11-01-13 P03:29 IN

NO. 2013-CI-APL-002

NOOKSACK COURT OF APPEALS
FOR THE NOOKSACK INDIAN TRIBE

SONIA LOMELI, ET AL.,
Appellants,

v.

ROBERT KELLY, ET AL.,
Appellees

ON APPEAL FROM THE NOOKSACK TRIBAL COURT
No. 2013-CI-CL-001

RESPONSE BRIEF OF APPELLEES

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SUMMARY OF ARGUMENT

The Trial Court properly ruled that Appellees retain sovereign immunity as officials of the Tribe acting within the scope of their authority. Appellants allege that *Ex parte Young* strips Appellees of their sovereign immunity, but this doctrine, if it even applies in the Nooksack tribal context, fails to allow Appellants to bring suit against Appellees when Appellees have acted within the scope of their authority. Appellants now assert that the Trial Court should not have evaluated the merits of the case, but the federal courts have evaluated the merits of cases in determining sovereign immunity applicability, and Appellants requested that the Court consider the merits by filing two Motions for Temporary Restraining Orders. Appellants fully litigated this case below without objection. Appellants cannot now complain that the Trial Court erred in responding to Appellants' requests for a determination of the tribal officials' authority.

Appellees have not violated Nooksack law. Rather, the Tribal Council has fulfilled its responsibility to enforce Nooksack enrollment and Constitutional law in furtherance of the best interests of the Tribe.

Appellants do not include approximately 271 individuals. Appellants' counsel asserted in writing and orally that the *Lomeli* plaintiffs consist of six individuals.[1] Appellants cannot add a class of plaintiffs without any procedure – particularly when the Trial Court ordered the parties to utilize the Federal Rules of Civil Procedure to supplement Nooksack procedures.

[1] The number has varied between four and six individuals depending on which iteration of the Complaint is involved.

This case was fully and fairly litigated in the Trial Court, and the Trial Court's rulings should be upheld.

STATEMENT OF CASE

On November 21, 2012, the applications of Appellant Terry St. Germain's children, Anita St. Germain, Kylan St. Germain, Sotero St. Germain, Jovanni Bear-Eashappie, and Jeremiah Bear-Eashappie were submitted to the Nooksack Indian Tribe's Enrollment Department (St. Germain Applicants). CP 25, Decl. of R. Bailey at 3:8-10. Appellee Bailey[2] informed Appellant St. Germain that the applications were incomplete and that he would attempt to assist Appellant St. Germain with the process. *Id.* at 3:11-13. Appellee Bailey began to verify the St. Germain Applicants' eligibility for enrollment based on the information provided in the application and statements of Appellant St. Germain. *Id.* at 3:14-17. During the verification process, Appellee Bailey discovered the St. Germain Applicants were not eligible for enrollment. *Id.* at 3:17-19.

On December 20, 2012, the Tribal Council held a meeting to conduct regular business, which included the approval of ten applications for enrollment. CP 25, Decl. of A. Johnny, Exhs. B, C, and N; CP 25, Decl. of B. Solomon at 2:11-22; CP 25, Decl. of A. Smith at 2:17-24; CP 25 Decl. of R. George at 2:17-24. After the Enrollment Department presented recommendations for enrollment, Secretary St. Germain asked Appellee Bailey why Secretary St. Germain's nieces and nephews, the St. Germain Applicants, were not

[2] All Appellees aside from Appellee Bailey are members of the Nooksack Tribal Council.

recommended for enrollment. CP 25, Decl. of A. Johnny, Exhs. B and C; CP 25, Decl. of R. Bailey at 4:1; CP 25, Decl. of B. Solomon at 3:1-2; CP 25, Decl. of A. Smith at 3:2-4; CP 25, Decl. of R. George at 3:2-4. Appellee Bailey informed Secretary St. Germain that the St. Germain Applicants failed to establish eligibility for enrollment. CP 25, Decl. of R. Bailey at 4:2-3; CP 25, Decl. of B. Solomon at 3:3-6; CP 25, Decl. of A. Smith at 3:5-8; CP 25, Decl. of R. George at 3:5-8. In executive session, Councilmembers recommended that Secretary St. Germain, as well as those similarly situated, obtain copies of their enrollment files and locate documents that could prove the members were lineal descendants of an Original Nooksack Public Domain Allottee or otherwise eligible for enrollment. CP 25, Decl. of B. Solomon at 3:18-24; CP 25, Decl. of A. Smith at 3-4; CP 25, Decl. of R. George at 3-4; CP 25, Decl. of R. Bailey at 4:16-19.

Based on the issues raised by Secretary St. Germain at the December 20, 2013 Council meeting, on January 8, 2013, Appellee Kelly and Appellee Bailey went to the Bureau of Indian Affairs (BIA) seeking documentation to support the St. Germain Applicants and those currently enrolled members similarly situated. CP 25, Decl. of R. Bailey at 5:1. BIA Staff could not locate any records to establish that the St. Germain Applicants or their currently enrolled member relatives were (or are) lineal descendants of an Original Nooksack Public Domain Allottee. *Id.* The applications of the St. Germain Applicants (as well as those of

Appellants here) were based on either Section 1(A) (allottee descendants) or 1(C) (descendants of an enrollee) of Article II of the Constitution .[3]

The erroneous enrollments all involve persons who claim to be lineal descendants of an original Nooksack Public Domain allottee identified as Madeline Jobe, because they claim that Madeline Jobe was the mother of Annie George (James). *See* CP 4, Decl. of Lomeli, Exh. A. Yet, Annie George (James) was not the daughter of Madeline Jobe, Matsqui George's second wife, for she was the child of his first wife, Marie (Mary).[4]

The Tribal Council did not hold a regularly scheduled meeting on the first Tuesday in January 2013, and Secretary St. Germain did not object to the failure to hold this meeting. CP 25, Decl. of B. Solomon at 4:2-3; CP 25, Decl. of A. Smith at 4:4-5; CP 25, Decl. of R. George at 4:4-5. On January 8, 2013, Council held a meeting to consider regular business. CP 25, Decl. of A. Johnny, Exhs. E and S; CP 25, Decl. of B. Solomon at 4:5-6; CP 25, Decl. of A. Smith at 4:7-9; CP 25, Decl. of R. George at 4:7-9. After this meeting adjourned, Councilmembers discussed what records, if any, were located at the BIA, and Appellee Kelly informed Secretary St. Germain and Councilmember Roberts that no evidence could be located establishing that they and their family members, were (or are) lineal descendants of an Original Nooksack Public Domain Allottee.

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[3] Neither Appellants nor other individuals considered for disenrollment applied for enrollment or were enrolled under other sections of the Constitution, such as former Section 1(H). Appellants misstate the Trial Court in claiming that it held that "Appellants qualify for membership under Section 1(H) of the Constitution." Opening Br. At 5. The Trial Court made no such determination. *See* CP 79, Amended Order Granting Dismissal at 14:22.

[4] [Appellants] Excerpts of Record at 39, 63, *Roberts v. Kelly*, No. 2013-CI-CL-003 (filed Aug. 26, 2013).

CP 25, Decl. of B. Solomon at 4:8-19; CP 25, Decl. of A. Smith at 4:10-23; CP 25, Decl. of R. George at 4:10-23. Appellee Kelly again recommended that Secretary St. Germain and Councilmember Roberts consult with their families and locate the relevant documentation in order to avoid commencement of the disenrollment process. CP 25, Decl. of B. Solomon at 5:4-7; CP 25, Decl. of A. Smith at 5:7-10; CP 25, Decl. of R. George at 5:7-10.

On January 18, 2013, Appellant St. Germain requested a formal rejection letter as to his children's eligibility. CP 25, Decl. of R. Bailey at 5:2-8. Appellee Bailey informed Appellant St. Germain that the Enrollment Department was still accepting documentation supporting the applications, and Enrollment Department staff was still attempting to locate such documentation. *Id.* at 5:3-5. Appellant St. Germain insisted on a formal rejection letter, and Appellee Bailey hand wrote a letter. *Id.* at 5:6-8.

The Tribal Council cancelled the February 5, 2013 regular meeting due to public safety concerns at the Community Center resulting from the sensitive enrollment issues becoming widely known. CP 25, Decl. of B. Solomon at 5-6; CP 25, Decl. of A. Smith at 6:1-2; CP 25, Decl. of R. George at 6:1-2.

On February 11, 2013, Appellee Kelly gave notice to the Council of a meeting requiring an executive session to be held the following day. CP 25, Decl. of A. Johnny, Exh. F. On February 12, 2013, Council convened. CP 25, Decl. of A. Johnny, Exh. G; CP 25, Decl. of B. Solomon at 6; CP 25, Decl. of A. Smith at 6; CP 25, Decl. of R. George at 6. At the outset of the executive session, Appellee Kelly indicated that the Council would be considering a resolution to

begin the disenrollment process, which would directly affect Secretary St. Germain and Councilmember Roberts. CP 25, Decl. of B. Solomon at 6:9-11; CP 25, Decl. of A. Smith at 6:6-10; CP 25, Decl. of R. George at 6:6-10. Appellee Kelly requested Appellee Bailey's presence to inform the Council as to whether any documentation had been found to support the eligibility of the St. Germain Applicants or the current enrollment of the applicants' relatives. CP 25, Decl. of R. Bailey at 5:17-21; CP 25, Decl. of B. Solomon at 6:12-13; CP 25, Decl. of A. Smith at 6:17-18; CP 25, Decl. of R. George at 6:11-12.

The Council went into executive session, and during that executive session, Secretary St. Germain and Councilmember Roberts were asked to recuse themselves because the Council would be discussing matters directly affecting them and their families that would likely result in litigation. CP 25, Decl. of B. Solomon at 6:16-19; CP 25, Decl. of A. Smith at 6:20-24; CP 25, Decl. of R. George at 6:14-18; CP 25, Decl. of R. Bailey at 5-6. Secretary St. Germain and Councilmember Roberts left without objection. CP 25, Decl. of B. Solomon at 6:24; CP 25, Decl. of A. Smith at 7:3; CP 25, Decl. of R. George at 6:22; CP 25, Decl. of R. Bailey at 6:1. During the executive session, Appellee Bailey informed the Council that in his review of the enrollment files, BIA enrollment files, and other sources, he could not locate documentation supporting the claim that certain current members, including the St. Germain Applicants, were (or are) lineal descendants of an Original Nooksack Public Domain Allottee. Appellee Bailey also explained that the St. Germain Applicants and other affected families did not submit documentation supporting eligibility for enrollment under the

Constitution Article II, Section 1(A) or 1(C). CP 25, Decl. of R. Bailey at 6:1-14; CP 25, Decl. of B. Solomon at 7:2-6; CP 25, Decl. of A. Smith at 7:6-13; CP 25, Decl. of R. George at 7:2-5. Instead, the documents gathered from Canadian authorities showed clearly that Annie George (James) was the daughter of two members of a First Nations Band near Chilliwack, B.C. and not the daughter of a Nooksack Public Domain allottee.[5] After exiting executive session, the Council took action on several items, including Resolution 13-02. CP 25, Decl. of A. Johnny, Exhs. G-L; CP 25, Decl. of B. Solomon at 7:20-22; CP 25, Decl. of A. Smith at 8:1; CP 25, Decl. of R. George at 7:20-21.

The Council approved Resolution 13-02, which initiated the disenrollment process. CP 25, Decl. of A. Johnny, Exhs. G and H; CP 25, Decl. of B. Solomon at 8:4-8; CP 25, Decl. of A. Smith at 8:1; CP 25, Decl. of R. George at 7:20-21. The Council also approved Resolutions 13-03 and 13-04. CP 25, Decl. of A. Johnny, Exhs. G, J. and L; CP 25, Decl. of B. Solomon at 7:20-21; CP 25, Decl. of A. Smith at 8:1; CP 25, Decl. of R. George at 7:20-21. After the February 12, 2013 meeting adjourned, Secretary St. Germain and Councilmember Roberts returned and were updated regarding the Council's official actions. CP 25, Decl. of B. Solomon at 8:9-11; CP 25, Decl. of A. Smith at 8:13-16; CP 25, Decl. of R. George at 8:9-11.

Pursuant to Resolution 13-02, the Enrollment Department and other staff began drafting, preparing, processing and mailing formal Notices of Intent to Disenroll. CP 25, Decl. of R. Bailey at 6-7; CP 25, Decl. of C. Bernard at

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[5] *See* n.4, *supra.*

1:21-23. Each Appellant was sent a Notice of Intent to Disenroll. CP 25, Decl. of R. Bailey at 6:21-23; CP 25, Decl. of C. Bernard at 2:4-6. All of the Appellants have received their Notices of Intent to Disenroll and have timely responded requesting a meeting with the Council. CP 25, Decl. of C. Bernard at 2:4-6.

On March 1, 2013, the full Council met to consider other regular Council business. CP 25, Decl. of A. Johnny, Exhs. O-Q; CP 25, Decl. of B. Solomon at 8:13-14; CP 25, Decl. of A. Smith at 8:18-19; CP 25, Decl. of R. George at 8:13-14. The Council approved Resolution 13-37, adopting Title 65, the Nooksack Indian Tribe Conflict of Interest and Nepotism Code. CP 25, Decl. of A. Johnny, Exh. P; CP 25, Decl. of B. Solomon at 8:13-14; CP 25, Decl. of A. Smith at 8-9; CP 25, Decl. of R. George at 8-9. The Council also approved Resolution 13-38, requesting a Secretarial Election to amend the Constitution to remove Article II, Section 1(H). CP 25, Decl. of A. Johnny, Exh. Q; CP 25, Decl. of B. Solomon at 8:13-14; CP 25, Decl. of A. Smith at 8:18-19; CP 25, Decl. of R. George at 8:13-14. Secretary St. Germain and Councilmember Roberts were the only Councilmembers to oppose passage of Resolution 13-38. CP 50, Second Decl. of R. George at 3:17-19.

The Council cancelled the regularly scheduled March meeting at the Community Building due to continuing safety concerns related to the disenrollment. CP 25, Decl. of B. Solomon at 6:3-5; CP 25, Decl. of A. Smith at 6:1; CP 25, Decl. of R. George at 6:1-2.

This suit was filed on March 15, 2013. CP 1, Complaint. On March 25, 2013, Appellee Kelly notified the Council of a special meeting for March 26,

2013, at 10:00 a.m. to include a two-hour executive session related to this litigation, and a 1:00 p.m. session regarding amendments to Title 60, the Constitutional Petition Ordinance. CP 25, Decl. of A. Johnny, Exh. T; CP 25, Decl. of B. Solomon at 8-9; CP 25, Decl. of A. Smith at 9:11-14; CP 25, Decl. of R. George at 9:10-13. The Notice specifically informed Secretary St. Germain and Councilmember Roberts that they could not participate during the executive session because it involved litigation strategy related to the disenrollment proceedings. CP 25, Decl. of A. Johnny, Exh. T.

At the beginning of the March 26, 2013 meeting, Secretary St. Germain objected to the request that he and Councilmember Roberts recuse themselves, and Secretary St. Germain renewed his request for a special meeting. CP 25, Decl. of B. Solomon at 9:6-8; CP 25, Decl. of A. Smith at 9:20-21; CP 25, Decl. of R. George at 9:19-20. Once the executive session concluded, Secretary St. Germain and Councilmember Roberts returned, and the Council considered and approved four resolutions. CP 25, Decl. of A. Johnny, Exhs. U-X; CP 25, Decl. of B. Solomon at 9:11-13; CP 25, Decl. of A. Smith at 10:1-2; CP 25, Decl. of R. George at 10:1-2. First, the Council approved Resolution 13-52, which amended Title 60 – the Constitutional Petition Ordinance. CP 25, Decl. of A. Johnny, Exh. U; CP 25, Decl. of B. Solomon at 9:11-13; CP 25, Decl. of A. Smith at 10:1-2; CP 25, Decl. of R. George at 10:1-2. Second, the Council approved Resolution 13-53, appointing representatives to the BIA's secretarial election board. CP 25, Decl. of A. Johnny, Exh. V; CP 25, Decl. of B. Solomon at 9:11-13; CP 25, Decl. of A. Smith at 10:1-2; CP 25, Decl. of R. George at

10:1-2. Third, the Council approved Resolution 13-54, authorizing a moratorium on new enrollment applications until the litigation related to enrollment is finalized and the Secretarial election has been held and the results certified. CP 25, Decl. of A. Johnny, Exh. W; CP 25, Decl. of B. Solomon at 9:11-13; CP 25, Decl. of A. Smith at 10:1-2; CP 25, Decl. of R. George at 10:1-2. Finally, Council approved Resolution 13-55, reaffirming the prohibition of release of records and violations of the tribal records policy. CP 25, Decl. of A. Johnny, Exh. X; CP 25, Decl. of B. Solomon at 9:11-13; CP 25, Decl. of A. Smith at 10:1-2; CP 25, Decl. of R. George at 10:1-2.

Following the passage of these resolutions, Secretary St. Germain moved to rescind Resolution 13-02 (the resolution commencing disenrollment) and Councilmember Roberts seconded the motion. CP 25, Decl. of B. Solomon at 9:14-16; CP 25, Decl. of A. Smith at 10:3-4; CP 25, Decl. of R. George at 10:3-4. A majority of the Council voted against rescinding Resolution 13-02. CP 25, Decl. of B. Solomon at 9:14-16; CP 25, Decl. of A. Smith at 10:3-4; CP 25, Decl. of R. George at 10:3-4.

On March 12, March 21, and May 6, 2013, certain Councilmembers discussed personal matters and matters of tribal concern, but these discussions did not involve formal Council meetings. *Id.* at 2:17-20. Tribal Council business is mostly conducted through the use of formal special meetings.

ARGUMENT

I. The Nooksack Indian Tribe, the Council, and Tribal Officials Retain Sovereign Immunity in this Suit.

This Court lacks jurisdiction because the Nooksack Indian Tribe, the Council, and tribal officials are immune from suit. An Indian tribe is immune from suit because it is a sovereign entity with common law immunity. *Cline v. Cunanan*, Case No. NOO-CIV-02/08-5, 5-6 (Nooksack Ct. App. 2009); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Sovereign immunity acts as a jurisdictional bar to bringing suits against tribes unless Congress has authorized the lawsuit or a tribe has waived its immunity. *Martinez*, 436 U.S. at 58-59; *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Waivers of immunity must be clear, express, unequivocal, and cannot be implied. *Olson v. Nooksack*, 6 NICS App. 49, 52-53 (Nooksack Ct. App. 2001) (citing *Martinez*, 436 U.S. at 60). Sovereign immunity also applies to tribal officials and employees acting within the scope of their authority. *Cline*, Case No. NOO-CIV-02-08-5, at 6 (citing *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)); *see also Mitchell v. Pequette*, CV-07-38, 2008 WL 8567012 at *7-9 (Leech Lake Tribal Court May 9, 2008)[6] (holding that tribal employees retained sovereign immunity even though the plaintiff alleged that the employees acted outside the scope of their authority,

[6] Appellants imply that *Mitchell* supports finding a waiver of sovereign immunity when injunctive relief is sought, Opening Br. at 17, but the *Mitchell* Court found that tribal employees retained sovereign immunity because they did not act beyond the scope of their authority or violate federal law.

because the plaintiff failed to support this allegation). Tribal sovereign immunity "extends to actions brought against tribes in tribal court." *Olson*, 6 NICS App. at 51.

In the *Cline* case, the plaintiff-appellants sued the Council Chairman and the Council for declaratory relief based on allegations of civil rights violations and a challenge to the Nooksack Tribal Election Ordinance. *Cline*, Case No. NOO-CIV-02-08-5, at 1. The Nooksack Court of Appeals found that the defendant-appellees retained sovereign immunity even though the complaint named individual officers. *Id.* at 7. Importantly the Court found that, "[t]he Nooksack Tribal Council and its officers need to be able to enact ordinances and conduct business without constantly having to defend themselves against suit." Appellants inexplicably fail to discuss *Cline*.

The Nooksack Constitution entrusts the Council with the authority to establish the Tribal Court by ordinance. *Const.*, art. VI, § 2(A)(1). Article VI, § 2(A)(3) of the Constitution provides that the Tribal Court shall have jurisdiction "over all matters concerning the establishment and functions of tribal government, provided that nothing herein shall be construed as a waiver of sovereign immunity by the tribal government." Under this jurisdictional provision, a suit against the Tribal Government and the Council can only proceed when there is an express waiver of sovereign immunity. *Cline*, Case No. NOO-CIV-02/08-5, at 6.

The Council acted upon its constitutional authority to establish a tribal court by ordinance when it adopted Title 10—the Nooksack Indian Tribe's Tribal Court System and Court Rules. The Tribal Court has limited civil and criminal

subject matter jurisdiction only as to matters "specifically enumerated in the Nooksack Code of Laws." Title 10, § 10.00.030. Title 10, § 10.00.050 provides for exclusive, original jurisdiction in the Tribal Court in any matter where the Tribe or its officers and employees are parties in their official capacities, but this jurisdiction is limited by the following sentence:

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

Title 10, § 10.00.050. Title 10 contains an additional provision explaining that nothing in Title 10 or any other law waives the Tribe's, its officials', its entities', or its employees' immunity without an express waiver enacted by the Council. Title 10, § 10.00.100.[7] Neither Congress[8] nor the Council has expressly waived the Tribe's sovereign immunity, as required under the Constitution, Title 10, and federal law.

The Trial Court correctly found that "the sovereign immunity of the Tribe extends to [Appellees] as tribal officials and this Court lacks jurisdiction over them and the actions that have given rise to this suit." CP 79, Amended Order Granting Dismissal at 17:19-20.

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[7] In addition, § 63.00.003 of the enrollment ordinance expressly bars tribal court jurisdiction over enrollment matters.

[8] Inclusion of the Indian Civil Rights Act in the Constitution does not constitute a waiver of sovereign immunity. *Cline*, Case No. NOO-CIV-02/08-5, at 6; *Martinez*, 436 U.S. at 58-73; *Gallegos v. Jicarilla Apache Nation*, 97 F. App'x 806, 811 (10th Cir. 2003).

II. The *Ex parte Young* Doctrine, to the Extent it Applies in the Tribal Context, Does Not Strip Appellees of Their Sovereign Immunity.

Under *Ex parte Young*, 209 U.S. 123 (1908), state officials may be sued in their official capacity for violating a federal law when the Appellant seeks prospective, equitable relief. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). This doctrine is based on the need to protect the supremacy of federal law, and it expressly does not apply against a state official when that official is accused of violating a state law. *Pennhurst State Sch. & Hosp. v. Halderman* (*Pennhurst*), 465 U.S. 89, 105-06 (1984); *AUTO v. Washington*, 175 Wn. 2d 214, 231, n.3 (2012).[9] When a state official is accused of violating a state law, the "entire basis for the doctrine of *Young* . . . disappears." *Pennhurst*, 465 U.S. at 106. Similarly, there is no basis to apply *Ex parte Young* when a tribal official is accused of violating tribal law.

Appellants make clear that they seek relief "for violating Nooksack law." Opening Br. 1. Appellants further state that "[t]his lawsuit is about Nooksack officers acting in contravention of Nooksack law and Nooksack law only." *Id.* at 18 n.9. Thus, case law applying *Ex parte Young* to individuals violating federal law is simply inapplicable.[10] As the Trial Court has found in a related case, in

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[9] Contrary to Appellants' allegation that *Pennhurst* was overruled, it is still good law apart from the aspect (not material here) that was superseded by the supplemental jurisdiction statute, 28 U.S.C. § 1367. *See Etheridge v. Livingston*, 3:13-CV-02678-K, 2013 WL 5637419, at *1 (N.D. Tex. Oct. 16, 2013). This Court cited *Pennhurst* with approval in CP 69, Order Denying Permission For Interlocutory Appeal at 4 n.4.

[10] *Burlington Northern & Santa Fe Railway Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993); *Northern Arapahoe Tribe*

"the tribal context, the [*Ex parte Young*] analogy is inelegant and, quite frankly, fairly tortured." *Roberts, et al. v. Kelly, et al.*, Case No. 2013-CI-CL-003, Order Granting Defendants' Motion to Dismiss, at 5 (Oct. 17, 2013). There are six qualifications for *Ex parte Young* to apply,[11] and many simply do not fit in the tribal context. *Id.*

In *Cline*, the Nooksack Tribal Court of Appeals explained that the *Ex parte Young* doctrine allows "individual governmental officers [to] be sued for declaratory or injunctive relief where the actions taken exceed his or her authority." Case No. NOO-CIV-02/08-5, at 6. However, the *Cline* Court did not hold that the *Ex parte Young* doctrine would ever apply in the Nooksack tribal context. Case No. NOO-CIV-02/08-5. Even if a *Young*-like doctrine does apply in this Court, it would not allow Appellants to continue this suit, because

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v. Harnsberger, 697 F.3d 1272, 1281-82 (10th Cir. 2012); *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians*, 177 F.3d 1212, 1225-26 (11th Cir. 1999); *Vann v. Kempthorne*, 534 F.3d 741, 749-50 (D.C. Cir. 2008); *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 310 (N. Dist. N.Y. 2003) (citing *CSX Transp., Inc. v. New York State Office of Real Prop. Servs.*, 306 F.3d 87, 98 (2nd Cir. 2002)).

[11] In order to apply:

> (1) the state officer sued must have a duty to enforce the challenged state law; (2) the action by the state officer under state law must constitute an alleged violation of federal law; (3) the federal law allegedly violated must be the 'supreme law of the land'; (4) *Young* will not apply if federal law provides such an intricate remedial scheme that the court concludes that Congress did not intend for cases under Ex Parte Young [sic]; (5) Young will not apply if allowing suit would interfere with special state sovereignty interests; and (6) the Court has imposed significant restrictions on the remedies available under Ex parte Young.

Avoiding Sovereign Immunity: The Doctrine of Ex parte Young, 13 Fed. Prac. & Proc. Juris. § 3524.3, at 2 (3d ed.)

Appellees acting within the scope of their authority under tribal law retain sovereign immunity,[12] which means this Court lacks jurisdiction.

A. Importing the Federal Courts' Confused *Young* Analyses Is Unnecessary and Is Contrary to Nooksack Case Law.

Appellants assume that *Ex parte Young* applies in the Nooksack tribal context, and they rely on the federal Supreme Court's *Verizon Maryland v. Public Service Commission* (*Verizon*), 535 U.S. 635 (2002) decision to allege that the *Young* doctrine waives Appellees' immunity here regardless of whether Appellees have acted beyond the scope of their authority. Opening Br. 20-26. While *Verizon* found that "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim[,]"[13] the Supreme Court, in *Idaho v. Coeur d'Alene Tribe of Idaho*, also found that:

> [t]o interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe,* that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction.[14]

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[12] Because *Ex parte Young* is concerned with the supremacy of federal law, the issue of a state official's authority under state law rarely arises. However, in the tribal context, the scope of a tribal official's authority is often the issue that determines whether sovereign immunity protects the official. Thus the sovereign immunity inquiry in the tribal context is somewhat analogous to proceedings under the Federal Tort Claims Act where the question of the employee's scope of authority is intertwined with sovereign immunity and the courts' jurisdiction. *E.g., Hamm v. United States,* 483 F.3d 135, 137 (2d Cir. 2007). Appellees have not acted beyond the scope of their authority, which means *Young* does not strip them of immunity. *See* discussion *infra* Section IV.

[13] 535 U.S. at 646.

[14] *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). This case has not been overruled as Appellants suggest. *See* Opening Br. 26.

In another case, the Supreme Court expressly evaluated whether state officials acted beyond the scope of their authority when deciding whether the *Young* doctrine stripped the officials of their immunity. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 688-92 (1982) (plurality). The Ninth Circuit also recently delved into the merits of whether tribal officials acted within the scope of their authority to assess tribal taxes. *Miller v. Wright*, 705 F.3d 919, 927-28 (9th Cir. 2013) *cert. denied,* 133 S. Ct. 2829 (U.S. 2013). In *Miller*, the plaintiffs alleged that tribal officials were not immune from suit, because they were allegedly assessing unconstitutional taxes and therefore acting outside the scope of their authority. *Id.* at 927. The Court found that the "Tribe's sovereign immunity . . . extend[ed] to its officials who were acting in their official capacities and within the scope of their authority when they taxed transactions occurring on the reservation." The Ninth Circuit specifically determined that the tribal officials were acting within the scope of their authority, which is exactly what the Nooksack Trial Court found here. Despite *Verizon*, the federal application of *Young* is anything but clear, and it cannot detract from the Tribal Court's clear reasoning here.

Cline, which was decided well after *Verizon*, found that naming individual officers in a complaint does not automatically allow a case to proceed. Case No. NOO-CIV-02/08-5, at 7. The Nooksack Court of Appeals explained that the "Nooksack Tribal Council and its officers need to be able to enact ordinances and conduct business without constantly having to defend themselves against suit." *Id.* Sovereign immunity means immunity from suit and not simply a "defense to

liability," which means it is "effectively lost if a case is erroneously permitted to go trial." *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 144 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). To allow *Verizon* to dictate the outcome of this case would mean importing confusing and seemingly contradictory federal standards developed to assure the supremacy of federal law – which does not apply here – and it would ignore *Cline*'s concerns about protecting tribal officials from constant suit.

B. Appellants Requested that the Trial Court Consider the Merits of the Case By Filing Motions for Injunctions, and Appellants Fully Litigated the Merits.

Appellants sought two Motions for Temporary Restraining Orders (TRO) in the Trial Court. CP 9, Emergency Motion for TRO and CP 37, Second Emergency Motion for TRO. In order to obtain a preliminary injunction or TRO, a plaintiff must show a likelihood of success on the merits. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). That is, the Trial Court had to consider whether Appellants were likely to succeed *on the merits* because Appellants requested two Motions for TRO, the first one of which was expressly treated as a motion for a preliminary injunction.[15] Having requested the Court's determination of the merits, Appellants now complain that examining the merits of the case to determine the scope of Appellees' authority was error. This is nonsensical. In this proceeding the Court was forced to review at least

[15] Appellants also sought permission for an interlocutory appeal on the denial of Appellants' Motion for TRO, and this Court of Appeals considered the merits of the case in denying permission for the interlocutory appeal. *See* CP 69, Order Denying Permission for Interlocutory Appeal at 3-4.

64 declarations and attached materials;[16] it also invited the parties to present live testimony. CP 27, Order Resetting Hearing; CP 46, Scheduling Order on Second TRO. Although Appellants declined to present a witness,[17] the Court properly considered the merits of Appellees' authority under Nooksack law.

In addition, Appellants fully litigated the merits of the case without objection. As the Trial Court stated, "[t]he parties and this Court have conducted exhaustive and extensive research on the reach and application of sovereign immunity, both inside and outside of the tribal context. Hundreds of pages of briefing and thousands of pages of cases have been filed by the parties and reviewed by the Court . . .." CP 79, Amended Order Granting Dismissal at 8:18-21. Appellants cannot come at this late hour and complain that the Trial Court should not have examined the merits when Appellants themselves engaged the merits from the beginning of the litigation. *See* CP 31, Order re Motion to Strike at 3-4.

C. The Trial Court Analyzed the Suit As Against Appellees in Their Official Capacity.

Appellants allege that the Trial Court held that Appellants sued Appellees in their personal capacity, but the Court did not employ a qualified immunity analysis. *See* Opening Br. 21-26. On the contrary, the Trial Court analyzed the case as a suit against the individual Appellees in their official capacity. While the

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[16] CP 2 through CP 6, CP 14, CP 18, CP 19, CP 20, CP 22, CP 25, CP 39, CP 50, CP 60, CP 62, CP 64, CP 65, CP 75, CP 81, CP 83, CP 90.

[17] The Judge allowed witnesses to be called and Plaintiffs initially subpoenaed a witness but ultimately decided against presenting any witness. *See* CP 27, Order Resetting Hearing; CP 32, Plaintiff's Witness List; CP 33, Notice Pursuant to Court Order; CP 34, Plaintiff's Response to Defendants' Notice; CP 35, Subpoena to Testify; CP 40, Notice of Withdrawal of Subpoena.

Trial Court did include language of individual and personal liability, the context and substance of the arguments surrounding this language makes clear that the Court correctly understood that Appellants sued Appellees in their official capacity. *See* CP 79, Amended Order Granting Dismissal at 2:10-12 and 8:15-17; CP 71, Order Denying Second TRO at 3:14-15. Mere use of the words personal or individual does not indicate that the Trial Court failed to understand Appellants' pleadings; [18] rather, the statements demonstrate that the Trial Court knew Appellants sued individual tribal officials and did not name the Tribe or Tribal Council.

The Trial Court's reasoning establishes that it analyzed the case as a suit against Appellees in their official capacities. Appellants cite cases using qualified immunity analysis to show the difference between suing officials in their official and personal capacities. Opening Br. 31 n.19. These distinctions are irrelevant here. Qualified immunity shields government officials from liability for civil damages as long as their conduct does not violate clearly established rights. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity balances

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[18] The federal Supreme Court and the Tenth Circuit have incorporated the words personal and individual into analysis regarding suits against individuals in their official capacities. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997) ("To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism . . . ."); *Starkey ex rel. A.B. v. Boulder Cnty. Soc. Servs.*, 569 F.3d 1244, 1262 (10th Cir. 2009) ("under the Starkeys' complaint, BCDSS and the individual Defendants in their official capacities could be held liable only if there was an underlying constitutional violation-that is, only if at least one of the Defendants in a personal capacity had violated at least one of the Starkeys' constitutional rights."); *see also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701-02 (1949).

"the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* Appellants contend that the Trial Court engaged in a qualified immunity analysis, but instead the Court analyzed *Ex parte Young*, which does not apply in the qualified immunity context. Moreover, the Trial Court did not evaluate whether any of the laws at issue were clearly established, and the Court did not perform the qualified immunity balancing test.[19] Rather, the Trial Court simply analyzed whether Appellees could be stripped of sovereign immunity for actions taken in their official capacity and within their express authority under tribal law in light of *Cline* and *Young*.

Cline stated that "individual governmental officers may be sued for declaratory or injunctive relief where the actions taken exceed his or her authority." Case No. NOO-CIV-02/08-5, at 6. The Trial Court followed *Cline* in holding that the Court could "only act to grant prospective, injunctive relief in this matter should the actions taken by the Defendants clearly and unambiguously violate their official duties in ways more egregious than an error of law." CP 44, Order Denying Motion for Preliminary Injunction, at 9:18-20. This Court similarly found that "Tribal immunity extends to individual tribal officials and employees while acting within their scope of authority." CP 69, Order Denying Permission for Interlocutory Appeal at 4 n.4 (citing *Hardin*, 779 F.2d at 479;

[19] *See* CP 59, Order Denying Plaintiffs' Emergency Motion for Stay Pending Appeal at 2, lines 21-24, where the Court clarified its earlier Order and expressly stated that qualified immunity was not involved.

Yakima Tribal Court, 806 F.2d at 861). The Trial Court properly analyzed the case below.

III. There Are Six Appellants In This Case, and the Trial Court Rightly Concluded that There Have Only Been Six[20] Plaintiff-Appellants Throughout This Case.

On March 15, 2013, four individuals filed a Complaint for Equitable Relief (Complaint) against Appellees. CP 1, Complaint. On March 21, 2013, Appellants submitted the First Amended Complaint for Equitable Relief (First Amended Complaint) and added two additional parties – Robley Carr and Lee Carr. CP 17, First Amended Complaint. On May 2, Appellants moved for leave to amend the First Amended Complaint. CP 32, Motion to Amend Complaint. The Trial Court granted Appellants' Motion, but the Second Amended Complaint for Equitable Relief did not add any additional parties. CP 45, Order Granting Leave to Amend Complaint. Appellants again moved to amend, and on June 7, 2013, Appellants submitted the Third Amended Complaint for Equitable Relief (Third Amended Complaint). CP 62, Second Motion for Leave to Amend Complaint. The Third Amended Complaint added Francine Adams as a plaintiff, but Appellants voluntarily dismissed the Third Amended Complaint on August 9, 2013. CP 62, Third Amended Complaint; CP 80, Notice of Voluntary Dismissal of Third Amended Complaint.

Appellants now allege that Galanda Broadman represented 271 plaintiffs in the case below. Opening Br. 63-67. Appellants purported to assert claims on their own behalf and "on behalf of those similarly situated." CP 1, Complaint, at

[20] Initially, there were only four plaintiffs. CP 1, Complaint.

2:18. However, a lawsuit is not a representative suit merely because a plaintiff so designates it; whether it is a representative suit depends on the relevant facts and the court's orders. *Pacific Fire Ins. Co. v. Reiner*, 45 F. Supp. 703, 708 (D. La. 1942). Appellants never joined the 271 individuals in the complaint or sought class certification under Rule 23 of the Federal Rules of Civil Procedure (FRCP).[21] Nor did Appellants seek to add a class of plaintiffs in any of their amended complaints.[22] By contrast, Appellants did add other potential disenrollees as plaintiffs in the related case, *Roberts v. Kelly,* however they chose not to do so in this case.

Appellants claim that a Stipulation entered on March 20, 2013, establishes that the named plaintiffs below represented a class of those similarly situated. Opening Br. 63-67. Courts must interpret a stipulation in a manner that carries out the intentions of the parties. *U.S. v. Petty*, 80 F.3d 1384 (9th Cir. 1996). On appeal, "[i]nterpretation of stipulations, to determine whether the district court properly effectuated the intent of the parties, is an issue of law reviewed de novo." *United States v. Lewis*, 451 F. App'x 643, 646 (9th Cir. 2011) *cert. denied,* 132 S. Ct. 1766, 182 L. Ed. 2d 549 (U.S. 2012).

The Stipulation states:

> 1. On or before April 13, 2013, Galanda Broadman will furnish a list of those individuals for whom they are then

[21] The Trial Court determined that "the rules that should govern these proceedings from this point forward shall be the Federal Rules of Civil Procedure, *but only when Title 10 fails to provide a clear rule.*" CP 31, Order Denying Defendants' Motion to Strike in Part and Granting in Part at 2-3.

[22] *Compare* CP 65, Response to Second Motion for Leave to Amend at 5-11 (discussing the joinder rule) with CP 68, Reply in Support of Plaintiffs' Second Motion to Amend at 5 (acknowledging joinder rule).

> authorized to act in this matter and in the related proceedings regarding disenrollment of certain Nooksack Tribal Members pursuant to Title 63. Defendants will treat Mr. Galanda's letter of March 15, 2013, to Chairman Kelly regarding the Notice of Intent to Disenroll as a timely request for a meeting pursuant to Title 63.04.001(B)(2) before the Tribal Council for the individuals identified on that list.
>
> 2. No person will be disenrolled prior to completion of the meetings before the Tribal Council, regardless of whether that individual has requested a meeting with the Tribal Council . . ..

CP 16, Stipulation at 1:15-23. On April 12, 2013, Appellants provided Appellees with a "Representation List" and a letter. CP 81, Hurley Declaration, Exh. 3. The letter states:

> we hereby furnish a list of those individuals we are authorized to represent in *Lomeli v. Kelly* and in the Disenrollment Proceedings. In *Lomeli*, we represent the six enrolled Nooksack member plaintiffs Sonia Lomeli, Terry St. Germain, Norma Aldredge, RaeAnna Rabang, Robley Carr and Lee Carr, as well as those similarly situated.

Id. The letter further explains that "[t]o be as equally clear to the Tribal Council as we have been to the Tribal Court, *Lomeli* is a distinct matter from the Disenrollment Proceedings. In the Disenrollment Proceedings, we represent the 271 enrolled Nooksack members disclosed on the attached Representation List." *Id.*

The pertinent sentence in the Stipulation is ambiguous; it states "Galanda Broadman will furnish a list of those individuals for whom they are then authorized to act in this matter and in the related proceedings regarding disenrollment of certain Nooksack Tribal Members . . .." CP 16, Stipulation at 1. Yet, Appellants' counsel's letter accompanying the Representation List plainly elucidates the parties' intent. The *Lomeli* matter only involved the six named

individuals, and the disenrollment proceedings in which attorneys were authorized to act were distinct. CP 81, Hurley Declaration at 2.

In addition to Appellants' counsel's letter, the Trial Court clarified who the *Lomeli* plaintiffs were at least twice. *See* CP 95, Findings of Fact and Conclusions of Law at 3-4. In an Order, the Trial Court stated, "the Court has repeatedly asked the Plaintiffs' attorney who his clients are in this case and he has consistently stated that the named Plaintiffs are the only clients he represents in this Court in this action." CP 66, Order Modifying Order on Security at 2:22-24. The Trial Court further stated that , "[i]f there has been a change in representation, this Court expects an updated Notice of Appearance be filed with this Court immediately." *Id.* at 3:1-2. Appellants' counsel did not object to the Trial Court's Order, and they did not file an updated Notice of Appearance.

Nor did Appellants seek to establish a type of class action. While Title 10 lacks a class action rule, as well as other rules such as those governing motions to strike, the Trial Court early on ordered that the FRCPs be used by analogy when no applicable rule exists in Title 10. CP 31, Order Denying Defendants' Motion to Strike in Part and Granting in Part. Appellants have not followed the FRCPs related to certifying a class. Appellants' counsel have consistently stated that they represent only the six named plaintiffs in the *Lomeli* matter, and Appellants' counsel's letter explains that they only represent the six named plaintiffs in this case.[23]

[23] Appellants now state that the number of plaintiffs varied depending on the motion involved in this case. Opening Br. at 67. Appellants allege that only certain plaintiffs (the initial four plaintiffs on the Complaint—the two additional

IV. The Trial Court Correctly Held That Appellees Acted Within the Scope of Their Authority.

The Trial Court rightly held that Appellees "have acted within the authority granted them by the Nooksack Constitution and Title 63." CP 79, Amended Order Granting Dismissal at 17:18-19. Article II of the Constitution concerns tribal membership, and it grants the Council the authority to govern membership matters. Article II, § 2 states that the "Tribal Council shall have the power to enact ordinances in conformity with this constitution, subject to the approval of the Secretary of the Interior, governing future membership in the tribe, including adoptions and loss of membership." Article II, § 4 addresses loss of membership and mandates that the Council, "shall, by ordinance, prescribe rules and regulations governing involuntary loss of membership." The reason for loss of membership must be a "failure to meet the requirements set forth for membership in this constitution[] . . . ." *Const.*, art. II, § 4. Sections 2 and 4 grant the Council the exclusive authority over enrollment and loss of membership. *Const.*, art. II, §§ 2 and 4. The Council has acted within this authority in all its actions related to this case.

A. Standard of Review.

The Trial Court examined the scope of Appellees' authority under Nooksack law in connection with Appellants' requests for injunctive relief. Abuse of discretion is the standard of review employed by federal courts for decisions denying injunctive relief. *Hunt v. Imperial Merch. Servs., Inc.,*

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plaintiffs had not been added yet) filed the Motion for TRO even though the case involved 271 plaintiffs. *Id.* This argument completely contradicts the statements of Appellants' counsel, and it must be judicially estopped.

560 F.3d 1137, 1140 (9th Cir. 2009). *See also Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131 (9th Cir. 2011); *A & M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004, 1013 (9th Cir. 2001) (Amended). "An abuse of discretion will be found if the District Court based its decision 'on an erroneous legal standard or clearly erroneous findings of fact.'" *Cottrell,* 632 F.3d at 1131 (*citation omitted).* Reviewing courts look to "whether the District Court reaches a result that is illogical, implausible, or without support in inferences that may be drawn from facts in the record." *United States v. Hinkson,* 585 F.3d 1247, 1262 n.21 (9th Cir. 2009) (*en banc*). Under these standards the Trial Court must be affirmed.

B. Appellants Raise a New Issue Regarding Tribal Code § 63.04.001(B)(1)(a), and That Section is Constitutional.

Appellants now allege that Section 63.04.001(B)(1)(a) of Title 63 is unconstitutional "because it conflicts with Article II, Section 4, of the Nooksack Constitution." Opening Br. 33. This is a new allegation, as Appellants attacked only Resolution 13-02 below on this ground. *See* CP 17, First Amended Complaint at 11-12; CP 64, Opposition to Defendants' Motion to Dismiss at 33-34 and 34 n.16. In fact, that provision of Title 63 has not been at issue in this case because it concerns potential issues in disenrollment meetings of the Council, which have not occurred and were not before the Court. New allegations are not properly brought for the first time in an appeal.[24]

[24] Appellants complain that the Trial Court did not address this argument below, but that is surely because Appellants did not raise this issue below.

Even if Appellants had properly raised this issue below, Section 63.04.001(B)(1)(a) is constitutional. Section 63.04.001(B)(1)(a) states that a tribal member shall be disenrolled upon the discovery that s/he "was erroneously enrolled in that he/she did not submit adequate documentation proving he/she met constitutional membership criteria at the time of enrollment." The error may have resulted from "fraudulent submissions, mistakes in blood degree computations or inadequate research . . . ." Title 63, § 63.04.001(B)(1)(a). This provision does not conflict with Article II, Section 4 of the Constitution; the Tribe cannot enroll applicants without proof that the applicant meets the constitutional membership criteria, and the Council has a duty to disenroll members if and when it finds out that a member does not meet the constitutional membership criteria.[25] *See Const.* art. II, § 1; Title 63, § 63.04.001(B)(1)(a). Section 63.04.001(B)(1)(a) does not add an additional reason for disenrollment. It simply allows the Council to enforce the constitutional requirements for membership.

[25] The cases that Appellants cite in support of their argument that Section 63.04.001(B)(1)(a) is unconstitutional are inapposite. *See* Opening Br. 34-36. *Terry-Carpenter*, No. 01-2; *Terry-Carpenter v. Las Vegas Paiute Tribal Council*, Nos. 02-01 (Las Vegas Paiute Ct. App. 2003) involves different laws and does not appear to deal with this issue, and *Henrickson v. Ho-Chunk Nation Office of Tribal Enrollment*, No. SU02-06 (Ho-Chunk Sup. Ct. March 21, 2003) found that the disenrollment was not constitutional because the enrollment division could only disenroll members based on fraud and deceit, which was not present in that case. *Allen v. Cherokee Nation Tribal Council*, 6 Am. Tribal Law 18 (Cherokee 2006) does not apply, because the Council there attempted to add an additional requirement to membership other than those specified in the Cherokee constitution. Here, Section 63.04.001(B)(1)(a) allows for enforcement of the constitutional grounds for membership, and it does not add any additional membership requirements.

The Constitution calls for enactment of ordinances governing loss of membership subject to the approval of the Secretary of the Interior, and Section 63.04.001(B)(1)(a) was approved by the Secretary. *Const.* art. II, §§ 2 and 4. The Council acted within its constitutional authority to enact ordinances governing loss of membership when it enacted Title 63, and Title 63 is constitutional.

C. Appellees Acted Within the Scope of Their Authority In Enacting Resolution 13-02.

As noted above, the Council has authority over membership matters as granted by the Constitution and Title 63. The Constitution vests the Council with the sole authority to enact ordinances, rules, and regulations related to membership, including the loss of membership. *Const.*, art. II, §§ 2 and 4.[26] This is a grant of authority apart from those powers enumerated in Article VI, which delineates other powers of the Council.

Pursuant to the Tribal Council's exclusive authority to enact ordinances concerning loss of membership, the Council approved Title 63. Section 63.04.001(B), titled Disenrollment, begins with the statement that, "[t]he burden of proof in disenrollment actions rest [sic] with the Tribe" and concludes by stating that "[t]he Tribal Council will have the final say on loss of membership."

[26] Appellants allege that the Constitution does not grant the Council the power to determine loss of membership, but they cite to a portion of the Trial Court's Order which found that the Constitution does give the Council authority to determine loss of membership. *See* Opening Br. 39; CP 78, Order Granting Defendants' Motion to Dismiss Second Amended Complaint at 9. Additionally, Appellants cite *Menefee v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 97-12-092-CV, 2000 WL 35750183, at *3 (Grand Traverse Ct. App. Feb. 9, 2000), but that case does not stand for the proposition for which it is cited. It related to political questions and whether the trial court had the power to review an issue. *See* Opening Br. 40-41. Appellants further utilize inaccurate citations to the record in this section. *See id.* at 41.

When read as a whole, § 63.04.001(B) establishes that the responsibility and power of disenrollment rests with the Tribe through the Tribal Council. The paragraph describing the disenrollment procedure, § 63.04.001(B)(2), refers to the Tribal Council five times, which demonstrates the Council's pervasive authority over disenrollment proceedings, which includes initiating disenrollment proceedings.[27]

The Tribal Council did not implicitly divest itself of the power to disenroll by approving Title 63. Appellants base their argument on a single sentence (italicized here) contained in the first paragraph of § 63.04.001(B), which reads:

> The burden of proof in disenrollment actions rest [sic] with the Tribe. However, at no time will staff employed in the Enrollment Department purposely initiate a reason for a loss of membership. *Any tribal member requesting a 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.

Title 63, § 63.04.001(B) (emphasis added). This sentence does not stand for the proposition that a tribal member is the only person who can commence the disenrollment of another member; the clause merely offers individual tribal members a restricted opportunity to request the commencement of the disenrollment process against another member.[28] As this Court has already noted, § 63.04.001(B) "does not prohibit the Tribal Council itself from initiating

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[27] The Council does not have separate legislative and judicial roles related to disenrollment. If the Council cannot engage in investigation of enrollment matters the Tribe could not meet its burden of proof as required by Section 63.04.001(B).

[28] In addition, the Tribal Council, including each of the Appellees, is also composed of tribal members, and even if this sentence applied to them, Resolution 13-02 shows that they satisfied its requirement.

disenrollment proceedings." CP 69, Order Denying Permission for Interlocutory Appeal at 4. Appellants' technical, legalistic interpretation of Title 63 contravenes the statutory construction principles contained in Title 63 and Title 10.[29]

While a member may request the Tribal Council to disenroll another member, the Tribal Council makes all membership decisions. Moreover, the sentence allowing a member to request a disenrollment of another member simply explains that the requesting member must present written documentation; it does not state anything about initiating the disenrollment process, and it certainly does not limit the Tribal Council's authority to initiate disenrollment proceedings. *See* CP 69, Order Denying Permission for Interlocutory Appeal at 4. In fact, the language of "requesting" a disenrollment confirms that the member is appealing to the authority, the Council.

The Council has not implicitly divested itself of the sovereign power to determine loss of membership by not explicitly stating that the Council has the authority to initiate disenrollment proceedings within the confines of Title 63. Federal and tribal law supports the Council's authority. The Supreme Court rejected a similar implicit divestiture argument in *Merrion v. Jicarilla Apache*

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[29] Title 63 provides direction as to how it is to be interpreted and Title 10 establishes rules for interpretation for how the Court is to review laws of the Tribe. For example, Title 63, § 63.09.001(A) states that "[t]his ordinance is exempted from the rule of strict construction, and it shall be liberally construed to give full effect to the objectives 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."

Tribe, 455 U.S. 130, 148 (1982). The Court stated that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Merrion*, 455 U.S. at 148. The Constitution gives the Council the exclusive authority to enact laws governing disenrollment, and the Council's authority to initiate and oversee disenrollment proceedings cannot be questioned solely because Title 63 does not expressly state that the Council "initiates" the disenrollment process. Appellees acted within the scope of their authority by enacting Resolution 13-02.

D. Appellees' Enactment of Resolution 13-38 Was Lawful.

The Council enacted Resolution 13-38 on March 1, 2013, to request the Secretary of the Interior to hold a Secretarial Election to amend the Constitution by deleting Section 1(H) from Article II. CP 25, Decl. of R. George. The Secretary held the Secretarial Election on June 21, 2013, and the amendment passed overwhelmingly and was certified on August 2, 2013. CP 79, Amended Order Granting Dismissal at 5:3-5.[30] The Council adopted Resolution 13-38, because Article II, Section 1(H) was "so ambiguous that it [could not] be fairly applied and [had] potential for abuse[.]" CP 25, Decl. of A. Johnny, Exh. Q.

[30] In federal court, Appellants challenged the BIA's decision to hold the requested election and requested a TRO. The court denied relief. Order, *St. Germain v. Dept. of the Interior*, No. C13-945, W.D. Wash. (June 19, 2013). Subsequently, Appellants also appealed to the Secretary of the Interior and to the Interior Board of Indian Appeals from the BIA's certification of the election outcome. Those appeals remain pending, although the IBIA on September 30, 2013, ordered Appellants to show cause why the appeal should not be dismissed as untimely.

Appellants allege that passage of Resolution 13-38 targeted Appellants in violation of the Indian Civil Rights Act (ICRA), and Appellants allege that ICRA waives Appellees' sovereign immunity. Opening Br. 45 and n.30. ICRA does not constitute a waiver of sovereign immunity in this context. *Supra*, n.8. Appellees and the BIA retain sovereign immunity, which means the Trial Court rightly dismissed the claims surrounding the Secretarial Election, in addition to any other cause of action. *See supra*, Sections I and II.

Even if Appellees were not immune from suit, Resolution 13-38 did not target Appellants or any other group, and the Council's reason for passing Resolution 13-38 certainly meets the rational basis test. Appellants allege here that they might have qualified under former Section 1(H) of Article II, but they did not apply for enrollment on that basis. Section 1(H) no longer exists, and there is no proof that any person subject to potential disenrollment would have met Section 1(H) standards. The pending disenrollments all involve erroneous enrollment applications, based upon false claims regarding the parentage of Annie George, and those applications were based on either Article II, Section (A) or (C). Section 1(H) used ambiguous language, which lead to multiple possible interpretations and great potential for abuse. Amending the Constitution for the sake of clarity and avoiding abuse serves a legitimate governmental purpose, which is all that is necessary to survive rational basis scrutiny under *Mountain Water Co v. Montana Dept. of Public Service Regulation*, 919 F.2d 593 (9th Cir. 1990); *see also St. Germain v. Dept. of Interior* at 9-10, *supra,* n.30. The Trial Court (and the federal court) found that there was no improper targeting of

Appellants in the passage of Resolution 13-38, and the Court found that even if an inquiry into ancestry, arguably a form of racial animus, drove the passage of Resolution 13-38, that may not exceed the scope of Appellees' authority. CP 69, Order Denying Permission for Interlocutory Appeal at 7, CP 79, Amended Order Granting Dismissal at 10, 16. If racial animus might not exceed the scope of Appellees' authority, then enacting a resolution for a legitimate governmental purpose certainly does not exceed the scope of their authority.

E. Appellees Have Not Violated Appellants' Due Process Rights.

Appellants allege that Appellees have violated Appellants' due process rights under ICRA, as incorporated into the Nooksack Constitution, by failing to make a "preliminary showing of good cause" regarding why Appellants appear not to meet membership criteria. Opening Br. 52-53. Appellants rely on inapposite federal case law surrounding loss of citizenship. *See id.* at 52-54. Disenrollment is a very serious issue, but the Ninth Circuit has not found it significant enough to meet the standard of "detention" so as to trigger habeas corpus relief under ICRA. *See Jeffredo v. Macarro*, 599 F.3d 913, 919 (2010). If disenrollment does not meet the detention standard, it cannot be compared to loss of citizenship. *See Roberts v. Kelly*, Case No. 2013-CI-CL-003, Order Granting Defendant's [sic] Motion to Dismiss, at 7 (October 17, 2013).

Appellants additionally allege that Appellees have failed to provide any pre-hearing evidence to Appellants. Opening Br. 52-54. However, the Enrollment Ordinance "does not require the Tribal Council to provide documentation evidence prior to initiating disenrollment proceedings." CP 69, Order Denying Permission for Interlocutory Appeal at 4. In any event, Appellees

have provided Appellants with "detailed ancestral histories showing their lineage back several generations" in a packet of pre-hearing materials. *Roberts*, Case No. 2013-CI-CL-003, Order Granting Defendant's [sic] Motion to Dismiss, at 9:14-15. The Trial Court rightly found that Appellees acted within the authority granted to them under the Constitution and Title 63. CP 79, Amended Order Granting Dismissal at 17:18-19. Appellees are also immune from any due process claim as explained above.

F. The Trial Court's Rulings Related to Tuesday Meetings Should Be Upheld.

Section 2 of Article II of the Bylaws provides that "the Tribal Council shall meet regularly on the first Tuesday of each month. Regular meetings shall be held at the Tribal Office." Regular means "[s]teady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation." Black's Law Dictionary, 6th Edition, at 1285 (1990). While the Council has canceled its first Tuesday meetings for security reasons, it has continued to meet to conduct business regularly. *See* CP 79, Amended Order Granting Dismissal at 17-18; CP 25, Decl. of R. George. The Council has the express authority to "adopt resolutions regulating the procedures of the tribal council itself . . .." *Const.* art. VI, § 1(J). The Council plainly has the discretion to cancel meetings for public safety reasons, just as it has discretion to reschedule meetings that fall on holidays.

Even if Appellees lacked the authority to cancel meetings for public safety reasons, Appellees are immune from suit,[31] and Appellants fail to cite any

[31] *See supra*, Sections I-II.

authority that a technical violation of a Bylaw concerning the cancellation of a regular meeting creates a cause of action; in fact, Appellants lack such authority.[32] The failure to hold a regular meeting in a manner that would satisfy Appellants is not actionable. The Council possesses the explicit sovereign authority and discretion to determine its meeting procedures. *Const.* art. VI, § 1(J); *see generally Jicarilla Apache Tribe*, 455 U.S. 130. The sovereign authority regarding policing the Bylaws is not subject to judicial review; it is a political question that is not amenable to judicial resolution because relevant considerations are beyond the courts' capacity to gather and weigh as it is a political question. *Miami Nation of Indians of Indiana v. U.S. Dept. of Int.*, 255 F.3d 342, 347, citing *Nixon v. United States*, 506 U.S. 224 (1993). Appellees have not acted outside the scope of their authority by canceling and rescheduling regular meetings for public safety reasons.

G. Appellants' Special Meeting Claims Are Moot, and Appellants Lack Standing to Raise the Claims.

Article II, Section 5 of the Bylaws states that "[s]pecial meetings of the tribal council shall also be held upon written request of either two (2) members of the tribal council or by petition signed by twenty five (25) legal voters of the

[32] Appellants again misconstrue citations. Opening Br. 54-55. The Trial Court found Appellees' argument that the Bylaws need not be followed in the same manner as the Constitution to be questionable. But the Court also found that sovereign immunity applied. CP 79, Amended Order Granting Dismissal at 18. The *Garfield* Court allowed a lawsuit under that tribe's Bylaws, because a law waived the tribe's sovereign immunity. *Garfield v. Coble*, No. ITCN/AC 03-020, 2004 WL 5748178 (Nev. Inter-Tribal Ct. App. June 28, 2004). The Trial Court correctly took "strong exception to Plaintiffs' characterization of [the *Garfield*] case as precedent for the proposition that a similar exception to sovereign immunity exists here." CP 71, Order Denying Plaintiffs' Second Motion for TRO re Tribal Council Meetings at 4.

tribe." Appellants allege that Appellees have failed to call a special meeting requested by Secretary St. Germain and Councilmember Roberts.[33] Secretary St. Germain and Councilmember Roberts are not plaintiffs in this case. CP 95, Findings of Fact and Conclusions of Law at 4:1-4. Additionally, the special meeting has occurred. *Roberts*, Case No. 2013-CI-CL-003, Order Granting Defendant's [sic] Motion to Dismiss, at 13:9-11. Appellants acted within the scope of their authority by calling and holding the requested special meeting. The Bylaws set no timeline by which a special meeting request must be fulfilled.

An issue is moot if a change in circumstance has "forestalled any occasion for meaningful relief." *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir. 2007). Voluntary cessation moots an issue as long as "subsequent events [have] made it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur." *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1238 (9th Cir. 1999) (internal citations omitted). Appellants' allegations related to the special meeting request by Secretary St. Germain and Councilmember Roberts are moot, because the Council conducted the special meeting on August 27, 2013 at 4:15 PM. *See Roberts*, Case No. 2013-CI-CL-003, Order Granting Defendant's [sic] Motion to Dismiss, at 13:9-11. Appellants have received the relief they requested, and there is no possibility for recurrence. The meeting has taken place; the claim is moot.

Appellants also lack standing to raise claims regarding the special meeting. Standing requires that a plaintiff first have suffered an injury in fact,

[33] As with all claims raised by Appellants, Appellees are immune from suit on this issue. *See supra*, Sections I-II.

which is "an invasion of a legally protected interest which is (a) concrete and particularized,... and (b) 'actual or imminent, not conjectural or hypothetical[.]'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations removed). Second, the Court must find "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561. The Supreme Court further explained that a particular injury is one that affects "the plaintiff in a personal and individual way." *Id.* at 560 n.1. The Trial Court held that the Appellants' "general interest in the proceedings under the Special Meetings section of the Bylaws is a [sic] not a 'concrete and particularized' legally protected interest." CP 79, Amended Order Granting Dismissal at 19:11-12. The six Appellants in this case have not demonstrated any injury because the special meeting has taken place, and even if it had not, Appellants fail to demonstrate that failure to hold a meeting requested by two third-parties affects them in a "personal and individual way." *See Lujan*, 504 U.S. at 560 n.1.

H. Appellees Complied with Title 63.

Appellants allege that Appellees violated Title 63 because Appellee Bailey initiated disenrollment proceedings.[34] Opening Br. 57-60. This claim is factually incorrect and relies on a strained reading of the ordinance. Section 63.04.001(B) prohibits the Enrollment Department from initiating "a reason for loss of membership" (emphasis added). The Council acted within the scope of its authority under the Constitution and Title 63 when it initiated disenrollment proceedings against Appellants through enacting Resolution 13-02. *See* CP 25, Decl. of A. Johnny, Exh. H. Appellee Bailey performed his duties as an Enrollment Officer, and Appellants have not pointed to any facts to indicate that Appellee Bailey manufactured a reason to disenroll Appellants or initiated the disenrollment process.

Appellants allege that the Trial Court should have taken Appellants' bare assertions that Appellee Bailey initiated the disenrollment process as fact, but such conclusory statements do not meet even the federal test for avoiding a motion to dismiss under FRCP 12(b)(6).[35] Conclusions of law disguised as fact

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[34] As with all claims raised by Appellants, Appellees are immune from suit. *See supra*, Sections I-II.

[35] In order to survive a FRCP 12(b)(6) motion to dismiss in federal court, factual allegations in the pleading "must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). That is, a petition must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). The *Iqbal* Court clarified that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for

and unwarranted inferences of fact are not accepted as true – nor are they viewed in the light most favorable to the Plaintiffs. *Newport News Shipbuilding & Dry Dock Co. v. Schauffler,* 303 U.S. 54, 57 (1938); *Western Mining Council v. Watt,* 643 F.2d 618, 624 (9th Cir. 1981) ("[w]e do not, however, necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations.") Moreover, it would have been absurd for the Trial Court to rely solely on the four corners of Appellants' Complaint when two Motions for TRO were filed, which required the Trial Court to analyze the merits of the case. Additionally, a Trial Court can always consider evidence on which a Complaint "'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim, and (3) no party questions the authenticity of the document." *U.S. v. Corinthian Colleges,* 655 F.3d 984, 999 (9th Cir. 2011). Thus the Trial Court correctly held that Appellee Bailey did not initiate disenrollment proceedings, because Resolution 13-02 makes clear that Council initiated the process pursuant to Title 63.

V. The Trial Court Properly Struck Appellants' Exhibit and Allowed Appellees' Declaration.

On March 28, 2013, Appellants filed Diantha Doucette's Declaration and accompanying Exhibit A. Exhibit A consists of a letter from an attorney to a client for the purpose of giving legal advice.[36] The Trial Court granted Appellees'

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the misconduct alleged." *Id.* There must be more than "a sheer possibility that a defendant has acted unlawfully." *Id.* As noted above, this case required the trial court to examine the merits repeatedly.

[36] Appellants misstate the contents of the letter, which they have done in numerous pleadings since the Trial Court decided that it was privileged and stricken. *See* CP 72, Defendants' Strict Reply to Plaintiffs' Opposition to

Motion to Strike the exhibit, because the letter was protected by the attorney-client privilege.[37] CP 31, Order Denying Defendants' Motion to Strike in Part and Granting in Part at 5; Title 10, § 10.02.020. The Trial Court explained that "the letter was prepared by an attorney for an organizational client. The client, the Nooksack Tribe has not only not waived that privilege, they are asserting it here . . .. [T]here is no evidence whatsoever that disclosure to a third party occurred." CP 31, Order Denying Defendants' Motion to Strike in Part and Granting in Part at 5.

The attorney-client privilege protects all communications and advice between an attorney and client, including documents that contain privileged communications.[38] *Soter v. Cowles Publ'g Co.*, 162 Wash. 2d 716, 745 (2007). Where the client is an organization, the attorney-client privilege extends to those communications between attorneys and all those within the organization who are authorized to act or speak for it in relation to the subject matter of communication. *Upjohn Co. v. U.S.*, 449 U.S. 383, 394 (1981). If otherwise privileged, a communication does not lose its privilege merely because it was obtained by an agent of the employer acting under such agency. *D.I.*

Defendants' Motion to Dismiss at 24-26. The letter did not state that Ms. Rapada was likely eligible for enrollment under Section 1(H) of Article II of the Constitution.

[37] Appellants have violated the Trial Court's Order striking Exhibit A numerous times. *Id.* at 24-26.

[38] Appellants allege that the Trial Court should have applied the attorney work-product privilege, but they give no argument as to why. Opening Br. 62 n.41. The letter was plainly written for the purpose of giving advice, so it is protected under the attorney-client privilege. It may also be protected under the work-product privilege, but this would be an additional protection.

Chadbourne, Inc. v. Superior Court, 388 P.2d 700, 736-738 (Cal. 1964). The mere fact that Appellants' counsel has snagged a copy of an attorney-client communication does not alter the fact that the letter is still an attorney-client communication. *Id.* If, indeed, Ms. Doucette obtained the memorandum from a copy of an enrollment file, the unfortunate placement of the memorandum in the file by an agent of the Tribe and its accidental disclosure to a non-employee, does not alter the fact that the memorandum is still a privileged communication. *Upjohn Co.*, 449 U.S. 383.

A corporate employee, more specifically an ex-employee, cannot waive the corporation's privilege. *U.S. v. Chen*, 99 F.3d 1495, 1502 (9th Cir.1996), *cert. denied*, 520 U.S. 1167 (1997). By analogy, ex-enrollment officers and unseated tribal officials (and their spouses) cannot waive the privilege by the mere fact they possess the communication through their former position or employment, or by way of obtaining a copy of an enrollment file. *Chen*, 99 F.3d at 1502; *In re Richard Roe, Inc.*, 168 F.3d 69, 72 (2nd Cir. 1999).

The privilege belongs solely to the client and may only be waived by the client. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-49 (1985); *In re Claus von Bulow*, 828 F.2d 94, 100 (2d Cir. 1987). As the Supreme Court has noted, "the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors." *Commodity Futures Trading Comm'n*, 471 U.S. at 348-49. Here, the privilege belongs solely to the current Tribal Council. *Const.*, art. III, § 1 and art. VI; *see also Upjohn Co.*, 449 U.S. 383. When "control of a corporation

passes to new management, the authority to assert the corporation's attorney-client privilege passes as well." *Commodity Futures Trading Comm'n*, 471 U.S. at 349. The fact that an unseated Chairman (or his spouse) has a copy of a privileged communication developed, or available, during his or her time as a Chairman, does not bestow upon him or her, after leaving office, the power to waive the privilege of the current Council. *See id.*

The Trial Court properly allowed Mr. Hurley's Declaration regarding the intent of Appellees related to the Stipulation. As explained above, courts must interpret a stipulation in a manner that carries out the intentions of the parties. *Petty*, 80 F.3d 1384. Mr. Hurley's declaration was relevant to the Findings of Fact requested by this Court, and it is not disputed by any evidence. Nevertheless, nothing in the Trial Court's Opinion suggests that it considered it. Instead, the Trial Court relied upon the language of the Stipulation, Mr. Galanda's own statements, and letters about who he represented. CP 95, Findings and Conclusions at 3-5. Additionally, Mr. Galanda filed multiple Declarations in this case, including one giving testimony as to occurrences that took place outside the court room.[39] Appellants cannot complain about attorney declarations at this late hour after Appellants' counsel has submitted numerous declarations of his own.

[39] CP 76, Declaration of Galanda re Security Issues; *see also* CP 93, Declaration of Galanda in Support of Motion for Order to Show Cause re Contempt; CP 90, Declaration of Galanda in Support of Response Briefing re Order Extending Stay; CP 64, Fourth Declaration of Galanda; CP 62, Third Declaration of Galanda; CP 54, Second Declaration of Galanda; and CP 14, Declaration of Galanda.

VI. The Trial Court Completely Disposed of This Case.

Appellants allege that the Trial Court failed to dispose of various claims. Opening Br. 67-70. Appellants lack standing as to many claims they include in their list. Moreover, the Trial Court found that Appellees retained sovereign immunity, which disposed of all Appellants' claims. *See* CP 79, Amended Order Granting Dismissal. Appellants further allege that the Trial Court must make detailed findings under FRCP 52(a), but even if it applies – which it does not – FRCP 52(a)(3) explains that a Court is not required to include findings or conclusions when ruling on a motion under FRCP 12 or 56. Appellants attempt to hold the Trial Court to a standard that does not bind it.

Appellants lack standing to assert claims on behalf of Secretary St. Germain and Councilmember Roberts, which includes claims one through four and claims six through eight in their list. *See* Opening Br. 67-69. As explained above in Section IV(G), Appellants lack a particularized injury in bringing claims related to the inner workings of Council – especially claims that only allege an injury against Secretary St. Germain and Councilmember Roberts, because they are not parties to this case.[40]

[40] Additionally, the Council may pass Resolutions with a quorum, which consists of five Councilmembers. Bylaws, art. II, § 4. Thus the absence of Secretary St. Germain and Councilmember Roberts from any meeting where the Council passed a Resolution is irrelevant as long as the Council passed the Resolution with a quorum, which it always has. With respect to Appellants' sixth claim in the list, the Council defeated Secretary St. Germain's Motion to rescind Resolution No. 13-02 on March 26, 2013, which renders this allegation moot. *See* CP 25, Decl. of R. George.

All meetings of the Tribal Council have been validly called and conducted with a quorum, including those when the Council adopted amendments to Titles 10 and 60. Appellants cite no evidence to the contrary.

As to Appellants' fifth claim (that § 63.00.004's reference to a census roll conflicts with art. II, § 1(H) of the Constitution), this claim both misstates the provision of § 63.00.004, and it also refers to a section of the Constitution which was deleted by an Amendment and approved by the Bureau of Indian Affairs. The notices of intent to disenroll are specific about the member's lack of a public domain allottee ancestor. Appellants have never claimed that an ancestor was on the 1942 Census Roll. Moreover, Appellees have not disenrolled over 15 percent of the Nooksack Membership as Appellants allege. *See* Opening Br. 69. In fact, disenrollment hearings have not been held due to this litigation and related litigation by the same parties.

VII. The Trial Court Rightly Denied Appellants' Motions for TRO.

Appellants filed two Motions for TRO in this case – one on March 18, 2013[41] and one on May 7, 2013. CP 9, Emergency Motion for TRO and CP 32, Second Emergency Motion for TRO. In their first Motion for TRO, Appellants alleged that Resolution 13-02 was unconstitutional, but their complaint and proposed restraining order did not attack Section 63.04.001(B)(1)(a) as

[41] Despite alleging that the Trial Court "*sua sponte* converted Appellants' TRO Motion into one for a preliminary injunction[,]" Appellants have acknowledged that the first Motion for TRO was turned into a Motion for Preliminary Injunction by the Stipulation of March 20, 2013. *See* Opening Br. 70 n.44. As Appellants earlier explained, "[t]he original Motion for Temporary Restraining Order ("TRO") was converted to a Motion for Preliminary Injunction, [sic] per the parties' March 20, 2013, Stipulation . . . ." CP 28, Reply in Support of Plaintiffs' Emergency Motion for TRO at 1 n.1.

unconstitutional. *See* CP 9, Emergency Motion for TRO; CP 11, Proposed Order Granting Plaintiffs' Emergency Motion for TRO; CP 17, First Amended Complaint. The Trial Court denied Appellants Motion, because "this Court cannot find that the Defendants acted outside the scope of their official duties and, as such, cannot find that the Plaintiffs would be likely to prevail on the merits." CP 44, Order Denying Motion for Preliminary Injunction at 13:3-5. Appellants' second Motion for TRO alleged that Appellees acted beyond the scope of their duties in taking actions in furtherance of Resolution 13-38 related to the Secretarial Election, in canceling and rescheduling the first Tuesday meetings, and in failing to schedule the special meeting requested by Secretary St. Germain and Councilmember Roberts. CP 32, Second Emergency Motion for TRO. The Trial Court denied Appellants' second Motion, because it found that Appellees were protected by sovereign immunity because they did not act beyond the scope of their duties and Appellants lacked standing related to the special meeting request. CP 67, Order Denying TRO re Resolution 13-38 and CP 71, Order Denying Second Motion for TRO.

The standard for issuing a TRO is essentially the same as that for issuing a preliminary injunction. *Beaty v. Brewer*, 649 F.3d 1071 (9th Cir. 2011). To be entitled to injunctive relief, a movant must demonstrate (1) that s/he is likely to succeed on the merits, (2) that s/he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his or her favor, and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *National Meat Ass'n v. Brown*, 599 F.3d

1093, 1097 (9th Cir. 2010); *see also Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). The burden of persuasion falls on the movant, who must make "a clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (*per curiam*). An injunction is an "extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24.

The Trial Court did not employ the wrong standard, as Appellants allege. *See* Opening Br. at 71 n.45. A plaintiff may obtain a preliminary injunction by demonstrating either: "(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [the movant's] favor." *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993). The Trial Court correctly found that Appellants were not likely to succeed on the merits because Appellees are immune from suit and Appellants lack standing for certain claims. *See* CP 44, Order Denying Motion for Preliminary Injunction; CP 67, Order Denying TRO re Resolution 13-38; and CP 71, Order Denying Second Motion for TRO. The Trial Court did not find that there were serious questions going to the merits, and Appellants misconstrue the Court's finding that disenrollment involves "serious issues" in a scheduling order. *See* Opening Br. 71 n.45; *see also* CP 21, Order From Scheduling Hearing. Appellants also misconstrue *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013). *See* Opening Br. 72. There, the court established that there likely was a violation of law, which contrasts with the Trial Court's repeated determination that Appellants were not

likely to succeed on the merits because Appellees acted within the scope of their authority. *See Hobby Lobby Stores, Inc.*, 723 F.3d 1114.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the Trial Court's dismissal of Appellants' Second Amended Complaint and both of Appellants' Motions for TRO.[42]

Respectfully submitted this 1st day of November, 2013.[43]

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By: RJ

RJ

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[42] Appellees note that their Motion to Dismiss included several other grounds for dismissal, which would need to be reached if the Court were to remand the case.

[43] Appellees ask the Court to find that Appellants' Opening Brief was filed three days late, on October 21, 2013, and accordingly Appellees request that the Court reduce the time for Appellees' Optional Reply Brief by the same number of days.

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By: RJ

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[44] Although Mr. Hurley and Mr. Schlosser are listed on the cover of Appellants' Opening Brief, those lawyers represent the Tribal Council defendants – Appellees here. Mr. Hurley and Mr. Schlosser did not prepare Appellants' brief and do not represent Appellants.