

1                                   **IN THE NOOKSACK TRIBAL COURT**  
2                                   **FOR THE NOOKSACK INDIAN TRIBE**  
3                                   **DEMING, WASHINGTON**

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

7 Plaintiffs,

8  
9                                   vs.

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

13 Defendants.

Case No.: 2013-CI-CL-001

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS SECOND  
AMENDED COMPLAINT**

14                                   **THIS COURT** held a hearing on June 25, 2013 to hear the Defendants' *Motion to Dismiss*.  
15 Anthony Broadman, representing the Plaintiffs, appeared by telephone to present argument, with  
16 attorney Gabriel Galanda and Ryan Dreveskracht also on the telephone conference call. Tom  
17 Schlosser and Grett Hurley, attorneys for the Nooksack Tribe, appeared in person for the  
Defendants. Rickie Armstrong, Adrian DelCotto, and Charity Bernard were also in the courtroom.  
None of the named Plaintiffs or Defendants appeared.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

## DECISION

Citizenship in a federally recognized Indian tribe brings with it the rights to vote in tribal elections, access to health care, access to housing services and programs, as well as a multitude of other benefits. More than that, however, membership in a tribe identifies and defines members as a part of a community. This case puts the membership of the Plaintiffs squarely in front of the Tribal Council and raises important questions about the role of the Nooksack Tribal Court and the Nooksack Tribal Council.

The Plaintiffs filed a Complaint in this Court on March 15, 2013 alleging that the Defendants exceeded their authority when they issued “Notices of Intent to Disenroll” to approximately 300 Nooksack Tribal members. By exceeding their authority, the Complaint alleges, the Defendants became liable personally for this lawsuit because their actions stripped them of their sovereign immunity. The Defendants deny that their actions were anything other than conducted within the limits of their authority as Tribal Council members. As a result, Defendants in their answer asserted sovereign immunity and moved the Court to dismiss the matter. Following two hearings on motions by the Plaintiffs seeking *Temporary Restraining Orders/Preliminary Injunctions*, this Court set a scheduling order for briefing on the Defendants’ *Motion to Dismiss* and held a hearing on the motion.

In a *Motion to Dismiss*, allegations of fact by the non-moving party are taken as true and viewed in the light most favorable to the non-movant. *Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.wd 228, 230 (9<sup>th</sup> Cir. 1989). Indeed, the facts in this case are largely undisputed. What is at dispute is the meaning of those facts and the applicable law that applies in cases like this one. While the Court has issued orders

1 discussing the factual situation up to this point, the Court will set forth those facts again in this  
2 Order.

3 **I. Facts**

4 In December 2012, Terry St. Germain, one of the named plaintiffs to this case, sought to  
5 have his children enrolled in the Nooksack Indian Tribe. He submitted applications for the children  
6 to the Nooksack Enrollment Office. On December 19, 2013, at a special meeting of the Nooksack  
7 Tribal Council, the Tribal Council heard the enrollment applications for others applying for  
8 enrollment, as required by the Nooksack Enrollment Ordinance. Mr. St. Germain's children were  
9 not presented for enrollment by Enrollment Officer Roy Bailey, one of the named defendants in this  
10 case.

11 At the meeting, Rudy St. Germain, the Tribal Council Secretary, asked why the St. Germain  
12 children were not presented for enrollment to the Council. Officer Bailey stated that the application  
13 did not provide information that would make the children eligible for enrollment in the Nooksack  
14 Indian Tribe ("the Tribe"). Secretary St. Germain noted that if the St. Germain applicants were not  
15 eligible for enrollment, then neither was he. Chairman Kelly stated that he would do further research  
16 with Mr. Bailey to determine whether the applicants might be eligible for enrollment and that the  
17 issue would be discussed at a future meeting.

18 At the regular Tuesday meeting on January 8, 2013, Mr. Bailey informed the Council that he  
19 and Chairman Kelly had gone to the Bureau of Indian Affairs' Regional Office to conduct the  
20 research and found no documentation to support the enrollment of the applicant children. Mr. Bailey  
21 also stated that supporting documents for enrollment of approximately 300 enrolled Nooksack tribal  
22 members either did not exist in the files or were "missing." This included Secretary St. Germain and  
23 another Tribal Council member, Michelle Roberts.

24

1 Following that meeting, Chairman Kelly called a Special Meeting on February 11, 2013 and  
2 that meeting was held on February 12, 2013. At that meeting, the Council passed Resolutions 13-02,  
3 13-03, and 13-04. During that meeting, Chairman Kelly and the Council had both Secretary St.  
4 Germain and Council Member Roberts leave and they were not able to cast votes on these  
5 resolutions. The resolutions passed by votes of 5-0.

6 Resolution 13-02 states that the Nooksack “Constitution explicitly addresses loss of  
7 membership whereby the Tribal Council shall by ordinance prescribe rules and regulations  
8 governing involuntary loss of membership and such reasons shall be limited exclusively to failure to  
9 meet the requirements set forth for membership.” 13-02 further states the Council has the final  
10 decision on the loss of membership. 13-02 resolves that notice be provided to “each member who  
11 descended from Annie James (George) or Andrew James and claim right to membership based  
12 through lineal descendancy of an original Nooksack Public Allottee.” Notices of Intent to Disenroll  
13 were sent out in accordance with this Resolution to about 306 current tribal members notifying them  
14 of their rights to hearing under Title 63 of the Nooksack Tribal Code, which lays out enrollment and  
15 disenrollment procedures.

16 Following the passage of this resolution, the Council cancelled “first Tuesday” Tribal  
17 Council meetings. Under the Tribal Constitution’s Bylaws, Tribal Council meetings are to be held  
18 on the first Tuesday of each month. Special meetings may be called by the Chairman with 24 hours  
19 notice to the Council members. Since February, “first Tuesday” Council meetings have not been  
20 held. The Tribal Council has cancelled the meetings, citing concerns for public safety arising out the  
21 animosity surrounding the potential disenrollments of the Plaintiffs and the other approximately 300  
22 members. Regular Council business has been conducted with Special Meetings called by the  
23 Chairman.

24

1 On March 1, 2013, the Tribal Council passed Resolution 13-38, which authorized a request  
2 to that the Secretary of the Interior hold a Secretarial Election to amend the Nooksack Constitution's  
3 Article II on Membership to delete Section 1(h). That request went to the Secretary of the Interior,  
4 which held an election on June 21, 2013. The Constitutional Amendment passed and was certified  
5 as of August 2, 2013.

## 6 **2. Procedure**

7 The Plaintiffs filed suit in the Nooksack Tribal Court on March 13, 2013 seeking declaratory  
8 and injunctive relief. The original Complaint has been amended with leave of the Court three times<sup>1</sup>.  
9 The Plaintiffs sought two Preliminary Injunctions and this Court denied both of them. Following the  
10 initial denial, the Plaintiffs sought Permission to File an Interlocutory Appeal with the Nooksack  
11 Court of Appeals. The Court of Appeals refused to grant permission for an interlocutory appeal.  
12 The Plaintiffs sought a stay on the disenrollment proceedings both in writing and in oral argument  
13 and this Court refused to grant those stays. The Defendants filed a Motion to Dismiss, which this  
14 Court heard on June 22, 2013.

15 During the pendency of the case, the following orders have been issued:

- 16 1. 03/28/13 – Order from Scheduling Hearing
- 17 2. 04/15/13 – Order Resetting Hearing Addressing Other Scheduling matters, and Limiting Number of  
Participants in Courtroom on Hearing Date
- 18 3. 04/23/13 – Decisions and Order Denying Defendants Motion to Strike In Part and Granting In Part
- 19 4. 05/07/13 – Order Setting Date for Responding to Motion for Leave to Amend
- 20 5. 05/20/13 – Order Denying Motion for Preliminary Injunction
- 21 6. 05/20/13 – Order Granting Leave to Amend Complaint
- 22 7. 05/20/13 – Scheduling Order for Briefing on Second Emergency Motion for Temporary Restraining  
Order
- 23 8. 05/29/13 – Order for Briefing on Defendants' Motion to Dismiss
- 24 9. 05/29/13 – Amended Order for Briefing on Defendants' Motion to Dismiss
10. 05/30/13 – Second Amended Order for Briefing On Defendants' Motion to Dismiss and Setting a  
Hearing Date

---

<sup>1</sup> This Order addresses the Plaintiffs' Second Amended Complaint.

11. 06/03/13 – Decision and Order Denying Plaintiffs Emergency motion for Stay Pending Appeal
12. 06/07/13 – Order on Security for Hearings
13. 06/17/13 – Order Modifying Order on Security
14. 06/17/13 – Decision and Order Denying Plaintiffs Motion for Temporary Restraining Order as to issues Related to Resolution #13-38
15. 06/18/13 – Second Order Granting Leave to Amend Complaint
16. 06/19/13 – Order Denying Plaintiffs Second Motion for Temporary Restraining Order as to Issues Relating to Tribal Council Meetings
17. 06/24/13 – Order on Hearing Attendees for June 25, 2013

### 3. Discussion

As noted above, in a Motion to Dismiss, the Court views the allegations of fact as true. In this matter, the facts are not much in dispute; rather, the interpretation of the law of the Nooksack Indian Tribe and the powers of the Tribal Council under Nooksack law determine the outcome of this lawsuit in the Nooksack Tribal Court. The Defendants seek dismissal on the basis of a lack of jurisdiction, failure to join indispensable parties, and lack of claim ripeness. The Court limits its discussion to the jurisdictional question, which answers the issues in front of the Court and the Court need not go further.

Therefore, the Court begins, as it must, with the Constitution and Bylaws of the Nooksack Indian Tribe of Washington. Under the Nooksack Constitution, the Tribal Council is made up of one chairman, one vice-chairman, one secretary, one treasurer and four council members. Nooksack Constitution, Article III, Section 2. Under the Bylaws, the Chairman only casts a vote in the event of a tie<sup>2</sup>. Bylaws, Article 1, Section 1. The Chairman, Secretary, and two council members serve four year terms. The Vice-Chairman, the Treasurer, and the remaining two council members serve two year terms. Tribal Council members must be tribal members. Nooksack Constitution, Article III,

---

<sup>2</sup> In fact, Chairman Kelly has not cast a vote in any of the Resolutions passed by the Council that have given rise to this suit.

1 Section 3. The Constitution sets out the powers of the Tribal Council in various parts, but most  
2 specifically in Article VI.

3 The Constitution addresses the issue of membership in Article II. Up until the Secretarial  
4 Election of June 21, 2013 which repealed Section H, Article II, Section 1, Sections A through H, set  
5 out the means by which a person may be eligible for membership in the Nooksack Indian Tribe.  
6 Amendments to the Constitution may be accomplished by following the process set out in Article X.  
7 Under Article X, the Nooksack Tribe requested a Secretarial Election to eliminate Section H, which  
8 was held on June 21, 2013. That amendment passed, eliminating Section H. That election result has  
9 been certified by the Secretary of the Interior and the Constitutional Amendment has become  
10 effective as of August 2, 2013. Therefore, the Constitution now allows membership based on seven  
11 possible claims, A through G.

12 Article II, Section 2 provides the Tribal Council with the power to enact ordinances in  
13 conformity with the Constitution “governing future membership in the tribe, including adoptions and  
14 loss of membership.” Under Section 4, the Constitution mandates that the Tribal Council set out in  
15 an ordinance that prescribes “rules and regulations governing involuntary loss of membership.”  
16 Section 4 states “The reasons for such loss shall be limited exclusively to failure to meet the  
17 requirements set for membership in this constitution.”

18 The Constitution also requires that the Tribal Council establishes a tribal court. Nooksack  
19 Constitution, Article VI, Section 2, A 1-3. Section 2(A)(3) states, in pertinent part, that:

20 The court shall have jurisdiction over all Indians on tribal lands, over all civil matters  
21 concerning members of the Nooksack Indian Tribe; over all matters concerning the  
22 establishment and functions of the tribal government, provided that nothing herein shall be  
23 construed as a waiver of sovereign immunity by the tribal government.”  
24

1 The Nooksack Court of Appeals, in *Cline v. Cunanan*, held that this section of the Constitution  
2 “specifically granted jurisdiction over matters concerning the establishment and function of the tribal  
3 government. We interpret this Constitutional grant of *jurisdiction* to mean that the Nooksack  
4 Constitution intended to confer subject-matter jurisdiction on the tribal court to hear matters  
5 concerning the establishment and functions of tribal government.” *Cline v. Cunanan*, NOO-CIV-  
6 02/08, page 3. The Court further held, however, that there must be a “threshold finding that  
7 sovereign immunity has been waived.” *Cline* at 5, relying on *Campion*.

8 Thus, the question of whether the Defendants are protected by sovereign immunity becomes  
9 a threshold issue, and one the Court has addressed in orders related to the Preliminary Injunctions  
10 sought by the Plaintiffs and denied by this Court. The Defendants are elected members of the Tribal  
11 Council: Robert Kelly, Chairman, Rick George, Vice-Chairman, Agripina Smith, Treasurer, Bob  
12 Solomon, Council Member, Katherine Canete, Council Member, Lona Johnson, Council Member.  
13 Defendant Roy Bailey serves as the Enrollment Clerk. (Jewell Jefferson was also an Enrollment  
14 Clerk, but was terminated in April 2013. However, the Plaintiffs have not amended their Complaint  
15 to drop Ms. Jefferson as a Defendant, so the Court includes her.) Each of the Defendants were sued  
16 in their personal capacity as the Plaintiffs allege that the Defendants lost their sovereign immunity  
17 protection by virtue of their actions being outside the scope of their official duties.

18 The parties and this Court have conducted exhaustive and extensive research on the reach  
19 and application of sovereign immunity, both inside and outside of the tribal context. Hundreds of  
20 pages of briefing and thousands of pages of cases have been filed by the parties and reviewed by the  
21 Court, in addition to the Court’s own research. After months of argument, research, and writing, the  
22 Court concludes that the issues here boil down to relatively simple principles. Sovereign immunity  
23 applies in the tribal context and the Nooksack Constitution specifically holds that the grant of  
24



1 jurisdiction to this Court over the “establishment and functions of the tribal government” does not  
2 act as a waiver of sovereign immunity. As the Nooksack Court of Appeals noted in this case, “tribal  
3 immunity extends to individual tribal officials and employees while acting within the scope of their  
4 authority . . . [but when] an official commits an act prohibited by law, he acts beyond his authority  
5 and is not protected by sovereign immunity.” *Lomeli v. Kelly, Order Denying Permission for*  
6 *Interlocutory Appeal*, page 4, fn. 4, citing *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476,  
7 479 (9<sup>th</sup> Cir. 1985) and *Pennhurst State Sch. & Hosp. v. Halderman* 465 U.S. 89, 138 (1984).

8 Plaintiffs allege that the actions taken by the Defendants constitute acting beyond their  
9 official duties and those actions strip them of their sovereign immunity. In prior analyses of these  
10 allegations, the Court reviewed the *Ex Parte Young* doctrine upon which the Plaintiffs’ case hinges.  
11 In order to find that the *Young* exception to the sovereign immunity protection applies here, this  
12 Court must find first that the Defendants acted outside the scope of their authority.

13 The Nooksack Constitution grants the authority to determine loss of membership to the  
14 Tribal Council. The Constitution directs the Tribal Council to adopt an order that will “prescribe  
15 rules and regulations governing involuntary loss of membership.” Nooksack Constitution, Article II,  
16 Section 4. The Council adopted Title 63, titled Membership Ordinance of the Nooksack Indian  
17 Tribe. The Tribal Council amended the Membership Ordinance in full in 2004. (Title 63 was  
18 originally adopted in 1975, with amendments in 1996, 1998, and 2004.) Title 63.04.001 sets out the  
19 procedure by which membership in the Tribe may be lost.

20 (Under Title 63, the Ordinance specifically states that “the Tribal Court shall not have subject  
21 matter jurisdiction to hear cases under this ordinance. Any reconsideration of the Nooksack Tribal  
22 Council enrollment decisions are to be made under the procedures set forth in this ordinance.” NTC  
23 63.00.003. In this discussion, the Court does not assert jurisdiction it does not have. Rather, the  
24

1 Court must review the scope of the authority granted to the Council by the Constitution and Title 63  
2 in order to assess whether they exceeded their authority stripping them of their sovereign immunity.)

3 Title 63 provides two means by which membership in the Tribe may be lost: voluntary  
4 relinquishment and disenrollment. Title 63.04.001 states:

5 The burden of proof in disenrollment actions rest with the Tribe. However, at no time will  
6 staff employed in the Enrollment Department purposely initiate a reason for loss of  
7 membership. Any tribal member requesting loss of membership of another tribal member  
will need to present written documentation on how the information was obtained that  
warrants disenrollment. The Tribal Council will have the final say on loss of membership.

8 Plaintiffs argue that this section limits the authority for requesting disenrollment to individual tribal  
9 members. Plaintiffs read this section to require that a tribal member who identifies a person who  
10 may not meet membership eligibility requirements provide written documentation regarding how  
11 they came about the information of eligibility and then provide that to the Tribal Council. As the  
12 Court has noted in prior orders, this is not how this Court reads and interprets the Ordinance.

13 The Constitution and the Code expressly reserve determinations about membership to the  
14 Tribal Council. The Constitution gives the authority to determine membership processes to the  
15 Tribal Council. The Council's enactment of Title 63 divests the Court of authority to review  
16 enrollment decisions (a change from the 1998 ordinance, which placed the Tribal Court in the role of  
17 an appellate, reviewing body for disenrollment decisions). In order to read 63.04.001(B) as limiting  
18 the Tribal Council's power, the Court would have to read the sentence "Any tribal member  
19 requesting loss of membership of another tribal member. . ." as a limiting factor on the authority of  
20 the Tribal Council. Such a reading would require the Court to ignore both the clear mandate of the  
21 Constitution reserving the authority to determine loss of membership to the Council, as well as the  
22 intention of the Membership Ordinance, which states that it is adopted in conformity with the  
23 Constitution's requirement that the Council "prescribe rules and regulations governing involuntary  
24

1 loss of membership”: “The purpose of this membership ordinance is to establish guidelines, rules  
2 and an orderly procedure to maintain a current membership roll of all persons eligible for  
3 membership pursuant to Article II of the Constitution and Bylaws of the Nooksack Tribe of  
4 Washington.” NTC 63.00.002.

5 The Court reads Title 63 as requiring the Tribal Council to prove that an enrolled tribal  
6 member is ineligible for membership before disenrolling her. The prohibition on the Enrollment  
7 Department “initiating” a reason for loss of membership prevents the Enrollment Department from  
8 beginning disenrollments of their own accord. If individual tribal members believe others to be  
9 erroneously enrolled, they may present that to the Council, but only if they demonstrate how they  
10 learned of the potential erroneous enrollment. These are not limitations on the Tribal Council’s  
11 authority. They are limitations on those who are not elected to make such determinations: staff and  
12 individual tribal members.

13 The reasons for those limitations on Enrollment Department staff and individual tribal  
14 members is unclear, but it is entirely possible that those limitations are there to protect the  
15 membership from Enrollment Department staff and individual tribal members from attempting to  
16 change the membership based upon disputes between families, political entanglements and other  
17 issues. Enrollment staff come and go. There is no requirement that they be tribal members (indeed,  
18 Jewell Jefferson is a member of the Lummi Nation, not the Nooksack Indian Tribe) and allowing  
19 them the authority to make such decisions alone would have the potential to create power in the  
20 department that they are not given through the Constitution.

21 Those two limitations on Enrollment Department staff and individual tribal members do not  
22 work limitations on the Tribal Council, as the Plaintiffs argue. Plaintiffs argue that only individual  
23 tribal members may request loss of membership against other members. Title 10 requires that the  
24

1 Tribal Court “interpret tribal ordinances, resolutions, regulations, and policies in order that the  
2 substantive intent of the Tribal Council is ensured. The court shall not indulge in highly technical or  
3 legalistic interpretations of tribal ordinances, regulations, and policies when such interpretation  
4 would defeat the overall legislative goals of the Tribal Council.” NTC 10.01.020. The substantive  
5 intent of 63.04.001(B) is to allow the Tribal Council to make determinations about enrollment and  
6 disenrollment and to prevent arbitrary disenrollment proceedings to be initiated by Enrollment  
7 Department staff and individual tribal members who are not elected to carry out the functions of  
8 tribal officers.

9 Plaintiffs argue that Enrollment Officer Roy Bailey initiated the disenrollment of the  
10 individual Plaintiffs. The facts in front of this Court do not support this. Officer Bailey processed  
11 applications from Terry St. Germain for his children and, in so doing, found they lacked the  
12 necessary documentation for enrollment. Upon the questioning of Secretary St. Germain, Chairman  
13 Kelly stated that he would research the issue and both he and Mr. Bailey were tasked with doing so.  
14 Upon conducting that research with the Regional Office of the Bureau of Indian Affairs, Chairman  
15 Kelly and Officer Bailey found that there was no documentation to support the enrollment of the  
16 Plaintiffs, as well as the others who have received Notices of Intent to Disenroll. Officer Bailey did  
17 not, of his own accord, initiate a disenrollment process. Rather, he carried out the research as he was  
18 instructed to do by the Tribal Council.

19 Upon conducting that research and determining that there were approximately 300 people  
20 enrolled who may not meet the Constitutional eligibility requirements, the Council sent out Notices  
21 of Intent to Disenroll through certified mail. The Council followed the procedure set out in NTC  
22 63.04.001(B)(2). That section also requires that the Tribal Council provide the potential disenrollees  
23 the option of requesting a meeting, which they must do within thirty days of receiving the letter.  
24

1 Copies of the letters sent to the Plaintiffs provide that option. As of this writing, the Court has not  
2 been provided with any facts indicating whether and how such meetings have occurred.

3 The Court cannot find that the Defendants acted outside of the scope of their authority in  
4 commencing the process of disenrollment against the Plaintiffs. The Plaintiffs argue that the  
5 Defendants have acted out of racial discrimination because the Plaintiffs have Filipino ancestry.  
6 They have also argued that they are eligible for enrollment, based upon the statements of a  
7 University of Washington anthropologist and other claims. Certainly, if the Plaintiffs meet the  
8 eligibility requirements for enrollment, they should remain enrolled, but this decision lies with the  
9 Tribal Council and not the Tribal Court. Title 63 allows for both reconsideration and reapplication  
10 for enrollment if they are able to provide documentation of their eligibility.

11 Plaintiffs seem to argue that the Court must engage in an analysis of the intention of  
12 Chairman Kelly and the other Defendants in order to determine whether sovereign immunity's  
13 protection extends to them or not. They argue that the Defendants' actions to disenroll the Plaintiffs  
14 stem from racial animus that violates their Equal Protection rights. Even taking the facts presented  
15 as true in this Motion to Dismiss, the Court cannot find that this is, in fact, the case. And even if it  
16 were, which this Court expressly declines to find, there are serious and reasonable questions about  
17 whether that would give rise to a justiciable claim in and of itself.

18 The determination of tribal membership is one of the few remaining aspects of tribal  
19 sovereignty that the federal government, federal and state courts, and the Bureau of Indian Affairs  
20 have agreed lie in the sole discretion of the tribal government. *Patterson v. Council of the Seneca*  
21 *Nation*, 157 N.E. 734 (1927); *Santa Clara v. Martinez*, 436 U.S. 49 (1978); *Morton v. Mancari*, 417  
22 U.S. 535 (1974); *Aguayo et. al. v. BIA*, 55 IBIA 192, 2013 WL 8436503 (2013); *Aguayo v. BIA*, June  
23 12, 2013 (Decision authored by Assistant Secretary of Indian Affairs). Tribal membership  
24

1 requirements vary widely from tribe to tribe. Some tribes require that members must be ½ blood  
2 quantum to be enrollable. Other tribes, particularly those tribes that were moved from their original  
3 homelands, tie enrollment to descendency from census rolls from a certain date in time. It is  
4 reasonable to argue that tying membership to government taken census rolls works an unfair result;  
5 if tribal members were away on the dates a census was taken, they would be left off the rolls. But  
6 that does not change the fact that tribal governments are free to tie membership to those census rolls  
7 or any other point in time they choose. Tribal membership requirements are often controversial  
8 within individual tribes and there is no question that there are tribes and tribal governments who  
9 have engaged in disenrollments of tribal members for questionable reasons. In all its months of  
10 research, however, the Court has yet to find a case that holds that tribes do not have the authority to  
11 determine their own membership. In this case, the Tribal Council is doing what the Constitution and  
12 Codes allow it to do.

13         The Nooksack Constitution's membership eligibility criteria provide several means by which  
14 a person could claim to be enrollable. Enrollment at Nooksack is based upon descendency from  
15 Nooksack Public Domain allottees and their lineal descendants living on January 2, 1942 (Section  
16 1(A)), those with Indian blood whose names appear on the Nooksack census roll dated January 1,  
17 1942, (Section 1(B)), lineal descendants of a person who was enrolled after January 1, 1942 if they  
18 possess ¼ Indian blood (Section 1(C)), those who received payments under the Distribution of  
19 Judgment Fund dated October 6, 1966 and their lineal descendants provided they have ¼ Indian  
20 blood (Section 1(D). Sections 1(F) and (G) provide for two types of adoption, both requiring at least  
21 ¼ Indian blood. Section 1(H), now repealed, provided for ¼ degree of Indian blood with Nooksack  
22 ancestry to any degree.

1           These eligibility criteria tie most enrollments to certain dates in time, with requirements that  
2 the person have ¼ degree of Indian blood as well. Whether the Plaintiffs do or do not meet these  
3 criteria is not in front of this Court and, in fact, the Court has not attempted to make that  
4 determination. The determination of who is and who is not a member is not in front of this Court  
5 today. Again, the Court’s only task is to decide whether the actions of the Defendants exceed the  
6 scope of their authority.

7           Here, the Plaintiffs argue that their disenrollments are based on racial animus toward those of  
8 Filipino ancestry. If, as the Plaintiffs argue, the Defendants are attempting to “cleanse” the Tribe of  
9 Filipino ancestry, they would be doing so in direct contravention to their own interests. Several of  
10 the Defendants share Filipino ancestry with the Plaintiffs. Indeed, there is a long history of  
11 intermarriage between Filipinos in this area and the Nooksacks. The Plaintiffs do not make up all of  
12 those Nooksacks who have Filipino ancestry, making the argument that they are targeted because of  
13 their Filipino ancestry questionable. If, as the Plaintiffs argue, the Defendants seek to rid the Tribe  
14 of Filipino ancestry, they are doing a poor job of it with these potential disenrollments.

15           This argument, however, begs the underlying question of how tribal membership is  
16 determined at all. The concept of blood quantum and membership in a tribe is not a tribally derived  
17 notion. Rather, the concept of blood quantum as a means of deciding who is a tribal member stems  
18 from a Bureau of Indian Affairs means of counting the numbers of tribal members. Membership  
19 allows tribal members to vote in elections, have access to healthcare and housing, among other  
20 benefits, seek redress in the tribal courts, as well as many other benefits, privileges and  
21 responsibilities. In order to function as quasi-sovereign entities, tribes must make some  
22 determination about how to qualify and quantify membership. Making determinations about  
23 enrollment based on blood quantum is, in and of itself, at least in part a racial determination—can  
24

1 the applicant show that he or she has the requisite tie to the Tribe by virtue of their blood? If the  
2 answer is yes, he or she may enroll and become a political participant in the life of the Tribe. If the  
3 answer is no, he or she may not. In the Nooksack Constitution, there are multiple means by which a  
4 person may claim membership, including by way of adoption. The lines of membership are not  
5 always drawn fairly and there are always people who believe they should be able to enroll but  
6 cannot. Since tribal membership is considered a political status, that line must be drawn  
7 somewhere. If the Tribal Council wishes to change the ways in which people may be eligible for  
8 Nooksack membership, they may do so by seeking a change in the Constitution through a vote of the  
9 membership, as they did here in repealing Section H. If the Tribal Council seeks to ensure that each  
10 and every tribal member now enrolled is enrolled in accordance with the Constitution, the  
11 Constitution reserves that authority to the Council and to the Council alone.

12         The Court cannot find that racial animus has driven the actions of the Defendants. Even if it  
13 could so find, the Court questions whether that would exceed the scope of their authority—given that  
14 tribal membership by its definition requires, at least in part, analysis of race, descendency and blood,  
15 it is hard to imagine an argument that would find such determinations to violate of the Council’s  
16 scope of authority. Here, however, the Court finds that the Defendants have identified those who  
17 appear to not be enrollable under the Constitution and have proceeded to disenroll them on the basis  
18 of that information.

19         The Plaintiffs argue also that the Court should intervene in the Secretarial Election process,  
20 arguing that the election to eliminate Section H violates the Constitution because it is a decision  
21 driven by racial animus. They allege that Chairman Kelly campaigned for this Constitutional change  
22 “without authority” and that the Tribe’s use of tribal resources to campaign for this amendment  
23 constituted illegal action. The Secretarial Election was conducted by the federal government and the  
24



1 Court has no authority to intervene in that process, as the Plaintiffs conceded. An election is, by its  
2 nature, a political event. The members of the Tribal Council were free to campaign in favor of the  
3 Amendment and the Plaintiffs were free to campaign in opposition to it. Indeed, the Plaintiffs were  
4 free to cast votes in that election. Plaintiffs argue that the election notices were insufficient and that  
5 the timeframe during which the voter registration occurred was unreasonable and unlawful. Again,  
6 this was a federal election and this Court is the wrong venue in which to challenge it.

7 The Court is not unaware of the significant impacts disenrollment may have on the Plaintiffs.  
8 Indeed the Court is painfully aware of those impacts. Cultural and tribal identity lay at the heart of  
9 how we know ourselves. This is not a simply a decision of membership, but rather a decision about  
10 belonging. Belonging to a tribe gives tribal members a sense of home, of connection to a  
11 community, whether one lives there or not. The Council is charged with making decisions in the  
12 best interests of the Tribe. It is not the job of the Court to decide whether those decisions are wise  
13 decisions, nor is it the job of this Court to manage what are critically important political decisions to  
14 be made by elected officials.

15 Plaintiffs have argued in court and in writing that the actions of the Council are without legal  
16 justification. They have used the language of conspiracy, more than once referring to the  
17 Defendants as a “cabal.” Upon very close analysis of the facts and the relevant Nooksack law, the  
18 Court finds that the Defendants have acted within the authority granted them by the Nooksack  
19 Constitution and Title 63. Therefore, the sovereign immunity of the Tribe extends to them as tribal  
20 officials and this Court lacks jurisdiction over them and the actions that have given rise to this suit.

21 The Court needs to address also the issue centering on the so called “First Tuesday”  
22 meetings. In its analysis at the Preliminary Injunction stage, the Court found that the Council  
23 cancelled those meetings for public safety reasons. The Court found further that doing so did not  
24

1 violate the Constitution, any more than canceling the meetings because they fell on a holiday, as the  
2 first meeting of this year did by falling on New Year's Day. Under the Bylaws, the First Tuesday  
3 meetings "shall" be held at the tribal office. Beginning in late 2011 and through 2012, First Tuesday  
4 meetings were held at the Nooksack Community Building, with agendas published to the  
5 membership prior to the meetings. Since the disenrollment issues arose, the First Tuesday meetings  
6 have been cancelled for public safety reasons, with business conducted through the Special Meetings  
7 clause under Article II, Section 3 of the Bylaws. The Bylaws of the Constitution were adopted by  
8 the Tribe in 1973, with amendments in 1989 and the Court finds the Defendants' argument that they  
9 are not to be followed by the Council in the same manner as the Constitution to be questionable.  
10 However, the sovereign immunity of the Tribe protects the Council again in this instance. Canceling  
11 meetings for holidays, public safety reasons or other reasons of public concern do not give rise to the  
12 loss of sovereign immunity on the part of the Defendants.

13 Finally, the Court addresses the Plaintiffs' issue challenging the Defendants failure to call a  
14 special meeting in accordance with written requests submitted by Tribal Council Secretary Rudy St.  
15 Germain and Michelle Roberts. Under Article II, Section 5 of the Bylaws, the Tribal Council shall  
16 hold special meetings "upon written request of either two members of the tribal council or by  
17 petition signed by twenty five (25) legal voters of the tribe." The Plaintiffs allege that special  
18 meetings requests were submitted by Secretary St. Germain and Council member Michelle Roberts  
19 but no meetings have occurred. Defendants do not deny that the meeting requests were submitted  
20 nor do they deny that the meetings have yet to be called. They assert sovereign immunity and  
21 standing as defenses to this claim.

22 As the Court held in the *Order Denying Plaintiffs Second Motion for Temporary Restraining*  
23 *Order as to Issues Relating to Tribal Council Meetings*, the Plaintiffs simply lack standing to bring  
24

1 these issues to this Court. The Court has repeatedly sought clarification from the Plaintiffs’  
2 attorneys regarding who their clients are and each time, the Court has been told that they represent  
3 the named Plaintiffs only. As has already been analyzed by this Court, the Plaintiffs cannot establish  
4 an injury-in-fact. In order to satisfy the requirements for standing, 1) plaintiff must have suffered an  
5 “injury-in-fact”—“an invasion of a legally protected interest which is concrete and particularized  
6 and actual or imminent, not conjectural or hypothetical”, 2) there must be a causal connection  
7 between the injury and conduct complained of, and 3) the injury must be likely to be redressable by  
8 a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted).  
9 The injury-in-fact must “affect the plaintiff in a personal and individual way” and the “party seeking  
10 review must himself be among the injured.” *Lujan*, 504 U.S. at footnote 1 and 563, respectively.

11 The Plaintiffs general interest in the proceedings under the Special Meetings section of the  
12 Bylaws is a not a “concrete and particularized” legally protected interest. Rather, it is an assertion of  
13 a “right to a particular kind of Governmental conduct.” Plaintiffs are tribal members who cannot  
14 bring to this Court a claim that the Council should act on Special Meetings requests filed by Tribal  
15 Council members. They fail to demonstrate an injury-in-fact and the Court finds they lack standing  
16 to bring this issue to this Court.

### 17 3. Conclusion

18 As Assistant Secretary of Indian Affairs Kevin Washburn wrote recently, “in the exercise of  
19 sovereignty and self-governance, tribes have the right, like other governments, to make good  
20 decisions, bad decisions, and decisions with which others may not agree.” *Aguayo*, page 1. The  
21 Tribal Council members named in this Complaint hold an obligation to act in the best interests of the  
22 Nooksack Indian Tribe. Membership and enrollment decisions impact individual lives in the deepest  
23 possible ways and those decisions cannot be taken lightly. This Court recognizes the serious  
24

1 implications of this case and its decision on this motion and all the others that have preceded it. It is  
2 the solemn obligation of this Court to follow the law of the Nooksack Indian Tribe and it is the  
3 obligation of the Tribal Council to do the same.

4 **Therefore, THIS COURT HEREBY GRANTS THE DEFENDANTS' MOTION TO**  
5 **DISMISS SECOND AMENDED COMPLAINT.**

6 **IT IS SO ORDERED.**

7 **DATED** this 6 day of August, 2013.

8 

9  
10 Raquel Montoya-Lewis  
Chief Judge, Nooksack Tribal Court