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Bobby J. [unclear]

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

LOMELI, *et al.*,

Plaintiffs,

v.

KELLY, *et al.*,

Defendants.

Case No. 2013-CI-CL-001

DEFENDANTS' MOTION TO DISMISS
PLAINTIFFS' SECOND AMENDED
COMPLAINT FOR LACK OF
JURISDICTION, FAILURE TO JOIN
INDISPENSABLE PARTIES, AND
UNRIPE CLAIMS

Date: *Set per Title 10, § 10.05.030(c)*
Time:

COPY

COMES NOW, Defendants in the above-entitled action, by and through the Office of Tribal Attorney, without waiving other defenses and objections, and hereby submits this Motion to Dismiss Plaintiffs' Second Amended Complaint for Lack of Jurisdiction, Failure to Join Indispensable Parties, and Unripe Claims.

I. MOTION

Defendants move for judgment on the pleadings in their favor, because this Court lacks jurisdiction, Plaintiffs failed to join indispensable parties, and Plaintiffs'

1 claims are unripe. A judgment on the pleadings is appropriate “when there are no issues
2 of material fact, and the moving party is entitled to judgment as a matter of law.” *Gen.*
3 *Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational*
4 *Church*, 887 F.2d 228, 230 (9th Cir. 1989). Allegations of facts by the non-moving
5 party are taken as true “and are construed in the light most favorable to that party.” *Id.*
6 The judgment on the pleadings analysis under Federal Rule of Civil Procedure 12(c) “is
7 ‘substantially identical’ to analysis under Rule 12(b)(6) because, under both rules, ‘a
8 court must determine whether the facts alleged in the complaint, taken as true, entitle
9 the plaintiff to a legal remedy.’” *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir.
10 2012) (quoting *Brooks v. Dunlop Mfg. Inc.*, No. C 10–04341 CRB, 2011 WL 6140912,
11 at *3 (N.D.Cal. Dec. 9, 2011)).

12 The Court lacks jurisdiction to resolve this political issue, the Constitution and
13 laws of the Nooksack Indian Tribe do not vest this Court with subject matter
14 jurisdiction, and sovereign immunity bars this action. The Nooksack Indian Tribe and
15 certain federal parties are necessary and indispensable parties under Federal Rule of
16 Civil Procedure 19, have not been joined, and whose non-joinder requires dismissal.
17 Additionally, Plaintiffs’ claims are not ripe, because Plaintiffs’ statuses as members of
18 the Tribe have not changed. Plaintiffs received Notices of Intent to Disenroll, but the
19 Nooksack Tribal Council has not held any disenrollment meetings or made a final
20 determination about any disenrollment. Moreover, the Secretarial Election has not yet
21 taken place. Plaintiffs prematurely filed this Second Amended Complaint.

22 Defendants’ motion is based on the following Memorandum of Points and

1 Authorities and the files and records in this action.

2 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

3 A. INTRODUCTION

4 On March 15, 2013, Plaintiffs initiated a lawsuit against Defendants for
5 equitable relief. Plaintiffs unsuccessfully sought to preliminary enjoin proposed
6 disenrollment proceedings that have not yet been executed by the tribal governing
7 body—the Nooksack Indian Tribal Council. Order Den. Mot. for Prelim. Inj. (May 20,
8 2013). Plaintiffs state that they challenge “the actions of Nooksack Tribal Council
9 Members and other Nooksack officials who acted beyond the scope of their authority as
10 tribal officers in their official capacities, in an attempt to remove ... 306 Nooksack
11 Indians from the Nooksack Indian Tribe ...” Second Am. Compl. for Equitable Relief
12 (Am. Compl.) 2:4-7. Plaintiffs allege that Defendants have unlawfully enacted binding
13 resolutions and changed the Nooksack Tribal Code (Code) to irreparably harm the
14 Nooksack Indians who received Notices of Intent to Disenroll. *Id.* at 2:8-16. Plaintiffs
15 also seek to enjoin the Secretarial Election and allege various Indian Civil Rights Act
16 and constitutional violations. *Id.* at 20-24.

17 Defendants move for judgment on the pleadings, because this Court lacks
18 jurisdiction, Plaintiffs failed to join indispensable parties, and Plaintiffs’ claims are not
19 ripe. This Court lacks jurisdiction because the Nooksack Indian Tribe, the Council, and
20 tribal officials are immune from suit. Indian tribes are immune from suit as sovereign
21 entities. *Cline v. Cunanan*, Case No. NOO-CIV-02/08-5, 5-6 (Nooksack Ct. App.
22 2009); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). This immunity also

1 applies to tribal officials and employees acting within the scope of their authority.
2 *Cline*, Case No. NOO-CIV-02-08-5, at 6 (citing *Hardin v. White Mountain Apache*
3 *Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *United States v. Yakima Tribal Court*, 806
4 F.2d 853, 861 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)). Additionally, this
5 Court lacks jurisdiction because Title 63, the Tribe’s Membership Ordinance, explicitly
6 states that the “Nooksack Tribal Court shall not have subject matter jurisdiction to hear
7 cases under this ordinance. Any reconsideration of Nooksack Tribal Council enrollment
8 decisions are to be made under the procedures set forth in this ordinance.” Title 63 §
9 63.00.003.

10 The Tribe is an indispensable party, which cannot be joined due to sovereign
11 immunity, under Federal Rule of Civil Procedure (FRCP) 19. The Tribe certainly has
12 an interest in protecting the Council’s right to govern, and only the Council can provide
13 the requested relief in this matter. Individual councilmembers do not have authority to
14 make any enrollment determinations, including initiating or terminating disenrollment
15 proceedings, because the Tribe’s Constitution and its Membership Ordinance vests this
16 authority with the Council. Nooksack Constitution (*Const.*), art. II, §§ 2, 4; Title 63,
17 § 63.04.001(B).

18 The Secretarial Election is conducted pursuant to federal law—specifically, 25
19 U.S.C. § 476 and 25 CFR Part 81. Judith Joseph, Chairperson of the Secretarial
20 Election Board, the Bureau of Indian Affairs (BIA), and the Department of the Interior
21 (Interior) are indispensable parties, which cannot be joined due to sovereign immunity.
22 *See* FRCP 19; *Motah v. United States*, 402 F.2d 1, 2 (10th Cir. 1968); *Twin Cities*

1 *Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 531-32 (8th Cir.
2 1967). Judith Joseph, the BIA, and Interior have interests in complying with the federal
3 law governing the Secretarial Election. Only the BIA and Interior have the ability to
4 stop the Secretarial Election, which means this Court cannot grant Plaintiffs the relief
5 they request. Title 10, §§ 10.00.030; 10.05.020(b), (c).

6 The ripeness doctrine aims to prevent courts from adjudicating issues, which
7 “hang[] on future contingencies that may or may not occur.” *Clinton v. Acequia, Inc.*,
8 94 F.3d 568, 572 (9th Cir. 1996). Without “an immediate and certain injury to a party, a
9 dispute has not ‘matured sufficiently to warrant judicial intervention.’” *Id.* (quoting
10 *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)). Plaintiffs’ claims are unripe, because
11 Plaintiffs’ statuses as members of the Tribe have not changed, the disenrollment process
12 has not been completed, and the Secretarial Election has not occurred. There is no
13 “immediate and certain injury” here. *Id.*

14 Even if the facts alleged in Plaintiffs’ Am. Compl. are taken as true, Plaintiffs
15 are still not entitled to a legal remedy, and this Court should dismiss this case.

16 B. PROCEDURAL HISTORY AND STATEMENT OF FACTS

17 Defendants incorporate the Procedural History and Statement of Facts set forth in
18 Defendants’ Motion to Strike, Defendants’ Brief in Opposition to Plaintiffs’ Emergency Motion
19 for a Temporary Restraining Order, Response to Motion for Leave to Amend Complaint, and
20 Defendants’ Response Brief in Opposition to Plaintiffs’ Second Emergency Motion for
21 Temporary Restraining Order, including all supporting declarations and exhibits. Most recently,
22 the Court issued its Order Denying Motion for Preliminary Injunction to prohibit the Tribal

1 Council from moving forward with Disenrollment Proceedings.

2 **III. LEGAL ARGUMENT**

3 A. THIS COURT LACKS JURISDICTION BECAUSE THE NOOKSACK TRIBAL
4 COUNCIL AND ITS OFFICERS ARE IMMUNE FROM SUIT.

5 The Plaintiffs' requests for a writ of mandamus and injunctive and declaratory relief must
6 fail because the Nooksack Indian Tribe is immune from suit. The Nooksack Tribal Court
7 jurisdiction is set forth in Article VI, § 2 of the Constitution of the Nooksack Indian Tribe of
8 Washington. Order Den. Mot. for Prelim. Inj. at 8; see also *Cline*, Case No. NOO-CIV-02/08/5.
9 Specifically, "[t]he Court shall have jurisdiction ... over all matters concerning the establishment
10 and functions of the tribal government, provided that nothing herein shall be construed as a
11 waiver of sovereign immunity by the tribal government..." *Const.*, art. VI, § 2(3). At no time
12 has the Council waived its sovereign immunity with concern to review any of the claims and
13 issues presented in this case.

14 An Indian tribe is immune from suit because it is a sovereign entity with common law
15 immunity. *Cline*, Case No. NOO-CIV-02/08-5, at 5-6 (citing *Martinez*, 436 U.S. at 58).
16 Sovereign immunity acts as a jurisdictional bar to bringing suits against tribes unless Congress
17 has authorized the lawsuit or a tribe has waived its immunity. *Martinez*, 436 U.S. at 58-59;
18 *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Waivers of
19 immunity must be clear, express, unequivocal, and cannot be implied. *Olson v. Nooksack*, 6
20 NICS App. 49, 52-53 (Nooksack Ct. App. 2001) (citing *Martinez*, 436 U.S. at 60). Sovereign
21 immunity also applies to tribal officials and employees acting within the scope of their authority.
22 *Cline*, Case No. NOO-CIV-02/08-5, at 6 (citing *Hardin*, 779 F.2d at 479; *Yakima Tribal Court*,
23 806 F.2d at 861); *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008).

1 Tribal sovereign immunity “extends to actions brought against tribes in tribal court.” *Olson*, 6
2 NICS App. at 51.

3 1. This Court Found that the Tribal Council Asserted its Sovereign Immunity to the Fullest
4 Extent Possible.

5 This Court has made clear that “[a] sovereign cannot be sued without expressly
6 consenting to suit, unless Congress or the tribe has waived the tribe’s sovereign immunity.”
7 *Cline*, Case No. NOO-CIV-02/08-5, at 6. In this Court’s recent Order Denying Motion for
8 Preliminary Injunction, this Court found that the Nooksack Tribal Council intends to assert its
9 sovereign immunity to the fullest extent possible in the Tribal Code or otherwise. Order Den.
10 Mot. for Prelim. Inj. at 5: 5-6, 6:8-9.

11 This Court’s finding is supported by overwhelming evidence contained in the record, in
12 provisions of the Constitution and tribal laws, and in Plaintiffs’ plea for application of the *Young*
13 doctrine. The Constitution entrusts the Council with the authority to establish the Tribal Court
14 by ordinance. *Const.*, art. VI, § 2(A)(1). Article VI, § 2(A)(3) of the Constitution provides that
15 the Tribal Court shall have jurisdiction “over all matters concerning the establishment and
16 functions of tribal government, provided that nothing herein shall be construed as a waiver of
17 sovereign immunity by the tribal government.” Under this jurisdictional provision, a suit against
18 the Tribal Government and the Council can only proceed when there is an express waiver of
19 sovereign immunity. *Cline*, Case No. NOO-CIV-02/08-5, at 6.

20 The Council engaged its constitutional authority to establish a tribal court by ordinance
21 when it adopted Title 10, the Nooksack Indian Tribe’s Tribal Court System and Court Rules. The
22 Tribal Court has limited civil and criminal subject matter jurisdiction only as to matters
23 “specifically enumerated in the Nooksack Code of Laws.” Title 10, § 10.00.030. Title 10,

1 § 10.00.050 provides for exclusive, original jurisdiction in the Tribal Court in any matter where
2 the Tribe or its officers and employees are parties in their official capacities, but this jurisdiction
3 is limited by the following sentence:

4 Nothing contained in the preceding sentence or elsewhere in this Code shall be
5 construed as a waiver of the sovereign immunity of the Tribe or its officers or
6 enterprises unless specifically denominated as such and the court is expressly
prohibited from exercising jurisdiction over the Nooksack Indian Tribe without
and [sic] express wavier [sic] of sovereign immunity.

7 Title 10, § 10.00.050. Title 10 contains an additional provision explaining that nothing in
8 Title 10 or any other law waives the Tribe's, its officials', its entities', or its employees'
9 immunity without an express waiver enacted by the Council. Title 10, § 10.00.100.

10 Neither Congress¹ nor the Council has expressly waived the Tribe's sovereign immunity,
11 as required under the Constitution, Title 10, and federal law. This Court should dismiss this case
12 because sovereign immunity bars the Court from taking jurisdiction over any of the Plaintiffs'
13 claims.

14 2. The *Ex Parte Young* Doctrine, to the Extent it Exists in the Tribal Context, Does Not
15 Strip the Named Tribal Officials of Their Sovereign Immunity.

16 Under *Ex parte Young*, 209 U.S. 123 (1908), state officials may be sued in their official
17 capacity when the plaintiff seeks prospective, equitable relief. *Puerto Rico Aqueduct & Sewer*
18 *Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). In *Cline*, the Nooksack Tribal Court of

19 ¹ Plaintiffs allege due process and equal protection violations under the Indian Civil Rights Act (ICRA), 25 U.S.C.
20 § 1302 et. seq., and Article IV of the Constitution. Am. Compl. at 21-23. Article IV of the Constitution does not
21 relate to ICRA, but Article IX applies ICRA's protections to Nooksack members. *Const.*, art. IX. Congress,
22 however, did not waive the Tribe's sovereign immunity through ICRA, and ICRA does not create an implied cause
23 of action for equitable relief. *Martinez*, 436 U.S. at 58-73. Even if this were not the case, there are no due process
or equal protection violations here. The Tribal Court previously found Council acted within the procedures set forth
in Title 63. Order Den. Mot. for Prelim. Inj. at 11-12. The Plaintiffs arguments that Council is discriminating based
on race borders on absurd and ignores the plain reality. Three members of the Council are part Filipino, as well as a
substantial percentage of the tribal membership and are not subject to the proposed disenrollment proceedings. *See*
Decl. of K. Canete; Decl. of A. Smith (May 14, 2013); Decl. of A. Johnson; Second Decl. of R. George.

1 Appeals explained that the *Ex parte Young* doctrine allows “individual governmental officers [to]
2 be sued for declaratory or injunctive relief where the actions taken exceed his or her authority.”
3 Case No. NOO-CIV-02/08-5, at 6. However, the *Cline* Court did not hold that the *Ex Parte*
4 *Young* doctrine applied in the Nooksack-tribal context. Case No. NOO-CIV-02/08-5. Further,
5 this Court found, “that, if there is an *Ex Parte Young* exception that applies in the Nooksack
6 Tribal Court system, that exception is a narrow one that only gives rise to prospective, injunctive
7 relief when the governmental officials act well outside the scope of their duties, not simply when
8 an error of law or procedure occurs.” Order Den. Mot. for Prelim. Inj. at 7: 9-12.

9 As stated previously, the facts of the case have changed little since the filing of the
10 Original Complaint. Further, the basis for Plaintiffs’ claims that the Tribal Council actions are
11 illegal, that is, Plaintiffs’ misguided beliefs concerning Council meeting procedures and its
12 irrational reading of Title 63, have remained completely unchanged. This Court previously
13 determined that the Tribal Council commenced the Disenrollment Process, the process complied
14 with Title 63, and that no set of facts established a basis for invocation of the *Young* exception, to
15 the extent that a *Young* exception exists. Order Den. Mot. for Prelim. Inj. at 10. Given this
16 Court’s previous Order and the failure of the Plaintiffs’ to put forth any facts, which if true,
17 would entitle the Plaintiffs to a legal remedy on any of its claims, this Court must dismiss.

18 B. PLAINTIFFS’ CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF
19 PERTAINING TO THE DISENROLLMENT PROCESS SHOULD BE DISMISSED
20 FOR LACK OF SUBJECT MATTER JURISDICTION, FAILURE TO STATE A
CLAIM FOR WHICH RELIEF CAN BE GRANTED, AND BECAUSE THE PROCESS
COMPLIES WITH ALL APPLICABLE LAWS.

21 The Court should dismiss the Plaintiffs’ claims for injunctive and declaratory relief
22 pertaining to the pending disenrollment proceedings because this Court lacks subject matter
23

1 jurisdiction to review such claims and neither the Constitution Article IX nor ICRA provide a
2 cause of action for which relief may be granted. The Constitution, Article VI, § 2 provides the
3 maximum permissible jurisdiction of the Tribal Court. Article VI, § 2(A)(3) limits the Court's
4 subject matter jurisdiction to the establishment and functions of the Tribal Council when the
5 Council grants a waiver of sovereign immunity. This Court has found that the Council
6 specifically reserved its sovereign immunity in cases concerning Title 63 and therefore, dismissal
7 is appropriate in this case because the Court lacks subject matter jurisdiction. Further, the Court
8 should dismiss this case because Tribal Council commenced the pending disenrollment
9 proceedings in compliance with Title 63, the Constitution and ICRA, and Title 63, Article IX of
10 the Constitution and ICRA do not provide a cause of action for which relief can be granted.

11 1. Title 63 Expressly precludes the Tribal Court from Having Jurisdiction over Enrollment
12 Matters.

13 As confirmed by this Court, Article II of the Constitution concerns tribal membership,
14 and it grants the Council the authority to govern membership matters and does not vest the Tribal
15 Court with subject matter jurisdiction. Article II, § 2 states that the “[t]ribal Council shall have
16 the power to enact ordinances in conformity with this constitution, subject to the approval of the
17 Secretary of the Interior, governing future membership in the tribe, including adoptions and loss
18 of membership.” Article II, § 4 addresses loss of membership and mandates that the Council,
19 “shall, by ordinance, prescribe rules and regulations governing involuntary loss of membership.”
20 The reason for loss of membership must be a “failure to meet the requirements set forth for
21 membership in this constitution[.]...” *Const.*, art. II, §4. §§ 2 and 4 grant the Council the
22 exclusive authority over enrollment and loss of membership. *Const.*, art. II, §§ 2 and 4.

1 Title 63—the Membership Ordinance of the Nooksack Indian Tribe—approved in 2005
2 by the Council and then in 2006 by the Secretary of Interior, manifests the broad authority vested
3 by the Constitution in the Council to enact laws governing enrollment and loss of membership.
4 Title 63 expressly states that this Court does not have jurisdiction over matters related to Title 63
5 and enrollment. Title 63, § 63.00.003. Also, “[a]ny reconsideration of the Nooksack Tribal
6 Council enrollment decisions are to be made under the procedures set forth in this ordinance.”
7 *Id.* Title 63 properly limits the jurisdiction of the Tribal Court, because a tribal ordinance may
8 limit the subject matter jurisdiction of the Court so long as the Constitution permits it to do so.
9 *Cline*, Case No. NOO-CIV-02/08-5 at 4.

10 The Constitution does not prohibit the Council from limiting the subject matter
11 jurisdiction of this Court by ordinance. In fact, Article VI, § 2(A)(3) of the Constitution limits
12 the subject matter jurisdiction of the Tribal Court in part, to the establishment and functions of
13 the Tribal Court when authorized by a waiver of sovereign immunity. In this case, the Tribal
14 Council has not granted a waiver of its sovereign immunity and this Court specifically found that
15 the Tribal Council asserted its sovereign immunity as to this area of the law to the fullest extent
16 possible. Order Den. Mot. for Prelim. Inj. at 5: 5-6. The Council initiated the disenrollment
17 process according to the Constitution and Title 63, but the Council has not completed the
18 process. Order Den. Mot. for Prelim. Inj. at 3-4; *see generally* Decl. of R. George. While
19 Notices of Intent to Disenroll have been mailed, the Council has not disenrolled any tribal
20 members, and even if it had, “[t]he Tribal Council will have the final say on loss of
21 membership.” Title 63, § 63.04.001(B). Apart from sovereign immunity, this Court has no
22 jurisdiction over the Council’s enrollment decisions, a fact conceded by the Plaintiffs at the
23

1 hearing on May 16, 2013. Order Den. Mot. for Prelim. Inj. at 1:22-23. Title 63, § 63.00.003.

2
3 2. Even if this Court has Jurisdiction, this Court Found that Council Initiated the
4 Disenrollment Process Consistent with the Constitution and Title 63.

5 Plaintiffs' allegations that the Tribal Defendants violated the Constitution and Title 63
6 because (1) the Tribal Council implicitly divested itself of any authority to initiate the
7 disenrollment process by approving Title 63 in its current form and (2) the Enrollment
8 Department purposely initiated the disenrollment process, are without merit and have been
9 rejected by this Court. Order Den. Mot. for Prelim. Inj. at 12-13. The Court's holding that
10 Tribal Council retains its sovereign authority to commence disenrollment under Article II of the
11 Constitution and the provisions of Title 63 has been decided as a matter of law. Further, this
12 Court's finding that the Council initiated the Disenrollment Proceedings consistent with the
13 Constitution is supported by the record.

14 *i. This Court held as a matter of law that the Tribal Council retained its sovereign*
15 *authority to commence disenrollment proceedings.*

16 The Court should dismiss the Plaintiffs' claims concerning the disenrollment process
17 because the Court lacks subject matter jurisdiction to review the Tribal Council's exercise of its
18 sovereign powers absent a waiver of its sovereign immunity. *Constit.*, art. VI, §2(A)(3). This
19 Court found that the Tribal Council did not implicitly divest itself of the power to disenroll by
20 approving Title 63. Plaintiffs base their argument on a single provision contained in the first
21 paragraph of § 63.04.001(B), which reads:

22 The burden of proof in disenrollment actions rest [sic] with the Tribe. However,
23 at no time will staff employed in the Enrollment Department purposely initiate a
24 reason for a loss of membership. *Any tribal member requesting a loss of*
25 *membership of another tribal member will need to present written documentation*
on how the information was obtained that warrants disenrollment. The Tribal

1 Council will have the final say on loss of membership.

2 Title 63, § 63.04.001(B) (emphasis added). This clause, read in isolation, does not stand for the
3 proposition that a tribal member is the only person who can commence the disenrollment of
4 another member; the clause merely offers a tribal member the opportunity to request the
5 commencement of the disenrollment process against another member. Plaintiffs' narrow
6 technical, legalistic interpretation of Title 63 contravenes the statutory construction principles
7 contained in Title 63 and Title 10.²

8 Further, and more importantly, the Council has sole authority over membership matters
9 as granted by the Constitution and Title 63. The Constitution vests the Council with the sole
10 authority to enact ordinances, rules, and regulations related to membership, including the loss of
11 membership. *Const.*, art. II, §§ 2 and 4. This is a grant of authority apart from those powers
12 enumerated in Article VI, which delineates other powers of the Council.

13 Pursuant to the Tribal Council's exclusive authority to enact ordinances concerning loss
14 of membership, the Council approved Title 63. § 63.04.001(B), titled "Disenrollment", begins
15 with the statement that, "[t]he burden of proof in disenrollment actions rest [sic] with the Tribe"
16 and concludes by stating that "[t]he Tribal Council will have the final say on loss of
17 membership." When read as a whole, § 63.04.001(B) establishes that the responsibility and
18 power of disenrollment rests with the Tribe through the Tribal Council. The paragraph
19 describing the disenrollment procedure, § 63.04.001(B)(2), refers to the Tribal Council five

20 ² Title 63 provides direction as to how it is to be interpreted and Title 10 establishes rules for interpretation for how
21 the Court is to review laws of the Tribe. For example, Title 63, § 63.09.001(A) states that "[t]his ordinance is
22 exempted from the rule of strict construction, and it shall be liberally construed to give full effect to the objectives
23 and purposes for which it was enacted." Title 10, § 10.01.020, requires this Court to interpret "tribal ordinances[,]
resolutions, regulations, and policies in order that the substantive intent of the Tribal Council is ensured. 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."

1 times, which demonstrates the Council's pervasive authority over disenrollment proceedings.

2 While a member may request a disenrollment of another member from the Tribal
3 Council, the Tribal Council makes all membership decisions. Moreover, the sentence allowing a
4 member to request a disenrollment of another member simply explains that the requesting
5 member must present written documentation; it does not state anything about initiating the
6 disenrollment process, and it certainly does not limit the Tribal Council's authority to initiate
7 disenrollment proceedings. In fact, the use of the term "requesting" a disenrollment, confirms
8 that the member is appealing to the authority, the Council.

9 This Court also rejected the Plaintiffs' argument that the Council implicitly divested itself
10 of the sovereign power by not explicitly stating that the Council has the authority to initiate
11 disenrollment proceedings within the confines of Title 63. Order Den. Mot. for Prelim. Inj. at
12 12:10-20. Federal and tribal law supports this Courts' holding. The Supreme Court rejected a
13 similar implicit divestiture argument in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148
14 (1982). The Court stated that "[w]ithout regard to its source, sovereign power, even when
15 unexercised, is an enduring presence that governs all contracts subject to the sovereign's
16 jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Id.* The
17 Constitution gives the Council the exclusive authority to enact laws governing disenrollment,
18 and the Council's authority to initiate and oversee disenrollment proceedings cannot be
19 questioned solely because Title 63 does not expressly state that the Council "initiates" the
20 disenrollment process. Given the Council possesses the sovereign power to commence
21 disenrollment proceedings and the Court lacks subject matter jurisdiction to review its
22 determinations under Article VI, § 2(A)(3) of the Constitution, this Court must dismiss the

1 Plaintiffs' case.

2
3 *ii. The undisputed record supports the Court's finding that the Tribal Council
4 commenced the disenrollment proceedings.*

5 This Court specifically found that the Tribal Council commenced the disenrollment
6 process, thereby, rejecting the Plaintiffs' arguments that the Enrollment Department violated
7 § 63.04.001(B) by purposely initiating the disenrollment process. Order Den. Mot. for Prelim.
8 Inj. at 11. This Court's findings that the Enrollment Department acted only after the direction of
9 Tribal Council is supported by overwhelming, undisputed evidence in the record. The Plaintiffs
10 failed to put forth any additional facts which would entitle it to relief, and as such, dismissal is
11 warranted.

12 Section 63.04.001(B) states that "[t]he burden of proof in disenrollment actions rest [sic]
13 with the Tribe. However, at no time will staff employed in the Enrollment Department
14 purposely initiate a reason for a loss of membership." That is, the Enrollment Department likely
15 has the documentation demonstrating whether a person meets the membership criteria, and it
16 may not actively work to create gaps in enrollment records or create reasons to disenroll
17 members. Enrollment Department staff must perform their job duties consistent with Title 63.
18 Title 63 requires the Enrollment Department to engage in a variety of actions related to
19 membership, enrollment and disenrollment. For example, when processing an enrollment
20 application, the Enrollment Department must "[r]ecommend for rejection the applicants who
21 have not proven they fulfill the membership requirements as shown in the constitution." Title
22 63, § 63.03.001(A)(11). The Tribal Council must direct the Enrollment Department to notify the
23 rejected applicants of their rejection by certified mail. Title 63, § 63.03.001(B)(4). Involuntary

1 disenrollments proceed similarly in that if the Enrollment Department, a member, or the Tribal
2 Council discovers that a member was erroneously enrolled, the “tribal member shall be
3 disenrolled.” Title 63, § 63.04.001(B)(1).

4 Title 63, § 63.04.001(B)(2) establishes the procedure for disenrollment. Under
5 § 63.04.001(B)(2), those members who are to be disenrolled must be notified by certified mail,
6 return receipt requested. The notice must include an option to request a meeting with the Tribal
7 Council. Title 63, § 63.04.001(B)(2). If a timely request for a meeting is not received, the
8 Council will disenroll the person by resolution. *Id.* If the Council receives a request, then
9 meetings are held where the Council determines if the person was erroneously enrolled.³ *Id.*
10 Throughout the process, “[t]he Tribal Council will have the final say on loss of membership.”
11 Title 63, § 63.04.001(B).

12 Contrary to Plaintiffs’ claims, this Court found, and the record supports with undisputed
13 evidence, that Jewell Jefferson and Defendant Bailey were simply doing their job in processing
14 and verifying enrollment applications. Order Den. Mot. for Prelim. Inj. at 11; *see, e.g.*, Decl. of
15 R. Bailey. In fact, the current disenrollment issues arose only after Secretary St. Germain,
16 brother to Plaintiff St. Germain questioned Defendant Bailey as to why his nieces and nephews,
17 the St. Germain Applicants, were not recommended for enrollment at the December 20, 2012
18 Council Meeting. *Id.* Secretary St. Germain then addressed the question of prior enrollments

19 ³ Plaintiffs cite *Henrickson v. Ho-Chunk Nation Office of Tribal Enrollment*, No. SU02-06, (Ho-Chunk Sup. Ct.
20 Mar. 21, 2003) for the holding that during a disenrollment, an enrollment committee must prove that a disenrollee is
21 not a member under all membership ordinances and resolutions. Pls.’ Reply in Supp., 17:22-25 and 18:1-5. The
22 case can be found at <http://ho-chunknation.com/?PageId=138>. *Henrickson* does not stand for Plaintiffs position but
23 merely held that the Ho-Chunk Enrollment Committee did not meet the requirements of Ho-Chunk’s enrollment
24 ordinance when it disenrolled the plaintiff. Here, the Tribal Council’s burden to show erroneous enrollment only
25 includes the sections of the Constitution under which Plaintiffs were enrolled—Article II, § 1 (A) and (C). The
Tribal Council does not have to prove that Plaintiffs fail to meet the criteria in other sections of Article II because
Plaintiffs were not enrolled under those sections.

1 before the Council, which raised the validity of the enrollments at issue to the level of the
2 Council. *Id.* Following research at the BIA and elsewhere, presentation of the research results to
3 the Council, and the passage of nearly two months, the Council initiated the process under the
4 authority granted to it by the Constitution and Title 63. Again, this Court's finding that Council,
5 and not the Enrollment Department or its officers, initiated the current disenrollment process
6 consistent with the Constitution and Title 63 is supported by overwhelming and uncontradicted
7 evidence. The Plaintiffs' failure to allege any set of facts which would entitle them to relief
8 warrants dismissal.

9 3. Plaintiffs' Allegations that the Disenrollment Process Violates the Equal
10 Protection Guarantee in Article IX of the Constitution Fail to State a Claim for
11 Which Relief Can be Granted and Fail to Join a Necessary Party – The Nooksack
12 Tribal Council.

13 The Plaintiffs failed to state, and support its allegations of, an equal protection violation
14 which would entitle them to relief; therefore dismissal is appropriate. Further, for the Court to
15 invoke its subject matter jurisdiction over the establishment and functions of the Tribal Council,
16 the Court must find a waiver of sovereign immunity to which, none exist in this case⁴. The
17 Tribal Council has not provided a waiver of sovereign immunity to review its disenrollment
18 decisions or any alleged Article IX violations pertaining to such disenrollment decisions⁵.
19 Finally, the Plaintiffs' claim that Council Resolution #13-02 violates the Plaintiffs' protections, if
20 any, under Article IX, must be dismissed because they have failed to join the necessary party –
21 the Tribal Council.

22 ⁴ Plaintiffs' claim fails for want of jurisdiction under Article VI, § 2(A)(3) of the Constitution. *See supra* part III. B.

23 ⁵ Defendants claim fails for lack of a waiver of sovereign immunity. *See supra* part III. A.

1 i. *Plaintiffs' Equal Protection Claim Fails to State a Claim for Which Relief May be*
2 *Granted.*

3 The current disenrollment process is constitutional and does not deny equal protection of
4 tribal law to a protected class of tribal members. First, tribal and federal law do not provide the
5 Plaintiffs with a cause of action for which relief can be granted under these circumstances⁶. To
6 the extent a cause of action does exist, Plaintiffs failed to support their allegations with relevant
7 evidence which if taken as true, would entitle them to relief in this Court.

8 Not only does a cause of action for which relief may be granted not exist, the Plaintiffs'
9 allegations fail to establish a prime facie case under its theory of an equal protection violation.
10 Plaintiffs' support for their allegations is irrelevant and/or false. The disenrollment proceedings
11 are not directed at persons of Filipino descent, but at those persons erroneously enrolled without
12 having met the required Constitutional criteria for which they were originally enrolled under.

13 Many Nooksack tribal members possess Filipino descent, and the fact that some of those
14 individuals are subject to pending disenrollment proceedings has nothing to do with their
15 Filipino ancestry, but the failure to establish the Constitutional criteria for enrollment. Decl. of
16 K. Canete, Decl. of A. Smith (May 14, 2013), Decl. of L. Johnson. No evidence provided by
17 the Plaintiffs remotely suggests that all members with Filipino ancestry are proposed for
18 disenrollment. On the contrary, the evidence demonstrates that there are tribal members with
19 Filipino ancestry who are not proposed for disenrollment. For example, three Councilmember
20 Defendants who voted to commence the disenrollment proceedings are also of Filipino ancestry.
21 *Id.* Plaintiffs' use an article from the Los Angeles Times from approximately fifteen years ago to

22 ⁶ Defendants hereby incorporate by reference, the arguments in Def.s' Response to Mot. for Leave to Amend
23 Compl. at 5-8. Further, to the extent that a cause of action exists, this Court lacks subject matter jurisdiction under
24 Article VI, § 2A(3) of the Constitution because the Tribal Council has not waived its immunity.

1 support its discrimination is irrelevant as to the Defendants. Plaintiffs' misuse of quotes
2 partially taken from mailers and letters from Chairman Kelly are taken out of context and so
3 distorted as to be irrelevant. The Plaintiffs' evidence supporting these claims of equal protection
4 violations based on Filipino ancestry lack merit and the Plaintiffs' claim must fail.

5 Indian tribes are political entities with the sovereign authority to define tribal enrollment
6 standards. *Martinez* at 72. To the extent that a tribal enrollment standard touches upon the equal
7 protection clause in ICRA and its incorporation through the Constitution Article IX, such
8 enrollment standards are permissible and not an equal protection violation. *Id.* (rejecting to
9 create a cause of action under ICRA based on denying membership to children of female
10 members who marry outside the tribe). Although Plaintiffs' claims of discrimination based upon
11 Filipino ancestry are false, to the extent that the Tribe's membership criteria discriminated
12 against a protected class, such decision is immune from equal protection of the laws. Given the
13 above, the Court should dismiss the Plaintiffs' claim of equal protection violations.

14 *ii. Plaintiffs' Equal Protection Claim Fails for Failure to Join Necessary Party.*

15
16 The Court should dismiss Plaintiffs' equal protection claims because they are aimed at
17 the Nooksack Tribal Council, as the body that authorized Resolution 13-02, and the Plaintiffs
18 failed to join the Nooksack Tribal Council. Pursuant to this Court's Order, when the Nooksack
19 Tribal Code lacks a clear rule of civil procedure, the FRCPs govern. Decision and Order Den.
20 Defs.' Mot. to Strike (Apr. 23, 2013). Under FRCP 19, and in accordance with FRCP 12(b)(7),
21 this Court should dismiss Plaintiffs' claim of an equal protection violation. FRCP 19(a) states
22 that a necessary party is one in whose absence "the court cannot accord complete relief ..." or
23 one who "claims an interest relating to the subject of the action and is so situated that disposing

1 of the action in the person's absence may ... impair or impede the person's ability to protect the
2 interest” When a necessary party cannot be joined, due to sovereign immunity, for example,
3 the court must determine whether the party is indispensable. FRCP 19(b); *Kescoli v. Babbitt*,
4 101 F.3d 1304, 1309 (9th Cir. 1996). In making this determination, the court considers four
5 factors: (1) the degree to which a person who cannot be joined would be prejudiced by a
6 judgment, (2) the degree to which that prejudice can be avoided or mitigated, (3) “whether a
7 judgment rendered in the person's absence would be adequate[,]” and (4) whether the plaintiff
8 can obtain an adequate remedy if the case is dismissed. FRCP 19(b).

9 The Tribe is a necessary party because this Court cannot accord relief without the Tribe.
10 Only the Tribe, through its Council, may make disenrollment determinations and/or enact
11 ordinances, rules, and regulations governing membership. *Const.*, art. II, §§ 2, 4; Title 63,
12 § 63.04.001(B). Individual Council members have no authority to make membership
13 determinations or enact any related laws. *Const.*, art. II, §§ 2 and 4. Even if this Court could
14 grant relief without the Tribe, the Tribe certainly has an interest in protecting the Council's right
15 to govern. As explained above, and confirmed in the Order Denying Motion for Preliminary
16 Injunction, the Tribe cannot be joined because it retains sovereign immunity, and the Tribe has
17 not waived its immunity.

18 C. PLAINTIFFS' REQUESTS FOR MANDAMUS AND INJUNCTIVE AND
19 DECLARATORY RELIEF PERTAINING TO TRIBAL COUNCIL MEETINGS
20 AND PROCEDURES MUST BE DISMISSED FOR WANT OF
JURISDICTION, FAILURE TO JOIN NECESSARY PARTY, AND FAILURE
21 TO STATE A CLAIM FOR WHICH RELIEF CAN BE PROVIDED.

22 The Plaintiffs' request for relief related to violation of the Bylaws of the Nooksack Indian
23 Tribe of Washington fail for want of jurisdiction, failure to join a necessary party, and failure to

1 state a claim for which relief can be granted.

2 1. The Plaintiffs' challenges to Council Resolutions Fail for Want of
3 Jurisdiction, Failure to Join Necessary Parties, and Failure to State a Claim
4 for Which Relief May be Granted.

5 Plaintiffs request for injunctive and declaratory relief with concern to resolutions⁷ passed
6 by the Tribal Council on the basis that the process used to pass the resolution or the content of
7 the resolution, violated tribal law must fail. Challenges to the Tribal Council's resolution, by
8 their very nature, concern the "functions" of Tribal Council and fit squarely into Article VI,
9 § 2(A)(3) of the Constitution. *See supra* part III. A. Tribal Council has not waived its immunity
10 from suit with regards to any of its functions at issue in this case. *Id.* Further, the Plaintiffs are
11 directly attacking an action of the Tribal Council, yet, they do not name the necessary party – the
12 Tribal Council – and they continue to rely on a *Young* exception. *See supra* part III. B. 3.
13 Lastly, no action lies in tribal law which would allow a member, or a group of members, to file a
14 claim in Court for relief to challenge a resolution of the Tribal Council, the proper remedy is the
15 Referendum process in Article VII of the Constitution. As the Plaintiffs fail to state a claim for
16 which relief can be provided, the Court should dismiss. *See supra* part III. B. 3. a.

17 Therefore, the Plaintiffs' claims attempt to invalidate Council resolutions and attempt to
18 enjoin action in furtherance of said resolutions fails and the Court should dismiss these claims.
19

20 ⁷ Plaintiffs continue to allege harm related to Resolution 13-03 even though they acknowledge that the challenged
21 provision was removed by subsequent resolution and the Plaintiffs failed to demonstrate any actual harm. Am.
22 Compl at 13:6-25, 14:1-11, 24:7-9, The Defendants hereby incorporate by reference, the arguments on this topic
23 contained in Defs' Brief in Opp. To the Pls' Emerg. Mot. for T.R.O. at 37:8-25, 381-7 as basis for this motion to
24 dismiss for failure to state a claim for which relief can be granted.

1 2. Plaintiffs' Claims for Relief Stemming from Alleged Violations of the
2 Bylaws Fail for Want of Jurisdiction, Failure to Join Necessary Parties,
3 and Failure to State a Claim for Which Relief May be Granted.

3 Plaintiffs' claims stemming from a strict reading of the Bylaws of the Nooksack Indian
4 Tribe fail because the Bylaws do not provide a party with any recognizable cause of action or a
5 waiver of sovereign immunity and therefore, the Court should dismiss the Plaintiffs' claims. The
6 Council is the governing body of the Tribe, and the presence of five Council members
7 establishes a quorum. *Const.*, art. III, §§ 1-2; *Bylaws*, art. II, § 4. The Council acts within its
8 scope of authority when a majority of the Council approves a resolution, whether it commences
9 the disenrollment process, approves the request for a Secretarial Election, appoints
10 representatives to the Secretarial Election Board, or enacts an ordinance. *Bylaws*, art. II, § 4.
11 Plaintiffs' arguments that excusing members with a conflict of interest or allowing the
12 attendance of staff members during a meeting somehow invalidates the actions taken is without
13 merit and should be dismissed. In addition, the setting of the time, place, and manner of
14 meetings is a distinctly political question and Plaintiffs' claims concerning the cancelling of
15 regular meetings due to safety concerns and the scheduling of special meetings must be
16 dismissed as they are nonjusticiable issues.

17 A Council meeting was held on February 12, 2013⁸, and the entire Council was present—
18
19

20 ⁸ Plaintiffs similarly claim that the recusal of Secretary St. Germain at the March 26, 2013 executive session makes
21 the Council actions later that day during regular session invalid, in particular the installation of the Secretarial
22 Election Board. Am. Compl. 20:18-23. Excused absences do not thwart the Council's actions when a quorum is
23 present and Plaintiffs cite no authority for this claim. However, Secretary St. Germain and Councilmember Roberts
were present during regular session, voted on Resolution 13-53 among others, and Secretary St. Germain even
moved to amend the board appointment to add Councilmember Roberts to the Secretarial Election, but the motion
failed by a vote of five (5) to two (2). Second Decl. of Rick George at 5:10-18. All Council members fully
participated in the consideration of Resolution 13-53. *Id.*

1 establishing a quorum to transact business. Secretary St. Germain⁹ and Councilmember Roberts
2 were excused from the meeting and vote because the main topic of the meeting was
3 consideration of Resolution 13-02, the resolution authorizing the initiation of the disenrollment
4 process which directly affected the two councilpersons' personal interests. As is the regular
5 Council practice, and not contrary to the Constitution of other tribal law, persons who have
6 conflicts with what is being considered either leave on their own accord or are asked to leave.
7 The full Tribal Council formalized this policy through the approval of Title 65, the Nooksack
8 Tribe Conflict of Interest and Nepotism Code. Plaintiffs fail to cite any authority for their claim
9 for relief, and in fact, none exists. Nothing in the Constitution and Bylaws requires the Council
10 to allow persons who have a personal stake in the topic under consideration to participate in in
11 executive sessions or meetings if a conflict exists.¹⁰ Further, the Tribal Court's May 20, 2013
12 Order Denying Motion for Preliminary Injunction cited these facts surrounding the approval of
13 Resolution 13-02 and did not find the Council acted beyond the scope of its authority by recusing
14 the members for a conflict of interest. Order Den. Mot. for Prelim. Inj. at 4:1-6, 13:3-5.

15 Plaintiffs similarly complain that the presence of staff during Council executive sessions
16 invalidates the action taken by Council. Am. Compl. at 24. Council's common practice shows a
17 long history of designation by a simple, verbal request for staff attendance or instruction for staff
18 to leave the meeting. Decl. of R. George at 3:10-15, Decl. of B. Solomon 3:8-12, Decl. of A.
19 Smith at 3:10-15.

20 _____
21 ⁹ Although not cited as a basis under Plaintiffs' "Cause of Action", Plaintiffs claim that the Secretary's absence
22 invalidates Council action. Am. Compl. 8:4-6. This claim similarly fails to state a cause of action for which relief
23 can be granted. The only support Plaintiffs provide is contained in Article 1, § 3 of the Bylaws of the Nooksack
24 Indian Tribe, which contains Duties of Officers. Am. Compl. at 24.

25 ¹⁰ Indeed avoidance of conflicts is a familiar federal requirement that must be followed in self-determination act
contracts and compacts. E.g., 25 CFR § 1000.460 and Subpart S.

1 Lastly, Plaintiffs fail to cite any authority that a violation of a Bylaw concerning the
2 cancellation of a regular meeting or the scheduling of a special meeting creates a cause of action;
3 in fact, Plaintiffs lack such authority. The failure to hold a regular meeting and/or schedule a
4 special meeting in a manner that would satisfy the Plaintiffs is not actionable.¹¹ For all of the
5 complained-about “violations” of the Bylaws, Plaintiffs cite no authority for their “cause of
6 action”; and none can be found. The simple fact is that Council possesses the sovereign
7 authority and discretion to determine its meeting procedures and how to address a failure of an
8 officer to perform his or her duties. *See generally Jicarilla Apache Tribe*, 455 U.S. 130. The
9 sovereign authority regarding policing the Bylaws is not subject to judicial review; it is a
10 political question that is not amenable to judicial resolution because relevant considerations are
11 beyond the courts’ capacity to gather and weigh, as it is a political question. *Miami Nation of*
12 *Indians of Indiana v. U.S. Dept. of Int.*, 255 F.3d 342, 347 [citing *Nixon v. United States*, 506
13 U.S. 224 (1993)].

14 The authority to control all aspects of disenrollment rests with the Council, and the
15 Council’s approval of Resolution 13-02, 13-38 and 13-53 were properly approved and within the
16 scope of the Council’s authority. Plaintiffs mention other resolutions and they need not be
17 addressed as these three, are the resolutions the Plaintiffs’ complaint is built around. Sovereign
18 immunity remains fully intact because the Council acted as the governing body of the Tribe,
19 there has been no waiver of sovereign immunity, the *Ex parte Young* doctrine does not apply to
20 actions taken by the Council, the Council acted within its authority, and the named Defendants

21 _____
22 ¹¹ Defendants hereby incorporate the arguments concerning the alleged violations of the Bylaws with regards to
calling regular meetings and special meetings in the Def.s’ Resp. to Second Emerg. Mot. for T.R.O. at 11-16.

1 did nothing more than vote as Council members. Because the Plaintiffs' claims for relief fails to
2 state a claim for which relief may be granted and they are unable to join the necessary parties due
3 to sovereign immunity, this Court should dismiss said claim

4 D. THE COURT SHOULD DISMISS PLAINTIFFS' REQUEST TO ENJOIN THE
5 SECRETARIAL ELECTION FOR FAILURE TO JOIN THE TRIBE, JUDITH JOSEPH,
6 THE BIA, AND INTERIOR - INDISPENSABLE PARTIES, WHICH CANNOT BE
7 JOINED.

8 This Court should dismiss the Plaintiffs' Am. Compl. for Plaintiffs' failure to join
9 necessary parties as required by federal law. Title 10, § 10.05.020(c). Plaintiffs failed to join the
10 Tribe, Judith Joseph, the BIA, and Interior—indispensable parties, which cannot be joined due to
11 sovereign immunity. *See Kescoli*, 101 F.3d 1304; *Motah*, 402 F.2d at 2; *Twin Cities Chippewa*
12 *Tribal Council*, 370 F.2d at 532-33. Pursuant to this Court's Order, when the Nooksack Tribal
13 Code lacks a clear rule of civil procedure, the FRCPs govern. Dec. and Order Den. Defs.' Mot.
14 to Strike. FRCP 19(a) states that a necessary party is one in whose absence "the court cannot
15 accord complete relief ..." or one who "claims an interest relating to the subject of the action and
16 is so situated that disposing of the action in the person's absence may ... impair or impede the
17 person's ability to protect the interest" When a necessary party cannot be joined, due to
18 sovereign immunity, for example, the court must determine whether the party is indispensable.
19 FRCP 19(b); *Kescoli*, 101 F.3d at 1309. In making this determination, the court considers four
20 factors: (1) the degree to which a person who cannot be joined would be prejudiced by a
21 judgment, (2) the degree to which that prejudice can be avoided or mitigated, (3) "whether a
22 judgment rendered in the person's absence would be adequate[,]" and (4) whether the plaintiff
23 can obtain an adequate remedy if the case is dismissed. FRCP 19(b).

24 The Tribe is a necessary party because this Court cannot accord relief without the Tribe.

1 Only the Tribe can request a Secretarial Election. *Const.*, Art. II, §§ 2, 4, Art. X. Individual
2 Council members have no authority to individually request a Secretarial Election. *Const.*, art. II,
3 §§ 2 and 4, art. X. Even if this Court could grant relief without the Tribe, the Tribe certainly
4 has an interest in protecting the Council's right to govern. As explained above, the Tribe cannot
5 be joined because it retains sovereign immunity, and the Tribe has not waived its immunity.

6 Judith Joseph, the BIA, and Interior are necessary parties because this Court cannot
7 enjoin the Secretarial Election without these parties and the Tribal Code does not grant this Court
8 jurisdiction over said parties. Title 10, § 10.05.020(c). The Secretarial Election is governed by
9 25 U.S.C. § 476 and 25 CFR Part 81. As shown in the Notice of Secretarial Election from Judith
10 Joseph, "[o]n March 20, 2013, the Regional Director, Northwest Region, approved and
11 authorized a Secretarial Election." Pls.' Second Decl. of D. Doucette, Ex. B. Moreover, these
12 parties are responsible for ensuring the election process complies with law. *See* 25 U.S.C. § 476;
13 25 CFR Part 81.

14 If the Tribe, Judith Joseph, the BIA, and Interior are indispensable parties, this Court
15 must determine whether, "in equity and good conscience," it should dismiss the action. FRCP
16 19(b). In *Kescoli*, the Ninth Circuit Court of Appeals determined that the district court did not
17 err when it found that protecting "tribal sovereignty warranted dismissal." 101 F.3d at 1311. In
18 that case, "the factors were not clearly in favor of dismissal," yet the court held that tribal
19 sovereignty pushed the analysis into warranting dismissal. *Id.* Here, concerns about tribal
20 sovereignty not only warrant dismissal, the four factors plainly favor dismissal. First, the Tribe
21 would be severely prejudiced if the case were to continue in its absence because the case
22 challenges the Council's actions and not the actions of individual Council members. Second,

1 any relief granted will directly impact the Council's ability to govern and impair the Council's
2 credibility and authority with the B.I.A. and Interior. Third, the Council approved the request for
3 Secretarial Election, so the Court cannot award an adequate remedy without the Tribe as a party.
4 Fourth, Plaintiffs will have and vote during the Election.

5 The Eighth and Tenth Circuits have held that suits challenging an election under 25
6 U.S.C. § 476 cannot be maintained against the United States, Interior, or its agents due to
7 sovereign immunity.¹² *Motah*, 402 F.2d at 2; *Twin Cities Chippewa Tribal Council*, 370 F.2d at
8 532-33. Even if Plaintiffs attempted to add Judith Joseph as a party under the *Ex parte Young*
9 doctrine, the Court lacks jurisdiction over Ms. Joseph under Title 10, § 10.05.020(c) and she
10 retains her sovereign immunity absent waiver. Further, Plaintiffs do not allege that Judith Joseph
11 acted outside the scope of her authority and to the extent they have, such allegations are meritless
12 and without factual support. Apart from dismissing this case for lack of jurisdiction, the Court
13 should dismiss this case under FRCP 19.

14 E. DISMISSAL IS WARRANTED AS PLAINTIFFS' CLAIMS PERTAINING TO THE
15 DISENROLLMENT PROCESS AND SECRETARIAL ELECTION ARE NOT RIPE
16 FOR REVIEW.

17 Alternatively, if this Court finds that it has jurisdiction over this case and FRCP 19 does
18 not warrant dismissal, this Court should nevertheless dismiss this case because Plaintiffs' claims
19 are not ripe. The Ninth Circuit Court of Appeals holds that "a case is not ripe where the
20 existence of the dispute hangs on future contingencies that may or may not occur." *Clinton*, 94
21 F.3d at 572. When a party does not demonstrate "immediate and certain injury[.]... a dispute has

22 ¹² If sovereign immunity did not bar joining these parties, Plaintiffs would still have to exhaust administrative
23 remedies before bringing suit in Tribal Court. See *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543,
551 (10th Cir. 2001) (requiring exhaustion under the Indian Reorganization Act).

1 not 'matured sufficiently to warrant judicial intervention.'" *Id.* (quoting *Warth*, 422 U.S. at 499
2 n.10).

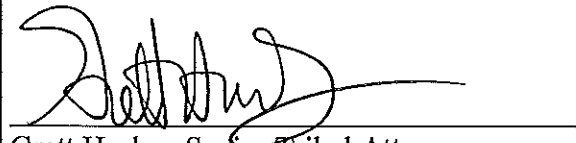
3 Here, Plaintiffs have been sent Notices of Intent to Disenroll, but no disenrollment
4 meetings have been scheduled. The Notices of Intent to Disenroll were mailed by certified mail,
5 return receipt requested, and they included the reason the Council initiated the disenrollment
6 process, the option to request a meeting with the Council, instructions for requesting the meeting,
7 and the next steps in the process. *See* Dec. of N. Aldredge, Exh. A. This Court did not find the
8 the Council acted outside of its authority under the Constitution and Title 63 § 63.04.001(B)(2).
9 Order Den. Mot. for Prelim. Inj. at 4:7-10, 13. Plaintiffs' statuses as members of the Tribe have
10 not changed, which means Plaintiffs' claims of harm from being nonmembers are unripe.
11 Plaintiffs have not been injured, and this Court can offer no remedy as confirmed by this Court.
12 Order Den. Mot. for Prelim. Inj. at 12. The disenrollment process must be allowed to run its
13 course. This is especially so when the process provides due process, including the opportunity to
14 request reconsideration of the Council's final membership determination under Title 63,
15 § 63.04.001(C). Unless and until Plaintiffs are disenrolled and the time for requesting
16 reconsideration has run, this Court would be ruling on future contingencies that might not occur
17 in violation of the Ripeness Doctrine.

18 The claims related to the Secretarial Election are similarly unripe. The Election has not
19 occurred and Tribal members have not decided whether they will vote for or against the
20 Council's proposed change to the Constitution. Even if the Court had jurisdiction over the
21 Election, which it does not, the Court would be ruling on an issue that may not occur. The
22 processes for disenrollment and constitutional amendment must be allowed to continue.

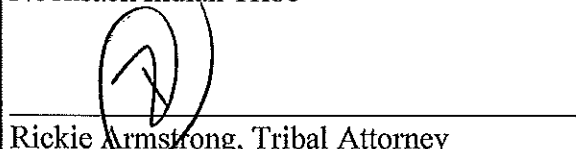
1 IV. CONCLUSION

2 For the reasons and facts stated above, Defendants respectfully request that this case be
3 dismissed for lack of jurisdiction, failure to join indispensable parties, and unripe claims.

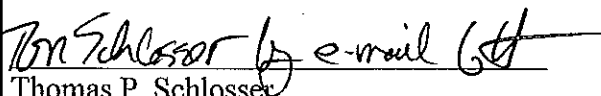
4 Respectfully submitted this 15th day of May, 2013.

5 

6
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Becky J. ...

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

LOMELI, et al.,
and
KELLY, et al.,
Plaintiffs,
Defendants.

Case No. 2013-CI-CL-001

DECLARATION OF SERVICE

COPY

I Declare:

That I am over the age of 18 years, competent to be a witness, and not a party to this action.

On May 29, 2013, I duly mailed by first class mail, a copy of the following:

1. Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint for Lack of Jurisdiction, Failure to Join Indispensable Parties, and Unripe Claim, with CD of Supporting Authorities; and
2. (this) Declaration of Service

to Galanda Broadman PLLC, Attn: Gabriel S. Galanda, P.O. Box 15146, Seattle, Washington 98115.

Also, on May 29, 2013, I emailed Gabriel S. Galanda at gabe@galandabroadman.com a courtesy copy of the Motion and Declaration.

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

Signed at Deming, Washington on May 29, 2013.

CBernard

Charity Bernard, Paralegal
Office of Tribal Attorney, Nooksack Indian Tribe

DECLARATION OF SERVICE – Page 1 of 1

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