall be to supervise and certify the election, and resolve all election disputes." As discussed in the January 26th order, however, there are issues giving rise to "election disputes" that are outside the ambit of the Election Board. In *Campion v. Swanaset*, No. NOO-C-496-004, p. 7 (Nooksack Ct. App. 11/12/96), the Court of Appeals held that the trial court, rather than the Election Board, had jurisdiction over election disputes "rais[ing] many important issues which directly touch upon the essence of government – the ability of tribal members to elect their governmental leaders."

In *Cline v. Cunanan*, No. NOO-CIV-02/08 (Nooksack Ct. App. 1/12/09), the Court of Appeals also looked to the nature of the election dispute, distinguishing between disputes over election results versus a constitutional challenge to a provision in the Election Code. The court found the latter to be outside the ambit of the Election Board.

In *Roberts v. Kelly*, No. 2013-CI-CL-003, p. 6 (Nooksack Ct. App. 3/18/14), the Court of Appeals held that Tribal membership is a "constitutionally protected property right." Like the constitutional issue in *Campion*, the constitutional issue here – whether Plaintiffs are eligible for enrollment and, therefore, entitled to vote – is outside the ambit of the Election Board. In fact, when the parties submitted supplemental briefs addressing the Court's jurisdiction over Defendants' petition for preliminary injunction, Defendants contended the issue of Plaintiffs' right to vote was within the Court's jurisdiction and not the Election Board's. At the time, Defendants argued it was not an election dispute because, as yet, there was no election. But that was a matter entirely within Defendants' control. They could have initiated the election process and put the matter before the Election Board, as they now advocate. Their failure to do so before coming to this Court suggests they realize, contrary to the position they now espouse, that the issue is not an election dispute committed to the Election Board.

Further, at oral argument, the Court questioned whether the Election Board would have the expertise to decide Plaintiffs' eligibility for enrollment. Defendants' counsel responded that the Election Board would "confer with" the Nooksack Enrollment Department, which raised red flags. The Election Board is an independent body. The Election Superintendant, Ballot Clerks, and Election Clerk shall not already be employees of the Tribe or its entities. NTC § 62.03.010(A), (B). The Election Board must "ensure fair and honest elections" and prepare and provide election materials in an "impartial and fair manner." NTC § 62.03.020. The Nooksack Tribal Election Board Bylaws set forth extensive qualifications and grounds for removal of the Election Board. The Bylaws also require the taking of an oath.

By no means does the Court intend to impugn the integrity of the Enrollment Department. But the employees of that department are simply not subject to the same conditions and restrictions governing members of the Election Board. In fact,

two employees of the Enrollment Department are Defendants in this lawsuit. Although NTC § 63.04.001(B) provides that "at no time will staff employed in the Enrollment Department purposely initiate a reason for loss of membership," Resolution # 13-02, included in the packet mailed to Plaintiff Belmont on May 16, 2014, states at page 2 that "the Tribe's Enrollment Department discovered that persons on the current tribal roll did not meet the existing Constitutional requirements at the time of enrollment and were erroneously enrolled into the Tribe . . . ." *See* Declaration of Sue Steadle Re: Mailings, filed 6/6/14. Unlike the Election Board, the Enrollment Department is not an independent body.

Moreover, members of the Election Board are probably not well-schooled in the adjudicative skills of weighing evidence and engaging in fact-finding. Although they would receive evidence from both Plaintiffs and the Enrollment Department relevant to Plaintiffs' eligibility for enrollment, the Election Board, with little or no expertise on the subject, would likely rely heavily upon the Enrollment Department's view. Or, as Defendants' counsel stated at the February 22nd hearing, the Election Board would "confer with" the Enrollment Department. Such an arrangement would compromise the independence of the Election Board.

In addition, it is not at all clear from the Election Code what manner of due process would be available to provisional voters tasked with proving their eligibility for enrollment. According to procedures established by the Tribal Council and approved by the Court of Appeals in *Roberts* at page 8, each potential disenrollee will be afforded a 10-minute hearing in formal disenrollment proceedings. Where their right to vote is at stake, based upon their eligibility for enrollment, Plaintiffs should receive no less before the Election Board.

Defendants contend some of the 272 adult Plaintiffs named in the unabridged caption of this lawsuit are not properly joined as Plaintiffs, but most are. Defendants also announced for the first time at the February 22nd hearing that an additional 40 voters would be singled out for provisional ballots for reasons other than the reasons associated with Plaintiffs. Thus, the Election Board could be faced with 50 hours of hearings in order to decide whether each provisional ballot will be counted. But it does not necessarily end there. Every in-person voter in *Crawford* had to show an ID card at the

polls or within 10 days after filing a provisional ballot. Arguably, upon strict application of equal protection principles, all voters in the 2016 Tribal Council elections would have to demonstrate their eligibility for enrollment. Defendants claim Plaintiffs have already singled themselves out by conceding in earlier pleadings that they were not properly enrolled, but Plaintiffs dispute that claim.

Next, each decision by the Election Board regarding eligibility for enrollment and, therefore, entitlement to vote would presumably be appealable to this Court under NTC § 62.03.030 and NTC § 62.07.030. That chain of events would tie the 2016 Tribal Council elections in knots and eviscerate the spirit of the Nooksack Enrollment Code, which expressly provides that "[t]he Nooksack Tribal Court shall not have subject matter jurisdiction to hear cases under this ordinance." NTC § 63.00.03. It is neither fair nor practical nor legally sound to take a matter committed to the jurisdiction of the Tribal Council, under the Enrollment Code, and place it before the Election Board and potentially this Court, under the Election Code.

Provisional Balloting: Ripple Effect

In *Crawford*, a provisional voter had the option whether to obtain government-issued photo identification. If he did, his vote would be counted. If he did not, his vote would be null. Nothing else was riding on his decision whether to obtain the ID card. The issue here — whether Plaintiffs are eligible for enrollment — implicates many benefits and privileges beyond the right to vote and threatens repercussions well beyond the consequences in *Crawford*. It is not just an ID card. It is a potential disenrollee's "cultural, familial and spiritual identity." *Roberts v. Kelly* at 6.

Of course, Defendants insist Plaintiffs must demonstrate their eligibility for enrollment to the Election Board only for the purpose of voting in the 2016 Tribal Council elections. Plaintiffs will have an opportunity later to demonstrate eligibility for enrollment in formal disenrollment proceedings before the Tribal Council. The Court understands this and fully appreciates the Tribe's right, in line with *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n.32 (1978), to maintain enrollment standards and to assure the purity of the Tribal membership list. But the proof is the same — whether in the

context of voting or in the context of disenrollment proceedings – and a decision now by the Election Board and possibly this Court, even if not binding upon the Tribal Council, would surely increase momentum against Plaintiffs.

As the Court stated in the January 26th order, "the procedures for addressing the enrollment issue are the subject of Plaintiffs' pending appeal to the IBIA. Unless and until the IBIA says otherwise, Plaintiffs have a right to address their due process concerns in that forum. And they have a right to present their evidence regarding enrollment in a setting that comports with the Nooksack Constitution, Nooksack ordinances, and ICRA. The critical enrollment issue cannot be shifted to another forum, from the Tribal Council to the Election Board, to be resolved in an election context under the Election Code, rather than in a disenrollment context under the Enrollment Code." Order Denying Defendants' Motion for Preliminary Injunction at 13.

Given the potential dire consequences for Plaintiffs and the potential ripple effect of an earlier decision by an alternate forum, Plaintiffs should not be forced to demonstrate their eligibility for enrollment prior to disposition of underlying issues and prior to formal disenrollment proceedings before the Tribal Council.

(2) Likelihood of Irreparable Harm to Defendants Absent Injunctive Relief

In the January 26th order, the Court noted that Defendants did not challenge Plaintiffs' right to vote in the 2014 Tribal Council elections. Given Defendants' position now, it seems Defendants are worried about the outcome of the 2016 elections. But Defendants claim they "do not worry about the outcome of the 2016 elections*; they worry about voter fraud, ineligible voting, and the integrity of Nooksack elections.*" Defendants' Motion for Reconsideration at 10 (emphasis in original).

Defendants stress that, on August 8, 2013, the Tribal Council disenrolled 24 members who, like Plaintiffs, claimed eligibility for enrollment through Annie George. Apparently this history is intended to demonstrate that Plaintiffs are likewise improperly enrolled and, therefore, permitting them to vote would be injurious to Defendants. But by Defendants' own admission, those 24 members, unlike Plaintiffs, did not request

disenrollment meetings with the Tribal Council pursuant to NTC § 63.04.001(B)(2). Under the circumstances, the fact that the 24 members were disenrolled does not support Defendants' position.

The date of those disenrollments is significant, however, with respect to another of Defendants' arguments. Defendants continue to insist they did not challenge Plaintiffs' right to vote in the 2014 elections because it was only around that time when Plaintiffs allegedly disavowed their enrollment in complaints filed in two other disenrollment lawsuits. Thus, Defendants' were not adequately motivated or armed to challenge Plaintiffs' entitlement to vote until the 2016 elections.

The argument strains credulity. In their counterclaim, Defendants explain how the issue of Plaintiffs' right to enrollment first arose at a Tribal Council meeting in December 2012. Defendants' Answer and Counterclaim at 5. The Tribal Chairman and the Enrollment Officer performed research at the Regional Office of the Bureau of Indian Affairs and reported back to Tribal Council in January 2013. *Id.* At a special meeting in February 2013, the Tribal Council passed resolutions providing that Notices of Intent to Disenroll would be sent to members such as Plaintiffs. *Id.* at 6. And, as Defendants report, 24 members who, like Plaintiffs, claimed eligibility for enrollment through Annie George were actually disenrolled on August 8, 2013.

Quite obviously, Defendants were already thoroughly convinced Plaintiffs were not entitled to enrollment – even to the point of disenrolling 24 lineal descendants of Annie George – well before the 2014 elections rolled around. It is disingenuous for Defendants to argue now: "When the Tribe has evidence that its rolls have been corrupted it must be able to address voter fraud and prevent ineligible voting through a fair process – a process that the Supreme Court has upheld [in *Crawford*]. To force the Tribe to ignore evidence that ineligible voters intend to vote would irreparably harm the integrity of the Nooksack elections." Defendants' Motion for Reconsideration at 9.

In fact, Defendants ignored the "evidence" themselves with respect to the 2014 elections. How litigation progressed, with Plaintiffs allegedly disavowing their eligibility for enrollment around the same time as the 2014 elections, is beside the point.

The point is: When, in Defendants' view, was there strong evidence the membership rolls had been corrupted? That occurred well before the 2014 elections.

(3) Balance of Equities

In the January 26th order, the Court applied "the equitable maxim that 'he who comes into equity must come with clean hands.'" *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945). The Court found that Defendants did not come to Court with clean hands because they had already missed several constitutional and statutory deadlines regarding the 2016 Tribal Council elections. They did not file their counterclaim and motion for preliminary injunction until two weeks after the first deadline, which required the Tribal Council Chairman to appoint an Election Superintendant by December 3, 2015. NTC § 62.03.010(A); *see also* Nooksack Const. art. IV, § 4.

In a brief, two-paragraph argument for reconsideration regarding the balance of equities, Defendants concede they "should have filed their Motion for Preliminary Injunction on December 2, 2015 instead of December 18, 2015, but a two-week delay should not bar Defendants from equitable relief." Defendants' Motion for Reconsideration at 11.

In the Court's view, December 2nd would not have been early enough either. Surely Defendants do not think that by filing their counterclaim and motion for preliminary injunction one day before the first election deadline, they would have obtained a ruling from the Court in time to meet the deadline. In fact, Defendants should have filed their counterclaim and motion well before the eve of the first deadline, let alone a fortnight afterwards. Instead, Defendants waited until delay of the elections was already an accomplished fact. And they filed on December 18th, on the eve of a one-week cessation in Tribal operations over the holidays, assuring additional delay.

Further, Defendants believe "[t]his Court should not blame Defendants for failing to initiate the election process prior to receiving this Court's ruling on the matter." Defendants' Motion for Reconsideration at 11. In fact, Defendants received the Court's ruling on the matter on January 26th, just 19 workdays after filing their counterclaim and motion for preliminary injunction, with response, reply, oral argument, and

additional briefing in the interim. Defendants should have filed early enough to obtain a ruling before the December 3rd deadline. Moreover, one month after the Court's ruling on the matter, Defendants have still not initiated the election process.

Perhaps Defendants justify their delay based upon the status of disenrollment litigation in the Fall of 2015, similar to their argument regarding the status of disenrollment litigation at the time of the 2014 Tribal Council elections. The simple fact is, Defendants should have anticipated and proceeded in a timely manner with respect to the 2016 Tribal Council elections. Defendants' failure to do so puts them in a bad light in a court of equity.

(4) Public Interest

Defendants make an even briefer, two-sentence argument regarding public interest: "This Court failed to recognize that all Nooksack members have interests in protecting the integrity of Nooksack elections, preventing voter fraud, and ensuring that only eligible voters participate in Nooksack elections. The provisional ballot process protects Nooksack elections while allowing Plaintiffs to demonstrate eligibility to vote." Defendants' Motion for Reconsideration at 11.

Defendants' iteration of the public interest is essentially a restatement of their argument and an assertion that all members have an interest in the Court's adoption of Defendants' position. The Court stated the matter a bit differently by recognizing that all enrolled members of the Nooksack Tribe – including Plaintiffs and Defendants, including those old enough to vote and those not – have "a strong interest in fair and timely elections." Order Denying Defendants' Motion for Preliminary Injunction at 20-21.

Surreply Footnote 4

Defendants again seek to remove from the record "offensive statements" from footnote 4 at page 5 of Plaintiffs' surreply to Defendants' motion for preliminary injunction. At oral argument on January 14, 2016, Plaintiffs' counsel apologized for the footnote and moved to strike, which was granted. Other than a single, obvious word in the footnote, Defendants have not identified the precise "offensive statements" they wish to have removed.

Defendants' motion for reconsideration of the January 26th order is granted to the extent that the Court declined to remove "offensive statements" from the record. The Court Clerk shall redact the text in footnote 4 of Plaintiffs' surreply to Defendants' motion for preliminary injunction extending from "(1) never" through "before Christmas" and replace it with the following text: "[Removed from record by Court order entered January 29, 2016.]" In the event the Court of Appeals wishes to examine the redacted material, the Court Clerk shall retain a copy of the full page, without redaction, separate from the official record, to be shredded after this case is closed in both trial and appellate courts.

CONCLUSION

As in the order entered January 26, 2016, the Court still finds that Defendants have failed to satisfy each and every prong of the four-part test governing an application for preliminary injunction. Particularly, the Court finds that Defendants are unlikely to succeed on the merits of their counterclaim seeking a permanent injunction to prevent Plaintiffs from voting in the 2016 Tribal Council elections. As stated at page 15 of the January 26th order, "When Defendants seek to withhold Plaintiffs' franchise entirely or pending proof of enrollability, the right to vote is fundamental and subject to strict scrutiny. Unequivocally, Plaintiffs are enrolled members of the Nooksack Indian Tribe and, pursuant to the Nooksack Constitution, Article IV, Section 1, '[a]ll enrolled members of the Nooksack Indian Tribe, eighteen (18) years of age or over, shall have the right to vote.' *See also* NTC § 62.04.020."

Defendants' motion for reconsideration of the January 26th order denying Defendants' motion for preliminary injunction is denied, except that Defendants' request to remove "offensive statements" from footnote 4 at page 5 of Plaintiffs' surreply is granted.

SO ORDERED this 29th day of February, 2016.

Susan M. Alexander
Susan M. Alexander
Chief Judge

FOOTNOTE

1/ Under NTC § 80.04.010, a notice of appeal must be filed within 14 days after entry of the decision appealed from. A motion for reconsideration filed within that period suspends the time to appeal until 14 days after disposition of the motion. Defendants timely filed their motion for reconsideration of the January 26th order on February 5, 2016. With the hearing on Defendants' motion noted for February 18, 2016, Plaintiffs' response to the motion was due by noon on February 16, 2016 (NTC § 10.05.050(e)(2)), and Defendants' reply was due by noon on February 17, 2016 (NTC § 10.05.050(e)(3)).

Plaintiffs filed and served their response a few hours late on the afternoon of February 16, 2016. The morning of February 17, 2016, Defendants filed a motion seeking, in the alternative, to continue the hearing or to strike Plaintiffs' response. On the morning of February 18, 2016, the Court entered an order permitting the filing of Plaintiffs' late response, setting a new deadline for Defendants' reply, and granting Defendants' motion for continuance, rescheduling the hearing for February 22, 2016.

At the beginning of the hearing on February 22, 2016, counsel mentioned that a Tribal official had questioned the Court's authority to extend Plaintiffs' deadline and adjust the schedule. In fact, every court has the inherent authority to manage the cases on its docket "with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936)(citations omitted). Such inherent powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991).

The Court's inherent authority is reflected in the Nooksack Tribal Code. *E.g.*, NTC § 10.03.040(b)("[T]he court may use any appropriate procedure that is fair and consistent with the spirit and intent of the tribal law being applied."); NTC § 10.03.040(c)("If these rules do not set forth a procedure, the parties and the judge may agree on a procedure or the judge may determine the procedure, which will be followed.").

Extensions of time — via motion or through sua sponte action by the court in the context of case management — are commonplace. Even a quick Google search turns up thousands of instances in which court rules provide for extension of time or, in the absence of rules, courts permit extension of time. In some jurisdictions, a first request for extension of time may be granted by a court clerk on an ex parte basis, without a judge's involvement. *See, e.g.*, Wyoming Rules of Civil Procedure, Rule 6(b). "Guidelines for Civility in Litigation," appended to Local Rule 3.26 of the Superior Court of California, Los Angeles County, provides that a first request for extension of time "should ordinarily be granted as a matter of courtesy . . . even if the counsel requesting it has previously refused to grant an extension." Further, "[a] lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing 'tough'."

Defendants have also benefitted from this Court's attentive case management and exercise of discretion. On January 29, 2016, after several

election deadlines had passed without action, Plaintiffs filed an emergency petition for writ of mandamus asking the Court to compel Defendants to proceed with the 2016 Tribal Council elections. Following briefing and oral argument, the Court entered an order on February 12, 2016, holding Plaintiffs' mandamus petition in abeyance pending full disposition in this Court and the appellate court of Defendants' motion for preliminary injunction regarding Plaintiffs' right to vote. In effect, the Court granted Defendants a very lengthy extension of time to exhaust all avenues of relief.

IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE NOOKSACK INDIAN TRIBE

BELMONT, *et al.*,

Plaintiffs,

v.

KELLY, *et al.*,

Defendants.

Case No. 2014-CI-CL-007

DECLARATION OF RAYMOND DODGE

COPY

I, RAYMOND DODGE, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am over the age of 18, competent to testify about the matters stated in this Declaration, and I make this Declaration of my personal knowledge.

2. I am co-counsel of record for Defendants in the above captioned case.

3. Ineligible Plaintiffs' counsel did not contact me or any of my co-counsel regarding Ineligible Plaintiffs' Motion for Sanctions prior to noting it for hearing on January 14, 2016.

4. I have attached the relevant portion of *Lomeli, et al. v. Kelly, et al.*, No. 2013-CI-CL-001, Second Amended Complaint (May 1, 2013) as Exhibit A.

5. I have attached the relevant portion of *Adams, et al. v. Kelly, et al.*, No. 2014-CI-

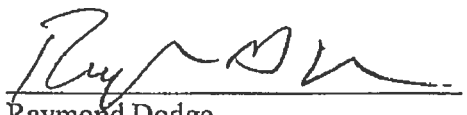
EXHIBIT 3

CL-006, Complaint (Jan. 23, 2014) as Exhibit B.

6. I have attached *St. Germain, et al. v. Kelly, et al.*, Case No. 2013-CI-CL-005, Order Granting Defs. Mot. to Dismiss and Den. Pls. Mot. for Summary J. (June 24, 2014) as Exhibit C.

7. I have attached *Roberts, et al. v. Kelly, et al.*, Case No. 2013-CI-APL-003, Opinion (Mar. 18, 2014) as Exhibit D.

DATED this 13th day of January, 2016, at Deming, Washington.



Raymond Dodge

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EXHIBIT B

legal mail service

RECEIVED

JAN 23 2014

Office of Tribal Attorney
Nooksack Indian Tribe

IN THE NOOKSACK TRIBAL COURT

FRANCINE ADAMS; ANTHONY ADAMS; BRINA ALDREDGE; BRITTANY ALDREDGE; NORMA ALDREDGE; ANGELITA AURE; DOE AURE; CHELSEA BAKER; KELSEA BAKER; PRICILLA BAKER; JERIC BAKER; FLORENTINO BARRIL; CALEB BARRIL-BOTHELL; CATHALINA BARRILL; BILLIE BARTLE; ADAM BELLO; EILEEN BELLO; PATRICK BELLO JR.; ELIZABETH BELLO; PATRICK BELLO; ELPIDO BELLO JR.; EUGENA BELLO; JOSEPH BELLO; LUCAS BELLO; NICHOLAS ELPEDIO BELLO; DOMINIC BELLO; RICHARD BELLO; ELEANOR BELMONT; DIONNE BENNETT; OLIVA BOTHELL; KIRK BROWN; CHRISTINA BUMATAY; ANDREA BUMATAY; ROBERT BUMATAY; ANDREW BUMATAY; JAMES BUMATAY; JONATHAN BUMATAY; BARTON BUMATAY; ANGELA BUMATAY; NOELANI BUMATAY-JEFFERSON; MARIAH BUMATAY-JEFFERSON; CAROL CAILING; DONNA CAILING; KEITH CAILING; NEVEAH CAILING; ANITA CAMPBELL; ALEXANDREA CARR; LEE CARR; PRICILLA CARR; ROBLEY CARR; ANNA CARR; QUOLIA CARR; VANESSA CASIMIR; CHRISSA CASONO; NINA CHOW; KYLE COBLE; LISA COBLE; STEVE COBLE; SEAN COLEMAN; GILDA CORPUZ; PEDRO CORPUZ; VICTORINO CORPUZ; CHRISTINA CORPUZ-PEATO; JORDAN CRAIN; ROLAND CUATERO;

NO. 2014-CI-CL-___

COMPLAINT

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16. **Simply put, a child of an enrolled Nooksack who is ¼ Indian is properly enrolled Nooksack.** *Id.* There is simply no Constitutional requirement that a properly enrolled member descend from somebody whose name appears on any census. *Id.*

17. Defendants intend to disenroll persons who qualified as members at the time of their enrollment under Constitution, art. II, § 1(c) and were enrolled under that provision of the Constitution. *See e.g.* Appendixes A-G. As the *Lomeli* Court held, "the burden of proving a member did not meet the requirements of enrollment at the time of enrollment rests with the Tribe." *Lomeli* at 14. Defendants intend to disenroll Plaintiffs because their ancestor allegedly does not appear on the official census roll of the tribe dated January 1, 1942. *See e.g.* Appendixes H-N. This is not constitutionally required by Article II, Section 1(c).

18. Resolution 13-02 states the following, in relevant part:

> Title 63, the membership ordinance of the Nooksack Indian Tribe, Section 63.00.004 defines a Base Enrollee as those individuals from whom all persons applying for membership must prove direct descent. For the Nooksack Tribe, these base enrollees are these persons who are original Nooksack Public Domain allottees and/or all persons of Indian blood whose names appear on the official census roll of the Nooksack Tribe dated January 1, 1942 . . . . Annie James (George) or Andrew James are not original Nooksack Public Domain allottees or lineal descendants of an original Nooksack Public Domain allottee living on January 1, 1942. NOW THEREFORE BE IT RESOLVED, that the Nooksack Tribal Council initiates involuntary disenrollment proceedings [against] each member who descended from Annie James (George) or Andrew James and claim right to membership based through lineal descendancy of an original Nooksack Public Domain allottee . . . .

19. Notices of Intent to Disenroll were sent to roughly 306 enrolled tribal members, including Plaintiffs. *See e.g.* Appendixes H-N. Critically, the Notices were sent to these members despite that they do not "claim right to membership based through lineal descendency of an original Nooksack Public Domain allottee" under Article II, Section 1(a) of the Constitution, as required by Resolution 13-02. They were instead sent to members who were enrolled pursuant to Article II, Section 1(c) of the Nooksack Constitution and do *not* "claim right

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to membership based through lineal desceendancy of an original Nooksack Public Domain allottee."

20. Resolution 13-02 granted Defendants only the authority to "initiate[] involuntary disenrollment proceedings [against] each member who descended from Annie James (George) or Andrew James and clam[s] right to membership based through lineal descendancy of an original Nooksack Public Domain allottee." By initiating involuntary disenrollment proceedings against members who *do not* "claim right to membership based through lineal descendancy of an original Nooksack Public Domain allottee," and who *do* claim membership as, *inter alia*, "lineal descendants of a person who was enrolled after January 1, 1942 [and] possess ¼ Indian blood," Defendants have acted in contravention of Nooksack law, out side of the scope of their authority, and must be enjoined. *Lomeli v. Kelly*, No. 2013-CI-APL-002, at 19, n. 24 (citing Const., art. II, § 1(c)).

B. Plaintiff-Councilpersons St. Germain and Roberts Were Illegally Removed from the Council Yesterday.

21. Plaintiffs hereby incorporate by reference the facts set forth in the appended Declaration of Nooksack Tribal Councilwoman Michelle Joan Roberts, signed and dated today.

V. FIRST CAUSE OF ACTION
(Injunction/Declaratory Judgment – Violation of Nooksack Constitution)

22. Plaintiffs incorporate and reallege the foregoing allegations.

23. "[T]he Tribe's Constitution itself clearly provides a Tribal member with a right to challenge the enforcement or threatened enforcement of an unconstitutional law or policy, and with a forum where the member can bring that challenge." *Lomeli*, at 14.

24. Defendants use of a "base enrollee" requirement that does not exist in the Constitution to disenroll Plaintiffs violates the Constitution and should be (a) declared unconstitutional and (b) enjoined.

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IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE NOOKSACK INDIAN TRIBE

BELMONT, *et al.*, Plaintiffs, v. KELLY, *et al.*, Defendants v. KELLY, et al.	Case No. 2014-CI-CL-007 DECLARATION OF SERVICE ORIGINAL

I Declare:

That I am over the age of 18 years and competent to be a witness.

On March 14, 2016, I duly mailed by first class mail a copy of:

1. Defendant-Appellants' Notice for Permission to File an Interlocutory Appeal; and
2. This Declaration

to the persons listed in the attached mailing list.

I declare under the penalty of perjury, under the laws of Nooksack Indian Tribe, that the foregoing is true and correct.

Signed at Deming, Washington on March 14, 2016.

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Nooksack Indian Tribe

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