EXHIBIT M

IN THE NOOKSACK TRIBAL COURT

FOR THE NOOKSACK INDIAN TRIBE

DEMING, WASHINGTON

SONIA LOMELI; TERRY ST. GERMAIN; NORMA ALDREDGE; RAENNA RABANG; ROBLEY CARR, individually on behalf of his minor son, LEE CARR, enrolled members of the Nooksack Indian Tribe, Plaintiffs, vs. ROBERT KELLY, RICK D. GEORGE, AGRIPINA SMITH, BOB SOLOMON, KATHERINE CANETE, LONA JOHNSON, JEWELL JEFFERSON, AND ROY BAILEY Defendants.	Case No.: 2013-CI-CL-001 ORDER ON SECURITY FOR HEARINGS

THIS COURT has held several hearings in the above captioned matter. The Court requested security for these hearings be provided by the Nooksack Police Department. At a hearing on June 6, 2013, Plaintiffs' attorney, Gabe Galanda, objected to the presence of the officers and the cordon set up around the Tribal Court. The Court responded to those concerns on the record. After further consideration, the Court has concluded it necessary to issue a written order for future hearings, in order to both clarify the reason for the precautions ordered by this Court and the nature of those measures.

This matter involves issues of significant interest to the members of the Nooksack Tribe, the Nooksack Tribal government, and the public. As the Court stated on the record on June 6, 2013, this Court has reason to be concerned for the safety of the court staff, the security of the Tribal Court building itself, the safety of the Chief Judge, and the safety of the members of the public who wish to be present at the hearings. The Court will not elaborate further on the reasons for concern. At each of the hearings held in these matters, large numbers of people have congregated outside the building. It is the responsibility of this Court to ensure that the Court can hear this case while being certain of the safety for those inside the Courthouse and those who wish to be outside during the hearings.

Mr. Galanda stated in court that in his years of practice in tribal court that he had never seen a police officer in the courtroom. While that may be Mr. Galanda's experience in tribal court practice, the Court notes that courtroom and staff safety has been a major issue of concern for tribal

court judges around the country for years. It has been the undersigned judge's practice for many years to have a full-time officer dedicated to the safety of the courthouse, courthouse staff, and the judge wherever this judge has presided when funding has been available to do so. That has not been available at Nooksack and this judge has instead requested police presence in the courthouse whenever she believes circumstances so require. This has been a routine practice for as long as this judge has presided at Nooksack. Other security measures are in place to provide around the clock safety for the courthouse and the court staff.

Several weeks ago, the Court has asked the Nooksack maintenance department to provide a perimeter around the courthouse so that the Nooksack Police Department could regulate the numbers of people in the courthouse during these hearings. The Court sought this perimeter after being informed that large numbers of people planned to gather hoping to be inside the courtroom during the hearing. The building itself simply cannot accommodate many people. In addition, while the judge is hearing cases, including this one, other court staff need to continue their regular duties. Their duties do NOT include providing security to the courtroom and the building.

The perimeter around the court building is a line set by this Court. The officers who are regulating that perimeter are doing so after a formal request was made by this Court to the Chief of Police. The perimeter is not set to "criminalize" the five Plaintiffs represented by Mr. Galanda as he stated in court. It is set up entirely for the safety of *all* involved, including the Plaintiffs, Defendants, others with an interest in this case, and the Court. It is this Court's responsibility to ensure the safety of all by asking the police department to regulate the perimeter. *It is entirely in the judgment of the police department to decide staffing levels for that purpose.*

As noted in prior orders, the Courtroom can accommodate 10 people. The Court had asked that the Plaintiffs' and Defendants' attorneys work together prior to each hearing to agree as to how those 10 seats were assigned. Unfortunately, the Court concludes that its expectation of cooperation between the attorneys on this point was misplaced.

Therefore, this Court concludes it must issue an order that both parties are *required to follow* for all future hearings.

ORDER

1. The perimeter around the courthouse shall be regulated by the Nooksack Police Department for all future hearings in this case. Staffing levels are to be determined by the Nooksack Police Department, in their sole discretion.
2. There may be a total of 10 people in this courtroom for each hearing. No one else will be allowed in the building other than regular court staff during hearings in this matter.
3. Each "side" in this case shall have five seats assigned to them for each hearing. It is up to the attorneys and their clients as to who shall be seated in the five seats for each side. This modifies a previous directive by this Court to the attorneys that they agree as to who shall be in the courtroom. Agreement is no longer possible and therefore the Court now orders that each party may determine how to use their five seats.

4. The attorneys for the parties shall submit, in writing (emailed list acceptable), a list of who will be attending each hearing by the Friday preceding each hearing **to the Nooksack Police Department by 4:00 p.m.** Those lists shall not be filed with this Court as the Court has no interest in who is in the audience. However, the attorneys for the parties shall notify the Court in writing (emails to the Court Clerk are acceptable, but the parties may not email the judge) that they have notified the police department of their lists prior to each hearing. The police department will use these lists to ensure that those who are named come into the courthouse. If the parties change their list after filing it with the police department, they must notify the police department within a reasonable time prior the hearing, but it is in the police department's discretion as to whether they can accommodate list changes.

5. With regard to Item 4 of this Order, the next scheduled hearing is set on June 25, 2013. Therefore, the attorneys shall notify the Nooksack Police Department on June 21, 2013 of their attendance lists by 4:00 pm. The attorneys shall notify the Court by 4:30 pm on that date of their compliance.

6. This is a court of public record. Audio copies of the hearings shall be made available to anyone who so requests. Due to the expense and time in fulfilling these requests, the requesting party must pay a $10 recording request fee to the Nooksack Accounting department prior to the Court providing the copy. This fee does not apply to the parties in this lawsuit, whose attorneys will receive one copy of the hearing as soon as practicable after each hearing.

7. Members of the public are welcome to congregate outside the cordoned area during hearings. The Court welcomes their presence and interest in this case and has no intention of preventing them from being outside. The police department shall regulate the perimeter as they have been doing.

8. Disputes regarding this order shall be resolved by this Court. At no time may either of the parties engage the police department in a debate about this order.

IT IS SO ORDERED.

DATED this 7 day of June, 2013.

Raquel Montoya-Lewis
Chief Judge, Nooksack Tribal Court

Cc: Nooksack Police Department

EXHIBIT N

IN THE NOOKSACK TRIBAL COURT

FOR THE NOOKSACK INDIAN TRIBE

DEMING, WASHINGTON

SONIA LOMELI; TERRY ST. GERMAIN; NORMA ALDREDGE; RAENNA RABANG; ROBLEY CARR, individually on behalf of his minor son, LEE CARR, enrolled members of the Nooksack Indian Tribe, Plaintiffs, vs. ROBERT KELLY, RICK D. GEORGE, AGRIPINA SMITH, BOB SOLOMON, KATHERINE CANETE, LONA JOHNSON, JEWELL JEFFERSON, AND ROY BAILEY Defendants.	Case No.: 2013-CI-CL-001 **ORDER MODIFYING ORDER ON SECURITY**

THIS COURT issued an order on June 7, 2013 setting out the requirements for security in the courtroom and outside the courthouse for all hearings in the above entitled matter. In that order, the Court ordered that the attorneys for the parties file the names of the five individuals for each side who will be in the courtroom on the Friday prior to each hearing. The Court ordered that the names be filed with the Nooksack Police Department and the Court specifically noted that those notices should not be filed with the Court because the Court did not want to be involved in decisions about who will be in the courtroom for each hearing. The Court ordered that the notices of individuals who will be in the courtroom be filed with the Nooksack Police Department so that they could ensure that those individuals have a seat in the courtroom and, in particular, can be provided disabled and elder parking close to the courthouse.

On June 17, 2013, the Nooksack Police Department informed this Court that the Plaintiffs' attorney, Gabe Galanda, emailed Chief Gilliland and Lt. Ashby stating that he was filing a client list with 270 names on it and that he would put "sincere effort" into complying with this Court's order, but that it is "impractical" for him to ascertain who of those 270 individuals would attend. The Nooksack Police Department sought this Court's guidance in determining how to properly enforce this Court's Order on Security.

First of all, the Court has repeatedly asked the Plaintiffs' attorney who his clients are in this case and he has consistently stated that the named Plaintiffs are the only clients he represents in this Court in this action. Thus, the client list of 270 names does not comport with his representations in

Court. If there has been a change in representation, this Court expects an updated Notice of Appearance be filed with this Court immediately.

Second, **the Order on Security is a *court order*.** This Court expects that all attorneys and spokespersons who have been admitted to practice in this Court will follow the orders of this Court, even when attorneys believe them to be too "impractical." Should they fail to comply with orders of the Court, the Court will take action to ensure compliance.

This Court has ordered that the attorneys provide notice to the Nooksack Police Department on Friday, June 21, 2013 of those who will be present in the courtroom for the hearing scheduled for June 25th. The Court has allotted five seats to the Plaintiffs and the Defendants. If the Nooksack Police Department has not received those notices from each side by 4:00 pm on June 21, 2013, the Police Department shall notify this Court by phone and this Court will issue an order naming the five individuals who will be allowed to be present in the courtroom on June 25th. The Court will choose those names from the named parties listed in the caption to this case at the top of this order and it will order that the Nooksack Police Department enforce that order.

As stated on the record and in writing, the Court is responsible for the safety of all the attorneys and parties involved in this case, the safety of the public and the safety of the court staff. The Court intends to handle this case in an orderly and efficient fashion and it expects no less of all of the attorneys, named parties, and public interested in this case. This Court hopes and expects it need not continue to spend its time issuing orders like this one in order to clarify its expectations that all parties will comply with its orders.

IT IS SO ORDERED.

DATED this 17 day of June, 2013.

Raquel Montoya-Lewis
Chief Judge, Nooksack Tribal Court

EXHIBIT O

IN THE NOOKSACK TRIBAL COURT

FOR THE NOOKSACK INDIAN TRIBE

DEMING, WASHINGTON

SONIA LOMELI; TERRY ST. GERMAIN; NORMA ALDREDGE; RAENNA RABANG; ROBLEY CARR, individually on behalf of his minor son, LEE CARR, enrolled members of the Nooksack Indian Tribe, Plaintiffs, vs. ROBERT KELLY, RICK D. GEORGE, AGRIPINA SMITH, BOB SOLOMON, KATHERINE CANETE, LONA JOHNSON, JEWELL JEFFERSON, AND ROY BAILEY Defendants.	Case No.: 2013-CI-CL-001 **ORDER ON HEARING ATTENDEES FOR JUNE 25, 2013**

THIS COURT issued orders on security on June 7 and June 17th ordering the attorneys in this matter to provide a list of attendees for the hearing on the Defendants' *Motion to Dismiss* set for June 25, 2013 at 10:00 a.m. As stated in those orders, the Courtroom can accommodate a total of 10 people (excluding court staff and a police officer). This Court ordered the Nooksack Police Department to provide security at the courthouse for the hearing. The Court ordered the attorneys to communicate with the police department about who the courtroom attendees would be so that the police could ensure that those who wanted to be in the courtroom could get into the courthouse and through the court-ordered police cordon around the building. The court stated that failure to comply with this Court's orders would result in the Court determining who could be in the courthouse.

As this Court has stated repeatedly, the Court has no interest in who is in the courtroom during this hearing, but the Court is committed to ensuring the safety of the parties, court staff, and the public. The Plaintiffs have had a variety of attendees during the hearings, which the Court has been more than happy to accommodate. At the last hearing, the Plaintiffs' attorney, Mr. Galanda, objected to the security measures taken by the Court. Prior to the hearing, he shouted at Chief of Police Gilliland outside the courthouse. This exchange was loud enough that the undersigned judge could hear the shouting outside from inside the building. At the time, the Court believed the shouting to be coming from the crowd assembled outside the police cordon. The Court was, quite frankly, shocked to learn after the hearing that the shouting came from Mr. Galanda.

This Court determined that the best course of action was to issue a very clear court order setting out responsibilities of the police, the attorneys and the court for ensuring security inside and outside of the courthouse. Included in that order was the requirement that the attorneys notify the police department who would be attending the hearings on the Friday before any scheduled hearing. The Defendants complied with that order, submitting a list of attendees on Friday, June 21, 2013 to the police department.

Mr. Galanda has not complied. On June 20, 2013, Mr. Galanda wrote the following email to the undersigned judge:

> With that, I will appear by phone, feeling it is best for this process under the circumstances. And please know that I am still attempting to identify which five of our plaintiff-clients and/or disenrollee-clients desire to attend the hearing Tuesday, as I told the Police Chief I would in my email. I intend absolutely no disobedience in expressing to the Police or the Court the practical challenge that those restrictions impose upon my clients under their current circumstance, per my email the day before the last hearing and again last weekend, and I ask that the Court give me the benefit of the doubt in that regard. I am simply playing the hand I have been dealt by everyone privy to that particular security process. In any event I will be in touch with the Police Chief tomorrow, and I may also file something for the record in that regard to obviate the confusion, aspersion and other ill emotion surrounding that issue.

On June 21, Mr. Galanda informed Chief Gilliland he would not be submitting a list of names, having been unable to identify who would be attending the June 25th hearing.

The Court notes here that Mr. Galanda has waived his physical appearance in court for the *Motion to Dismiss* hearing, choosing to appear by phone. Mr. Galanda asked the Court if the Court would permit him to appear by phone, giving no reason for his need to do so. The Court determined that appearing in person is Mr. Galanda's decision and that if he wished to waive his physical appearance, he could so choose.

The Court is extremely disappointed by Plaintiff Counsel's inability or refusal to comply with this Court's *Orders on Security*. As a result of his non-compliance, the Court must issue an order that informs the Nooksack Police Department who may be allowed into the building on June 25th to attend the hearing. The Court dislikes being placed in exactly the position it attempted to avoid by issuing those orders.

Mr. Galanda's failure to comply with this Court's order will have no bearing on this Court's assessment of this case. The Court is surprised he has chosen not to appear in court for the June 25th hearing, as this is a dispositive motion by the Defendants. The Court wishes to state for the record that Mr. Galanda's failure to comply with the Court's orders and his telephonic appearance tomorrow have no impact on the Court's view of the Plaintiffs' case and legal arguments. The Plaintiffs (and the Defendants) deserve to have a neutral judge assess and decide these arguments fairly, with no reference to the behavior of their attorney which is, as the Court notes, at the very least, disappointing, if not outright contempt of court. The Court reserves a determination on this point for another day.

THEREFORE, THE COURT HEREBY ORDERS THAT:

1. Nooksack Tribal Police Department shall allow those on the Office of the Tribal Attorney's list into the courthouse;
2. The following individuals from the Plaintiffs may be allowed into the courthouse:
    a. Sonia Lomeli
    b. Terry St. Germain
    c. Raeanna Rabang
    d. Robley Carr
    e. Norma Aldredge
3. All those who come into the courthouse and courtroom for the hearing shall conduct themselves professionally and respectfully at all times.

IT IS SO ORDERED.

DATED this 24 day of June, 2013.

Raquel Montoya-Lewis
Chief Judge, Nooksack Tribal Court

EXHIBIT P

IN THE NOOKSACK TRIBAL COURT OF APPEALS
NOOKSACK INDIAN TRIBE
DEMING, WASHINGTON

SONIA LOMELI; TERRY ST. GERMAIN; NORMA ALDREDGE; RAENNA RABANG; ROBLEY CARR, individually on behalf of his minor son, LEE CARR, enrolled members of the Nooksack Indian Tribe, Plaintiffs/Appellants. v. ROBERT KELLY, RICK D. GEORGE, AGRIPINA SMITH, BOB SOLOMON, KATHERINE CANETE, LONA JOHNSON, JEWELL JEFFERSON, AND ROY BAILEY, Defendants/Appellees.	NO. 2013-CI-CL-001 ORDER DENYING MOTION TO DISQUALIFY CHIEF JUDGE ERIC NIELSEN

On August 12, 2013 Plaintiffs/Appellants Lomeli et al. (hereinafter "Appellants") filed a Notice of Appeal of the Nooksack Tribal Court's August 9, 2013 Final Judgment in these proceedings, which includes by necessity the Tribal Court's August 7, 2013 Amended Order Granting Defendant's Motion to Dismiss Second Amended Complaint. In addition to their Notice of Appeal, Appellants filed a Motion to Disqualify Chief Judge Eric Nielsen from presiding in this matter.[1] Without accusing Judge Nielsen of actual bias, Appellant's Motion to Disqualify is based on their contention that "Judge Nielsen's impartiality might reasonably be questioned due to his ongoing significant participation in separate litigation involving Appellant's counsel." The "separate litigation" is a matter in the Lummi Tribal Court in which Judge Nielsen, in his capacity as a private attorney; served as the registered agent of an entity and an advisor to a family member involved in a dispute in which Appellants' counsel in this

[1] On June 18, 2013, Chief Judge Nielsen, acting under the authority of NTC 80.05.030, issued an Order denying Appellant's motion for permission to file an interlocutory appeal in these proceedings.

Nooksack proceeding represented an adverse party. Judge Nielsen did not represent any party or the corporate entity in the Lummi case.

Appellants' motion states that "no provision of Nooksack Tribal Code (NTC) Title 80 touches on disqualification of judges." Appellants are mistaken. NTC 80.02.010 is clear that the Nooksack Court of Appeals "is operative as a division of the Nooksack Tribal Court." Therefore, the general provisions of NTC Title 10 governing the Tribal Court System apply to the Court of Appeals. Title 10 addresses the disqualification of judges in two sections. First, NTC 10.03.030 provides that "[n]o judge shall be qualified to act in any case where he or she has an interest, is or has been a material witness or is related to any party or their advocate as a parent, guardian, grandparent, son, daughter, grandson, granddaughter, aunt, uncle, sister, brother, niece or nephew." Second, NTC 10.03.060 provides that a "judge should disqualify herself or himself from hearing a case in which a close relative is a party or witness, a case in which the judge has interests which may be affected by the outcome, or has personal knowledge of facts which would prevent him or her from considering all sides impartially." By their plain language these provisions do not require, or in any way support, disqualification of Judge Nielsen in this case.

Appellants' reliance on federal law is unavailing. Indeed, the cases cited by Appellants tend to contradict rather than support their arguments for disqualification. All of the cases cited by Appellants involve disqualification of judges based on an appearance of bias against a party, rather than the party's representative. None of the cases cited by Appellants stand for the proposition that a judge should be disqualified for bias (real or perceived) against a party's representative. And, while Appellants'' Motion to Disqualify contain's accurate quotations from the cited cases, the holdings in these cases counsel against Appellants' simplistic notions that any

suggestion of bias requires disqualification, that outside observers are somehow predisposed to find an appearance of bias, and that in a close case, the balance tips in favor of recusal.

In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1987); the United States Supreme Court held that a trial judge should have disqualified himself for appearance of bias in a case in which the judge had constructive knowledge of a conflict of interest during the proceedings and failed to vacate his judgment when he gained actual knowledge of his conflict of interest a mere eight days after entering judgment.[2] Thus, *Liljeberg* in no way supports the contention that a judge should be disqualified based on a perceived bias against a party's representative.

In *Preston v. United States*, 923 F.2d 731 (9th Cir. 1991), the federal Court of Appeals for the Ninth Circuit held that disqualification was *required* by 28 U.S.C. § 455(b)(2), which provides that a judge "shall" disqualify himself "[w]here in private practice he served as a lawyer in the matter in controversy, or a lawyer with whom the he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it." The Court found that the judge's prior association as an attorney in private practice "of counsel" to a law firm with an interest in the outcome of the matter before the judge triggered mandatory disqualification under 28 U.S.C. § 455(b)(2). As the Court stated, "We need not explore whether an appearance of partiality existed in this case. The drafters of *section 455* have accomplished this task for us." As the Court observed, "the focus has consistently been on the question whether the relationship between the judge and an interested

[2] The Supreme Court also concluded that the Court of Appeals correctly noted that the judge also was required to disqualify himself under 28 U.S.C. 455(b)(4) because the judge was a trustee and fiduciary of a University that had a financial interest in the subject matter in controversy.

party was such as to present a risk that the judge's impartiality might reasonably be questioned by the public." *Id.* at 735, summarizing *Liljeberg, supra* (emphasis added).

As set forth in Appellants' Motion, the Ninth Circuit did state in *United States v. Holland*, 519 F.3d 909 (9th Cir. 2008), that if the claim of appearance of bias "is a close case, the balance tips in favor of recusal." *Holland* at 912. However, the Court of Appeals also noted that "[w]e begin with the general proposition that, in the absence of a legitimate reason to recuse himself, a judge should participate in cases assigned." *Id.* (internal quotation marks and citations omitted). As argued by Appellants and acknowledged by this Court, the *Holland* Court noted that the standard is that "[i]f it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists." *Id.* at 913. However, as opposed to Appellants' description of the outside observer as someone inclined to perceive an appearance of bias, the *Holland* Court stated

> The "reasonable person" is not someone who is hypersensitive or unduly suspicious, but rather is a "well-informed, thoughtful observer. The standard must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice.

Id. (citations omitted).

The Court further posited that "[t]he reasonable third-party observer is not a partly informed man-in-the-street, but rather someone who understands all the relevant facts and has examined the record and the law." *Id.* at 914 (internal quotation marks, brackets and citations omitted). The *Holland* Court ultimately held that threatening phone messages left for a judge presiding over the criminal trial of a defendant with a lengthy history of violent offenses did not necessarily create an appearance of bias, and the judge was not required to disqualify himself.

Nothing in *Holland* supports the contention that alleged bias against a party's representative arising from a separate matter creates an appearance of bias or requires a judge to disqualify him or herself.

Lastly, and perhaps most significantly, the holding of the United States Supreme Court in the fourth case cited by Appellants, *Liteky v. United States*, 510 U.S. 540 (1994), can be read as barring any claim of appearance of bias where the alleged bias relates to anyone other than a party. The majority in *Liteky*, addressing a minority opinion concurring only in the result and sharply criticizing the majority's reasoning, held that the provisions of 28 U.S.C. § 455(b) effectively act as limitations on § 455(a), the provision that Appellants rely on here, where the two sections overlap. The hypothetical example set forth by the majority involved § 455(b)(5), which requires a judge to disqualify himself when specified conditions apply to him or his spouse, "or a person within the third degree of relationship to either of them, or the spouse of such a person." The majority reasoned that this express delineation of the types and degree of relationship that would require disqualification under § 455(b)(5) act as a limitation on the requirement of § 455(a) that a judge disqualify himself in "any proceeding in which his impartiality might reasonably be questioned." The majority stated:

> It would obviously be wrong . . . to hold that "impartiality could reasonably be questioned" simply because one of the parties is in the fourth degree of relationship to the judge. *Section 455(b)(5)*, which addresses the matter of relationship specifically, ends the disability at the third degree of relationship, and that should obviously govern for purposes of *§ 455(a)* as well. Similarly, § *455(b)(1)*, which addresses the matter of personal bias and prejudice specifically, contains the "extra-judicial source" limitation – and *that* limitation, (since nothing in the text contradicts it) should govern for purposes of *§ 455(a)* as well.

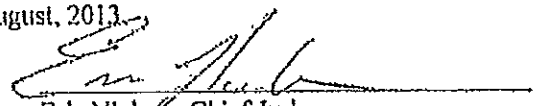
Id. at 553 (emphasis in original).

While this Court does not necessarily embrace the *Liteky* majority's analysis, it notes that Appellants' reliance on it is misplaced in that it directly contradicts Appellants' claim here. §

455(b)(1) provides that a judge shall disqualify himself "where he has a personal bias or prejudice *concerning a party*, or personal knowledge of disputed evidentiary facts *concerning the proceeding*." Under *Liteky*, § 455(a) is limited to allegations that a judge has bias concerning *a party* or concerning personal knowledge of disputed facts relevant to the proceeding before him. *Liteky*, therefore would prohibit claims of appearance of bias based on a judge's alleged bias against a party's *representative*.[3]

Because the cases cited by Appellant do not support their theory that a judge should disqualify himself based on alleged bias against a party's representative rather than the party, and because the Appellants cite no other source of law, Nooksack or otherwise, that supports their Motion to Disqualify, and this Court is aware of none, the Motion to Disqualify Judge Nielsen is denied.[4]

It is so ordered, this 14th day of August, 2013.



Eric Nielsen, Chief Judge

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[3] The minority opinion in *Liteky* discusses the standard by which appearance of bias should be judged.

> For present purposes, it should suffice to say that § 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings. I think all would agree that a high threshold is required to satisfy this standard. Thus, under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

Liteky, at 557 – 558 (concurring opinion of Justice Kennedy). Nothing in Appellants' Motion to Disqualify or the supporting declaration suggest Judge Nielsen harbors resistance to fair and dispassionate inquiry or the sort of aversion, hostility or disposition that the *Liteky* minority (JJ Kennedy, Blackmun, Stevens and Souter) suggest are needed for a finding of appearance of bias.

[4] NTC 80.08.010 provides that the Chief Judge may rule on a motion alone or after consulting with the associate judges on the panel.

may and who may not enroll as a Nooksack tribal member rests with the Tribal Council. Rather, this hearing centers on a fairly narrow question: Should the Tribal Court issue a Preliminary Injunction prohibiting the Tribal Council from moving forward with disenrolling the Plaintiffs under Resolution 13-02? As with all Temporary Restraining Orders and Preliminary Injunctions, it is the burden of the movant, in this case, the Plaintiffs, to demonstrate a likelihood that they will prevail on the merits of the Complaint, that irreparable harm will come to the Plaintiffs should a preliminary injunction not be issued, and that an injunction is in the public interest. *Winter v. NRDC*, 129 S.Ct. 365, 374 (2008).

In order to make that determination, the Court must engage in a preliminary, but thorough analysis of some of the issues presented in the *Complaint.* Plaintiffs argue that the named Defendants' actions, set out in Resolutions 13-02, violate the Nooksack Tribal Constitution ("the Constitution") and Title 63—Enrollment Ordinance of the Nooksack Tribal Code. Plaintiffs argue that in enacting Resolution 13-02 and taking actions leading up to the passage of Resolution 13-02, the Defendants acted beyond the scope of their official authority and duties granted in the Constitution and the Enrollment Ordinance. By acting outside the scope of their authority, Plaintiffs argue that the doctrine of sovereign immunity, which serves as a bar to suits against governments, governmental officers and employees when they are acting in the course of their official duties, does not apply.

Hundreds of pages of argument and authority have been cited and filed with this Court during the pendency of this case so far. The attorneys on both sides of this matter have cited an enormously wide range of authority, including Nooksack Tribal Court of Appeals cases, federal cases from multiple circuits, U.S. Supreme Court cases, and other tribal court cases. While the use of these authorities have elucidated the complexity in analyzing a sovereign immunity question, the

EXHIBIT Q

IN THE NOOKSACK TRIBAL COURT

FOR THE NOOKSACK INDIAN TRIBE

DEMING, WASHINGTON

SONIA LOMELI; TERRY ST. GERMAIN; NORMA ALDREDGE; RAENNA RABANG; ROBLEY CARR, individually on behalf of his minor son, LEE CARR, enrolled members of the Nooksack Indian Tribe,

Plaintiffs,

vs.

ROBERT KELLY, RICK D. GEORGE, AGRIPINA SMITH, BOB SOLOMON, KATHERINE CANETE, LONA JOHNSON, JEWELL JEFFERSON, AND ROY BAILEY

Defendants.

Case No.: 2013-CI-CL-001

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

THIS COURT held a hearing on May 16, 2013 on the Plaintiffs' *Emergency Motion for a Temporary Restraining Order*. Attorneys Gabe Galanda, Anthony Broadman, and Ryan Dreveskracht appeared for the Plaintiffs. Plaintiffs Norma Aldredge, Sonia Lomeli, and Robley Carr appeared for the hearing. Attorneys Thomas Schlosser, Grett Hurley, and Rickie Armstrong appeared for the Defendants. Defendant Chairman Robert Kelly appeared for the hearing. Due to space restrictions in the courtroom, not all of the named Plaintiffs and Defendants were able to be in the courtroom for the hearing. As noted on the record, this Court is a court of public record, but audience size is limited due to the size of the courtroom and courthouse. Should individuals wish to hear a recording of the proceedings in this matter, they may request a DVD of the hearing. Requests shall be made in writing in order to ensure that the Court Clerks have an accurate record of fulfilling such requests. The Tribal Court will fulfill these requests as quickly as possible.

DECISION

As the Plaintiffs' attorney, Mr. Galanda, noted at the outset of the hearing, neither this hearing nor the Plaintiffs' *Complaint* asks this Court to determine who is and who is not a Nooksack tribal member. Plaintiffs concede and the Defendants agree that the fundamental decision of who

may and who may not enroll as a Nooksack tribal member rests with the Tribal Council. Rather, this hearing centers on a fairly narrow question: Should the Tribal Court issue a Preliminary Injunction prohibiting the Tribal Council from moving forward with disenrolling the Plaintiffs under Resolution 13-02? As with all Temporary Restraining Orders and Preliminary Injunctions, it is the burden of the movant, in this case, the Plaintiffs, to demonstrate a likelihood that they will prevail on the merits of the Complaint, that irreparable harm will come to the Plaintiffs should a preliminary injunction not be issued, and that an injunction is in the public interest. *Winter v. NRDC*, 129 S.Ct. 365, 374 (2008).

In order to make that determination, the Court must engage in a preliminary, but thorough analysis of some of the issues presented in the *Complaint.* Plaintiffs argue that the named Defendants' actions, set out in Resolutions 13-02, violate the Nooksack Tribal Constitution ("the Constitution") and Title 63—Enrollment Ordinance of the Nooksack Tribal Code. Plaintiffs argue that in enacting Resolution 13-02 and taking actions leading up to the passage of Resolution 13-02, the Defendants acted beyond the scope of their official authority and duties granted in the Constitution and the Enrollment Ordinance. By acting outside the scope of their authority, Plaintiffs argue that the doctrine of sovereign immunity, which serves as a bar to suits against governments, governmental officers and employees when they are acting in the course of their official duties, does not apply.

Hundreds of pages of argument and authority have been cited and filed with this Court during the pendency of this case so far. The attorneys on both sides of this matter have cited an enormously wide range of authority, including Nooksack Tribal Court of Appeals cases, federal cases from multiple circuits, U.S. Supreme Court cases, and other tribal court cases. While the use of these authorities have elucidated the complexity in analyzing a sovereign immunity question, the

Court must start first with the Nooksack Court of Appeals cases, which the Court is bound to follow. As this Court has stated in another order in this case, the Nooksack Tribal Court will look to and follow Nooksack law where such law exists and applies.

I. Facts

The facts as they relate to Resolution 13-02 are not in substantial dispute. In December 2012, plaintiff Terry St. Germain submitted paperwork for his children's enrollment. On December 19, 2012 at a special meeting called by Chairman Kelly, the Tribal Council addressed the question of whether these children were eligible for Nooksack enrollment. Enrollment Officer Roy Bailey indicated that he did not have information at that time that would qualify the children for enrollment. Secretary Rudy St. Germain, who is not a plaintiff to this proceeding, questioned why his relatives were not presented for enrollment. Mr. Bailey indicated that the applicants did not appear to meet the requirements at this time and Secretary St. Germain objected, stating that if those applicants were ineligible, so was he. Chairman Kelly indicated he would do further research to address the issue. At the January 8, 2013 meeting, a regularly scheduled Tribal Council meeting, Roy Bailey informed the Council that he and Chairman Kelly had gone to the Bureau of Indian Affairs' office to conduct that research and found that there was no documentation to support the enrollment of Terry St. Germain's children. Mr. Bailey testified that supporting documents for the enrollment of approximately 300 currently enrolled Nooksack tribal members either did not exist in the files or were "missing." Two of those currently enrolled Nooksack tribal members are Nooksack Tribal Council members, Secretary Rudy St. Germain and Tribal Council member Michelle Roberts.

Chairman Kelly called an executive session of the Tribal Council on February 11, 2013 to be held on February 12. At that session, four resolutions were proposed and passed, Resolutions 13-01, 02, 03, & 04. Prior to the consideration of those resolutions, Secretary St. Germain and

Councilmember Roberts were instructed that they could not participate in the discussion or vote on these Resolutions because they were included in the approximately 300 individuals who would be subject to disenrollment by Resolution 13-02 and their participation in these resolutions would be a conflict of interest. Each of these resolutions were discussed and passed, by a vote of 5-0. (The Tribal Council consists of eight members, on chairman, one vice-chair, one secretary, one treasurer, and four councilmen. Nooksack Constitution, Article III, Section 2.)

Following the February 12th meeting, approximately 300 Notices of Intent to Disenroll were mailed to each of the tribal members who were identified as having been enrolled erroneously. These Notices inform the recipients that they are subject to disenrollment and instruct that they may request a meeting with the Tribal Council to challenge the disenrollment.

Plaintiffs argue that Chairman Kelly, the other members of the Tribal Council who voted in favor of the resolutions, Enrollment Officer Roy Bailey and former Enrollment Officer Jewell Jefferson acted outside the scope of their authority during this process. By alleging that the Defendants acted outside the scope of their authority, the Plaintiffs hope to avoid the defense of sovereign immunity by invoking the *Ex Parte Young*, 209 U.S. 123 (1907), exception. Absent prevailing on the *Ex Parte Young* analysis, Plaintiffs' motion for a preliminary injunction is barred by the doctrine of sovereign immunity.

As noted in a prior order, this Court looks first to Nooksack law and, in so doing, follows the tribal law's Rules of Construction that require this Court to "interpret tribal ordinances, resolutions, regulations, and policies in order that the substantive intent of the Tribal Council is ensured." Title 10 instructs "The court shall not indulge in highly technical or legalistic interpretations of tribal ordinances, regulations and policies when such interpretation would defeat the overall legislative goals of the Tribal Council." NTC 10.01.020. While there is no question that the attorneys and the

Court can engage in technical and "legalistic" argument and analysis, the Court notes that the Code specifically instructs that this Court view the Nooksack Tribal Code in a holistic manner that considers the "substantive intent" and "legislative goals" of the Tribal Council.

II. Sovereign Immunity

First, the Court finds that the Nooksack Tribal Council intends to assert its sovereign immunity to the fullest extent possible in the Tribal Code. Sovereign immunity is reserved in the Nooksack Tribal Constitution, under Article VI, Section 2(3): "This court shall have jurisdiction . . . over all matters concerning the establishment and functions of the tribal government, provided that nothing herein shall constitute a waiver of sovereign immunity by the tribal government." Resolution 13-04, passed on February 12, 2013 further amends Title 10 to explicitly reserve sovereign immunity to the Tribe:

> 10.00.100 SOVEREIGN IMMUNITY. Nothing in this Ordinance is intended or shall be construed as a waiver of sovereign immunity of the Nooksack Indian Tribe, its officials, its entities, or employees acting within the scope of their official or individual capacities. The Court shall have no jurisdiction over any suit brought against the Nooksack Indian Tribe, its official, its entities, or employees without the consent of the Tribe. Nothing contained within this code, or other Tribal ordinance, resolution, policy, or otherwise shall be deemed to constitute a waiver or renunciation of the sovereign immunity of the Tribe to suit. Such consent or waiver must be expressly made by the Nooksack Tribal Council by majority vote through the passage of an ordinance, by resolution, by entering into a written contract, which provides for an express waiver, or other means adopted by the Nooksack Tribal Council.

The Court recognizes here that the Plaintiffs challenge the validity of Resolution 13-04 and the Court explicitly notes here that it does not rule on the validity of Resolution 13-04 for the purposes of the Plaintiffs' preliminary injunction. Rather, the Court uses it as evidence of the substantive intent of the Tribal Council with regard to its assertion of sovereign immunity. There is no question that the Nooksack Tribe seeks to invoke its sovereign immunity unless it issues an express waiver.

Plaintiffs' attorney argues that the Tribe waived its sovereign immunity by seeking "affirmative relief" in this Court when it moved the Court to strike certain declarations from consideration in this case. Such a ruling by this Court would border on the absurd. Defendants (and indeed, any government or governmental office seeking to defend a claim against it by invoking sovereign immunity) must be able to defend itself from lawsuit without waiving its sovereign immunity. While there is federal law that holds the proposition that a government or governmental official waives the defense of sovereign immunity when it seeks certain forms of affirmative relief, that affirmative relief differs substantially from the relief sought by the Defendants. The Court declines to find a waiver by the Defendants in their responses to the Plaintiffs' suit.

Sovereign immunity serves as a bar to suits against government and governmental officials in order to prevent governments and their officials from constant suit and this immunity applies to tribal governments. *Imperial Granite v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (1991). When governmental officers act outside their official duties, relief under the *Ex Parte Young* line of cases may be available. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). *Ex Parte Young* provides relief to a plaintiff against a governmental actor for prospective, injunctive relief when the acts to be enjoined exceed the authority granted to the governmental official. This is, as the United States Supreme Court has stated, a narrow exception. In both *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 693 (1949) and *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 112 (1984), the Supreme Court held that "at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief is effectively against it." If a governmental official lost his or her sovereign immunity when he or she made a mistake, the Supreme Court held, the exception itself would swallow the rule. A governmental official may lose the cloak of sovereign

immunity for the purposes of injunctive relief, but only when his actions exceed his official duties in a manner that verges on bad faith, not simply by making technical errors of law.

The Nooksack Court of Appeals has relied on *Ex Parte Young*, in part, by noting the reasons why an *Ex Parte Young* theory provides a narrow exception to sovereign immunity protection:

> The Nooksack Tribal Council and its officers need to be able to enact ordinances and conduct business without constantly having to defend themselves against suit. This is one of the fundamental policy reasons behind sovereign immunity. The court cannot sanction a holding that would allow suits against individual officers to proceed simply because an individual officer is named.
>
> *Cline v. Cunanan,* NOO-CIV-02/008 (January 12, 2009), page 7.

The Court finds that, if there is an *Ex Parte Young* exception that applies in the Nooksack Tribal Court system, that exception is a narrow one that only gives rise to prospective, injunctive relief when the governmental officials act well outside the scope of their duties, not simply when an error of law or procedure occurs. To find otherwise would subject the Tribal Council members to the potential for constant suit and the specter of that threat would render the government unable to function. The Court in *Cline* clearly sought to avoid that result and preserve the sovereign immunity of the Tribal Council members.

III. Analysis of the Motion for Preliminary Injunction

With that view of the law, the Court turns to the Plaintiffs' claims and the basis for which they seek injunctive relief. First, the Court notes here that this analysis applies only to the facts as they've been presented at this early stage: this Court specifically finds that fact finding is at its most early stage in these proceedings and the Court can only proceed on the basis of that preliminary information. *It is conceivable that the Court's view of these matters may change as the Plaintiffs develop their case and the factual situation becomes clearer.* At present, the Court has been

presented with multiple declarations from both sides, as well as counsel's presentation of the facts. Though the facts on their face do not seem to differ substantially, it's clear that the parties' view of the meaning of those facts does.

The Nooksack Tribal Constitution establishes eight means by which membership may be conferred. Nooksack Tribal Constitution, Article II, Section 1 (A) through (H)[1]. Article II, Section 2 states that "The Tribal Council shall have the power to enact ordinances in conformity with this constitution, subject to the approval of the Secretary of the Interior, government future membership in the tribe, including adoptions and *loss of membership.*" (Emphasis supplied.) Article II, Section 4 states "Loss of Membership. The tribal council shall, by ordinance, prescribe rules and regulations governing involuntary loss of membership. The reasons for such loss shall be limited exclusively to failure to meet the requirements set forth for membership in this constitution." The Tribal Council acted on its authority delegated by the Constitution, enacting Title 63—Enrollment Ordinance in the Nooksack Tribal Code ("Title 63").

Title 63 provides the procedure by which applicants for enrollment seek enrollment. Title 63 was amended in full in January 2004 and approved by the Secretary of the Interior, as required by the Constitution. As the Court in *Cline* held, the Nooksack Tribal Court has been conferred jurisdiction to act by the Tribal Constitution, which grants the authority to the Tribal Council to create a court that can hear cases within the Constitutional framework laid out in Article VI, Section II(3). However, the Court has not been granted jurisdiction to hear any and all cases arising under Nooksack law. Rather, the Court has been granted jurisdiction to hear cases where the Constitution

[1] Article II, Section 1(H) is under reconsideration by the Nooksack Tribe, who's members have a Secretarial Election scheduled on June 21, 2013 that asks the membership to vote to repeal that section. The Plaintiffs have filed a second Emergency Motion related to the Secretarial Election. The Court has set a scheduling order and a hearing date on that motion.

provides subject matter jurisdiction. An affirmative limitation on subject matter jurisdiction would indicate the Tribal Council's intention to prevent certain matters from being heard in the Nooksack Tribal Court, in much the same way the U.S. Constitution and Congress has limited the matters that may be heard by the federal courts.

Title 63's full amendment in 2004 provides some interesting legislative history that this Court finds instructive on this point. In 1975, Title 63's enactment provided that "The decision of the Council [on enrollment]. . . is final, except that the Tribal Court (Northwest Intertribal Court) shall have exclusive jurisdiction to hear all appeals of enrollment, disenrollment, or blood degree correction decisions." NTC, Title 63, 8.5 Appeals, 1975. In the 2004 amended version that is currently the law of the Nooksack Indian Tribe, the Code states "The Nooksack Tribal Court shall not have subject matter jurisdiction to hear cases under this ordinance. Any reconsideration of Nooksack Tribal Council enrollment decisions are to be made under the procedures set forth in this ordinance." NTC 63.00.003. Title 63 once conferred appellate authority on the Tribal Court for enrollment and disenrollment appeals; in the current version, all subject matter jurisdiction was divested of this Court.

The Court reviews this history to point out that the Tribal Council appears to have reserved its decision making authority on all membership decisions, be they enrollment or disenrollment. When combined with the assertion of its sovereign immunity, the Court finds that it can only act to grant prospective, injunctive relief in this matter should the actions taken by the Defendants clearly and unambiguously violate their official duties in ways more egregious than an error of law. The Plaintiffs argue that such a conclusion renders the Constitution and the Code unenforceable and argued at the hearing on this matter that such a conclusion would end "law and order on the

Nooksack reservation" (sic)[2]. Such hyperbole is unnecessary. The Court here recognizes its limitations as laid out in the Constitution and the Code and concludes that the job of the Court in all instances is, as Title 10 directs, to give meaning to the Tribal Council's "substantive intent" and "legislative goals". The Court does not cede its authority to interpret and give meaning to the Nooksack Tribal Constitution or its Code of Laws. In fact, the Court finds that it must act to do exactly that, even when the result may mean that the Court itself acknowledges where its limitations lie.

Thus, the Court cannot, as the Plaintiffs noted at the outset of the hearing, make decisions in this Court about the validity of the actions of the Tribal Council under Title 63, except under the narrow circumstances when sovereign immunity does not attach to the Tribe or its officials. The Plaintiffs argue that Enrollment Officer Roy Bailey, Chairman Kelly, and the members of the Tribal Council who voted in favor of Resolution 13-02 violated the Constitution and Title 63 and stripped themselves of their official authority and the protections of sovereign immunity when they 1) voted in favor of Resolution 13-02 and 2) caused Notices of Intent to Disenroll be sent to some 300 members of the Tribe and 3) began moving forward on those disenrollments. The Plaintiffs ask the Court to prevent further action on the proposed disenrollments under the *Young* exception while the case in chief moves forward. Based on its preliminary analysis of the facts, the Court cannot find reason to do so.

Title 63, 63.04.001 lays out the procedure by which a member may be disenrolled. "The burden of proof in disenrollment decisions rest with the Tribe. However at no time will staff employed in the Enrollment Department purposely initiate a reason for loss of membership. Any

[2] The Court notes that this statement does not encompass the complexity of this Court's jurisdictional reach as the Nooksack Tribe's territorial lands extends beyond the reservation, which is a small fraction of the lands held by the Tribe.

tribal members requesting loss of membership of another tribal member will need to present written documentation on how the information was obtained that warrants disenrollment." Plaintiffs argue that the Defendants have violated this provision in such a manner as to strip them of their sovereign immunity.

As the Court understands the preliminary facts in this case, Enrollment Officer Roy Bailey processed enrollment applicationw in the normal course of business and determined that certain applicants did not meet the requirements for membership. At a meeting of the Tribal Council, Secretary St. Germain asked why his relatives were not being presented for enrollment and Mr. Bailey stated that they did not appear to meet the requirements. Secretary St. Germain stated, in effect, that if those applicants did not meet enrollment criteria, neither did he. This discussion spurred Chairman Kelly and Mr. Bailey to travel to the Bureau of Indian Affairs to find the documentation that supported the enrollment of Secretary St. Germain and his family members; they did not find the documentation and notified the Tribal Council. This resulted in the passage of Resolution 13-02, which lays out this course of events.

The Plaintiffs appear to argue that Mr. Bailey and Chairman Kelly should have done nothing upon the discovery that 300 members of the Tribe may be erroneously enrolled. The Court does not see that Mr. Bailey "purposely initiated a reason for loss of membership." Rather, Mr. Bailey was asked by Secretary St. Germain why his family members were not presented for membership; Mr. Bailey explained why. The Plaintiffs seem to argue that upon the discovery that certain enrolled members might not meet the Constitutional requirements for membership that neither Mr. Bailey nor the Tribal Council should act. In fact, based upon the Declarations presented to this Court, Mr. Bailey did not act until directed by the Tribal Council, all of whom are members of the Tribe (as is Mr. Bailey). This is not an initiation on behalf of the Enrollment Department or its staff. It is the

Tribal Council engaging in its responsibility to ensure that those who are enrolled are enrolled appropriately.

Under Title 63, the Tribe must prove that those who face loss of membership have been enrolled either from "fraudulent submissions, mistakes in blood degree computations or inadequate research." NTC 63.04.001(B)(1)(a). It is the Tribe's burden to prove a member has been enrolled erroneously, not a tribal member's. The Tribal Council must become involved in disenrollment proceedings because it is its responsibility is to prove the reason for the loss of membership. The second sentence of that provision prohibits the Enrollment Department from acting on its own, which it did not do. Rather, the Enrollment Department acted at the direction of the Tribal Council.

Plaintiffs focus on the line in Title 63 that states that a tribal member must file to challenge the enrollment of another tribal member. Plaintiffs argue that by enacting that portion of Title 63 the Tribal Council divested itself of authority to act. In reading the Constitution's provisions on Loss of Membership with Title 63, this argument makes no sense. The Constitution plainly reserves the authority to determine membership and loss of membership to the Tribal Council. Title 63 further restricts determinations as to loss of membership to the Tribal Council alone. To hold that the Tribal Council could not act in the face of evidence that members may be erroneously enrolled works an absurd reading of the ordinance and requires that the Court ignore the provision in the Constitution that reserves determinations regarding Loss of Membership to the Tribal Council. The Tribe itself, by and through its officers, surely must be able to act when such information comes to them in the normal course of business.

The Constitution and Title 63 reserve to the Tribal Council the authority to determine both enrollment and loss of membership. Title 63 sets out those procedures. Plaintiffs argue that the

Tribal Council failed to follow Title 63, giving rise to the exception to sovereign immunity. The Court does not find that the Defendants have acted outside the procedures set out in Title 63.

Based upon these preliminary facts presented, this Court cannot find that the Defendants acted outside of their scope of their official duties and, as such, cannot find that the Plaintiffs would be likely to prevail on the merits. As a result, the motion for a preliminary injunction is denied.

IT IS SO ORDERED.

DATED this 20th day of May, 2013.

Raquel Montoya-Lewis
Chief Judge, Nooksack Tribal Court

EXHIBIT R

Rickie W. Armstrong

From: Gabe Galanda <gabe@galandabroadman.com>
Sent: Monday, December 30, 2013 8:05 PM
To: Thomas P. Schlosser; Grett Hurley; Rickie W. Armstrong; Charity Bernard
Cc: AB; Joe Sexton; Ryan Dreveskracht
Subject: Roberts v. Kelly Appellate Reply Brief
Attachments: Roberts REPLY BRIEF OF APPELLANTS - Final.pdf

Folks:

Attached please find our reply, which should have arrived to OTA via our clients much earlier today. You have now dodged several emails from us about the status of Christmas support checks, leaving us no choice but to now take this matter up with the Tribal Court. To the three of you at OTA who we have learned were very involved with ruining the holidays for over 300 Indians, shame on you. You and your clients have stooped to an all-time low.

Gabriel S. Galanda
Attorney at Law
Galanda Broadman, PLLC
m: 206.300.7801
gabe@galandabroadman.com

EXHIBIT S

Rickie W. Armstrong

From: Gabe Galanda <gabe@galandabroadman.com>
Sent: Monday, December 09, 2013 2:21 PM
To: Sue Steadle
Cc: anthony@galandabroadman.com; ryan@galandabroadman.com; Grett Hurley; t.schlosser@msaj.com; Rickie W. Armstrong; Joe Sexton
Subject: St. Germain v. Kelly: Complaint, TRO Motion, Roberts Decl.
Attachments: RUDY ST GERMAIN v. KELLY - Roberts Declaration With Exhibits.pdf; RUDY ST GERMAIN v. KELLY - TRO Motion .pdf; RUDY ST GERMAIN v. KELLY - Complaint .pdf

Attached.

These papers are now being filed and will soon be served in person on Grett/Rickie's office. Copies will also be mailed to Grett/Rickie's P.O. Box.

We'll involve you in our emergency scheduling efforts before the Tribal Court.

On a long list of disgusting antics, excluding Indian families from $250 in much-needed Christmas support might be your and your clients' most repulsive act yet.

Gabriel S. Galanda
Attorney at Law
Galanda Broadman, PLLC
m: 206.300.7801
gabe@galandabroadman.com

EXHIBIT T

IN THE NOOKSACK TRIBAL COURT

FOR THE NOOKSACK INDIAN TRIBE

DEMING, WASHINGTON

SONIA LOMELI; TERRY ST. GERMAIN; NORMA ALDREDGE; RAENNA RABANG; ROBLEY CARR, individually on behalf of his minor son, LEE CARR, enrolled members of the Nooksack Indian Tribe, Plaintiffs, vs. ROBERT KELLY, RICK D. GEORGE, AGRIPINA SMITH, BOB SOLOMON, KATHERINE CANETE, LONA JOHNSON, JEWELL JEFFERSON, AND ROY BAILEY Defendants.	Case No.: 2013-CI-CL-001 DECISION AND ORDER DENYING DEFENDANT'S MOTION TO STRIKE IN PART AND GRANTING IN PART

THIS COURT has reviewed the Defendant's *Motion to Strike* and the Plaintiff's *Response in Opposition to Defendant's Motion to Strike.* After reviewing the filings, the relevant authorities, and being fully advised in the premises, the Court issues the following:

DECISION

As the Court noted in its initial hearing on this matter, the Nooksack Tribal Code's Title 10 is frustratingly vague as to the appropriate civil procedure. The Code allows the Court to adopt appropriate rules and also allows the Court and the parties to agree to a particular set of civil procedures. NTC 10.03.040(c). This shortcoming in the Tribal Code cannot be resolved during the pendency of this case. As a result, the Court needs to adopt appropriate rules of civil procedure in order to ensure this case proceeds smoothly. However, in doing so, it notes that the NTC should be consulted first.

The Nooksack Tribal Code's Title 10 states that the purpose of Title 10 is to provide a set of rules that allow the Tribal Court to accurately reflect the "substantive intent" of the Tribal Council in court decisions. NTC 10.01.010. Further, the Code directs that "[t]he court shall not indulge in highly technical or legalistic interpretations of tribal ordinances, regulations and policies when such interpretations would defeat the overall substantive legislative goals of the Tribal Council." NTC 10.01.020. The Court views the purpose and rule construction set out in Title 10 as requiring the Court to make decisions that are clear, adhere to the basic rules of fairness, and avoid a solely technical analysis. As the parties must be aware, the Rules of Civil Procedure, whether federal or state, can require an extremely technical analysis. While the Court has confidence that the parties' attorneys and the Court itself are capable of conducting complex civil procedure analysis, the Court will endeavor to avoid overly technical interpretations as directed by the Code. As such, the purpose and intent of Title 10 becomes critical when addressing the Defendant's *Motion to Strike*.

Given the complexity of this case and the potential for lengthy litigation in this matter, the Court has determined that there are likely to be situations in which the Code fails to provide clear direction and that the Court ought to adopt a clear set of civil procedure rules that all parties are able to use with relative ease. In the *Motion to Strike* and the *Response* both parties make reference to the Federal Rules of Civil Procedure, as well as the Washington Rules of Civil Procedure. The parties rely most heavily on the Federal Rules and the federal law interpreting those rules. Given the Court's and the parties' familiarity with the Federal and Washington rules, either set of Rules of Civil Procedure would be appropriate. It is the Court's determination that given the authorities cited in the *Motion* and *Response* that the rules that should govern these proceedings from this point

forward shall be the Federal Rules of Civil Procedure, *but only when Title 10 fails to provide a clear rule.* NTC 10.05.010(d).

The Defendants have moved the Court to strike 1) Second Declaration of Rudy St. Germain with Exhibits A-F; 2) Declaration of Cathalina Barril with Exhibits A-B; 3) Declaration of Narcisco Cunanan; 4) Third Declaration of Rudy St. Germain; and 5) Declaration of Diantha Doucette with Exhibit A. The Defendants refer to these as the "Unattached Declarations" because they were filed after the Plaintiffs' filed their *Motion for a Temporary Restraining Order* and were filed without being attached to a pleading or otherwise discussed in any pleading.

The Defendants argue that the federal Rules of Civil Procedure contemplate the filing of declarations only when attached to pleadings. The Plaintiffs, however, argue filing these Declarations simply adds to the record in this case and that they may rely on these Declarations in their reply to the Plaintiff's Answer. While the parties each make persuasive arguments using the federal and state rules, the Court finds it need not apply the federal RCP in this case and can instead rely upon Title 10.

Title 10 states that "a copy of every complaint, summons, warrant, motion, written argument, agreement, order or *other document* which records action taken by the parties and by the court during Tribal Court shall be filed with the clerk." NTC 10.05.040(a). The Court interprets this section to direct the parties to file copies of all relevant actions taken with the court during the pendency of a civil case. The Code appears to contemplate the filing of more than simple pleadings and do not limit document filing in as restrictive a manner as the federal Rules appear to do.

The Court further notes that these Declarations may also fall under the Rules of Evidence. The Nooksack Rules of Evidence state that "the purpose of these rules of evidence is to ensure that

the Tribal Court is able to determine the truth of a matter with a minimum of delay, confusion and uncertainty." NTC 10.06.010. Further, the Code states that neither state or federal rules of evidence shall apply in the Tribal Court, absent an agreement from the parties and the Court. NTC 10.06.020(a). The Rules of Evidence in the Code seem to lean in favor of the admission of evidence rather than the limiting of evidence. While the parties and the Court need to discuss how to apply these Rules of Evidence and whether to use the Federal or State rules for the purpose of hearings as we move forward in this litigation, the parties and the Court have not done so to date and, therefore, the Nooksack Rules apply.

The Court fails to see injury to the Defendants with the admission of the Declarations. Defendants argue that they have not been afforded appropriate notice as to the meaning of the Declarations. Given the point at which this case sits in litigation, this is a weak argument. The *Temporary Restraining Order* motion and hearing require the Plaintiffs to show irreparable harm should the Court not enjoin the Tribe and demonstrate the likelihood that they would prevail on the merits. This, of course, requires the Plaintiffs to develop a significant body of evidence prior to trial, in an effort to meet their burden of proof. As they do so, the Court expects that the Plaintiffs will develop additional evidence in support of their claims and that this will require the taking of Declarations and, ultimately, the production of witnesses. The Defendants will have ample opportunity to develop their defense and respond to these Declarations and testimony as the case develops. The Court fails to see that damage accrues to the Defendants' case by the admission of most of these Declarations.

Therefore, the Court finds that the Nooksack Rules of Civil Procedure and Evidence allow for the inclusion of the Declarations of Rudy St. Germain, Cathalina Barril, and Narcisco Cunanan.

However, the Declaration of Diantha Doucette and Exhibit A to that Declaration require some additional analysis.

The Defendants' Motion to Strike Exhibit A is based upon their assertion that Exhibit A is protected by the attorney client privilege. The Nooksack Rules require Advocates to adhere to attorney client privilege in the same manner as "professional attorneys,' thereby noting the importance of this privilege. NTC 10.02.020. This privilege is foundational to the attorney-client relationship and the Defendants' attorneys are required to uphold it in proceedings in this Court as they would be in any other court of law.

The Defendants assert that Exhibit A, attached to the Declaration of Diantha Doucette, was prepared for the purpose of providing legal advice to the Nooksack Enrollment Department. As both parties note, the attorney client privilege requires that legal advice be sought by the client, given by the attorney, with the expectation of confidentiality on the part of the client. Only the client may waive the privilege. *See Soter v. Cowles Publishing Co.*, 162 Wash.2d 716 (2007). Exhibit A easily falls within this definition. The letter was prepared by an attorney for an organizational client. The client, the Nooksack Tribe has not only not waived that privilege, they are asserting it here. The Plaintiffs argue that the privilege has been waived by sharing the document to a third party. However, there is no evidence whatsoever that disclosure to a third party occurred. The analysis need go no further. Exhibit A is protected by the attorney-client privilege and may not be used by the Plaintiffs in this case. The Declaration of Ms. Doucette is stricken in the sections in which it refers to this letter, items 3, 4, and 5. Items 1 and 2 are not stricken.

The Defendants's Motion to Strike is denied as to the Declarations of Rudy St. Germain, Cathalina Barril, and Narcisco Cunanan. The Motion to Strike is granted AS to the

Declaration of Diantha Doucette Items 3-5, with items 1 and 2 not stricken. The Motion to Strike as to Exhibit A to Diantha Doucette's Declaration is granted and Exhibit A stricken.

IT IS SO ORDERED.

DATED this _23____ day of _April_____, 2013__.

Raquel Montoya-Lewis
Chief Judge, Nooksack Tribal Court

EXHIBIT U

Rickie W. Armstrong

From:	Gabe Galanda <gabe@galandabroadman.com>
Sent:	Wednesday, December 11, 2013 2:18 PM
To:	Grett Hurley
Cc:	Sue Steadle; anthony@galandabroadman.com; ryan@galandabroadman.com; t.schlosser@msaj.com; Rickie W. Armstrong; Joe Sexton; Charity Bernard
Subject:	Re: St. Germain v. Kelly: TRO St. Germain Decl.
Attachments:	RUDY ST GERMAIN v. KELLY - First Declaration of Rudy St. Germain.pdf

Grett:

I tip my cap to you on a powerful oral argument this morning.

The service of process and motion notice advocacy was quite strong. But your line, and I'm paraphrasing your eloquence, that "there wasn't even enough time to have Tom argue the TRO motion," was absolutely masterful. Bravo.

Attached is a declaration being filed with the Court as I write. And don't worry, I've copied Charity, it'll be mailed to your correct P.O. Box, we'll follow the sham procedures you wrote into Title 10 in due course; etc., etc., etc.

Gabriel S. Galanda
Attorney at Law
Galanda Broadman, PLLC
m: 206.300.7801
gabe@galandabroadman.com

On Mon, Dec 9, 2013 at 2:30 PM, Grett Hurley <GHurley@nooksack-nsn.gov> wrote:

> Please include Charity Bernard in the e-mails, Sue Steadle did send you papers once but she is not the main person and does not need to be included. Thank you.
>
> Grett

From: Gabe Galanda [mailto:gabe@galandabroadman.com]
Sent: Monday, December 09, 2013 2:21 PM
To: Sue Steadle
Cc: anthony@galandabroadman.com; ryan@galandabroadman.com; Grett Hurley; t.schlosser@msaj.com; Rickie W. Armstrong; Joe Sexton
Subject: St. Germain v. Kelly: Complaint, TRO Motion, Roberts Decl.

Attached.

These papers are now being filed and will soon be served in person on Grett/Rickie's office. Copies will also be mailed to Grett/Rickie's P.O. Box.

We'll involve you in our emergency scheduling efforts before the Tribal Court.

On a long list of disgusting antics, excluding Indian families from $250 in much-needed Christmas support might be your and your clients' most repulsive act yet.

Gabriel S. Galanda

Attorney at Law

Galanda Broadman, PLLC

m: 206.300.7801

gabe@galandabroadman.com

EXHIBIT V

GALANDA BROADMAN
An Indian Country Law Firm

VIA EMAIL AND U.S. MAIL

December 13, 2013

Hon. Raquel Montoya Lewis
c/o Tribal Court Clerk
Nooksack Tribal Court
P.O. Box 157
Deming, WA 98244

Re: *St.Germain v. Kelly*, No. 2013-CI-CL-005

Dear Judge Montoya-Lewis:

We write to inform the Court that Plaintiffs have complied with N.T.C. § 10.05.050(e) and hereby request a "full hearing" on our Temporary Restraining Order ("TRO") motion for December 17, 2013, or as soon as possible.

While we disagree with the Court's holding that the statute applies to emergency TRO motions,[1] per N.T.C. § 10.05.050(e) a movant has "six court days" from initial service of the moving papers to have his or her motion considered. The Motion for TRO in this matter was personally served on Defendants on December 9, making December 17 the earliest that said "full hearing" can be held.

A declaration that "reasonable, good faith efforts to coordinate with the opposing party or his advocate" is attached to this correspondence. Defendants state that they are available only at 12:30 on Tuesday, December 18. Although we do not object to holding a hearing on this date, given the Court's stated interest in hearing the matter quickly and the Plaintiffs' need to resolve the matter before any unlawful acts occur, we would ask the Court inquire into exactly why Defendants are conveniently unavailable at any other times — particularly given the uncertainty of the factual posture that underlies the action (i.e. whether Defendants will refrain from taking acts in furtherance of the portion Resolution No. 13-171 to which we have objected, until the Court can determine its legality).

[1] Because of the urgent and temporary nature of temporary restraining orders, as opposed to general civil motions addressed by N.T.C. § 10.05.050(e), notice is generally not even required; let alone 6-days of notice that would render the issuance of a TRO essentially useless. *See* Charles A. Wright, et al., *Temporary Restraining Orders—In General*, 11A Fed. Prac. & Proc. Civ. § 2951 (2d ed. 2013).

Also attached are declarations of service that attest to "initial service" of the lawsuit (and, as a courtesy, the TRO papers), which have been effected "upon the Chairman and the Office of Tribal Attorney" by both certified mail and hand delivery.

Thank you in advance for your respectful consideration of our concerns on behalf of our clients.

Ryan D. Dreveskracht
Attorney at Law
ryan@galandabroadman.com

cc: Clients
Thomas Schlosser, Esq.
Grett Hurley, Esq.
Rickie Armstrong, Esq.

IN THE NOOKSACK TRIBAL COURT

RUDY ST. GERMAIN, et al.,	NO. 2013-CI-CL-005
Plaintiffs,	DECLARATION OF SERVICE
v.	
ROBERT KELLY, et al.,	
Defendants.	

I, Wilma K. Rabang, declare as follows:

I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

On December 12, 2013, I caused the following document(s) to be hand delivered to Chairman Robert Kelly, at the address listed below:

- Summons, to each named defendant
- Complaint for Prospective Equitable Relief
- Motion for Temporary Restraining Order
- Declaration of Rudy St. Germain
- Declaration of Nooksack Tribal Council Woman Michelle Joan Roberts

Chairman Robert Kelly
Nooksack Tribal Council

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Nooksack Indian Tribe
4979 Mt. Baker Hwy, Ste. G
Deming, WA 98244

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

DATED this 12th day of December, 2013.

Wilma K. Rabang

Wilma K. Rabang

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

IN THE NOOKSACK TRIBAL COURT

RUDY ST. GERMAIN, et al.,	NO. 2013-CI-CL-005
Plaintiffs,	DECLARATION OF SERVICE
v.	
ROBERT KELLY, et al.,	
Defendants.	

I, Molly A. Jones, declare as follows:

I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Ave. NE, Suite L1, Seattle, WA 98115.

On December 12, 2013, I caused the following document(s) to be delivered via Certified Mail, Return Receipt Requested on all named Defendants at the addresses listed on the Summons:

- Summons
- Complaint for Prospective Equitable Relief

I also caused the following documents to be served on Nooksack Tribal Counsel and Chairman Robert Kelly, at the addresses listed below via Certified Mail, Return Receipt Requested:

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

- Summons, to each named defendant
- Complaint for Prospective Equitable Relief
- Motion for Temporary Restraining Order
- Declaration of Rudy St. Germain
- Declaration of Nooksack Tribal Council Woman Michelle Joan Roberts

Grett Hurley
Rickie Armstrong
Tribal Attorney
Office of Tribal Attorney
Nooksack Indian Tribe
5047 Mt. Baker Hwy
P.O. Box 157
Deming, WA 98244

Chairman Robert Kelly
Nooksack Tribal Council
Nooksack Indian Tribe
4979 Mt. Baker Hwy, Ste. G
Deming, WA 98244

Thomas Schlosser — Via Email
Morisset, Schlosser, Jozwiak
& Somerville
1115 Norton Building
801 Second Avenue
Seattle, WA 98104-1509

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

DATED this 12th day of December, 2013.

MOLLY A. JONES

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

IN THE NOOKSACK TRIBAL COURT

RUDY ST. GERMAIN, et al., Plaintiffs, v. ROBERT KELLY, et al., Defendants.	NO. 2013-CI-CL-005 DECLARATION OF RYAN D. DREVESKRACHT

I, Ryan D. Dreveskracht, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Ave. NE, Suite L1, Seattle, WA 98115.

3. On December 13, 2013, I made reasonable good faith efforts to coordinate a full hearing with opposing counsel. Attached to this Declaration, as **Exhibit A**, is a true and correct copy of this correspondence.

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

DATED this 13th day of December, 2013.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

RYAN D. DREVEKSRACHT

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Exhibit A

Gmail by Google

Ryan Dreveskracht <ryan@galandabroadman.com>

Second TRO Hearing in St.Germain v. Kelly

Grett Hurley <GHurley@nooksack-nsn.gov> Fri, Dec 13, 2013 at 9:04 AM
To: Ryan Dreveskracht <ryan@galandabroadman.com>
Cc: Tom Schlosser <t.schlosser@msaj.com>, "Rickie W. Armstrong" <rarmstrong@nooksack-nsn.gov>, Charity Bernard <cbernard@nooksack-nsn.gov>, Gabe Galanda <gabe@galandabroadman.com>, Anthony Broadman <anthony@galandabroadman.com>, Joe Sexton <joe@galandabroadman.com>

Ryan,

I have reviewed my email of 12/12/13 (2:34pm) to you and I thought it explained our availability for next week and what we would agree to. Paragraph 2 states that 12/20 complies with the six day rule if you serve the Chairman and is the best date for us, but the Court clerk said the Court is closed on that day. Paragraph 4 states that because the Court has expressed a desired to resolve this prior to the holiday closure my client will agree to a date less than six court days prior to the hearing but only if that date and time are 12/18 at 12:30. Moreover, paragraph 4 says that we are not available any other times prior to the 20th. Also the waivers only apply to that schedule.

Here is an illustration of Tribe's availability for next week described in the e-mail:

12/16:	Not available
12/17:	Not available
12/18:	Available 12:30
12/19:	Not available
12/20:	Available after 10:30

This should answer your question about our availability for next week and in particular the 17th. If you wish to propose another week we will take a look at other dates.

In reference to your statement regarding Resolution No. 13-171, your clients have filed pleadings in the Nooksack Tribal Court related to this resolution and we will engage your arguments in the court not in e-mails coordinating a hearing schedule.

Thank you.

Regards,

Grett

From: Ryan Dreveskracht [mailto:ryan@galandabroadman.com]
Sent: Thursday, December 12, 2013 5:56 PM
To: Grett Hurley
Cc: Tom Schlosser; Rickie W. Armstrong; Charity Bernard; Gabe Galanda; Anthony Broadman; Joe Sexton
Subject: Re: Second TRO Hearing in St.Germain v. Kelly

Grett,

I am not seeing your answer below; could you please indulge me? Your service objections aside, will anyone from your office be available at any time on December 17?

Also, again, will your clients agree to refrain from taking acts in furtherance of the portion Resolution No. 13-171 to which we have objected, until the Court can determine its legality? I am not seeing your answer to this question below either.

Thanks,

On Thu, Dec 12, 2013 at 4:51 PM, Grett Hurley <GHurley@nooksack-nsn.gov> wrote:

Ryan,

You are correct I meant 10.050.040(d).

My prior e-mail explains our availability for a hearing for next week. The waivers and requirements in my prior e-mail are only applicable to that date and time and we do not waive for any other time. If you wish to propose another week we can take a look. Thank you.

Regards,

Grett

From: Ryan Dreveskracht [mailto:ryan@galandabroadman.com]
Sent: Thursday, December 12, 2013 3:54 PM
To: Grett Hurley
Cc: Tom Schlosser; Rickie W. Armstrong; Charity Bernard; Gabe Galanda; Anthony Broadman; Joe Sexton

Subject: Re: Second TRO Hearing in St.Germain v. Kelly

Grett,

Title 10.05.040(e) does not discuss "service by certified mail return receipt upon the Chairman and OTA." It pertains to preliminary hearings. Assuming that you meant Title 10.05.040(d), that portion of the code discusses "initial process" only. The Complaint and summonses have already been certified mailed to your office and to the Chairman, per Title 10.05.040(d). Proper service will have been obtained, without a doubt, in the normal course, by December 17th. At any rate, since you and the Chairman have graciously waived the "certified mail return receipt" requirement, initial service will be completed today.

Your position that "all documents" need to be "served and filed six court days prior to the hearing" is found nowhere in the code. Title 10.05.050 refers only to "civil motion documents." Your office received our "civil motion documents" in person on December 9. Title 10.05.040(d) has nothing to do with the TRO motion.

Again, please let us know by close of business today if and what time someone from your office will be available for a hearing on the 17th, so that we might inform the Court. Also, please let us know if your clients agree to refrain from taking acts in furtherance of the portion Resolution No. 13-171 to which we have objected, until the Court can determine its legality.

Thanks,

On Thu, Dec 12, 2013 at 2:34 PM, Grett Hurley <GHurley@nooksack-nsn.gov> wrote:

Ryan,

Thank you for your 10.05.050(e)(1) coordinating effort. Title 10.05.050(e) requires the "moving party shall serve and file all civil motion documents no later than six court days before the date the party wishes the motion to be considered." As of yesterday the Chairman had not been served as is required by Title 10.05.040(e) which requires service by certified mail return receipt upon the Chairman and OTA. The OTA was also not served in that method either. Therefore, all civil motion documents were not served and the date you are requesting of December 17, 2013 is not consistent with all documents being served and filed six court days prior to the hearing. However, I think we can come to an agreement in this scheduling as discussed below.

The Court stated that a hearing will only be held after proper service and everyone has complied with 10.05.050(e). If those requirements are met today 12/12, the soonest a hearing could be held under Title 10 is December 20, 2012 and that happens to be the best date for us. Opposition briefing would be due by noon on the 18th. Unfortunately, the Court clerk informed me that Court will be closed on the 20th.

I have spoken with the Chairman and he has agreed to accept service of process by delivery to the Tribal Council offices on Mt. Baker Hwy instead of service by certified mail return receipt. The OTA will also waive

the service requirement of certified mail return receipt. This waiver of the service of process requirement only applies only to this hearing. Service must be accomplished today. The Tribal Council offices will be open till 4:30pm.

Because the Court has expressed a desire to resolve this prior to their closure for the holiday, my client will also agree to a date less than six court days prior to the hearing, but only if the date and time are December 18 at 12:30 pm. We are not available other times prior to the 20th. The Court Clerk has informed me that this is available. Also we will expect that there will be no objection to the Tribe filing its opposition to the TRO by 12:00 noon of the day prior to the scheduled hearing. This waiver of the requirements of Title 10 only applies to this hearing.

Regards,

Grett

Grett L. Hurley

Tribal Attorney

Office of Tribal Attorney

Nooksack Indian Tribe

5047 Mt. Baker Hwy

P.O. Box 63

Deming, WA 98244

Phone: 360-592 4158 Ext. 1012

Fax: 360-592-2227

attached to it by any unintended recipient is unauthorized, strictly prohibited by the sender, and may be unlawful.

IRS CIRCULAR 230 DISCLOSURE: The views expressed herein or in any attachments hereto are not intended to constitute a "reliance opinion" under applicable treasury regulations, and accordingly are not intended or written to be used, and may not be used or relied upon, for the purposes of (a) avoiding tax-related penalties that may be imposed by the IRS or (b) promoting, marketing or recommending to another party any tax-related matters addressed herein.

From: Ryan Dreveskracht [mailto:ryan@galandabroadman.com]
Sent: Thursday, December 12, 2013 10:47 AM
To: Grett Hurley; Tom Schlosser; Rickie W. Armstrong; Charity Bernard
Cc: Gabe Galanda; Anthony Broadman; Joe Sexton
Subject: Second TRO Hearing in St.Germain v. Kelly

Grett,

Per the Court's order this AM, we intend to schedule a "full hearing" on our TRO motion for Tuesday, December 17. While we disagree that the statute applies to emergency TRO motions, per N.T.C. § 10.05.050(e) a movant has "six court days" from initial service of the moving papers to have his or her motion considered.

The Motion for TRO was personally served on your office on December 9, making December 17 the earliest that said "full hearing" can be held. The Court indicated quite strongly its desire to hold the hearing as soon as possible, so we expect that it will be amenable to having this matter heard on that date as well. Please let us know if someone from your office will be available on that date as well.

In the interim, we would simply request that your clients refrain from taking acts in furtherance of the portion Resolution No. 13-171 to which we have objected, until the Court can determine its legality. We assume that this matter can be resolved by December 18, at the latest, which would give your clients plenty of time to issue Christmas Support checks before the Christmas Holliday.

Thank you,

Ryan D. Dreveskracht
Attorney at Law
Galanda Broadman, PLLC
8606 35th Avenue NE, Ste. L1
P.O. Box 15146
Seattle, WA 98115
m: 206.909.3842
f: 206.299.7690
ryan@galandabroadman.com
www.galandabroadman.com
GALANDA BROADMAN
An Indian Country Law Firm

Ryan D. Dreveskracht
Attorney at Law
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CONFIDENTIAL ATTORNEY WORK PRODUCT/ATTORNEY-CLIENT PRIVILEGED COMMUNICATION
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****

EXHIBIT W

Rickie W. Armstrong

From:	Ryan Dreveskracht <ryan@galandabroadman.com>
Sent:	Tuesday, December 17, 2013 12:46 PM
To:	Grett Hurley
Cc:	Tom Schlosser; Rickie W. Armstrong; Charity Bernard
Subject:	Re: Second TRO Hearing in St.Germain v. Kelly
Attachments:	RUDY ST GERMAIN v. KELLY - BRIEF IN SUPPORT OF TEMPORARY RESTRAINING ORDER RELIEF.pdf

Grett,

Attached is a digital courtesy copy of the brief that was filed with the Tribal Court and personally served on your office today.

Thanks,

On Fri, Dec 13, 2013 at 9:04 AM, Grett Hurley <GHurley@nooksack-nsn.gov> wrote:

> Ryan,
>
> I have reviewed my email of 12/12/13 (2:34pm) to you and I thought it explained our availability for next week and what we would agree to. Paragraph 2 states that 12/20 complies with the six day rule if you serve the Chairman and is the best date for us, but the Court clerk said the Court is closed on that day. Paragraph 4 states that because the Court has expressed a desired to resolve this prior to the holiday closure my client will agree to a date less than six court days prior to the hearing but only if that date and time are 12/18 at 12:30. Moreover, paragraph 4 says that we are not available any other times prior to the 20th. Also the waivers only apply to that schedule.
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This should answer your question about our availability for next week and in particular the 17th. If you wish to propose another week we will take a look at other dates.

In reference to your statement regarding Resolution No. 13-171, your clients have filed pleadings in the Nooksack Tribal Court related to this resolution and we will engage your arguments in the court not in e-mails coordinating a hearing schedule.

Thank you.

Regards,

Grett

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Regards,

Grett

Grett L. Hurley

Tribal Attorney

Office of Tribal Attorney

Nooksack Indian Tribe

5047 Mt. Baker Hwy

P.O. Box 63

Deming, WA 98244

Phone: 360-592 4158 Ext. 1012

Fax: 360-592-2227

From: Ryan Dreveskracht [mailto:ryan@galandabroadman.com]
Sent: Thursday, December 12, 2013 10:47 AM
To: Grett Hurley; Tom Schlosser; Rickie W. Armstrong; Charity Bernard
Cc: Gabe Galanda; Anthony Broadman; Joe Sexton
Subject: Second TRO Hearing in St.Germain v. Kelly

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Thank you,

--

Ryan D. Dreveskracht
Attorney at Law
Galanda Broadman, PLLC

8606 35th Avenue NE, Ste. L1
P.O. Box 15146
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GALANDA BROADMAN
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Ryan D. Dreveskracht
Attorney at Law
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Ryan D. Dreveskracht
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f: 206.299.7690
ryan@galandabroadman.com
www.galandabroadman.com
GALANDA BROADMAN
An Indian Country Law Firm

EXHIBIT X

Rickie W. Armstrong

From: Raquel Montoya-Lewis
Sent: Tuesday, August 12, 2014 5:05 PM
To: Gabe Galanda
Cc: Grett Hurley; Rickie W. Armstrong; Ryan Dreveskracht; Deanna Francis; Betty Leathers; Charity Bernard; AB
Subject: RE: FW: 2014-CI-CL-006 (Adams v. Kelly) Notice of Appeal

Dear Mr. Galanda,

Thanks for your thorough response. At this point, we do not have an appeal filed in this case. While we see that you provided copies to the OTA, none were filed with the Tribal Court and we have done a very thorough review of all of our systems to confirm that. Our files end at the filing of my last order in this case, at the end of June. I checked with the Court of Appeals to be sure they didn't have something and they do not.

Thank you,

Judge Montoya-Lewis

From: Gabe Galanda [gabe@galandabroadman.com]
Sent: Tuesday, August 12, 2014 2:54 PM
To: Raquel Montoya-Lewis
Cc: Grett Hurley; Rickie W. Armstrong; Ryan Dreveskracht; Deanna Francis; Betty Leathers; Charity Bernard; AB
Subject: Re: FW: 2014-CI-CL-006 (Adams v. Kelly) Notice of Appeal

Judge Montoya-Lewis:

We are glad that OTA inquired of the Court because we, too, have been wondering why the Appeals Court has not yet issued a briefing schedule in this latest appeal, given the speed with which the Panel has done so previously.

In addition to the Declaration of Service subjoined to the Notice of Appeal, which OTA provided the Court, the two attachments are the only additional information we can offer the Court in this regard.

We have every reason to believe that the Notice of Appeal was mailed to the Court, as with the many prior trial court and appellate court filings in this litigation over the last 17 months, but we have no proof of that mailing.

While we have prepared and filed Declarations of Service for all of the trial or appellate court papers that we have served in this litigation, we have not created or filed proof that those same papers have been filed.

In any event, we cannot and will not attribute any error or oversight to the Tribal Court Clerk, as her record of handling the parties' countless filings in this litigation, has been impeccable, including her consistent provision to our office of a conformed copy of the cover sheet to each of our trial and appellate court filings.

As for the appellate filing fee, I am confident that we did not provide any appellate filing fee, per the attached email and our assumption that the Court's filing fee order pertained only to trial court filings.

Indeed, having not heard anything from the Court or Appeals Court in reply to that email inquiry, we did not previously pay any filing fee in the interlocutory appeal previously filed in this same matter.

To the extent a fee is in fact required for Nooksack appellate filings, we will immediately pay the fee (or fees, if one was previously required too), and otherwise cure any deficiency in our appeal by any means the Court sees fit.

If accepted for appeal, we could propose to the Panel, and hereby propose to Appellees, that we cede some of the time typically allowed for the filing of our appeal brief in chief, to minimize any delay to the appellate proceedings.

Please let us know should the Court need anything else in this regard. Thank you.

Gabriel S. Galanda
Attorney at Law
Galanda Broadman, PLLC
m: 206.300.7801
gabe@galandabroadman.com

On Tue, Aug 12, 2014 at 11:23 AM, Raquel Montoya-Lewis <rmontoya-lewis@nooksack-nsn.gov> wrote:

> Dear Counsel:
>
> Yesterday, the Office of the Tribal Attorney asked the Court Clerk about this appeal (Adams II, see attached file from the OTA). Betty is out of the office and so Deanna followed up. We find NO record of this appeal being filed with the Court. We checked with Accounting and they have no record of the appeal fee being paid. NICS also has no record of having received the appeal from the Tribal Court.
>
> Here is what I need from you. 1) Mr. Galanda, if your office has a copy of the Notice of Appeal that is stamped ³Received² by this Court with either Betty or Deanna¹s signature, please scan and email it to me immediately so that I can ensure a file gets created and sent to the COA. This applies to the appeals fee, as Accounting always provides a receipt that we copy and place in the file. If you have no record of the appeal actually being filed with this Court, please let me know that as well. 2) OTA: I assume what you sent us that is attached is all you have, but if you have a copy that¹s file stamped by the Court by some odd quirk, please also let me know as soon as possible. If the error is the Tribal Court¹s, we will file a declaration with the Court of Appeals and ask that they expedite the appeal.

Thank you,

--
Raquel Montoya-Lewis, J.D., M.S.W.

Chief Judge, Nooksack Indian Tribe

EXHIBIT Y

IN THE NOOKSACK TRIBAL COURT OF APPEALS
NOOKSACK INDIAN TRIBE
DEMING, WASHINGTON

FRANCINE ADAMS, et al., individually and on behalf of their minor children, enrolled members of the Nooksack Indian Tribe, Plaintiffs/Appellants, v. **ROBERT KELLY, Chairman of the Nooksack Tribal Council, et al.** Defendants/Appellees.	NO. 2014-CI-CL-007 OPINION RECEIVED NOOKSACK COURT CLERK NOV 13 2014 FILED BY

Before: Eric Nielsen, Chief Judge; Douglas Nash, Associate Judge; Mark W. Pouley, Associate Judge.

Appearances: Gabriel S. Galanda, Anthony S. Broadman and Ryan D. Drevekracht of Galanda Broadman PLLC, for Appellants.
Thomas P. Schlosser and Rebecca JCH Jackson of Morisset, Schlosser, Jozwiak & Somerville; and Grett Hurley and Rickie Armstrong of the Nooksack Indian Tribe Office of Tribal Attorney, for Appellees.

This matter comes before this Court pursuant to a Notice of Appeal filed on August 22, 2014. Appellants sought to appeal separate orders of the Nooksack Tribal Court. First, Appellants sought to appeal a February 7, 2014 order denying their request that the court enjoin a majority of the Tribal Council from enforcing two resolutions removing two council members from office. Second, Appellants sought to appeal a June 26, 2014 order dismissing that claim and the additional claim that a "base enrollee" provision in the Tribe's enrollment ordinance violates the Nooksack Constitution.

Appellants mailed counsel for Appellees with a notice of appeal from the above orders, which counsel received on July 7, 2014. On August 12, 2014, counsel for the Appellees inquired with the trial court about a briefing schedule. The trial court discovered it did not receive any notice of appeal from the February 7 and June 26 orders or the required filing fee, and the court so informed the parties. On August 18, 2014, Appellants filed a motion requesting the trial court extend time for leave to file an appeal from the two orders. On August 19, 2014 the trial court denied the request. Appellants timely appeal that order through their August 22 Notice of Appeal.

The only order subject to appeal is the trial court's August 19 order denying an extension of time to file the earlier appeal, and the sole issue on appeal is whether the trial court erred in denying Appellants' request to extend time to file that notice of appeal. Assuming the trial court has the authority to grant an extension of time to file a notice of appeal, we hold that it did not abuse its discretion in denying Appellants' motion. We further hold that assuming this Court has the inherent authority to extend the time for filing a notice of appeal, based on the record we find Appellants fail to show good cause why an extension should be granted.

Under Nooksack Tribal Code (NTC) 80.03.010, an aggrieved party may seek appellate review of a final order or judgment. To initiate an appeal a party must file a Notice of Appeal within 14 days from the trial court's decision and serve the opposing party with the notice, and must pay the filing fee unless waived by the Chief Judge of the Court of Appeals. NTC 80.04.010, 80.04.020 and 80.04.040. The Chief Judge of the Court of Appeals "shall" accept the appeal on behalf of the Court of Appeals provided there is compliance with NTC 80.04.010 and 80.04.040. NTC 80.05.010 (a).

Under NTC 10.05.050(d), the trial court may allow the extension of any time limit so long as the right to a speedy trial in a criminal case is not denied. We hold the trial court's decision to grant or deny a motion to extend time under this provision is reviewed under the abuse of discretion standard. Under the abuse of discretion standard of review, we will reverse the trial court only if we conclude that no reasonable person could agree with the trial court's ruling. See, *Hoopa Valley Housing Authority v. Doolittle*, 7 NICS App. 45, 47 (Hoopa Valley Tribal Ct. App. 2005) (abuse of discretion standard). The court abuses its discretion under the "no reasonable person" standard if it commits "(1) a clear error of judgment in its conclusions based on the weight of the relevant factors, (2) applied the wrong law or (3) its decision rested on clearly erroneous findings of material fact." *Doolittle*, at 47 (citing *United States v. Washington*, 3954 F.3d 1152, 1157 (9th Cir. 2005)).

The record shows that on July 2, 2014, an employee at Appellants' counsel's firm prepared a declaration that she mailed the notice of appeal to the Tribe's Chairman and counsel. She subsequently declared she mailed the notice of appeal from the court's June 26, 2014 order to the court on July 2, 2014 as well. It is undisputed, however, the court never received the notice of appeal. Appellants did not provide any independent evidence the notice of appeal was mailed to the court, or evidence that the court received the notice of appeal. Furthermore, the trial court found Appellants did not file the required filing fee, which is also undisputed.

It was Appellants' obligation to file a timely notice of appeal and by choosing to send the notice by mail, they assumed the risk that for whatever reasons it would not be delivered. Although Appellants' counsel's employee may have mailed or believed she mailed the notice of appeal to the court, it is undisputed the court never received it. Also, Appellants chose not to request the court acknowledge receipt of the notice by letter, file stamp or email, nor did they inquire by email or phone whether the court received the notice. If they had done so they would have had evidence the court did receive the notice or they would have known it did not and presumably could have timely filed another notice. Assuming the trial court even has the

authority to extend time to file the notice of appeal[1], on this record its denial is not an abuse of discretion because there was no clear error of judgment, the court did not apply the wrong law, and its decision did not rest on clearly erroneous findings of material fact.

Moreover, assuming this Court has the inherent authority to extend time to file a notice of appeal[2], based on the record and for the reasons articulated by the trial court we decline to do so. In addition, it is undisputed Appellants never paid the filing fee and never requested this Court's Chief Judge waive the fee. On that basis alone, dismissal of Appellants' appeal from the February 7 and June 26 orders would be warranted.

We hold the trial court did not abuse its discretion in denying Appellants' request to extend the time to file the notice of appeal from the February 7, 2014 and June 26, 2014 orders. We also hold that Appellants' have failed to show why this Court should grant the extension.

The trial court's August 19, 2014 order is affirmed. Appellants failed to timely appeal from the trial court's February 7 and June 26 orders

It is so ordered, this 12 day of November, 2014, for the Court:

Douglas Nash, Associate Judge,
Mark W. Pouley, Associate Judge,

Eric Nielsen, Chief Judge.

[1] We do not decide in this case whether the trial court has that authority.
[2] We note the code does not specifically address this Court's authority to extend time to file a notice of appeal and we do not decide whether this Court has the inherent authority to do so. We only find that even if this Court has that authority, on this record Appellants have failed to make any showing that convinces us there is good cause to extend time to file the notice of appeal or that in the interest of justice an extension is appropriate.

EXHIBIT Z

rec. via mail service

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

RUDY ST. GERMAIN AND MICHELLE ROBERTS, Appellants,	)	Pre-Docketing Notice and Order for Appellants to Show Cause
v.	)	
	)	Docket No. IBIA _____
NORTHWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	September 30, 2013

On September 27, 2013, the Interior Board of Indian Appeals (Board) received a notice of appeal from Rudy St. Germain and Michelle Roberts (Appellants), through Gabriel S. Galanda, Esq. of Galanda Broadman, PLLC. The notice of appeal was enclosed as an exhibit to a Statement of Reasons that Appellants filed with the Board to support the appeal.[1] Appellants seek review of an August 2, 2013, decision (Decision) of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), rejecting a challenge by Appellants and other individuals to a June 21, 2013, Secretarial election for a proposed constitutional amendment for the Nooksack Indian Tribe of Washington (Tribe).

Procedural regulations governing administrative appeals to the Board are found in 43 Code of Federal Regulations (C.F.R.) Part 4. A copy of these regulations is enclosed for non-Federal parties.

Order for Appellants to Show Cause

As a threshold matter, it appears that the appeal is untimely, and thus the Board lacks jurisdiction. A notice of appeal from a decision of a BIA regional director must be filed with the Board "within 30 days after receipt by the appellant of the decision from which the appeal is taken." 43 C.F.R. § 4.332(a). The 30-day deadline for filing an appeal is jurisdictional. 43 C.F.R. § 4.332(a). Untimely appeals must be dismissed. *Id.*

[1] The notice of appeal is a copy, not the original.

In the present case, the Decision included accurate instructions for filing an appeal with the Board. *See* Decision at 6; 25 C.F.R. § 2.7. Appellants' notice of appeal is dated August 23, 2013, indicating that Appellants received the Decision no later than that date. The notice of appeal received by the Board was filed on September 25, 2013, as shown by the postmark on the envelope in which the Statement of Reasons, and the enclosed copy of the notice of appeal, were mailed to the Board by Appellants. *See* 43 C.F.R. 4.310(a)(1) (date of filing). Although the notice of appeal identifies the Board on its first page as the forum for which the appeal is intended, the certificate of service and copies of certified mail receipts do not indicate that the notice of appeal was mailed to the Board at the time service copies were sent to BIA officials, the Assistant Secretary – Indian Affairs, and the Tribe. *See* Statement of Reasons Appendix A at 4, 38. There is no evidence in the Statement of Reasons and appendices that Appellants previously filed a timely appeal with the Board.

On or before October 31, 2013, Appellants are ordered to show cause why this appeal should not be dismissed as untimely. *See No More Slots v. Pacific Regional Director*, 56 IBIA 233, 238 (2013) (an appellant has the burden of proof to show timeliness of an appeal). Failure by Appellants to respond to this order may result in summary dismissal of the appeal without further notice. Interested parties may file answers to Appellants' response to this order to show cause within 20 days of receipt of the response and Appellants may file replies within 10 days of receipt of any answer.

Copies of all pleadings filed with the Board must be served on all interested parties. 43 C.F.R. §§ 4.310(b), 4.333(a). If U.S. mail is used for service and filing, it does not need to be by certified mail; parties may use regular first-class mail, unless they wish to obtain a receipt for their own records. If counsel is appearing for an interested party, counsel should enter an appearance, after which service should be made on counsel. A certificate or affidavit evidencing service shall be filed concurrently with the document furnished to the Board.

The Board's Internet website, containing a free, searchable database of its decisions, is located at www.doi.gov/oha/ibia/index.cfm. The Board's decisions are also available on the for-fee websites of WestLaw and Lexis-Nexis. There may be some delay in providing Board decisions to the operators of these sites, but they are relatively current.

Further Proceedings

In accordance with 43 C.F.R. § 4.336, this case will be assigned a docket number 20 days after the date of receipt noted above unless the Board has been properly notified before that date that the Assistant Secretary - Indian Affairs has assumed jurisdiction over the appeal. If the Assistant Secretary - Indian Affairs properly notifies the Board of an

assumption of jurisdiction under 25 C.F.R. § 2.20(c) and 43 C.F.R. § 4.332(b), the parties will be so informed, and the appeal will be transmitted to him.

Pending further order, the Regional Director need not prepare or transmit the administrative record.

Steven K. Linscheid
Chief Administrative Judge

Enclosure (for non-Federal parties)

Distribution: See attached list.

Distribution:

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for Appellants Rudy St. Germain
and Michelle Roberts
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BY CERTIFIED MAIL

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1849 C Street, NW, MS 6513 - MIB
Washington, DC 20240

Assistant Secretary - Indian Affairs
U.S. Department of the Interior
1849 C Street, NW, MS 4141 - MIB
Washington, DC 20240

their customary condition, to the satisfaction of the field officer in charge.

§3.12 Termination.

All permits shall be terminable at the discretion of the Secretary having jurisdiction.

§3.13 Report of field officer.

The field officer in charge of land owned or controlled by the Government of the United States shall, from time to time, inquire and report as to the existence, on or near such lands, of ruins and archaeological sites, historic or prehistoric ruins or monuments, objects of antiquity, historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.

§3.14 Examinations by field officer.

The field officer in charge may at all times examine the permit of any person or institution claiming privileges granted in accordance with the act and this part, and may fully examine all work done under such permit.

§3.15 Persons who may apprehend or cause to be arrested.

All persons duly authorized by the Secretaries of Agriculture, Army and Interior may apprehend or cause to be arrested, as provided in the Act of February 6, 1905 (33 Stat. 700) any person or persons who appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity on lands under the supervision of the Secretaries of Agriculture, Army, and Interior, respectively.

§3.16 Seizure.

Any object of antiquity taken, or collection made, on lands owned or controlled by the United States, without a permit, as prescribed by the act and this part, or there taken or made, contrary to the terms of the permit, or contrary to the act and this part, may be seized wherever found and at any time, by the proper field officer or by any person duly authorized by the Secretary having jurisdiction, and disposed of as the Secretary shall determine, by deposit in the proper national depository or otherwise.

§3.17 Preservation of collection.

Every collection made under the authority of the act and of this part shall be preserved in the public museum designated in the permit and shall be accessible to the public. No such collection shall be removed from such public museum without the written authority of the Secretary of the Smithsonian Institution, and then only to another public museum, where it shall be accessible to the public; and when any public museum, which is a depository of any collection made under the provisions of the act and this part, shall cease to exist, every such collection in such public museum shall thereupon revert to the national collections and be placed in the proper national depository.

PART 4—DEPARTMENT HEARINGS AND APPEALS PROCEDURES

Subpart A—General; Office of Hearings and Appeals

Subpart B—General Rules Relating to Procedures and Practice

Subpart C [Reserved]

Subpart D—Rules Applicable to Indian Affairs Hearings and Appeals

SCOPE OF SUBPART; DEFINITIONS

Subpart E—Special Rules Applicable to Public Land Hearings and Appeals

this section is applicable, if the party requesting the information agrees under oath in writing:

(1) Not to use or disclose the information except in the context of the proceeding conducted pursuant to this part; and

(2) To return all copies of the information at the conclusion of the proceeding to the person submitting the information under paragraph (a) of this section.

(d) If any person submitting a document in a proceeding under this Part other than a hearing conducted pursuant to 5 U.S.C. 554 claims that a disclosure of information in that document to another party to the proceeding is prohibited by law, notwithstanding the protection provided under paragraph (c) of this section, such person:

(1) Must indicate in the original document that it contains information of which disclosure is prohibited;

(2) Must request that the presiding officer or appeals board review such evidence as a basis for its decision without disclosing it to the other party or parties, and serve the request upon the parties to the proceeding. The request shall include a copy of the document or description as required by paragraph (a)(2)(i) of this section and state why disclosure is prohibited, citing pertinent statutory or regulatory authority. If the prohibition on disclosure is intended to protect the interest of a person who is not a party to the proceeding, the party making the request must demonstrate that such person refused to consent to the disclosure of the evidence to other parties to the proceeding.

(3) If the presiding officer or an appeals board denies the request, the person who made the request shall be given an opportunity to withdraw the evidence before it is considered by the presiding official or board unless a Freedom of Information Act request, administrative appeal from the denial of a request, or lawsuit seeking release of the information is pending.

(e) If the person submitting a document does not submit the copy of the document or description required by paragraph (a)(2)(i) or (d)(2) of this section, the presiding officer or appeals board may assume that there is no objection to public disclosure of the document in its entirety.

(f) Where a decision by a presiding officer or appeals board is based in whole or in part on evidence not included in the public record or disclosed to all parties, the decision shall so state, specifying the nature of the evidence and the provision of law under which disclosure was denied, and the evidence so considered shall be retained under seal as part of the official record.

[53 FR 49661, Dec. 9, 1988]

Subpart C [Reserved]

Subpart D—Rules Applicable in Indian Affairs Hearings and Appeals

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 372–74, 410; Pub. L. 99–264, 100 Stat. 61, as amended.

CROSS REFERENCE: For regulations pertaining to the processing of Indian probate matters within the Bureau of Indian Affairs, see 25 CFR part 15; For regulations pertaining to the probate of Indian trust estates within the Probate Hearings Division, Office of Hearings and Appeals, see 43 CFR part 30. For regulations pertaining to the authority, jurisdiction, and membership of the Board of Indian Appeals, Office of Hearings and Appeals, see subpart A of this part. For regulations generally applicable to proceedings before the Hearings Divisions and Appeal Boards of the Office of Hearings and Appeals, see subpart B of this part.

SCOPE OF SUBPART; DEFINITIONS

SOURCE: 66 FR 67656, Dec. 31, 2001, unless otherwise noted.

§ 4.200 How to use this subpart.

(a) The following table is a guide to the relevant contents of this subpart by subject matter.

For provisions relating to . . .	Consult . . .
(1) Appeals to the Board of Indian Appeals generally.	§§ 4.310 through 4.318.
(2) Appeals to the Board of Indian Appeals from decisions of the Probate Hearings Division in Indian probate matters.	§§ 4.201 and 4.320 through 4.328.
(3) Appeals to the Board of Indian Appeals from actions or decisions of BIA.	§§ 4.201 and 4.330 through 4.340.

For provisions relating to . . .	Consult . . .
(4) Review by the Board of Indian Appeals of other matters referred to it by the Secretary, Assistant Secretary-Indian Affairs, or Director-Office of Hearings and Appeals.	§§4.201 and 4.330 through 4.340.
(5) Determinations under the White Earth Reservation Land Settlement Act of 1985.	§§4.350 through 4.357.

(b) Except as limited by the provisions of this part, the regulations in subparts A and B of this part apply to these proceedings.

[73 FR 67287, Nov. 13, 2008]

§4.201 Definitions.

Administrative law judge (ALJ) means an administrative law judge with OHA appointed under the Administrative Procedure Act, 5 U.S.C. 3105.

Agency means:

(1) The Bureau of Indian Affairs (BIA) agency office, or any other designated office in BIA, having jurisdiction over trust or restricted land and trust personalty; and

(2) Any office of a tribe that has entered into a contract or compact to fulfill the probate function under 25 U.S.C. 450f or 458cc.

BIA means the Bureau of Indian Affairs within the Department of the Interior.

Board means the Interior Board of Indian Appeals within OHA.

Day means a calendar day.

Decedent means a person who is deceased.

Decision or order (or *decision and order*) means:

(1) A written document issued by a judge making determinations as to heirs, wills, devisees, and the claims of creditors, and ordering distribution of trust or restricted land or trust personalty;

(2) The decision issued by an attorney decision maker in a summary probate proceeding; or

(3) A decision issued by a judge finding that the evidence is insufficient to determine that a person is deceased by reason of unexplained absence.

Devise means a gift of property by will. Also, to give property by will.

Devisee means a person or entity that receives property under a will.

Estate means the trust or restricted land and trust personalty owned by the decedent at the time of death.

Formal probate proceeding means a proceeding, conducted by a judge, in which evidence is obtained through the testimony of witnesses and the receipt of relevant documents.

Heir means any individual or entity eligible to receive property from a decedent in an intestate proceeding.

Individual Indian Money (IIM) account means an interest-bearing account for trust funds held by the Secretary that belong to a person who has an interest in trust assets. These accounts are under the control and management of the Secretary.

Indian probate judge (IPJ) means an attorney with OHA, other than an ALJ, to whom the Secretary has delegated the authority to hear and decide Indian probate cases.

Interested party means any of the following:

(1) Any potential or actual heir;

(2) Any devisee under a will;

(3) Any person or entity asserting a claim against a decedent's estate;

(4) Any tribe having a statutory option to purchase the trust or restricted property interest of a decedent; or

(5) Any co-owner exercising a purchase option.

Intestate means that the decedent died without a valid will as determined in the probate proceeding.

Judge, except as used in the term "administrative judge," means an ALJ or IPJ.

LTRO means the Land Titles and Records Office within BIA.

Probate means the legal process by which applicable tribal, Federal, or State law that affects the distribution of a decedent's estate is applied in order to:

(1) Determine the heirs;

(2) Determine the validity of wills and determine devisees;

(3) Determine whether claims against the estate will be paid from trust personalty; and

(4) Order the transfer of any trust or restricted land or trust personalty to the heirs, devisees, or other persons or entities entitled by law to receive them.

Restricted property means real property, the title to which is held by an Indian but which cannot be alienated or encumbered without the Secretary's consent. For the purposes of probate proceedings, restricted property is treated as if it were trust property. Except as the law may provide otherwise, the term "restricted property" as used in this part does not include the restricted lands of the Five Civilized Tribes of Oklahoma or the Osage Nation.

Secretary means the Secretary of the Interior or an authorized representative.

Trust personalty means all tangible personal property, funds, and securities of any kind that are held in trust in an IIM account or otherwise supervised by the Secretary.

Trust property means real or personal property, or an interest therein, the title to which is held in trust by the United States for the benefit of an individual Indian or tribe.

Will means a written testamentary document that was executed by the decedent and attested to by two disinterested adult witnesses, and that states who will receive the decedent's trust or restricted property.

[73 FR 67287, Nov. 13, 2008]

§§4.202–4.308 [Reserved]

General Rules Applicable to Proceedings on Appeal Before the Interior Board of Indian Appeals

Source: 70 FR 11825, Mar. 9, 2005, unless otherwise noted.

§4.310 Documents.

(a) *Filing.* The effective date for filing a notice of appeal or other document with the Board during the course of an appeal is:

(1) For most documents, the date of mailing or the date of personal delivery; or

(2) For a motion for the Board to assume jurisdiction over an appeal under 25 CFR 2.20(e), the date that the Board receives the motion.

(b) *Serving notices of appeal and pleadings.* Any party filing a notice of appeal or pleading before the Board must serve copies on all interested parties in the proceeding. Service must be accomplished by personal delivery or mailing.

(1) Where a party is represented in an appeal by an attorney or other representative authorized under 43 CFR 1.3, service of any document on the attorney or representative is service on the party.

(2) Where a party is represented by more than one attorney, service on any one attorney is sufficient.

(3) The certificate of service on an attorney or representative must include the name of the party whom the attorney or representative represents and indicate that service was made on the attorney or representative.

(c) *Computation of time for filing and service.* Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document:

(1) The day upon which the decision or document to be appealed or answered was served or the day of any other event after which a designated period of time begins to run is not to be included;

(2) The last day of the period is to be included, unless it is a nonbusiness day (*e.g.*, Saturday, Sunday, or Federal holiday), in which event the period runs until the end of the next business day; and

(3) When the time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, Federal holidays, and other nonbusiness days are excluded from the computation.

(d) *Extensions of time.* (1) The Board may extend the time for filing or serving any document except a notice of appeal.

(2) A request to the Board for an extension of time must be filed within the time originally allowed for filing.

(3) For good cause the Board may grant an extension of time on its own initiative.

(e) *Retention of documents.* All documents received in evidence at a hearing or submitted for the record in any proceeding before the Board will be retained with the official record of the proceeding. The Board, in its discretion, may permit the withdrawal of original documents while a case is pending or after a decision becomes

final upon conditions as required by the Board.

§4.311 Briefs on appeal.

(a) The appellant may file an opening brief within 30 days after receiving the notice of docketing. The appellant must serve copies of the opening brief upon all interested parties or counsel and file a certificate with the Board showing service upon the named parties. Opposing parties or counsel will have 30 days from receiving the appellant's brief to file answer briefs, copies of which must be served upon the appellant or counsel and all other interested parties. A certificate showing service of the answer brief upon all parties or counsel must be attached to the answer filed with the Board.

(b) The appellant may reply to an answering brief within 15 days from its receipt. A certificate showing service of the reply brief upon all parties or counsel must be attached to the reply filed with the Board. Except by special permission of the Board, no other briefs will be allowed on appeal.

(c) BIA is considered an interested party in any proceeding before the Board. The Board may request that BIA submit a brief in any case before the Board.

(d) An original only of each document should be filed with the Board. Documents should not be bound along the side.

(e) The Board may also specify a date on or before which a brief is due. Unless expedited briefing has been granted, such date may not be less than the appropriate period of time established in this section.

§4.312 Board decisions.

Decisions of the Board will be made in writing and will set forth findings of fact and conclusions of law. The decision may adopt, modify, reverse, or set aside any proposed finding, conclusion, or order of an administrative law judge, Indian probate judge, or BIA official. Distribution of decisions must be made by the Board to all parties concerned. Unless otherwise stated in the decision, rulings by the Board are final for the Department and must be given immediate effect.

§4.313 Amicus curiae; intervention; joinder motions.

(a) Any interested person or Indian tribe desiring to intervene, to join other parties, to appear as amicus curiae, or to obtain an order in an appeal before the Board must apply in writing to the Board stating the grounds for the action sought. The Board may grant the permission or relief requested for specified purposes and subject to limitations it established. This section will be liberally construed.

(b) Motions to intervene, to appear as amicus curiae, to join additional parties, or to obtain an order in an appeal pending before the Board must be served in the same manner as appeal briefs.

§4.314 Exhaustion of administrative remedies.

(a) No decision of an administrative law judge, Indian probate judge, or BIA official that at the time of its rendition is subject to appeal to the Board, will be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. 704, unless it has been made effective pending a decision on appeal by order of the Board.

(b) No further appeal will lie within the Department from a decision of the Board.

(c) The filing of a petition for reconsideration is not required to exhaust administrative remedies.

§4.315 Reconsideration of a Board decision.

(a) Reconsideration of a decision of the Board will be granted only in extraordinary circumstances. Any party to the decision may petition for reconsideration. The petition must be filed with the Board within 30 days from the date of the decision and must contain a detailed statement of the reasons why reconsideration should be granted.

(b) A party may file only one petition for reconsideration.

(c) The filing of a petition will not stay the effect of any decision or order and will not affect the finality of any decision or order for purposes of judicial review, unless so ordered by the Board.

§4.316 Remands from courts.

Whenever any matter is remanded from any Federal court to the Board for further proceedings, the Board will remand the matter to an administrative law judge, an Indian probate judge, or BIA. In the alternative, to the extent the court's directive and time limitations permit, the parties will be allowed an opportunity to submit to the Board a report recommending procedures for it to follow to comply with the court's order. The Board will enter special orders governing matters on remand.

§4.317 Standards of conduct.

(a) *Inquiries about cases.* All inquiries about any matter pending before the Board must be made to the Chief Administrative Judge of the Board or the administrative judge assigned the matter.

(b) *Disqualification.* An administrative judge may withdraw from a case in accordance with standards found in the recognized canons of judicial ethics if the judge deems this action appropriate. If, before a decision of the Board, a party files an affidavit of personal bias or disqualification with substantiating facts, and the administrative judge concerned does not withdraw, the OHA Director will determine the matter of disqualification.

§4.318 Scope of review.

An appeal will be limited to those issues that were before the administrative law judge or Indian probate judge upon the petition for rehearing, reopening, or regarding tribal purchase of interests, or before the BIA official on review. However, except as specifically limited in this part or in title 25 of the Code of Federal Regulations, the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

APPEALS TO THE BOARD OF INDIAN APPEALS IN PROBATE MATTERS

SOURCE: 70 FR 11826, Mar. 9, 2005, unless otherwise noted.

§4.320 Who may appeal a judge's decision or order?

Any interested party has a right to appeal to the Board if he or she is adversely affected by a decision or order of a judge under part 30 of this subtitle:

(a) On a petition for rehearing;

(b) On a petition for reopening;

(c) Regarding purchase of interests in a deceased Indian's estate; or

(d) Regarding modification of the inventory of an estate.

[76 FR 7605, Feb. 10, 2011]

§4.321 How do I appeal a judge's decision or order?

(a) A person wishing to appeal a decision or order within the scope of §4.320 must file a written notice of appeal within 30 days after we have mailed the judge's decision or order and accurate appeal instructions. We will dismiss any appeal not filed by this deadline.

(b) The notice of appeal must be signed by the appellant, the appellant's attorney, or other qualified representative as provided in §1.3 of this subtitle, and must be filed with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203.

[73 FR 67289, Nov. 13, 2008]

§4.322 What must an appeal contain?

(a) Each appeal must contain a written statement of the errors of fact and law upon which the appeal is based. This statement may be included in either the notice of appeal filed under §4.321(a) or an opening brief filed under §4.311(a).

(b) The notice of appeal must include the names and addresses of the parties served.

[73 FR 67289, Nov. 13, 2008]

§4.323 Who receives service of the notice of appeal?

(a) The appellant must deliver or mail the original notice of appeal to the Board.

(b) A copy of the notice of appeal must be served on the judge whose decision is being appealed, as well as on every other interested party.

(c) The notice of appeal filed with the Board must include a certification that

service was made as required by this section.

[73 FR 67288, Nov. 13, 2008]

§4.324 How is the record on appeal prepared?

(a) On receiving a copy of the notice of appeal, the judge whose decision is being appealed must notify:

(1) The agency concerned; and

(2) The LTRO where the original record was filed under §30.233 of this subtitle.

(b) If a transcript of the hearing was not prepared, the judge must have a transcript prepared and forwarded to the LTRO within 30 days after receiving a copy of the notice of appeal. The LTRO must include the original transcript in the record.

(c) Within 30 days of the receipt of the transcript, the LTRO must do the following:

(1) Prepare a table of contents for the record;

(2) Make two complete copies of the original record, including the transcript and table of contents;

(3) Certify that the record is complete;

(4) Forward the certified original record, together with the table of contents, to the Board by certified mail or other service with delivery confirmation; and

(5) Send one copy of the complete record to the agency.

(d) While the appeal is pending, the copies of the record will be available for inspection at the LTRO and the agency.

(e) Any party may file an objection to the record. The party must file his or her objection with the Board within 15 days after receiving the notice of docketing under §4.325.

(f) For any of the following appeals, the judge must prepare an administrative record for the decision and a table of contents for the record and must forward them to the Board:

(1) An interlocutory appeal under §4.28;

(2) An appeal from a decision under §§30.126 or 30.127 regarding modification of an inventory of an estate; or

(3) An appeal from a decision under §30.124 determining that a person for whom a probate proceeding is sought to be opened is not deceased.

[76 FR 7505, Feb. 10, 2011]

§4.325 How will the appeal be docketed?

The Board will docket the appeal on receiving the probate record from the LTRO or the administrative record from the judge, and will provide a notice of the docketing and the table of contents for the record to all interested parties as shown by the record on appeal. The docketing notice will specify the deadline for filing briefs and will cite the procedural regulations governing the appeal.

[73 FR 67288, Nov. 13, 2008]

§4.326 What happens to the record after disposition?

(a) After the Board makes a decision other than a remand, it must forward to the designated LTRO:

(1) The record filed with the Board under §4.324(d) or (f); and

(2) All documents added during the appeal proceedings, including any transcripts and the Board's decision.

(b) The LTRO must conform the duplicate record retained under §4.324(b) to the original sent under paragraph (a) of this section and forward the duplicate record to the agency concerned.

[73 FR 67288, Nov. 13, 2008]

APPEALS TO THE BOARD OF INDIAN APPEALS FROM ADMINISTRATIVE ACTIONS OF OFFICIALS OF THE BUREAU OF INDIAN AFFAIRS; ADMINISTRATIVE REVIEW IN OTHER INDIAN MATTERS NOT RELATING TO PROBATE PROCEEDINGS

SOURCE: 54 FR 6497, Feb. 10, 1989, unless otherwise noted.

§4.330 Scope.

(a) The definitions set forth in 25 CFR 2.2 apply also to these special rules. These regulations apply to the practice and procedure for: (1) Appeals to the Board of Indian Appeals from administrative actions or decisions of officials of the Bureau of Indian Affairs issued under regulations in 25 CFR chapter I, and (2) administrative review by the Board of Indian Appeals of other matters pertaining to Indians

which are referred to it for exercise of review authority of the Secretary or the Assistant Secretary—Indian Affairs.

(b) Except as otherwise permitted by the Secretary or the Assistant Secretary—Indian Affairs by special delegation or request, the Board shall not adjudicate:

(1) Tribal enrollment disputes;

(2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority; or

(3) Appeals from decisions pertaining to final recommendations or actions by officials of the Minerals Management Service, unless the decision is based on an interpretation of Federal Indian law (decisions not so based which arise from determinations of the Minerals Management Service, are appealable to the Interior Board of Land Appeals in accordance with 43 CFR 4.410).

§ 4.331 Who may appeal.

Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals, except—

(a) To the extent that decisions which are subject to appeal to a higher official within the Bureau of Indian Affairs must first be appealed to that official;

(b) Where the decision has been approved in writing by the Secretary or Assistant Secretary—Indian Affairs prior to promulgation; or

(c) Where otherwise provided by law or regulation.

§ 4.332 Appeal to the Board; how taken; mandatory time for filing; preparation assistance; requirement for bond.

(a) A notice of appeal shall be in writing, signed by the appellant or by his attorney of record or other qualified representative as provided by 43 CFR 1.3, and filed with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203, within 30 days after receipt by the appellant of the decision from which the appeal is taken. A copy of the notice of appeal shall simultaneously be filed with the Assistant Secretary—Indian Affairs. As required by § 4.333 of this part, the notice of appeal sent to the Board shall certify that a copy has been sent to the Assistant Secretary—Indian Affairs. A notice of appeal not timely filed shall be dismissed for lack of jurisdiction. A notice of appeal shall include:

(1) A full identification of the case;

(2) A statement of the reasons for the appeal and of the relief sought; and

(3) The names and addresses of all additional interested parties, Indian tribes, tribal corporations, or groups having rights or privileges which may be affected by a change in the decision, whether or not they participated as interested parties in the earlier proceedings.

(b) In accordance with 25 CFR 2.20(c) a notice of appeal shall not be effective for 20 days from receipt by the Board, during which time the Assistant Secretary—Indian Affairs may decide to review the appeal. If the Assistant Secretary—Indian Affairs properly notifies the Board that he has decided to review the appeal, any documents concerning the case filed with the Board shall be transmitted to the Assistant Secretary—Indian Affairs.

(c) When the appellant is an Indian or Indian tribe not represented by counsel, the official who issued the decision appealed shall, upon request of the appellant, render such assistance as is appropriate in the preparation of the appeal.

(d) At any time during the pendency of an appeal, an appropriate bond may be required to protect the interest of any Indian, Indian tribe, or other parties involved.

[64 FR 6487, Feb. 10, 1999, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.333 Service of notice of appeal.

(a) On or before the date of filing of the notice of appeal the appellant shall serve a copy of the notice upon each known interested party, upon the official of the Bureau of Indian Affairs from whose decision the appeal is taken, and upon the Assistant Secretary—Indian Affairs. The notice of appeal filed with the Board shall certify that service was made as required

by this section and shall show the names and addresses of all parties served. If the appellant is an Indian or an Indian tribe not represented by counsel, the appellant may request the official of the Bureau whose decision is appealed to assist in service of copies of the notice of appeal and any supporting documents.

(b) The notice of appeal will be considered to have been served upon the date of personal service or mailing.

§ 4.334 Extensions of time.

Requests for extensions of time to file documents may be granted upon a showing of good cause, except for the time fixed for filing a notice of appeal which, as specified in § 4.332 of this part, may not be extended.

§ 4.335 Preparation and transmittal of record by official of the Bureau of Indian Affairs.

(a) Within 20 days after receipt of a notice of appeal, or upon notice from the Board, the official of the Bureau of Indian Affairs whose decision is appealed shall assemble and transmit the record to the Board. The record on appeal shall include, without limitation, copies of transcripts of testimony taken; all original documents, petitions, or applications by which the proceeding was initiated; all supplemental documents which set forth claims of interested parties; and all documents upon which all previous decisions were based.

(b) The administrative record shall include a Table of Contents noting, at a minimum, inclusion of the following:

(1) The decision appealed from;

(2) The notice of appeal or copy thereof; and

(3) Certification that the record contains all information and documents utilized by the deciding official in rendering the decision appealed.

(c) If the deciding official receives notification that the Assistant Secretary—Indian Affairs has decided to review the appeal before the administrative record is transmitted to the Board, the administrative record shall be forwarded to the Assistant Secretary—Indian Affairs rather than to the Board.

§ 4.336 Docketing.

An appeal shall be assigned a docket number by the Board 20 days after receipt of the notice of appeal unless the Board has been properly notified that the Assistant Secretary—Indian Affairs has assumed jurisdiction over the appeal. A notice of docketing shall be sent to all interested parties as shown by the record on appeal upon receipt of the administrative record. Any objection to the record as constituted shall be filed with the Board within 15 days of receipt of the notice of docketing. The docketing notice shall specify the time within which briefs shall be filed, cite the procedural regulations governing the appeal and include a copy of the Table of Contents furnished by the deciding official.

§ 4.337 Action by the Board.

(a) The Board may make a final decision, or where the record indicates a need for further inquiry to resolve a genuine issue of material fact, the Board may require a hearing. All hearings shall be conducted by an administrative law judge of the Office of Hearings and Appeals. The Board may, in its discretion, grant oral argument before the Board.

(b) Where the Board finds that one or more issues involved in an appeal or a matter referred to it were decided by the Bureau of Indian Affairs based upon the exercise of discretionary authority committed to the Bureau, and the Board has not otherwise been permitted to adjudicate the issue(s) pursuant to § 4.330(b) of this part, the Board shall dismiss the appeal as to the issue(s) or refer the issue(s) to the Assistant Secretary—Indian Affairs for further consideration.

§ 4.338 Submission by administrative law judge of proposed findings, conclusions and recommended decision.

(a) When an evidentiary hearing pursuant to § 4.337(a) of this part is concluded, the administrative law judge shall recommend findings of fact and conclusions of law, stating the reasons for such recommendations. A copy of the recommended decision shall be sent to each party to the proceeding, the Bureau official involved, and the

Board. Simultaneously, the entire record of the proceedings, including the transcript of the hearing before the administrative law judge, shall be forwarded to the Board.

(b) The administrative law judge shall advise the parties at the conclusion of the recommended decision of their right to file exceptions or other comments regarding the recommended decision with the Board in accordance with §4.339 of this part.

§4.339 Exceptions or comments regarding recommended decision by administrative law judge.

Within 30 days after receipt of the recommended decision of the administrative law judge, any party may file exceptions to or other comments on the decision with the Board.

§4.340 Disposition of the record.

Subsequent to a decision by the Board, the record filed with the Board and all documents added during the appeal proceedings, including the Board's decision, shall be forwarded to the official of the Bureau of Indian Affairs whose decision was appealed for proper disposition in accordance with rules and regulations concerning treatment of Federal records.

WHITE EARTH RESERVATION LAND SETTLEMENT ACT OF 1985; AUTHORITY OF ADMINISTRATIVE JUDGES; DETERMINATIONS OF THE HEIRS OF PERSONS WHO DIED ENTITLED TO COMPENSATION

SOURCE: 56 FR 61383, Dec. 3, 1991, unless otherwise noted.

§4.350 Authority and scope.

(a) The rules and procedures set forth in §§4.350 through 4.357 apply only to the determination through intestate succession of the heirs of persons who died entitled to receive compensation under the White Earth Reservation Land Settlement Act of 1985, Public Law 99-264 (100 Stat. 61), amended by Public Law 100-153 (101 Stat. 886) and Public Law 100-212 (101 Stat. 1433).

(b) Whenever requested to do so by the Project Director, an administrative judge shall determine such heirs by applying inheritance laws in accordance with the White Earth Reservation Settlement Act of 1985 as amended, notwithstanding the decedent may have died testate.

(c) As used herein, the following terms shall have the following meanings:

(1) The term *Act* means the White Earth Reservation Land Settlement Act of 1985 as amended.

(2) The term *Board* means the Board of Indian Appeals in the Office of Hearings and Appeals, Office of the Secretary.

(3) The term *Project Director* means the Superintendent of the Minnesota Agency, Bureau of Indian Affairs, or other Bureau of Indian Affairs official with delegated authority from the Minneapolis Area Director to serve as the federal officer in charge of the White Earth Reservation Land Settlement Project.

(4) The term *party (parties) in interest* means the Project Director and any presumptive or actual heirs of the decedent, or of any issue of any subsequently deceased presumptive or actual heir of the decedent.

(5) The term *compensation* means a monetary sum, as determined by the Project Director, pursuant to section 8(c) of the Act.

(6) The term *administrative judge* means an administrative judge or an administrative law judge, attorney-advisor, or other appropriate official of the Office of Hearings and Appeals to whom the Director of the Office of Hearings and Appeals has redelegated his authority, as designee of the Secretary, for making heirship determinations as provided for in these regulations.

(7) The term *appellant* means a party aggrieved by a final order or final order upon reconsideration issued by an administrative judge who files an appeal with the Board.

[56 FR 61383, Dec. 3, 1991; 56 FR 65762, Dec. 18, 1991, as amended at 64 FR 13363, Mar. 18, 1999]

§4.351 Commencement of the determination process.

(a) Unless an heirship determination which is recognized by the Act already exists, the Project Director shall commence the determination of the heirs of those persons who died entitled to receive compensation by filing with

EXHIBIT AA

by e-mail service

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

RUDY ST. GERMAIN AND MICHELLE ROBERTS, Appellants,	)	Order Docketing and Dismissing Appeal
v.	)	Docket No. IBIA 14-011
NORTHWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	November 15, 2013

Rudy St. Germain and Michelle Roberts (Appellants) appealed to the Interior Board of Indian Appeals (Board) from an August 2, 2013, decision of the Northwest Regional Director, Bureau of Indian Affairs, rejecting a challenge by Appellants and other individuals to a June 21, 2013, Secretarial election for a proposed constitutional amendment for the Nooksack Indian Tribe of Washington. On November 12, 2013, the Board received notice that Appellants are withdrawing their appeal.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board dockets but dismisses this appeal.

I concur:

Steven K. Linscheid
Chief Administrative Judge

Thomas A. Blaser
Administrative Judge

Rudy St. Germain and Michelle Roberts
v. Northwest Regional Director, Bureau of Indian Affairs
Docket No. IBIA 14-011
Order Docketing and Dismissing Appeal
Issued November 15, 2013
58 IBIA 120

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EXHIBIT BB

personally served

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Office of Tribal Attorney
Nooksack Indian Tribe

12-09-13 P02:12 IN

IN THE NOOKSACK TRIBAL COURT

RUDY ST. GERMAIN, Secretary of the Nooksack Tribal Council; MICHELLE JOAN ROBERTS, Councilmember of the Nooksack Tribal Council; 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;

NO. 2013-CI-CL-___

COMPLAINT FOR PROSPECTIVE EQUITABLE RELIEF

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RECONAR G.B. RAPADA; SONIA RAPADA; TIERRA RAPADA; ZACK RAPADA; NADINE RAPADA; ANGELA RAPADA; BETSIEBO RAPADA; CATALINA RENTERIA; MARCELLINA RENTERIA; SYLVIA RENTERIA; VINCENT RENTERIA; ALLEN RICHAMIRE; VERONICA RICHMIRE; ANGELO RITUALO; DIANA (MONA) RITUALO; FELIPE RITUALO; TERESA RITUALO; BRITTINIE ROBERTS; RAFFINAND ROBERTS; DEANNA ROMERO; RUDY ROMERO; EMMANUAL ROMERO-DANCEL; KRISTOFFER SILVA; SEVINA SILVA; TYLER SILVA; ENZO SIOSON; JULIETTE SIOSON; ROCCO SIOSON; DEBBIE SMITH (NARTE); ALEX ST. GERMAIN; BREANNA ST. GERMAIN; RUDY ST. GERMAIN; TAYLOR ST. GERMAIN; TERRY ST. GERMAIN JR.; ROSE TOVAR; AND JOCELYN TOVAR; CHERYL TRAINOR; KRISTAL TRAINOR, individually and on behalf of their minor children, enrolled members of the Nooksack Indian Tribe,

Plaintiffs,

v.

ROBERT KELLY, Chairman of the Nooksack Tribal Council; RICK D. GEORGE, Vice-Chairman of the Nooksack Tribal Council; AGRIPINA SMITH, Treasurer of the Nooksack Tribal Council; BOB SOLOMON, Councilmember of the Nooksack Tribal Council; KATHERINE CANETE, Councilmember of the Nooksack Tribal Council and Nooksack General Manager; and AGRIPINA "LONA" JOHNSON, Councilmember of the Nooksack Tribal Council; ELIZABETH KING GEORGE, Enrollment officer of the Nooksack Tribal Council; ROY BAILEY, Enrollment officer of the Nooksack Tribal Council, in their official capacities,

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Defendants.

I. INTRODUCTION

1. Plaintiffs, enrolled members of the Nooksack Indian Tribe ("Tribe"), bring this action for nonmonetary prospective relief to halt Defendants' violation of the Nooksack Constitution and Bylaws, as well as the federal Indian Civil Rights Act (ICRA) and Indian Gaming Regulatory Act (IGRA).

2. Defendants are once again violating the equal protection provisions of both Article IX of the Constitution and ICRA by excluding Plaintiffs – because they are "subject to pending disenrollment proceedings" – from the Tribe's Christmas distributions in the amount of $250 per enrolled Tribal member that will be mailed on December 12, 2013.

3. Because the monies being distributed per capita include net gaming revenues, as defined by IGRA, and the Tribe lacks any revenue allocation plan approved by the Bureau of Indian Affairs Office of Indian Gaming, the distributions also violate IGRA and potentially expose the Tribe to federal fines and/or sanctions.

4. On December 8, 2013, Plaintiff-Nooksack Tribal Councilmembers Rudy St. Germain and Michelle Roberts requested a Special Meeting to discuss Defendants' direction to "to deny Christmas distributions to all enrolled Nooksack members who are proposed for disenrollment."

5. On December 9, 2013, Councilwoman Roberts wrote Defendants in reference to the requested Special Meeting: "the Christmas distributions, which I understand you have instructed to go out to only non-Nooksack 306 members starting this Wednesday, will violate IGRA as well as the Tribal Constitution and federal Indian Civil Rights Act." By refusing to honor yet another requested Special Meeting of the Nooksack Tribe, and otherwise unlawfully

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interfering with the holding of that required Tribal Council meeting before the Nooksack People, Defendants are violating Nooksack Tribal Law. *See e.g.* Bylaws, art. II, § 5.

6. Defendants are continually violating and will again patently violate Nooksack law and they each are being sued, in their official capacity, for nonmonetary prospective relief. The *Ex parte Young* exception therefore allows a suit to proceed against each Defendant, Nooksack Tribal sovereign immunity notwithstanding. *See generally Schlender v. Quinault Indian Nation*, No. CV-12-078 (Quinault Tribal Ct. Dec. 5, 2013) (citing *Verizon Maryland, Inc. v. Public Service Commission*, 535 U.S. 635 (2002)).

II. JURISDICTION

7. The Court has personal jurisdiction over Defendants pursuant to N.T.C. § 10.05.020(c). The Court has subject matter over this action pursuant to N.T.C. § 10.00.050.

6. Because Defendants are being sued for nonmonetary prospective relief in their official capacities, and are slated to act illegally, the Tribe's sovereign immunity is not implicated in this action.

III. PARTIES

7. Defendants are members of the Nooksack Tribal Council and Enrollment Department who are each sued in their respective official capacities for nonmonetary prospective relief.

8. Plaintiffs are enrolled members of the Tribe. Plaintiffs bring this action on behalf of themselves, their minor children, and those other enrolled members of the Tribe who are similarly situated.

IV. FACTS

A. Plaintiff Councilpersons' Special Meeting Request Regarding Unlawful Christmas Gaming Per Capita Distribution

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9. On December 8, 2013, Plaintiff Tribal Councilpersons Rudy St. Germain and Michelle Roberts wrote to Defendant Tribal Council Chairman Bob Kelly in request of a Special Meeting, pursuant to Article II, Section 5 of the Bylaws, to discuss:

- Word that [Defendants] have directed Tribal staff to deny Christmas distributions to all enrolled Nooksack members who are proposed for disenrollment; and
- [Defendant Kelly's] refusal to answer Councilwoman Roberts' email information requests to you in this regard since December 5, 2013.

The request explained:

> The Tribal Court described your exclusion of "Nooksack 306" children from tribal school supplies stipends in August, as "distasteful." It would be beyond callous to deprive Tribal member families of much-needed Tribal holiday support.
>
> As you know full well, you must call this latest requested Special Meeting 24 hours before the date of the meeting per Article II, Section 5 of the Bylaws. You of course have refused to call various other requested Special Meetings, and have also failed to call the constitutionally mandated Regular Meeting of the Tribe for the last twelve months. **There has not been a public meeting of the Nooksack People this entire year. Enough is enough.** It is time for you to honor Nooksack Law and convene this latest requested Special Meeting before you ruin Christmas for over 300 Nooksack members (emphasis in original).

10. On December 9, 2013, Councilperson Roberts wrote Defendant Kelly:

> [I]n addition to any discrimination against the Nooksack 306 regarding the Christmas distribution, are we even allowed to distribute monies from the Council budget, which include Nooksack River and Northwood gaming revenues, to Tribal members without a revenue allocation plan approved by the [BIA]? I worry that if we distribute a couple million dollars in gaming revenues to Tribal members without that plan or federal approval, we will violate federal law and expose the Tribe to civil fines and possibly even closure of our casinos by the NIGC. That could also invite federal investigation and audit of both Christmas and school supplies distributions (which are funded from the same gaming monies) over the last several years. So the Christmas distributions, which I understand you have instructed to go out to only non-Nooksack 306 members starting this Wednesday, will violate IGRA as well as the Tribal Constitution and federal Indian Civil Rights Act. You will be putting the entire Tribe and our most successful businesses in harm's way. This is another issue we need to talk about as a full Tribal Council during the Special Meeting that Rudy and I have requested be held before Wednesday. Please get back to me.

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11. As of the date and time of the filing of this Complaint, Defendants have not allowed the Special Meeting requested by Plaintiff Tribal Councilpersons St. Germain and Roberts to transpire, and Defendant Kelly has yet to respond to Councilperson Roberts' related emails or stated concerns about Tribal and federal illegality.

B. Unlawful Christmas Gaming Per Capita Distributions

12. On December 3, 2013, Defendants passed Nooksack Tribal Council Resolution No. 13-171, authorizing "2013 Christmas Support in the amount of **$250.00** to be made available to each currently enrolled Nooksack Tribal members, not subject to pending disenrollment proceedings."

13. Defendants passed Tribal Council Resolution No. 13-171 via a "poll," in secret, and without any notice to Plaintiff Tribal Councilpersons St. Germain and Roberts. In so doing, Defendants violated Article II, Section 2 of the Bylaws and Article III, Section 2 of the Constitution. *See* Resolution No. 13-171, at 3-4.

14. The "discretionary funds" for the Nooksack Tribal Christmas per capita distribution come from the Tribal Council's budget, and include net Class II and Class III gaming revenues derived from the Tribe's Nooksack River Casino and Northwood Casino. 25 U.S.C. § 2703(9); 25 C.F.R. § 502.16.

15. The Tribe does not have, and has never had, a revenue allocation plan approved by the U.S. Department of the Interior, Bureau of Indian Affairs' Office of Indian Gaming (BIA). 25 U.S.C. §§ 2710(a)(3)(A-D), (d)(1)(A)(ii).

16. On December 3, 2013, Defendants announced on the Nooksack Indian Tribes Communications Page that:

> The Nooksack Tribal Council Christmas distribution will be in the amount of $250 per Enrolled Tribal Member. Checks will be printed and mailed soon!

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> Please make sure your mailing addresses are updated with then Nooksack Enrollment Office.

Defendants Tribal Enrollment Officers Elizabeth King George and Roy Bailey posted that, for purpose of the Tribal Christmas distributions, member address information could be emailed to them both at either enrollment@nooksack-nsn.gov or rbailey@nooksack-nsn.gov. Defendant Councilperson Bob Solomon and Lona Johnson "shared" the posting on their Facebook pages.

17. On December 5, 2013, Defendants further announced on the Nooksack Indian Tribes Communications Page that: "Nooksack Tribal Christmas Checks will be mailed out on December 12th." Defendant Councilperson Lona Johnson again "shared" the posting on her Facebook page, stating: "FYI – please share with our Nooksack families. Happy Holidays from the Nooksack Tribal Council."

18. Defendants are improperly advertising the "2013 Christmas Support" authorized by Resolution No. 13-171, as the "Nooksack Tribal Council Christmas distribution," for personal and political gain.

19. Defendants intend to exclude Plaintiffs and any other enrolled Nooksack members who are "subject to pending disenrollment proceedings," from the $250 Nooksack Tribal Christmas per capita distribution that they will mail out on December 12, 2013.

20. Defendants are acting, and will imminently act, in furtherance of the unlawful Tribal Council Resolution No. 13-171, in violation of Article IX of the Nooksack Constitution, ICRA, and IGRA.

V. FIRST CAUSE OF ACTION
(Injunction – Nooksack Due Process Violations)

20. Plaintiffs incorporate and reallege the foregoing allegations. Plaintiffs are not requesting affirmative action. Instead, Plaintiffs are seeking prospective injunctive relief.

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21. Article IX of the Constitution dictates that: "All members of the Nooksack Indian Tribe shall be accorded equal rights pursuant to tribal law."

22. Article IX of the Constitution further dictates that "[t]he protection guaranteed to persons by Title II of the Civil Rights Act of 1968 (82 Stat. 77) against actions of the Nooksack Indian Tribe in the exercise of its powers of self-government shall apply to the members of the Nooksack Indian Tribe." All Nooksack governmental agencies and agents must comply with Title II of the Civil Rights Act of 1968, 82 Stat. 77 ("ICRA"). Relevant sections of ICRA state that the Tribe may not: (a) "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)(1).

23. Per capita gaming revenue distributions cannot violate either Tribal law or the federal Indian Civil Rights Act, particularly through discrimination against an identified group of Tribal members. 25 C.F.R. §§ 290.16, .290.21

24. Defendants are violating these provisions of Tribal and federal law by discriminatorily depriving Plaintiffs and their enrolled children of the $250 Nooksack Tribal Christmas per capita distributions pursuant to Tribal Council Resolution No. 13-171, and other services and programs that are available to other enrolled members of the Nooksack Tribe. What is more, these services have been denied without notice, a hearing, or an opportunity to be heard.

25. Because statutory procedures and governmental assurances establish the minimum due process protections that a member must receive, failure to follow such procedures is a procedural due process violation. Here, Plaintiffs have been denied their rights to procedural due process in connection with Defendants' disenrollment process.

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26. Defendants' clear violation of Nooksack statutory due process requires an injunction that prevents Defendants from moving forward with the disenrollment process unless the appropriate due process is afforded.

VI. SECOND CAUSE OF ACTION
(Injunction – Violation of Nooksack Constitution)

27. Plaintiffs incorporate and reallege the foregoing allegations. Plaintiffs are not requesting affirmative action. Instead, Plaintiffs are seeking prospective injunctive relief.

28. Defendant Chairman Bob Kelly, in concert with the other Defendants, has unlawfully interfered with the holding of a Tribal Council Special Meeting upon the written request by Plaintiff Tribal Councilpersons Rudy St. Germain and Michelle Roberts, pursuant to Article II, Section 5 of the Bylaws.

29. Defendant Chairman Bob Kelly and the other Defendants must be directed to stop violating Article II, Section 5 of the Bylaws by unlawfully interfering with the holding that properly requested Tribal Council Special Meeting regarding the $250 Nooksack Tribal Christmas gaming per capita distribution, as legally required by that provision of Nooksack law.

30. Defendant Chairman Bob Kelly and the other Defendants must be directed to stop violating Article II, Section 5 of the Bylaws by unlawfully interfering with the holding of any other Councilperson-requested Tribal Council Special Meeting as legally required by that provision of Nooksack law.

31. Plaintiffs have clear legal or equitable rights and a well-grounded fear of immediate invasion of those rights. The relative equities of the parties favor granting injunctive relief. Defendants have acted and are continuing to act in excess of their constitutional authority in this matter. If not enjoined by order of this Tribal Court, Defendants will continue to carry out

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unconstitutional statutes and Resolutions, and Plaintiffs will suffer irreparable injury. Plaintiffs do not have a plain, speedy, and adequate remedy in the ordinary course of law.

VII. THIRD CAUSE OF ACTION
(Injunction – Declaratory Relief)

32. Plaintiffs incorporate and reallege the foregoing allegations. Plaintiffs are not requesting affirmative action. Instead, Plaintiffs are seeking prospective injunctive relief.

33. Defendants efforts to make the $250 Nooksack Tribal Christmas per capita distribution with net Class II and Class III gaming revenues derived from the Tribe's Nooksack River Casino and Northwood Casino, violates IGRA, 25 U.S.C. §§ 2710(a)(3)(A-D), (d)(1)(A)(ii), ICRA, 25 U.S.C. § 1302(a)(1), and the Nooksack Constitution, art. IX, art III, sec. 2, and Bylaws, art. II, sec. 2 and 5.

34. An actual controversy exists between the parties concerning the issues identified above.

35. A judicial determination resolving this actual controversy is necessary and appropriate at this time.

VIII. FOURTH CAUSE OF ACTION
(Mandamus)

36. Plaintiffs incorporate and reallege the foregoing allegations. Plaintiffs are seeking prospective injunctive relief.

37. Defendant Chairman Bob Kelly and the other Defendants must be directed to call any Councilperson-requested Tribal Council Special Meeting as required by Article II, Section 5 of the Bylaws.

38. Defendants must be directed to not violate IGRA, 25 U.S.C. §§ 2710(a)(3)(A-D), (d)(1)(A)(ii), ICRA, 25 U.S.C. § 1302(a)(1) or other federal law, 25 CFR §§ 290.16, .290.21, or

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the Nooksack Constitution or Bylaws, through any per capita distribution of Class II or III net gaming revenues.

IX. RELIEF REQUESTED

WHEREFORE, Plaintiffs pray for relief as follows:

A. For injunctive relief;

B. For declaratory judgment;

C. For writ of mandamus;

D. For attorneys' fees and costs; and

E. For such other relief as the Tribal Court may deem just and equitable.

Plaintiffs reserve the right to further amend their Complaint for prospective equitable relief.

DATED this 9th day of December, 2013.

Gabriel S. Galanda
Anthony S. Broadman
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EXHIBIT CC

personally served

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Office of Tribal Attorney
Nooksack Indian Tribe

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IN THE NOOKSACK TRIBAL COURT

RUDY ST. GERMAIN, et al., Plaintiffs, v. ROBERT KELLY, et al., Defendants.	NO. NO. 2013-CI-CL-___ MOTION FOR TEMPORARY RESTRAINING ORDER ***Hearing Requested by December 11, 2013***[1]

Plaintiffs, enrolled members of the Nooksack Indian Tribe, seek a Temporary Restraining Order ("TRO") to restrain Defendants from taking acts in furtherance of an unconstitutional and illegal Resolution.

I. FACTS

A. Plaintiffs' Special Meeting Request Regarding Unlawful Christmas Gaming Per Capita Distribution.

On December 8, 2013, Plaintiff Tribal Councilpersons Rudy St. Germain and Michelle Roberts wrote to Defendant Tribal Council Chairman Robert Kelly in request of a Special Meeting, pursuant to Article II, Section 5 of the Bylaws, to discuss:

- Word that [Defendants] have denied Christmas distributions to all enrolled Nooksack members who are proposed for disenrollment; and
- [Defendant Kelly's] refusal to answer Councilwoman Roberts' email information requests in this regard since December 5, 2013.

[1] Temporary Restraining Order hearings must be held prior to the alleged "irreparable injury, loss, or damage" resulting, and typically occur on very shortened time (i.e. within 24-48 hours). Charles A. Wright, et al., Temporary Restraining Orders — In General, 11A Fed. Prac. & Proc. Civ. § 2951 (2d ed. 2013).

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Declaration of Michelle Roberts ("Roberts Decl."), Exhibit C. The request explained:

> The Tribal Court described your exclusion of "Nooksack 306" children from tribal school supplies stipends in August, as "distasteful." It would be beyond callous to deprive Tribal member families of much-needed Tribal holiday support.
>
> As you know full well, you must call this latest requested Special Meeting 24 hours before the date of the meeting per Article II, Section 5 of the Bylaws. You of course have refused to call various other requested Special Meetings, and have also failed to call the constitutionally mandated Regular Meeting of the Tribe for the last twelve months. **There has not been a public meeting of the Nooksack People this entire year. Enough is enough.** It is time for you to honor Nooksack Law and convene this latest requested Special Meeting before you ruin Christmas for over 300 Nooksack members (emphasis in original).

Id. On December 9, 2013, Councilperson Roberts wrote to Defendant Kelly:

> [I]n addition to any discrimination against the Nooksack 306 regarding the Christmas distribution, are we even allowed to distribute monies from the Council budget, which include Nooksack River and Northwood gaming revenues, to Tribal members without a revenue allocation plan [RAP] approved by the [BIA]? I worry that if we distribute a couple million dollars in gaming revenues to Tribal members without that plan or federal approval[2], we will violate federal law and expose the Tribe to civil fines and possibly even closure of our casinos by the NIGC. That could also invite federal investigation and audit of both Christmas and school supplies distributions (which are funded from the same gaming monies) over the last several years. So the Christmas distributions, which I understand you have instructed to go out to only non-Nooksack 306 members starting this Wednesday, will violate IGRA as well as the Tribal Constitution and federal Indian Civil Rights Act. You will be putting the entire Tribe and our most successful businesses in harm's way. This is another issue we need to talk about as a full Tribal Council during the Special Meeting that Rudy and I have requested be held before Wednesday. Please get back to me.

Id. at Ex. D.

Defendants have yet to allow the Special Meeting requested by Plaintiff Tribal Councilpersons St. Germain and Roberts to transpire, and have yet to respond to Councilperson

[2] Defendants' impending "Christmas Support" gaming per capita distribution, alone and even without Plaintiff-"Nooksack 306" families, totals around $450,000. Roberts Decl., at 3. Inclusive of Defendants' unlawful "School Supplies Stipend" gaming per capita distribution this past August, and the Christmas Support distribution in December 2012 that gave rise to this entire disenrollment controversy, Defendants are — and if the maintain their current course, will be — responsible for the illegal distribution of millions of dollars of Tribal monies and possibly significant fines and other sanctions from the National Indian Gaming Commission (NIGC). *Id.;* 25 U.S.C. § 2713(a)(1); *see also generally U.S. v. Santee Sioux Tribe of Nebraska,* 135 F.3d 558 (8th Cir. 1998); NIGC NOV-09-37 (Sept. 1, 2009) (civil enforcement action for tribe's Christmas "economic stimulus" distribution without a BIA-approved RAP, alleging $25,000 fine per distribution).

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Roberts' related emails or stated concerns since December 5, 2013, about Tribal and federal illegality. Roberts Decl., at Ex. E; *id.* at ¶ 5.

B. Unlawful Christmas Gaming Per Capita Distributions

On December 3, 2013, Defendants passed Nooksack Tribal Council Resolution No. 13-171, authorizing "2013 Christmas Support in the amount of **$250.00** to be made available to each currently enrolled Nooksack Tribal members, not subject to pending disenrollment proceedings." Roberts Decl., at Ex. A (emphasis in original). Defendants passed Tribal Council Resolution No. 13-171 via a "poll," in secret, and without any notice whatsoever to Plaintiff Tribal Councilpersons St. Germain or Roberts, in violation of Article II, Section 2 of the Bylaws and Article III, Section 2 of the Constitution. *Id.* at Ex. A; *id.* at ¶ 3.

The "discretionary funds" for the Nooksack Tribal Christmas per capita distribution came from the Tribal Council's budget, and include net Class II and Class III gaming revenues derived from the Tribe's Nooksack River Casino and Northwood Casino. 25 U.S.C. § 2703(9); 25 C.F.R. § 502.16. *Id.* at Ex. A; *id.* at ¶ 6-7. But the Tribe does not have, and has never had, a revenue allocation plan approved by the U.S. Department of the Interior, Bureau of Indian Affairs' Office of Indian Gaming, as required by 25 U.S.C. §§ 2710(a)(3)(A-D), (d)(1)(A)(ii). *See id.*, ¶ 8-9 ("[T]he Nooksack Tribe has never promulgated a revenue allocation plan, or submitted any such plan to the BIA, NIGC, or any other federal agency for review or approval . . . Because the Nooksack Tribe does not have a BIA-approved revenue allocation plan, I fear that the distribution is illegal under federal law, as well as Nooksack law.").

On December 3, 2013, Defendants announced on the Nooksack Indian Tribes Communications Page that:

> The Nooksack Tribal Council Christmas distribution will be in the amount of $250 per Enrolled Tribal Member. Checks will be printed and mailed soon!

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> Please make sure your mailing addresses are updated with then Nooksack Enrollment Office.

Id. at Ex. B. Defendant Tribal Enrollment Officers Elizabeth King George and Roy Bailey posted that for purpose of the Tribal Christmas distributions, member address information could be emailed to them both at either enrollment@nooksack-nsn.gov or rbailey@nooksack-nsn.gov. *Id.*

On December 5, 2013, Defendants further announced on the Nooksack Indian Tribes Communications Page that: "Nooksack Tribal Christmas Checks will be mailed out on December 12th." *Id.* Defendant Lona Johnson "shared" the posting on her Facebook page, for personal political gain, saying: "FYI – please share with our Nooksack families. Happy Holidays from the Nooksack Tribal Council." *Id.*

II. ARGUMENT

A. TRO Standards

A movant may be awarded a TRO by establishing: (1) a likelihood of success on the merits; (2) a likelihood of suffering irreparable harm absent a TRO; (3) that the balance of equities tips in his favor; and (4) that injunctive relief is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). A TRO must issue if the second, third, and fourth factors "tip strongly in [their] favor," and then satisfy the first factor "by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Okla. ex rel. Okla. Tax Comm'n v. Int'l Registration Plan*, 455 F.3d 1107, 1113 (10th Cir. 2006). Here, all *Winter* criteria is satisfied.

B. Plaintiffs Will Succeed On The Merits.

1. Sovereign Immunity Does Not Present A Bar To The Requested Relief.

In determining whether a plaintiff has properly pled an *Ex parte Young* exception, the inquiry is "straightforward": Prospective relief to prevent the contravention of tribal law is

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permitted against a tribal official, but retrospective relief is barred. *See generally Schlender v. Quinault Indian Nation*, No. CV-12-078 (Quinault Tribal Ct. Dec. 5, 2013) (citing *Verizon Maryland, Inc. v. Public Service Commission*, 535 U.S. 635 (2002)).

Here, Plaintiffs have alleged that the tribal offices sued are slated to act in violation of Nooksack law.[3] Plaintiffs have requested nonmonetary prospective relief to remedy these violations. Plaintiffs have sued Nooksack officers in their *official* capacities, seeking to hold the Nooksack Indian Tribe responsible for the prospective acts and omissions of its officers. Plaintiffs have clearly met the requirements for application of the *Ex parte Young* exception.

2. Resolution No. 13-171 Violates Due Process.

Resolution No. 13-171 deprives all Nooksacks that are "subject to pending disenrollment proceedings" from receipt of $250 in "Christmas Support." Roberts Decl., Ex. A. It does so without notice, a hearing, or an opportunity to be heard.

[3] Although often confused with "sovereign immunity," certain defenses, such as legislative, prosecutorial, judicial, and presidential immunity defenses are actually "absolute immunity" defenses available to officials sued in their personal capacities. *Cleveland v. Garvin*, 8 Am. Tribal Law 21, 32 n.13 (Ho–Chunk Trial Ct. 2009). These types of defenses are available "to insure independence of action on their part, so that they may exercise discretion in the performance of their duties without harassment or intimidation, and without fear that their actions might result in personal liability." Barbara J. Van Arsdale, et al., *Persons or Acts Entitled to Absolute Immunity*, 15 Am. Jur. 2d Civil Rights § 102 (2013). Tribal Councilmembers often act as the executive and legislative branch, they are therefore entitled to an absolute immunity defense when sued in their personal capacities and performing these functions. *See e.g. Cline v. Cunanan*, No. NOO-CIV-02/08-5, at 7-8 (Nooksack Ct. App. Jan. 12, 2009); *In re Nuvumsa*, 7 Am. Tribal Law 305, 308 n.2 (Hopi Ct. App. 2007); *see also generally Schmidt v. Contra Costa County*, 693 F.3d 1122, 1135-38 (9th Cir. 2012) (applying the legislative immunity test). The question in these instances is whether the individual sued, in his individual capacity, has "acted outside the scope of his [or her] authority" in taking the acts alleged. *Cline*, No. NOO-CIV-02/08-5, at 7. This should not be confused with a second "scope of authority" question often raised in federal courts. In federal courts, tribal sovereignty itself has been held as inferior to the laws of the federal government. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). In these instances, where the tribe itself adopts a law or policy that conflicts with a "superior" federal law, the tribe itself is said to have "acted beyond the scope of [its] authority" such that sovereign immunity will not apply to *anyone* acting in furtherance of that law or policy. *See Tenneco Oil Co. v. Sac and Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984) ("If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit."); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993) (same). This test is not applicable in the context of tribal courts, however, as the supremacy of federal law is not at issue. *Seymour v. Colville Confederated Tribes*, No. AP96-022, 2001 WL 36243309, at *2-3 (Colville Ct. App. Oct. 18, 2001); *Seven Arrows, L.L.C. v. Tulalip Tribe of Washington*, No. TUL-CI-4/96-499, 1997 WL 34706747, at *1 (Tulalip Ct. App. Jul. 14, 1997); *see also Cleveland*, 8 Am. Tribal Law at 27 n.5 (applying *Ex parte Young* and noting that a tribal official does not share "the sovereign immunity of the tribe" when sued in tribal, as opposed to federal, court in his or her official capacity).

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Article IX of the Nooksack Constitution requires that "[t]he deprivation of life, liberty, or property must be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Notice of depravation must reach the parties affected and convey the required information to satisfy the principles of due process. *Id.* at 314. Of course, this procedural component does not protect everything that might be described as a "benefit": "To have a property interest in a benefit, a person [must] have a legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Such entitlements are, "'are created and their dimensions are defined by existing rules or understandings that stem from an independent source.'" *Paul v. Davis*, 424 U.S. 693, 709 (1976) (quoting *Roth*, 408 U.S. at 577). An entitlement for which Due Process must be provided is distinguished from a benefit for which it is not in that an entitlement exists when "a particular outcome necessarily follows" from "certain substantive predicates" being met. *Khan v. Bland*, 630 F.3d 519, 528 (7th Cir. 2010) (citing *Perry v. Sindermann*, 408 U.S. 593, 601 (1972)).

Here, Resolution No. 13-171 grants "2013 Christmas Support" to Nooksacks that meet certain specified requirements, *i.e.* are "not subject to pending disenrollment proceedings." *See generally* Roberts Decl., Ex. A. It denies this entitlement to all Nooksacks who do not meet these requirements, *i.e.* to those who are "subject to pending disenrollment proceedings," and does so without providing notice, a hearing, or an opportunity to be heard. *Id.* The procedure for determining the availability of Christmas Support established by Resolution No. 13-171 is thus unconstitutional, and the offices that are tasked with acting in furtherance of this unlawful Resolution must be enjoined.

3. Resolution No. 13-171 Violates Equal Protection.

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Substantive due process also involves the "right to liberty and equal protection of . . . law" and prevents laws from being "applied . . . in an unfair and unequal way." *Begay v. Navajo Nation Election Admin.*, 4 Am. Tribal Law 604, 611 (Navajo 2002). The guarantee of substantive due process, in other words, "assures that the law will be fair and reasonable, not arbitrary." *Id.* at 613. In so assuring, "[e]qual protection review is triggered . . . where persons similarly situated are treated differently." *Id.* at 613-14.

To withstand equal protection review, legislation that has a "disparate impact . . . on a particular group," *Nunez v. Cuomo*, No. 11-3457, 2012 WL 3241260, at *15 (E.D.N.Y. Aug. 17, 2012), "must be rationally related to a legitimate governmental purpose." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). Legislation passed with "a bare desire to harm a politically unpopular group" will always fail this test because such a desire is never a "legitimate state interest." *Id.* (quotation omitted). And when . . . "applying rational basis review to a classification that adversely affects an unpopular group, courts apply a 'more searching'" review of the evidence submitted by the parties. *Golinski v. U.S. Office of Personnel Management*, 824 F.Supp.2d 968, 996 (N.D. Cal. 2012). Here, Resolution No. 13-171 provides benefits to numerous similarly situated Nooksacks, but denies Plaintiffs these benefits. Resolution 13-171 outright denies targeted Nooksacks a public benefit simply because they have been targeted — simply because they are a politically unpopular group. Resolution No. 13-171 is thus unconstitutional. *See Collins v. AAA Homebuilders, Inc.*, 333 S.E.2d 792, 797 n.2 (W.Va. 1985) ("[A] policy [that] is motivated by a 'desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'") (quoting *U.S. Dept. Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)) (emphasis in original).

C. Plaintiffs Meet The Remaining TRO Factors.

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If the acts of an office sought to be enjoined are alleged to be unconstitutional, and the movant's claims are found to have a likelihood of success, the movant will always meet the three remaining factors. *See Towbin v. Antonacci*, 885 F.Supp.2d 1274, 1295 (S.D. Fla. 2012) (citing cases). Indeed, an alleged depravation of a constitutional right "is in and of itself irreparable injury" that requires an injunction to issue. *National Prisoners Reform Ass'n v. Sharkey*, 347 F.Supp. 1234, 1237 (D.R.I. 1972) (citing *Dombrowski v. Pfister*, 380 U.S. 479 (1965)).

Here, Plaintiffs clearly meet these standards. A TRO must issue. This Court must enjoin the Nooksack offices sued from acting in furtherance of an unconstitutional Resolution.

III. CONCLUSION

Plaintiffs will surely succeed on the merits. At minimum, the irreparable harm suffered by the Plaintiffs, the balance of equities, and the Nooksack public's interest in this serious, substantial, and difficult matter is deserving of more deliberate investigation upon this Court's review for permanent injunction. Plaintiffs, therefore, ask that a TRO issue ordering that Defendants refrain from acting in furtherance of Resolution No. 13-171.

DATED this 9th day of December, 2013.

Gabriel S. Galanda
Anthony S. Broadman
Ryan D. Dreveskracht
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DECLARATION OF SERVICE

I, Gabriel S. Galanda, say:

1. I am over eighteen years of age and am competent to testify, and have personal knowledge of the facts set forth herein. I am co-counsel of record for Plaintiffs.

2. Today, I caused the attached documents to be delivered to the following:

Grett Hurley
Rickie Armstrong
Tribal Attorney
Office of Tribal Attorney
Nooksack Indian Tribe
5047 Mt. Baker Hwy
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A copy was emailed to:

Thomas Schlosser
Morisset, Schlosser, Jozwiak & Somerville
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Seattle, WA 98104-1509

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

DATED this 9th day of December, 2013.

GABRIEL S. GALANDA

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EXHIBIT DD

by mail service

RECEIVED

DEC 18 2013

Office of Tribal Attorney
Nooksack Indian Tribe

IN THE NOOKSACK TRIBAL COURT

RUDY ST. GERMAIN, et al.,

Plaintiffs,

v.

ROBERT KELLY, et al.,

Defendants.

NO. 2013-CI-CL-005

PLAINTIFFS' BRIEF IN SUPPORT OF TEMPORARY RESTRAINING ORDER RELIEF

Hearing on December 18, 2013

I. BACKGROUND

On December 9, 2013, Plaintiffs filed a Motion for Temporary Restraining Order ("TRO") to restrain Defendants, sued in their official capacities,[1] from taking acts in furtherance of an unconstitutional and illegal Resolution. A hearing was held on that TRO Motion on December 11, 2013, where Defendants offered no defense on the constitutionality of the Resolution, but instead made only a jurisdictional deficiency argument. On December 12, 2013, this Court issued an Order "reserving ruling on the Motion for Temporary Restraining Order" until the "initial process" requirements of N.T.C. § 10.05.040 had been met and the six days of lag-time between initial filing and consideration of the motion required by N.T.C. § 10.05.050 had elapsed.[2] *Order*

[1] "'[O]fficial-capacity actions for prospective relief are not treated as actions against the State.'" *In re Ellett*, 254 F.3d 1135, 1138 (9th Cir. 2001) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989)). Although, in actuality, they are: "'As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity.'" *Schlender v. Quinault Indian Nation*, No. CV-12-078 (Quinault Tribal Ct. Dec. 5, 2013) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165-66 & n.11 (1985)).

[2] Plaintiffs continue to object to N.T.C. § 10.05.050's application to Temporary Restraining Orders and encourage the Court to reconsider this holding. Because of the urgent and temporary nature of TROs, as opposed to general civil

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on Motion for Temporary Restraining Order and Scheduling ("*TRO-Scheduling Order*"), at 2-3.

In that Order, the Court also posed the following question:

> If the Court finds an equal protection violation of the Nooksack Constitution by Resolution 13-171 as it applies to the proposed disenrollees, what *specific* legal or equitable remedies are allowed under the legal theories advanced . . . ?

Id. at 2 (emphasis in original). Plaintiffs answer this question below.

II. ARGUMENT

A. Severability

Once a portion of the Resolution is deemed unconstitutional, the burden is on the Defendants to show that the Resolution can be saved. *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 557 (2nd Cir. 1990) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936)). In doing so, courts employ the following test:

> Whether portions of a statute which are constitutional shall be upheld while other portions are eliminated as unconstitutional involves primarily the ascertainment of the intention of the legislature. When part of a statute or ordinance is unconstitutional and yet is not an integral or indispensable part of the measure, the invalid portion may be stricken without affecting the remainder of the statute or ordinance. However, if an unconstitutional portion of a statute is integral or indispensable to the operation of the statute as the legislature intended, the provision is not severable, and the entire measure must fail.

---

motions addressed by N.T.C. § 10.05.050(e), notice is generally not even required; let alone six days notice that would render the issuance of a TRO essentially useless in emergency circumstances. *See e.g. Watts v. Watts*, 99 So.3d 751, 756 (Miss. Ct. App. 2012) (trial court granting an *ex-parte* temporary restraining order to prevent abuse of a child). Indeed, that is why Tribal Judge Pro Tem Randy Doucet urgently convened a telephonic hearing on the *Lomeli* Plaintiffs' very first hearing TRO motion, on March 18, 2013, without requiring either service of process or six days notice; all that was required was notice to defense counsel, which is typically the only "process" required in TRO proceedings, and which Defendants admitted was provided relative to this particular TRO motion. And as noted by the Court last week, "the Nooksack Indian Tribe Communications Page stated that 'Christmas Checks will be mailed out December 12th.'" *TRO-Scheduling Order*, at 1. Although Plaintiffs have reason to believe that the Christmas Checks may have already been issued — which, if true, would severely limit the ability of this Court to provide prospective relief were it to find Resolution No. 13-171 unseverable — Plaintiffs will assume, for the sake of this brief, that the checks have yet to be issued. *But see* Declaration of Rudy St. Germain, at 1 ("I learned that Treasurer Abby Smith has advised Tribal staff to rush the "Christmas Support" checks today per Resolution No. 13-171, instead of waiting for the Tribal Court's decision on Plaintiffs' Motion . . . ."); Declaration of Ryan D. Dreveskracht, Exhibit A (opposing counsel vague as to whether Christmas Support checks will issue).

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State v. Nielsen, 960 P.2d 177, 181 (Idaho 1998) (citing *Electric Bond & Share Co. v. Securities & Exchange Com.*, 303 U.S. 419 (1938); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Boundary Backpackers v. Boundary County*, 913 P.2d 1141 (1996)).

Generally, in situations similar to the case at bar, courts have found benefits legislation to be severable. In *Smith v. Reynolds*, for example, a three-judge panel of the U.S. District Court for the Eastern District of Pennsylvania was faced with determining whether a statutory provision that required applicants for public welfare to have resided in the State for a period of one year before eligibility for assistance was constitutional. 277 F.Supp. 65, 22 (E.D. Pa. 1967). The court held that it was not, because it did not pass equal protection muster:

> [T]he constitutional test of equal protection is not satisfied by considerations of minimal financial expediency alone. To be sure, the State may reduce or even eliminate entirely welfare payments if it chooses to conserve resources in this fashion; it may turn all beggars from its doors. But it may not arbitrarily turn away some who are in need while bestowing its charitable favors on others. There must be some otherwise legitimate purpose for excluding members of the class who are in fact deprived of the protection and privileges of existing laws. It is not enough to say that the class is excluded because money is saved.

Id. at 68. As to relief, the court enjoined the state from enforcing the residence requirement, but left the remainder of the benefits legislation intact. *Id.*

In *Westberry v. Fisher*, a three-judge panel of the U.S. District Court for the Southern District of Maine was tasked with determining whether the state's "so-called 'maximum grant' and 'maximum budget' regulations" were constitutional under the equal protection clause. 297 F.Supp. 1109, 1111 (S.D. Me. 1969). The court held that they were not:

> The only apparent purpose to be served by the challenged regulations is to protect the state treasury against the burgeoning costs of public welfare. But the regulations cannot be sustained on this basis. The protection of the public purse is a valid, indeed necessary, purpose relevant to all public programs. But it may not be accomplished by arbitrarily singling out a particular class of persons to bear the entire burden of achieving that end. . . . The Attorney General's position is simply that, since there is no vested right to public welfare, the State may

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> distribute its largesse in any way it wishes and among any of its citizens it chooses to favor. But the authorities are to the contrary. Unquestionably, there has historically been no vested right to public welfare. However, once a state elects to establish a program of public assistance, it must meet constitutional standards; it cannot arbitrarily deny to a portion of its citizens the benefits of such a program.

Id. at 1115-16 (citation omitted). As to relief, the court enjoined the state from enforcing the "maximum grant and maximum budget regulations," but left the remainder of the benefits legislation intact. *Id.* at 1116.

Finally, in *Johnson v. Robinson*, the plaintiffs sought to enjoin state officials from the enforcement of state statute requiring state welfare aid applicant to have continuously resided for one whole year in the state. 296 F.Supp. 1165, 1167 (N.D. Ill. 1967). In determining that the injunction should issue, Justice Fairchild of the U.S. Court of Appeals for the Seventh Circuit, sitting on a three-judge panel of the U.S. District Court for the Northern District of Illinois, held that, for the same reasons cited in *Smith*, 277 F.Supp. 65, the statute did not pass equal protection muster. *Johnson*, 296 F.Supp. at 1169. As to relief, the court issued a preliminary injunction, "enjoining defendants, their successors, and persons under their control" from acting in furtherance of the specific provisions of the Illinois Public Welfare Code challenged, but left the remainder of the Welfare Code intact. *Id.*

Based upon on-point case law, it appears that the Court must fashion relief that severs the unconstitutional portion of Resolution No. 13-171 out of the Resolution, and that enjoins Defendants from acting in furtherance of that specific portion of the Resolution.

B. Prospective v. Retrospective Relief

Because Plaintiffs have asked the Court "to address a 'continuing violation'" of superior law, "[t]he relief requested must be prospective" and not retrospective. *Corrigon v. Kron*, No. 13-0116, 2013 WL 5442176, at *2 (E.D. Wash. Sept. 27, 2013) (quoting *Seminole Tribe of Florida v.*

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Florida, 517 U.S. 44, 73 (1996)). Thus, Plaintiffs are admittedly barred from seeking "money damages or retrospective equitable relief." *Williams v. Oregon Dept. of Corrections*, No. 12-35091, 2013 WL 5648786, at *1 (9th Cir. Oct. 10, 2013); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287, 289 (1997) (relief requested barred because it was the "functional equivalent" to a "retroactive levy upon funds in [the government's] Treasury" and therefore not prospective).[3]

This does not, however, bar all relief related to the issuance of government funds — money damages for harms already caused (and that are therefore retrospective) are not equivalent to expenses that are ancillary to prospective relief. The former are barred, but the latter are not. *See In re Ellett*, 254 F.3d at 1144 ("**The critical distinction is whether the plaintiff requests prospective or retroactive relief. . . .** The [U.S. Supreme] Court has repeatedly observed that prospective relief . . . may have a substantial ancillary effect on a State's treasury, but has nevertheless consistently held that this fact alone is insufficient to convert such actions into actions against the State . . . .") (citing e.g. *Milliken v. Bradley*, 433 U.S. 267 (1977)) (emphasis added); *C.T. ex rel. Beason v. Bentley*, No. 11-1123, 2013 WL 5231955, at *4 (M.D. Ala. Sept. 16, 2013) (holding that sovereign immunity does not "prohibit a federal court from entering injunctive relief against a state officer, even if such relief may cost the state substantial sums of money," but that sovereign immunity "does, however, prevent a . . . court from awarding retroactive relief paid from the state treasury").

In *Milliken v. Bradley*, for example, the U.S. Supreme Court held that an order requiring the state to pay the costs of education benefits for certain individuals being denied equal

[3] *But see In re Deposit Ins. Agency*, 482 F.3d 612, 620-21 (2nd Cir. 2007) (noting that *Coeur d'Alene* was limited to its facts); *Dubuc v. Michigan Bd. of Law Examiners*, 342 F.3d 610, 616-17 (6th Cir. 2003) (same); *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1048 (9th Cir.2000) (same); *American Exp. Travel Related Services Co., Inc. v. Sidamon-Eristoff*, 755 F.Supp.2d 556, 569-71 (D.N.J. 2010) (same); *Gila River Indian Community v. Winkelman*, No. 05-1934, 2006 WL 1418079, at *2-3 (D. Ariz. May 22, 2006) (same).

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protection was proper because it was "part of a plan that operate[d] prospectively to bring about the delayed benefits" that were required by law, as opposed to damages that could be characterized as retrospective. 433 U.S. at 289-90; *see also Papasan v. Allain*, 478 U.S. 265, 282 (1986) (injunctive relief in equal protection challenge to state's distribution of public school funds allowed because "[a] remedy to eliminate this current disparity, even a remedy that might require the expenditure of statute funds, would ensure compliance in the future with a substantive federal-question determination rather than bestow an award for accrued monetary liability").

Likewise, in *Luckey v. Harris*, the U.S. Court of Appeals for the Eleventh Circuit reversed a trial court's holding that an equal protection remedy that included "increased funding for indigent services" that was borne by the state was barred by sovereign immunity. 860 F.2d 1012, 1014 (11th Cir. 1988). In analyzing the requested relief, the court held:

> [T]he determining factor is the theory of the relief sought. . . . [T]he essence of the equal protection allegation is the present disparity in the distribution of the benefits of state-held assets and not the past actions of the State. A remedy to eliminate this current disparity, even a remedy that might require the expenditure of state funds, would ensure compliance in the future . . . rather than bestow an award for accrued monetary liability.

Id. at 1015 (quotation omitted); *see also e.g. Antrican v. Odom*, 290 F.3d 178, 185-186 (4th Cir. 2002) (injunction requiring that the state pay for dental screening and treatment not barred by sovereign immunity); *CSX Transp., Inc. v. Board of Public Works of State of W.Va.*, 138 F.3d 537, 541-43 (4th Cir. 1998) (injunction against the collection of the illegal taxes, even those that already have been assessed, is prospective, and therefore not barred by sovereign immunity); *Smith v. Sec. of Dept. of Envtl. Prot. of Penn.*, No. 12-2189, 2013 WL 6388555 (E.D. Pa. Dec. 5, 2013) (injunction that required the state to hire plaintiff, and to spend state funds in doing so, not barred by sovereign immunity).

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Here, Plaintiffs' "theory of the relief sought" is clearly prospective. *Luckey*, 860 F.2d at 1014. Plaintiffs do not demand that the Tribe issue Christmas Support checks. Plaintiffs simply request that if the Tribe does decide to issue Christmas Support checks, that Plaintiffs be provided the equal protection and due process of law required by the Nooksack Constitution. As currently drafted, Resolution No. 13-171 does not meet these requirements. Plaintiffs have thus requested that the Court order the Tribe to correct the "disparity in the distribution of the benefits" that currently exists under Resolution No. 13-171. *Id.* Plaintiffs do not seek money damages or any type of relief that can properly be construed as retrospective.

III. CONCLUSION

This Court must issue a TRO ordering that Defendants refrain from acting in furtherance of Resolution No. 13-171 as it is currently drafted.

To Plaintiffs, it makes no difference whether Defendants are enjoined from acting in furtherance of the entire Resolution No. 13-171, or merely the unconstitutional portion of the Resolution.

Based upon on-point case law, however, it appears that the Court must fashion relief that severs the unconstitutional portion of Resolution No. 13-171 out of the Resolution, and enjoins Defendants from acting in furtherance of that portion of the Resolution. Plaintiffs thus propose that the Defendants be enjoined as follows:

> Defendants are hereby enjoined from enforcing the portion of Resolution No. 13-171 that restricts the availability of "Christmas Support checks" to Nooksack Tribal members "not subject to pending disenrollment proceedings."

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A Proposed Order reflecting this language is included with this responsive briefing.

DATED this 17th day of December, 2013.

Gabriel S. Galanda
Anthony S. Broadman
Ryan D. Dreveskracht
Attorneys for Plaintiffs
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DECLARATION OF SERVICE

I, Gabriel S. Galanda, say:

1. I am over eighteen years of age and am competent to testify, and have personal knowledge of the facts set forth herein. I am co-counsel of record for Plaintiffs.

2. Today, I caused the attached documents to be delivered to the following:

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DATED this 17th day of December, 2013.

GABRIEL S. GALANDA

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EXHIBIT EE

IN THE COURT OF APPEALS

OF THE

QUINAULT INDIAN NATION

E. LEE SCHLENDER Plaintiff/Appellant,	Case No. CV-12-078
V.	OPINION
QUINAULT INDIAN NATION, Defendant/Respondent.	

July 17, 2013 - Argued
September 10, 2013 - Decided

Before: Jane Smith, Presiding Judge; Lisa Atkinson - Judge; Hunter Abell - Judge.

Appearances: E. Lee Schlender, pro se, for Appellant; Ray Dodge, Quinault Indian Nation Reservation Attorney, for Respondent.

This matter comes before the Quinault Indian Nation Court of Appeals pursuant to a Notice of Appeal filed on February 1, 2013 by Appellant E. Lee Schlender ("Appellant"). Appellant appeals an Order to Dismiss entered by the Tribal Court in favor of the Quinault Indian Nation ("Respondent"). Because this Court determines that the Appellant's claim is partially barred due to sovereign immunity, but that Appellant's claim for declaratory relief still requires adjudication by the Tribal Court, the decision of the Tribal Court is AFFIRMED in part and REMANDED in part for further action in accordance with this opinion.

I. Facts and Procedural History

Appellant was hired as a judge for the Respondent on July 28, 2008 by Resolution 08-59-87. The Employment Agreement subsequently signed by Appellant and Respondent specifically noted that it did not act as a waiver of the Respondent's sovereign immunity.

After approximately three years, on July 26, 2011, the Respondent terminated Appellant from his position by certified letter, without hearing or notice. On August 8, 2011, Appellant served a Notice of Claim on the Chairman of the Business Committee[1] and the Office of Attorney General. On June 26, 2012, Appellant filed a Complaint in the Tribal Court alleging breach of contract and seeking monetary damages and declaratory/injunctive relief. The Complaint was similarly served on the Chairman of the Business Committee and the Office of Attorney General. On August 9, 2012, an Amended Complaint was filed with the same entities.

On January 22, 2013, the Tribal Court granted a Motion to Dismiss in favor of the Respondent. The Tribal Court ruled that a narrow reading of Q.T.C. 99.02.040 required service of Appellant's Notice of Claim on, not only the Chairman of the Business Committee and the Office of Attorney General, but also the Secretary of the Business Committee. Additionally, the Tribal Court ruled that the Employment Agreement was, at best, ambiguous regarding whether there was a waiver of sovereign immunity. Lastly, the Tribal Court ruled that, even if there was a waiver of sovereign immunity, there was not a pledge of collateral as required under Article V, Section 3(d) of the Quinault Tribal Constitution. This appeal followed.

II. Discussion

Appellant's Notice of Appeal alleged five errors:[2]

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[1] The chief executive for the Quinault Nation appears alternately as "President" or "Chairman of the Business Committee" in the Nation's Code, Bylaws, and the parties' briefing in this case. For purposes of this opinion, we consider the terms synonymous, and utilize the Code term of "Chairman of the Business Committee."

[2] We note that Appellant's appellate brief reformulates the issues on appeal into four different, but overlapping, propositions. For sake of simplicity, we observe that the only issue differing markedly from the errors alleged in the Notice of Appeal is one pertaining to whether the Respondent's Motion to Dismiss should have been stayed pending completion of discovery. We address that issue separately herein.

1) That the interpretation of the Quinault Code as set forth in the Memorandum Regarding Notice Under Tribal Claim Statute is error as a matter of fact and law; that a separate service of the Plaintiff's claim was not required upon a separate officer or person acting on behalf of the Quinault Business Committee; that service upon the Chairman of the Quinault Business Committee was in all respects sufficient;
2) That sovereign immunity does not limit nor remove the application of Title 5 procedures, specifically requiring a hearing and vote to remove a judge of the Quinault Indian Nation;
3) That a Title 5 appointed judge is entitled to a hearing and due process before being removed and terminated as a judge of the Quinault Indian Nation;
4) That an ancillary contract to a Title 5 judicial appointment can be, by implication, a limited waiver of sovereign immunity for certain, specific purposes; that an application for specific performance of that contract is not per se a claim for damages restricted or limited by sovereign immunity; and
5) Appointment of the Plaintiff as per Title 5 and providing for a judicial salary is a waiver of sovereign immunity and is not constitutionally prohibited.

Appellant's Notice of Appeal, 1-2. Each of the allegations of error is addressed in turn.

A. Service on the Respondent

At oral argument, both parties extensively addressed the threshold question in this case regarding whether Appellant appropriately served the necessary parties specified under Q.T.C. 99.02.040. The record indicates that Appellant served the Chairman of the Business Committee and the Office of Reservation Attorney with the Notice of Claim and his subsequent Complaint. The Code provision at issue reads as follows:

> Procedure with Respect to Actions Authorized by This Title: (a) Any person desiring to institute suit against the Quinault Indian Nation as authorized by this Title shall as a jurisdictional condition precedent to institution of such suit provide notice to the Chairman, Quinault Business Committee and the office of Reservation Attorney of the Quinault Indian tribe.

The Tribal Court found that this language requires service on three distinct individuals or entities: The Chairman of the Quinault Business Committee, the Office of Reservation Attorney, and the Secretary of the Quinault Business Committee. *See* Memorandum Regarding Notice Under Tribal Claim Statute, 1-2.

We review orders granting summary judgment *de novo*. *See Pura v. Quinault Housing Authority*, CV 12-022, at 6-7; *See also Oneida Casino and Bingo v. Liggins*, No. 02-AC-015 at ¶12 (Oneida Appeals 02/01/2003). Additionally, we review questions of statutory interpretation *de novo*. In this case, Appellant argues that the Tribal Court erred, and that common grammar, policy, along with custom and usage, support the proposition that it is only necessary to serve the Chairman of the Business Council and the Office of Reservation Attorney. *See* Appellant's Brief, at 13-18.

In contrast, the Respondent agrees with the Tribal Court and argues that Q.T.C. 99.02.040 requires service on the Chairman of the Business Council, the Office of Reservation Attorney, and the Secretary of the Business Council. *See* Respondent's Brief, at 3-4. The Respondent contends that this comports with the separation of powers inherent in the Quinault form of government and correlates with a long-held interpretation of the Code provision by the Tribal Court.

We agree with Appellant. In doing so, we start with the language at issue. The operative phrase requires service on "the Chairman, Quinault Business Committee and the Office of Reservation Attorney…" The confusion stems from the question of whether the phrase "Quinault Business Committee" modifies the term "Chairman" or requires separate service on the Quinault Business Committee.

We find that the phrase is ambiguous and analyze the Code provisions at issue to effectuate the legislative intent. *See Cleveland v. City of Los Angeles*, 420 F.3d 981, 990 (9th Cir. 2005) ("According to the rules of statutory construction, the court can only look to legislative intent when a statute is ambiguous."). In doing so, we find that the purpose of Q.T.C. 99.02.040 is to ensure the Business Committee is on notice of potential litigation against the Quinault Nation. With that being the purpose, and noting that both the Chairman and Secretary serve on the Business Committee, adopting the Respondent's proposed reading of Q.T.C. 99.02.040 creates entirely unnecessary additional labor for litigants. While the Respondent argues that separate service on the President and the

Secretary of the Business Committee is appropriate as they represent different branches of the Quinault government, we are unpersuaded. Respondent's Brief, at 4. The Respondent provides no citation for this proposition, and we observe that no such distinction appears in the Quinault Tribal Constitution or the Quinault Tribal Code.[3] If the intent of the Q.T.C. 99.02.040 is to ensure the Business Committee is aware of pending litigation, the purpose of the statute was well served in this case.

Finally, the parties provide no citation to previous Quinault case law addressing this provision. We note, however, that this issue was addressed, at least tangentially, in *Quinault Indian Nation v. Hendricks et al.*, No. CV 11-093, 11-110. In that case, pertaining to dueling proceedings under the Minor In Need of Care ("MINOC") and guardianship provisions of the Quinault Code, this Court noted the following:

> If this had been a collateral attack on the jurisdiction of the Tribal Court over this matter or on another judgment of the court, the provisions of Title 99 would have been triggered *and service would have been required on the President and the Office of Reservation Attorney.*

Id., at page 4(emphasis added). We also note that the Respondent itself advocated such an interpretation in its briefing in *Hendricks*: "Service upon the Nation is governed exclusively by QTC 99. QTC 99.02.040 requires that service be made upon the President and the Office of Reservation Attorney (now known as the Office of the Attorney General)." Nation's Appellate Brief, *Quinault Indian Nation v. Hendricks*, at 4. Consequently, while not directly addressing the question presented in this case, *Hendricks* provides evidence of prior interpretation in a case directly involving the Respondent. For all these reasons, to the extent the Tribal Court found that service is required on the Chairman, Office of Reservation Attorney, and Secretary of the Business Committee, the Tribal Court is reversed.

B. Sovereign Immunity

Appellant next argues a series of contentions regarding sovereign immunity, including that an ancillary contract to the appointment as a judge under Title 5 may act as a limited waiver

[3] The lack of distinction between the executive and legislative stands in marked contrast to the Quinault Tribal Judiciary which is specifically described as "independent" under Article V of the Quinault Tribal Constitution.

of sovereign immunity, that the Respondent's sovereign immunity does not obviate the need to comply with the termination procedures under Title 5 of the Code, and that appointment of Appellant under Title 5 is not a waiver of sovereign immunity and is not constitutionally prohibited. As each of these contentions pertain to sovereign immunity and its applicability in this case, we combine our analysis of them here.

We recently examined at length the requirements under the Quinault Constitution for a valid waiver of sovereign immunity under Article V, Section 3(d). *See Pura*. In doing so, we determined that the particular constitutional language at issue, a provision seemingly unique to the Nation, requires that a waiver of sovereign immunity must be accompanied by a pledge of collateral. In this case, the Tribal Court found that, regardless of whether there was a waiver of sovereign immunity, the Employment Agreement between Appellant and Respondent contained no constitutionally-required pledge.

Appellant disagrees, and relies on the lower court's decision in *Pura* for a significant portion of his analysis. Appellant's brief, at 9. Appellant also argues that the Employment Agreement creates an implied waiver of sovereign immunity by stating "All actions arising under this Agreement or reasonably related to this Agreement shall be tried in the Quinault Tribal Court." *Id.*, at 11.

The Respondent counters by pointing out that the *Pura* decision relied on by Appellant was subsequently reversed by the Tribal Court at summary judgment. Respondent's Brief, at 6. Additionally, the Respondent notes that the Employment Agreement claims to specifically reserve the Respondent's sovereign immunity, whatever the language of the governing law and venue clauses. *Id.*, at 4-5.

Here, we agree with the Tribal Court and the Respondent that, regardless of the provisions of the Employment Agreement, there is no accompanying pledge of collateral as required under the Quinault Tribal Constitution. This constitutional provision, as noted in *Pura*, is unique and appears designed for the Respondent's protection and benefit. As a result, we affirm the decision of the Tribal Court on this issue. As there was no pledge of collateral, it is unnecessary for this Court to determine if the venue and governing law provisions of the Employment Agreement constitute a waiver of sovereign immunity.

C. Injunctive/Declaratory Relief

As there was no pledge of collateral sufficient to meet the constitutional requirements of Article V, Section 3(d), dismissal of Appellant's claim for monetary damages under his breach of contract theory was appropriate. *See e.g. Lane v. Pena*, 518 U.S. 187, 192 (1996)(To show that the government is liable for awards of monetary damages, "the waiver of sovereign immunity must extent unambiguously to such monetary claims."). Appellant does not seek solely monetary damages, however, but also seeks declaratory relief stating that he remains a judge of the Quinault judiciary until a hearing mandated under Title 5 of the Code is held. Appellant's brief, at 2.

Appellant's briefing and oral arguments present the issue of declaratory relief as one of grave importance for the Nation and the Quinault judiciary. At oral arguments, this Court questioned both parties regarding whether, if the service requirements QTC 99.02.040 were met, the Quinault judiciary could award Appellant the declaratory relief he sought. Appellant argues that the Quinault judiciary may award declaratory relief, regardless of any waiver of sovereign immunity. The Respondent did not directly respond, but observed that technical defects in Appellant's case may prevent awarding of the sought relief, regardless of whether it may legally be awarded.

The ability of the Quinault judiciary to award declaratory relief in an action against the sovereign appears to be a matter of first impression. As this matter is of significant importance to the Respondent, as the factual record appears incomplete regarding this issue, and as the parties' respective arguments may be impacted by our recent decision in *Pura*, we find that this matter should be remanded to the Tribal Court. Upon remand, in addition to addressing the issue of availability of declaratory relief, the Tribal Court is instructed to prepare complete findings of fact and conclusions of law allowing this Court of Appeals, if necessary, to review a comprehensive factual record. As this dispositive matter is remanded to the Tribal Court for consideration, it is unnecessary for us here to consider Appellant's final allegation of error regarding whether it was error by the Tribal Court to decline to stay the Respondent's Motion to Dismiss until the conclusion of discovery.

III. Conclusion

NOW THEREFORE, IT IS ORDERED:

The Tribal Court's decision is **AFFIRMED** in part and **REMANDED** in part for further action in accordance with this opinion.

DATED this 9th day of September, 2013.

Concurring:

Jane Smith
Presiding Judge

Lisa Atkinson
Judge

Hunter M. Abell
Judge

EXHIBIT FF

IN THE TRIBAL COURT OF

OF THE

QUINAULT INDIAN NATION

E. LEE SCHLENDER
Plaintiff,

v.

QUINAULT INDIAN NATION,
Defendant.

Case No. CV-12-078

ORDER OF DISMISSAL

This matter comes before the Tribal Court on remand from the Quinault Indian Nation Court of Appeals pursuant to an Order issued on September 9, 2013. Opinion, *Schlender v. Quinault Indian Nation*, No. CV-12-078 (Quin. Ct. App. Sept. 9, 2013) [hereinafter "Opinion"]. For the reasons discussed below, this matter is hereby **DISMISSED.**

I. Facts and Procedural History

Pro se Plaintiff E. Lee Schlender – a former judge of this Court – filed a Complaint in this matter on June 25, 2012, alleging that the Quinault Indian Nation ("Nation") had breached an employment contract executed between the parties on August 26, 2008. Complaint, Exhibit A [hereinafter "Employment Agreement"]. According to Plaintiff, the Nation terminated his

employment (1) "without cause" and in violation of the terms of the Employment Agreement, and (2) in circumvention of Title 5 of the Quinault Tribal Code. Complaint at ¶ XV; *see also generally id.* Exs. A(1), B (Quinault Business Committee Resolutions authorizing the appointment of Plaintiff pursuant to Title 5). Plaintiff named the Nation proper as a defendant, *id.* at ¶ 2, seeking the following relief:

> 1. [A]ll sums due the Plaintiff and to become due in the future, as both accrued and future amounts payable per the terms and conditions of the Employment Agreement in a sum of not less than $300,000.00.
>
> 2. Interest and costs in a sum to be determined upon trial and entered upon a Judgment of th[e] Court.
>
> 3. Such other and further relief as the Court deems proper in this proceedings [sic] including but not limited to re-instatement of Plaintiff as Chief Judge with an award of all accrued back salary and benefits.

Id. at ¶ XXIV. On August 9, 2012, Plaintiff filed a First Amended Complaint, adding the following additional relief:

> 4. [T]hat the Court enter an Order re-instating Plaintiff to the office of Judge of the Quinault Nation with all Title 5 powers and authority provided therein until his removal as per Title 5, with an award of accrued salary and benefits until he is so removed.

First Amended Complaint at ¶ XVII.

On November 16, 2012, the Nation filed a Motion to Dismiss Plaintiff's First Amended Complaint, arguing that Plaintiff had (1) failed to comply with the pre-filing requirements of Q.T.C. § 99.02.040(a); (2) failed to comply with the service

requirements of Q.T.C. § 30B.05.020; (3) was barred by the statue of limitations, Q.T.C. § 99.01.010; and (4) was barred by tribal sovereign immunity. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, at 2.

On January 22, 2013, this Court granted Defendant's Motion to Dismiss, holding that:

1. Initial Notice of the claim was not served on the Quinault Business Committee as required under a strict reading of Q.T.C. § 99.02.040; and

2. The Contract between the parties was not clear and unambiguous as to a waiver of sovereign immunity. In addition, the Quinault constitutional requirement of security was not met. Thus, the action was barred by tribal sovereign immunity.

Order to Dismiss, *Schlender v. Quinault Indian Nation*, No. CV-12-078 (Quin. Tribal Ct. Jan. 22, 2013).

On February 1, 2013, Defendant appealed the Court's Order of Dismissal, arguing that (1) the Defendant was properly served; (2) tribal sovereign immunity does not render the Nation immune from Title 5; and (3) the Nation is not immune from declaratory relief. Notice of Appeal at 2.

On September 10, 2013, the Quinault Court of Appeals issued an Opinion and Order that partially affirmed and partially reversed this Court's Order of Dismissal. As to this Court's holding on Plaintiff's failure to comply with the pre-filing requirements of Q.T.C. § 99.02.040(a), the Court of Appeals reversed, holding that separate service on the President of the

Quinault Indian Nation *and* the Secretary of the Quinault Business Committee, in addition to service upon the Office of Reservation Attorney, is not required. Opinion at 5. Rather, service is sufficient under Q.T.C. § 99.02.040(a) if it is made upon only "'the president and the Office of Reservation Attorney.'" *Id.* (quoting *Quinault Indian Nation v. Hendricks*, Nos. CV-11-093, CV-11-110, at 4 (Quin. Ct. App.)).

As to the Tribal Court's holding on sovereign immunity, the Court of Appeals affirmed, holding that Article V, Section 3(d) of the Quinault Constitution, "a provision seemingly unique to the Nation, requires that a waiver of sovereign immunity must be accompanied by a pledge of collateral." *Id.* at 6 (citing *Pura v. Quinault Housing Authority*, No. CV-12-002 (Quin. Ct. App. Aug. 27, 2013)). The Court of Appeals went on, however, to hold that this does not necessarily dispose of Plaintiff's nonmonetary prospective claims for relief. *Id.* at 7. The Court of Appeals found that "[t]he availability of the Quinault judiciary to award declaratory relief in an action against the sovereign appears to be a matter of first impression" and instructed this Court to make findings of fact and conclusions of law on this matter of "significant importance." *Id.*

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II. Law and Analysis

A. Legal Standard

"Sovereign immunity is a jurisdictional question, because courts do not have authority to hear a case against a government unless it has expressly consented to that exact suit." *Kalantari v. Spirit Mountain Gaming, Inc.*, 6 Am. Tribal Law 94, 99 (Grand Ronde Ct. App. 2005). In reviewing a challenge based on lack of jurisdiction, a trial court "must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Nichole Medical Equipment & Supply, Inc. v. TriCenturion, Inc.*, 694 F.3d 340, 347 (3d Cir. 2012) (quotation omitted). In so doing, "the court must consider the allegations of the complaint as true." *Parenti v. U.S.*, No. 03-5457, 2003 WL 23200011, at *1 (W.D. Wash. Dec. 22, 2003).

Where jurisdiction is properly alleged, a claim may be dismissed "only if it clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous."[1] *Gould Electronics Inc. v. U.S.*, 220 F.3d 169, 178 (3rd Cir. 2000). (internal quotations omitted). As stated by the U.S. Supreme Court in *Bell v. Hood*, 327 U.S. 678 (1946):

[1] A claim is frivolous "where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Dismissal is only appropriate "for a claim based on an indisputably meritless legal theory." *Fogle v. Pierson*, 435 F.3d 1252, 1259 (10th Cir. 2006).

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Id. at 682 (citing *Swafford* v. *Templeton*, 185 U.S. 487, 493-94 (1902); *Binderup* v. *Pathe Exchange*, 263 U.S. 291, 305-308 (1923)).

Thus, although the Court of Appeals instructed this Court to "complete findings of fact and conclusions of law" in determining the availability of declaratory relief, this Court holds that the jurisdictional analysis requested *necessarily* omits any analysis of the merits or evaluation of the facts. Opinion, at 7. *See e.g. Cronin v. Browner*, 898 F.Supp. 1052, 1058 n.5 (S.D.N.Y.,1995) (citing *Bell*, 327 U.S. 678, and holding that "a subject matter jurisdiction analysis . . . does not involve addressing the merits").

B. Analysis

The Court begins with the presupposition that "sovereign immunity does not shield wrongdoing" and that it is not "fair and just for one to have a right but their only remedy is barred

by sovereign immunity." *Ft. Peck Sioux Council v. Ft. Peck Tribes*, 4 Am. Tribal Law 292, 298 (Fort Peck Ct. App. 2003). Responsible tribal governments owe a duty to their membership; and that duty entails, at minimum, that the Tribal Court be empowered to hear grievances that allege acts repugnant to the Tribe's own constitution and law. *See generally Menefee v. Grand Traverse Band of Ottawa and Chippewa Indians*, No. 97-12-092-CV, 2004 WL 5714978, at *3 (Grand Traverse Tribal Ct. May 5, 2004); *Norton v. Shelby County*, 118 U.S. 425, 442 (1886); *Crater v. Galaza*, 508 F.3d 1261, 1267 (9th Cir. 2007); *U.S. v. Sampson*, 275 F.Supp.2d 49, 68 (D. Mass. 2003); *Seattle School Dist. No. 1 of King County v. State*, 585 P.2d 71, 87 n.7 (Wash. 1978).

At the same time, though, tribal governments must be allowed to protect their "public treasury, financial integrity, autonomy, [and] decision making ability" from constant subjection to legal attack. *Kalantari*, 6 Am. Tribal Law at 98 (citing *Alden v. Maine*, 527 U.S. 706, 750-51 (1999)). As noted in an extremely well-reasoned opinion of the Fort Peck Court of Appeals:

> [S]overeign immunity essentially boils down to substantial bothersome interference with the operation of government. . . . Sovereign immunity protects tribes against unconsented lawsuits that would drain tribal treasuries, interfere with tribal government operations, and handicap the tribe's ability to provide much-needed services to its people. . . . There is no doubt that the doctrine of sovereign immunity is the singular most important issue facing

> all Indian governments today. . . . Tribes are afforded the dignity consistent with sovereign entities; they are protected from unconsented lawsuits which drain their treasuries, interfere with daily governmental operations and handicap their ability to provide necessary services to their people. In short, sovereign immunity allows tribal governments to take their limited resources and run a more efficient, effective and productive entity; all of which ultimately inures to the benefit of its people. Recognizing the great need for services on Indian Reservations there should be no one unmindful of the importance of sovereign immunity, without which Tribal governments would be severely handicapped if not incapacitated. Thus, when the invocation of sovereign immunity advances the benefits of its purpose and rationale [courts should] continue to strongly support the doctrine.

Ft. Peck Sioux Council, 4 Am. Tribal Law at 288-98.

"On the one hand, sovereign immunity is an important shield against outside attacks on the Tribe's resources and ability to govern itself. However, that shield should not deny . . . the right to question the actions of [the] government in a tribal judicial forum." *Oneida Internal Security Dept. v. Somers*, No. 06-0011, 2006 WL 6469430, at *3 (Oneida Ct. App. May 23, 2006). The Court's decision today seeks to balance these two elements by espousing a test that, on the one hand, invocates sovereign immunity where it advances the benefits of its purpose, and, on the other, provides a much-needed forum for dispute resolution. *See generally* Matthew L.M. Fletcher, *(Re)Solving the Tribal No-Forum Conundrum:* Michigan v. Bay Mills Indian Community, 123 Yale L.J. Online 311 (2013).

1. The *Ex parte Young* Exception to Sovereign Immunity.

The doctrine known as the "*Ex parte Young* exception" derives from the U.S. Supreme Court case of *Ex parte Young*, 209 U.S. 123 (1908). In that case, the Supreme Court ruled that Edward T. Young, as attorney general of the State of Minnesota, could properly be enjoined in from enforcing unconstitutional state penalties against the railroad. The Court held:

> [I]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

Id. at 155-56.

The *Ex parte Young* doctrine has since spawned numerous federal appellate cases upholding, explaining, and recognizing its fundamental principles – most recently in the U.S. Supreme Court case of *Verizon Maryland, Inc. v. Public Service Com'n of Maryland*, where it was held that "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of [a superior] law[2] and seeks relief properly characterized as prospective.'" 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)).

[2] *See generally Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105-106 (1984).

Every Indian judiciary that this Court is aware of has found that this test strikes the proper balance between the sword of justice and the shield of sovereign immunity. *See e.g. Arendt v. Ward*, 9 Am. Tribal Law 443 (Ho-Chunk Trial Ct. 2011) (holding that the *Ex parte Young* exception applies, but only when a plaintiff requests nonmonetary relief); *Cleveland v. Garvin*, 8 Am. Tribal Law 21, 35 (Ho-Chunk Trial Ct. 2009) (same); *Honyaoma v. Nuvamsa*, 7 Am. Tribal Law 320, 324 (Hopi Ct. App. 2008) (citing the *Ex parte Young* exception and holding that "where a tribal official acts and such action is based upon an unconstitutional law, then that official is not protected by the doctrine of sovereign immunity."); *Fox v. Brown*, 6 Am. Tribal Law 446, 449 n.2 (Mohegan Trial Ct. 2005) ("A limited exception to the general principle of sovereign immunity has long been recognized, where prospective injunctive or declaratory relief is sought challenging the actions of state officials.") (citing *Ex parte Young*, 209 U.S. 123); *Kirkwood v. Decorah*, 6 Am. Tribal Law 188 (Ho-Chunk Trial Ct. 2005) (same); *Whiteagle v. Cloud*, 5 Am. Tribal Law 178 (Ho-Chunk Trial Ct. 2004) (same); *Fletcher v. Grand Traverse Band Tribal Council*, 2004 WL 5714967, at *9 (Grand Traverse Tribal Ct. Jan. 8, 2004) (discussing the *Ex parte Young* exception); *Olson v. Nooksack Indian Housing Authority*, 6 NICS App. 49, 54 (Nooksack Ct. App. 2001) (noting that "[v]arious tribal courts as well as the Ninth Circuit have

adopted" the *Ex parte Young* exception); *McDade v. Individual Members of Te-Moak Council*, No. SF-CV-004-99, 2000 WL 35782656, Nev. Inter-Tribal Ct. App. Mar. 8, 2000 ("Because the Appellant alleged unconstitutional acts by Appellees, they have no immunity through the doctrine of sovereign immunity.") (citing *Ex parte Young*, 209 U.S. 123); *Lynch v. Yomba Shoshone Tribe*, Nos. CVC-YT-003-96, CVC-YT-004-96, CVC-YT-005-96, 1997 WL 34704354, at *4 (Nev. Inter-Tribal Ct. App. Jul. 16, 1997) ("Because the appellant alleged unconstitutional acts by Appellees . . . , they have no immunity through the doctrine of sovereign immunity.") (citing *Ex parte Young*, 209 U.S. 123).

Today, we join our sister courts in adopting the *Ex parte Young* exception to tribal sovereign immunity.

2. *Ex parte Young* Fiction.

Although, in reality, *Ex parte Young* is an "exception" to sovereign immunity, the doctrine employs a **fiction** to obtain this result. *See Elephant Butte Irrig. Dist. of N.M. v. Dep't of the Interior*, 160 F.3d 602, 607-08 (10th Cir. 1998)("The *Ex parte Young* doctrine is not actually an exception to [sovereign] immunity because it applies only when the lawsuit involves an action against state officials, not against the state."). Thus, in order to properly plead an *Ex parte Young* suit - in order to employ this fiction - a plaintiff must name the officer that is "clothed with some duty in regard to the enforcement of the

laws," regulations, or policies that violate a superior law. *Ex parte Young*, 209 U.S. at 155; *see also Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011) ("The *Ex parte Young* exception proceeds on the fiction that an action against a state official seeking only prospective injunctive relief is not an action against the state . . . ."); *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1046 (9th Cir. 2000) ("The *Young* doctrine is premised on the fiction that such a suit is not an action against a 'State' and is therefore not subject to the sovereign immunity bar."); *Turano v. Board of Ed. of Island Trees Union Free School Dist. No. 26*, 411 F.Supp. 205, 213 (E.D.N.Y. 1976) ("The fiction upon which the *Young* decision is supported is that a suit against a state officer to restrain him from taking action in his official capacity is a suit against the individual officer and not against the state."); *Hercules Inc. v. Minnesota State Highway Dept.*, 337 F.Supp. 795, 800 (D. Minn. 1972) ("[E]veryone knew that the Court [in *Ex parte Young*] was engaging in fiction when it regarded the suit as one against an individual named Young rather than against the state of Minnesota.") (quotation omitted).

Suits that do not properly employ this fiction are barred by sovereign immunity. *See Santiago v. N.Y. State Dep't of Corr. Servs.*, 945 F.2d 25, 32 (2d Cir.1991) (dismissing equitable claims for prospective relief because plaintiff did

not use *Ex parte Young* "fiction," but instead named state agency); *Dariano v. Morgan Hill Unified Sch. Dist.*, 822 F.Supp.2d 1037, 1042 (N.D. Cal. 2011) ("Plaintiffs have named a state entity . . . as a Defendant. However, because *Ex parte Young* only enables suit against state officials, it does not permit Plaintiffs to sue [the state entity]."); *Cheek v. Garrett*, No. 10-0508, 2011 WL 839860, at *3 (D. Utah Mar. 8, 2011) ("Because Plaintiffs have named the State as the Defendant, rather than an individual state officer, the Ex parte Young exception does not apply."); *Harris v. N.Y.*, 419 F.Supp.2d 530, 534 (S.D.N.Y.2006) (dismissing the plaintiff's claims for injunctive relief because the plaintiff did not name state officials as required by *Ex parte Young*); *Sandoval v. Department of Motor Vehicles State of New York*, 333 F.Supp.2d 40, 43 (E.D.N.Y. 2004) ("[A]lthough Plaintiff is requesting prospective injunctive relief, this action does not fall within the confines of the *Ex parte Young* doctrine, because Plaintiff has not named a state official as a defendant.").

The Court thus comes to the first step of a properly plead *Ex parte Young* suit: **A plaintiff must name the officer that is clothed with some duty in the enforcement of the alleged unconstitutional or legally proscribed law, regulation, or policy.**

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3. Official v. Personal Capacity Suits.

Another caveat to the *Ex parte Young* fiction is that the plaintiff must specify that he or she is suing the "official capacity" of the named tribal officer. The explicit naming of the official in this capacity is important because, generally, unless specified, a suit against an official is assumed to be against his or her "personal capacity." *Ali v. Barry*, No. 94-0518, 1995 WL 350788, at *2 (D.D.C. May 22, 1995) (assumed to be named in personal capacities); *Cheyenne-Arapaho Gaming Com'n v. National Indian Gaming Com'n*, 214 F.Supp.2d 1155, 1164 (N.D. Okla. 2002) (noting that "immunity is assumed until proven otherwise"). A personal capacity suit does not evoke the *Ex parte Young* exception because there is no need. The government is not implicated - the suit is against the named official personally. As described by the U.S. Supreme Court in *Kentucky v. Graham*:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's

> personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. Should the official die pending final resolution of a personal-capacity action, the plaintiff would have to pursue his action against the decedent's estate. In an official-capacity action in federal court, death or replacement of the named official will result in automatic substitution of the official's successor in office.

473 U.S. 159, 165-66 & n.11 (1985) (citation omitted); *see also Rodriguez v. Cook County, Ill.*, 664 F.3d 627, 632 (7th Cir. 2011) (holding that "[i]ndividual-capacity claims against [officials] are not covered" by sovereign immunity).

An **official** capacity suit, on the other hand, is not actually against the official, but "against the sovereign the official represents." *Derrickson v. City of Danville, Ill.*, 845 F.2d 715, 719 (7th Cir. 1988); *see also Welch v. Laney*, 57 F.3d 1004, 1009 (11th Cir. 1995) ("[W]here a plaintiff brings an action against a public official in his official capacity, the suit is against the office that official represents, and not the official himself."); *Langweiler v. Borough of Newtown*, No. 10-3210, 2010 WL 5393529, at *3 (E.D. Pa. Dec. 29, 2010) ("[A]n official-capacity suit is against the entity itself."); *Wallace v. City of Montgomery*, 956 F.Supp. 965, 976 (M.D. Ala. 1996) ("It is well established that 'suits against an official in his or her official capacity are suits against the entity the individual represents.'") (quoting *Parker v. Williams*, 862 F.2d

1471, 1476 n.4 (11th Cir. 1989)). It is thus that an official capacity suit is the only way to obtain the relief requested by the *Ex parte Young* exception - a personal capacity suit enjoins a person, but an official capacity suit enjoins the government.

If a **personal** capacity suit is brought against a tribal official, he or she may raise a **personal** immunity defense whereunder, depending upon the defense raised, the court must decide whether the official "act[ed] outside the scope of his authority" in committing the alleged act. *Cline v. Cunanan*, No. NOO-CIV-02/08-5, at 6 (Nooksack Ct. App. Jan. 12, 2009); *see also Butz v. Economou*, 438 U.S. 478, 480 (1978) (certain government officials are "entitled to absolute immunity for all discretionary acts within the scope of their authority.").[3] But

[3] Although often confused with "sovereign immunity," certain defenses, such as legislative, prosecutorial, judicial, and presidential immunity defenses are actually "absolute immunity" defenses. *Cleveland v. Garvin*, 8 Am. Tribal Law 21, 32 n.13 (Ho-Chunk Trial Ct. 2009). These types of defenses are available "to insure independence of action on their part, so that they may exercise discretion in the performance of their duties without harassment or intimidation, and without fear that their actions might result in personal liability." Barbara J. Van Arsdale, et al., *Persons or Acts Entitled to Absolute Immunity*, 15 Am. Jur. 2d Civil Rights § 102 (2013). Other government officials are entitled to an immunity defense, too, but not "absolute immunity." Instead, they are entitled to "qualified immunity," which is available "to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz*, 438 U.S. at 506; *see also Ratte v. Corrigan*, No. 11-11190, 2013 WL 6185259, at *5-8 (E.D. Mich. Nov. 26, 2013) (distinguishing between qualified and absolute (judicial) immunity). Tribal Councilmembers often act as the executive and legislative branch, they are therefore entitled to an absolute immunity defense when sued in their personal capacities and performing these functions. *See e.g. Cline*, No. NOO-CIV-02/08-5, at 7-8; *In re Nuvumsa*, 7 Am. Tribal Law 305, 308 n.2 (Hopi Ct. App. 2007); *see also generally Schmidt v. Contra Costa County*, 693 F.3d 1122, 1135-38 (9th Cir. 2012) (applying the legislative immunity test). Other tribal officials, though, depending on their role, are merely entitled to "qualified immunity." *See generally Butz*, 438 U.S. 478. A qualified immunity determination involves three inquiries: (1) identification of the

this is not sovereign immunity, because the sovereign has not been implicated; *Ex parte Young* does not apply.[4] *See e.g. Magyar v. Kennedy*, No. 12-5906, 2013 WL 6119243 (E.D. Pa. Nov. 20, 2013) (applying the personal immunity defense test, but not *Ex parte Young*).

The Court thus comes to the second step of a properly plead *Ex parte Young* suit: A plaintiff must name the officer that is clothed with some duty in the enforcement of the alleged unconstitutional or legally proscribed law, regulation, or policy **in his or her "official capacity."**

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right that has allegedly been violated, (2) the determination of whether that right was clearly established such that a reasonable official would have known of it, and (3) the determination of whether a reasonable officer would have believed that the challenged conduct was lawful. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000). "The first two questions are issues of law; the third, although ultimately a legal question, may require fact finding as well." *Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 42 F.3d 1278, 1285-86 (9th Cir. 1994).

[4] This is not to be confused with a second "scope of authority" question often raised in federal courts. In federal courts, tribal sovereignty itself has been held as inferior to the laws of the federal government. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). In these instances, where the tribe itself adopts a law or policy that conflicts with a "superior" federal law, the tribe itself is said to have "acted beyond the scope of [its] authority" such that sovereign immunity will not apply to *anyone* acting in furtherance of that law or policy. *See Tenneco Oil Co. v. Sac and Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984) ("If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit."); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993) (same). This test is not applicable in the context of tribal courts, however, as the supremacy of federal law should not be at issue. *Seymour v. Colville Confederated Tribes*, No. AP96-022, 2001 WL 36243309, at *2-3 (Colville Ct. App. Oct. 18, 2001); *Seven Arrows, L.L.C. v. Tulalip Tribe of Washington*, No. TUL-CI-4/96-499, 1997 WL 34706747, at *1 (Tulalip Ct. App. Jul. 14, 1997); *see also Cleveland*, 8 Am. Tribal Law at 27 n.5 (applying *Ex parte Young* and noting that a tribal official does not share "the sovereign immunity of the tribe" when sued in tribal, as opposed to federal, court in his or her official capacity).

4. Prospective v. Retrospective Relief.

Finally, because the *Ex parte Young* exception is meant "to address a 'continuing violation'" of superior law, "[t]he relief requested must be prospective" and, for the most part, nonmonetary. *Corrigon v. Kron*, No. 13-0116, 2013 WL 5442176, at *2 (E.D. Wash. Sept. 27, 2013) (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996)); *see also generally Salt River Project Agr. Imp. and Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012). But to say that the relief requested must be completely nonmonetary would not be *entirely* true. What is important is that the relief be prospective, so that the fiction of *Ex parte Young* can be maintained.

"When a state official is asked to make a payment directly from the public fisc," for example, "courts will no longer close their eyes to the fact that such relief is in fact relief against the [government]." *Harkless v. Sweeny Independent School Dist.*, 388 F.Supp. 738, 747 (D.C. Tex.), *aff'd in part, rev'd in part*, 554 F.2d 1353 (5th Cir. 1977). Nor will the exception apply where the relief requested is the "functional equivalent" to a "retroactive levy upon funds in [the government's] Treasury," *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287, 289 (1997),[5] or "when the relief requested

[5] *But see In re Deposit Ins. Agency*, 482 F.3d 612, 620-21 (2nd Cir. 2007) (noting that *Coeur d'Alene* was limited to its facts); *Dubuc v. Michigan Bd. of Law Examiners*, 342 F.3d 610, 616-17 (6th Cir. 2003) (same); *Agua Caliente*

would, in effect, require the sovereign's specific performance of a contract." *Tamiami Development Corp. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1226 (11th Cir. 1999).

These types of relief are all barred because they are retrospective - not necessarily because they are monetary. Administrative expenses that are ancillary to the prospective relief, therefore, are not barred. This includes, for example, the "'payment of state funds . . . as a necessary consequence of compliance in the future.'" *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (quoting *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)). Hence, in *Milliken* the U.S. Supreme Court held an order "to eliminate a *de jure* segregated school system" by requiring the state to "share the future costs" of certain "educational components" did not violate the *Ex parte Young* exception because the payments were "part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system." *Id.* at 289-90; *see also generally Quern v. Jordan*, 440 U.S. 332, 346-48 (1979) (administrative costs); *Luckey v. Harris*, 860 F.2d 1012, 1015 (11th Cir. 1988) (increased funding for indigent services); *Kimble v. Solomon*, 599 F.2d 599 (4th Cir. 1979) (obligation to pay for medical services).

Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1048 (9th Cir.2000) (same); *American Exp. Travel Related Services Co., Inc. v. Sidamon-Eristoff*, 755 F.Supp.2d 556, 569-71 (D.N.J. 2010) (same); *Gila River Indian Community v. Winkelman*, No. 05-1934, 2006 WL 1418079, at *2-3 (D. Ariz. May 22, 2006) (same).

The Court thus comes to the third and final step of a properly plead *Ex parte Young* suit: A plaintiff must name the officer that is clothed with some duty in the enforcement of the alleged unconstitutional or legally proscribed law, regulation, or policy in his or her "official capacity," and **the relief requested must be prospective rather than retrospective.**

5. Application to the Case at Bar.

Here, Plaintiff has failed to properly plead the *Ex parte Young* exception. First, Plaintiff has named the Quinault Indian Nation proper as a defendant, instead of evoking the *Ex parte Young* fiction by **naming the officer** that is clothed with some duty in the enforcement of the alleged unconstitutional or legally proscribed law, regulation, or policy in his or her "official capacity." First Amended Complaint, at 1. Second, the relief sought by in the Complaint is barred to the extent that Plaintiff seeks **retrospective** relief in the form of monetary damages, interest, and/or specific performance of the Employment Agreement. *Id.* at 6-7.

Because all claims made in Plaintiff's First Amended Complaint are claims over which this Court lacks jurisdiction, Plaintiff's First Amended Complaint must be dismissed. The Court lacks the jurisdiction to evaluate the merits of Plaintiff's grievance and thus cannot render any findings of fact. *Bell*, 327 U.S. at 682.

III. Conclusion

Today, we join our sister courts in adopting the *Ex parte Young* exception to tribal sovereign immunity. This test invocates sovereign immunity where it advances the benefits of its purpose, while at the same time providing a much-needed forum for grievances against the Quinault Indian Nation.

But, unfortunately for Plaintiff, *Ex parte Young* was not properly pled in this instance. As such, the Quinault judiciary lacks jurisdiction over Plaintiff's First Amended Complaint and, therefore, Plaintiff's First Amended Complaint must be **DISMISSED.**

The Court cannot, however, summarily pronounce that Plaintiff is incapable of pleading some combination of claims and relief for which the *Ex parte Young* exception applies.

Accordingly, the Court grants Plaintiff leave to file an amended complaint, consistent with the above rulings, within **THIRTY (30) DAYS** of the date this Order is entered by the Clerk.

NOW THEREFORE, IT IS ORDERED:

1. Plaintiff's First Amended Complaint is hereby **DISMISSED,** without prejudice.

2. **Plaintiff is granted leave to file an amended complaint,** consistent with the above rulings, within thirty (30) days of the date this Order is entered by the Clerk.

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DATED this 5th day of December, 2013.

Gabriel S. Galanda
Judge