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

4  
5 **RUDY ST. GERMAIN, et. al.,**

Case No.: 2013-CI-CL-005

**ORDER GRANTING ON MOTION FOR  
TEMPORARY RESTRAINING ORDER**

6 vs.

7 **ROBERT KELLY, et. al.**  
8 Defendant

9 THIS COURT held a hearing on December 18, 2013 after the Plaintiffs, a group of enrolled  
10 members of the Nooksack Indian Tribe, filed a *Complaint for Prospective Equitable Relief* with the  
11 Court on December 9, 2013. Plaintiffs sue the Defendants, members of the Tribal Council and two  
12 Enrollment Officers, in their official capacities for “prospective nonmonetary relief.” In addition to  
13 filing the *Complaint*, the Plaintiffs filed a *Motion for Temporary Restraining Order*. This Court set  
14 this hearing to allow all parties to address the issues set out by the Plaintiffs as well as an issue the  
15 Court sought further briefing on regarding the kind of relief sought by the Plaintiffs. Ryan  
16 Dreveskracht appeared by telephone as attorney for the Plaintiffs, with Gabriel Galanda and  
17 Anthony Broadman also listening in on the hearing by telephone. Tom Schlosser and Grett Hurley  
18 appeared for the Defendants in the courtroom. Wilma Rabang, Rudy St. Germain, and Michelle  
19 Roberts appeared in the courtroom.

20 After hearing from the parties, reviewing the filings, and researching the issues, the Court  
21 issues the following:  
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2 **DECISION**

3 **I. Facts**

4 As the Court has noted in prior rulings, this is a Temporary Restraining Order and the facts  
5 set out here are preliminary. The *Complaint for Prospective Equitable Relief* sets out other causes of  
6 action, but this TRO motion is limited to the issues raised by Tribal Resolution 13-171. Tribal  
7 Resolution 13-171 “Polling Resolution Approving: 2013 Christmas Distribution (Option C)” was  
8 passed on December 3, 2013 approving 2013 Christmas Support in the amount of \$250.00 “to be  
9 made available to each currently enrolled Nooksack Tribal member, not subject to pending  
10 disenrollment proceedings.” The resolution regarding Christmas Distribution checks does not set  
11 out a distribution date. On December 5, 2013, the Nooksack Indian Tribe Communications Page on  
12 Facebook stated that “Christmas Checks will be mailed out on December 12th. Checks will not be  
13 made available for pick up for anyone and will only be mailed out.” Checks were mailed out;  
14 Plaintiffs allege that following the filing of this lawsuit, Christmas checks were mailed out earlier  
15 than planned to avoid the ruling by this Court.

16 On December 13, 2013, the Tribal Council passed 13-181 titled “Approving Polling  
17 Resolution for 2013 Christmas Distribution Superseding Polling Resolution No. 13-171.” This  
18 Resolution states that Resolution 13-171 “omitted a necessary clause pertaining to the Tribal  
19 Council’s directive and intent that persons subject to pending disenrollment proceedings be eligible  
20 for such support if Tribal Council’s determination is to retain the person’s membership status.” The  
21 Resolution goes on to state:

22 The Council hereby approves the 2013 Christmas Support in the amount of \$250.00 to be  
23 made available to each currently enrolled Nooksack Tribal member, not subject to pending  
24 disenrollment proceedings, who have not already received 2013 Christmas Support checks  
pursuant to Polling Resolution No. 13-171; and

1 . . .currently enrolled Nooksack Tribal members whose disenrollment proceedings are  
2 subsequently concluded to a final decision by the Tribal Council and that do not result in  
3 disenrollment will receive said 2013 Christmas Support following a favorable final decision  
4 of Tribal Council.

5 Plaintiffs argue that they have been deprived of due process by being denied access to a  
6 public benefit (Christmas distribution checks) without notice and an opportunity to be heard. They  
7 argue further that their equal protection rights have been violated by Resolution 13-171, which  
8 denied them the Christmas distribution because they are proposed for disenrollment. Unlike the  
9 “Back-to-School” resolution issued by the Tribal Council in August 2013, this Resolution does not  
10 provide that, in the event the proposed disenrollees prove to be continued to be entitled to  
11 enrollment, the proposed disenrollees would receive the distribution. This Resolution simply states  
12 that “the Council has identified discretionary funds which it would like to make available to tribal  
13 members not subject to disenrollment proceedings for Christmas Support.” Resolution 13-181  
14 attempts to correct that by replicating a “carve out” that the Court previously upheld when reviewing  
15 the Back to School resolution in a prior case that is now on appeal.

16 At the hearing, Plaintiffs argued that Resolution 13-181 fails to resolve the issues and may  
17 not, in fact, have been properly passed. Defendants argued that the polling resolution process used  
18 to pass both resolutions is valid and that 13-181 supercedes 13-171, resolving any equal protection  
19 issue.

## 20 **II. Discussion**

21 As the parties are aware, in reviewing a TRO, the movant (here, the Plaintiffs), the Court  
22 assesses 1) the likelihood of success on the merits; 2) a likelihood of suffering irreparable harm  
23 absent the TRO; 3) that the balance of the equities tips in the movant’s favor, and that injunctive  
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1 relief is in the public interest. *Winters v. NRDC*, 555 U.S. 7, 20 (2008). The Defendants have  
2 asserted sovereign immunity in this matter, as they have in all the other related suits. This Court  
3 must assess, then, whether sovereign immunity is a bar to relief sought by the Plaintiffs.

4 The Court's analysis centers on the same analysis it has used in prior cases and notes that this  
5 analysis is currently on appeal with the Nooksack Tribal Court of Appeals. The Court has no  
6 information as to when the Court of Appeals will rule and while it might be prudent to wait to issue  
7 any further rulings until their decision, the time frame in this TRO prevents further delay. Thus, the  
8 Court will apply the following sets of rules it has previously used in similar suits. As the Court  
9 previously found:

10 Sovereign immunity protects tribes and tribal governments as it does states and state  
11 officials. When a suit is brought against a government that asserts sovereign immunity, the  
12 suit must be dismissed. And, when a suit is brought against governmental officials, if the suit  
13 is "in fact a suit against the State, [it] is barred regardless of whether it seeks damages or  
injunctive relief." *Pennhurst v. Halderman*, 465 U.S. 89, 100 (1984). "The general rule is  
that relief sought nominally against an officer is in fact against the sovereign if the decree  
would operate against the latter." *Id.* (citations omitted).

14 *Roberts v. Kelly, Order Granting Motion to Dismiss*, 5. When officials acts in their official capacity  
15 in contravention of the law, however, an *Ex Parte Young* exception may be available. Again as the  
16 Court has noted, the *Young* theory is intended for use in the federal and state court systems and its  
17 analogy to the tribal context is difficult and unwieldy. The Court has attempted to modify it for  
18 Nooksack purposes and will continue to apply that exception. The standard *Young* analysis follows  
19 this structure: There are six qualifications for the *Young* doctrine: "(1) the state officer sued must  
20 have a duty to enforce the challenged state law; (2) the action by the state officer under state law  
21 must constitute an alleged violation of federal law; (3) the federal law allegedly violated must be the  
22 "supreme law of the land"; (4) *Young* will not apply if federal law provides such an intricate  
23 remedial scheme that the court concludes that Congress did not intend for cases under *Ex Parte*

1 *Young*; (5) *Young* will not apply if allowing suit would interfere with special state sovereignty  
2 interests; and (6) the Court has imposed significant restrictions on the remedies available under *Ex*  
3 *parte Young*.” *Avoiding Sovereign Immunity: The Doctrine of Ex Parte Young*, 13 Fed. Prac. &  
4 Proc. Juris. § 3524.3 (3d ed.) Further, if a court finds that *Young* applies, *Young* restricts Plaintiffs to  
5 prospective, non-monetary relief.

6 Plaintiffs argue that they have been denied due process and that Defendants have violated  
7 Equal Protection under the Nooksack Tribe’s Constitution and the Indian Civil Rights Act.  
8 Although the equal protection argument is presented inartfully, the crux of their argument is that the  
9 Plaintiff proposed-disenrollees who were excluded from the Christmas Check distribution are  
10 similarly situated to those who received the \$250 distribution. Defendants argue that equal  
11 protection rights of tribal members against their governments are distinct and “not co-extensive”  
12 with those of non-tribal individuals. While it is the case that there is a line of federal cases  
13 referencing that idea, none of those cases are similar to this one as most of them address questions  
14 surrounding tribal elections. *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079  
15 (8<sup>th</sup> Cir. 1975)(exclusion of 18-21 year olds from voting in tribal elections); *Daly v. U.S.*, 483 F.2d  
16 700 (8<sup>th</sup> Circ. 1973)(addressing an apportionment issue in a tribal election); *Howlett v. Salish and*  
17 *Kootenai Tribes of Flathead Reservation*, 529 F.2d 233 (9<sup>th</sup> Cir. 1976)(addressing the right to run for  
18 tribal council positions).

19 In those cases, the federal courts hold that the Indian Civil Rights Act was intended to  
20 provide tribal members with constitutional rights analogous to, but not co-extensive with, those  
21 expressed in the federal Bill of Rights. However, the cases that address equal protection only deal  
22 with questions surrounding tribal elections and whether the federal courts ought to engage in  
23 “enforcing an alien culture with strange procedures, on [a] tribe.” *Howlett v. Salish*, 529 F.2d at 237.  
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1 As has been the case in prior cases in this Court, little to no case law exists on the issues presented to  
2 this Court. As the Defendants note, the tribal case law cited to and relied upon by the Plaintiffs are  
3 neither on point nor do they stand for the propositions for which they have been cited. Therefore,  
4 the Court finds itself, once again, in the position of determining the appropriate law to apply in the  
5 Nooksack Tribal Court.

6 The Court need not engage in an extensive review of equal protection and its permutations,  
7 which have become complex and muddled in the federal and state systems. There are relatively  
8 simple concepts embodied in the equal protection clause in the Indian Civil Rights Act that can be  
9 applied, as well as in the Nooksack Indian Tribe's Constitution. Article IX of the Constitution states  
10 "All members of the Nooksack Indian Tribe shall be accorded equal rights pursuant to tribal law."  
11 25 U.S.C. Section 1302(a)(8) states "No Indian tribe in exercising powers of self-government shall  
12 (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of  
13 liberty or property without due process of law."

14 Equal protection requires that "persons similarly situated should be treated alike." *City of*  
15 *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). The U.S. Supreme Court has "devised  
16 standards for determining the validity of state legislation or other official action that is challenged as  
17 denying equal protection. The general rule is that legislation is presumed to be valid and will be  
18 sustained if the classification is rationally related to a legitimate state interest." *Id.* When the  
19 legislation infringes on a fundamental right or classifies a group by race, alienage or national origin  
20 or other suspect class as set out by relevant case law, strict scrutiny may be applied. In *Lomeli v.*  
21 *Kelly*, the Plaintiffs in that case argued that they were a "suspect class" and, therefore, the actions of  
22 the Defendants must be subject to strict scrutiny because the Plaintiffs in that case were of Filipino  
23 ancestry and, they argued, targeted for disenrollment because of that aspect of their ancestry. The  
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1 Court rejected that argument.

2 As *Cleburne* notes, “where individuals in the group affected by a law have distinguishing  
3 characteristics relevant to interests the State has the authority to implement, the courts have been  
4 very reluctant, as they should be . . . to closely scrutinize legislative choices.” *Cleburne*, 473 U.S. at  
5 441-442. The Defendants here argue that the decision to exclude those proposed for disenrollment  
6 from Christmas Distribution checks pass the rational relationship test and fall within the scope of  
7 authority of the Defendant Tribal Council members. They argue that the proposed disenrollees are  
8 not similarly situated to those not proposed for disenrollment because they are a group of individuals  
9 who’s enrollment eligibility is in question.

10 The Court disagrees. The Plaintiffs who are proposed for disenrollment are tribal members.  
11 They may or may not be disenrolled; that is dependent upon the decisions of this Court and the  
12 Nooksack Court of Appeals and the Nooksack Tribal Council. The Tribal Court itself makes no  
13 decisions about who is and who is not a tribal member; rather, the Court has been hearing lawsuits  
14 surrounding the process and the legal issues raised. At present, there are hearings and two appeals  
15 underway to determine the authority of this Court to intervene in the disenrollment matters and  
16 assess the validity and authority of the Disenrollment Procedures set out by the Tribal Council. If  
17 those procedures are used after the court process has concluded, the proposed disenrollees will have  
18 the opportunity to present why they should remain enrolled and the Tribal Council will have to make  
19 individualized decisions. That has yet to occur. Defendants argue that the proposed disenrollees are  
20 still enrolled as a result of “undue delay” by the Plaintiffs. *See Defendants’ Response in Opposition*  
21 *to Plaintiffs’ Motion for Temporary Restraining Order*, page 7, fn. 4. There have been four lawsuits  
22 brought to this Court in the last nine months addressing various issues related to the actions of the  
23 Defendants in their capacities as Tribal Council members. However, these issues are important and  
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1 the legal process takes time. At this point, there are unanswered questions about the applicable law  
2 and the nature of the process by which disenrollment can take place; while those questions are  
3 answered by the courts, the Plaintiffs remain enrolled.

4 As the Court has held in prior decisions, being enrolled in a federally recognized tribe brings  
5 with it benefits and privileges. No tribal member is entitled to money from tribal discretionary funds  
6 for Back to School Support or Christmas Support. If the Tribal Council had taken no action this year  
7 and provided no such support, no tribal member would have had the right to argue that the Tribal  
8 Council must do so. While there are entitlements that stem from tribal enrollment and the Court has  
9 discussed those in other decisions, Christmas Support checks are not one of them. However, when  
10 the tribal government chooses to provide such support to tribal members, it's axiomatic that they  
11 must do so in accordance with the "equal treatment" discussed in the Nooksack Tribal Constitution  
12 and the Indian Civil Rights Act's equal protection clause.

13 The Defendants argue that there is a rational relationship to a legitimate tribal interest in  
14 limiting the issuance of checks to those who are not proposed for disenrollment. "Plainly, only  
15 properly enrolled members of the Tribe are eligible to receive tribal funding, and limiting  
16 disbursement of funds to those members who are not subject to disenrollment proceedings is at least  
17 rationally related to responsibility administering funds." *Defendants' Response*, page 9. The key  
18 problem with the Defendants' argument here is that it assumes that those proposed disenrollees are  
19 not properly enrolled. This also impacts their argument that the Plaintiff proposed disenrollees are  
20 not similarly situated in relationship to other tribal members. The Court rejects the argument that  
21 these individuals may be treated differently because they are proposed for disenrollment. These  
22 individuals may or may not be eligible for enrollment. That determination has yet to be made. What  
23 is clear to this Court, however, is that those who are enrolled with the Tribe must be accorded equal  
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1 treatment by the Defendants with respect to the Christmas Distribution, under the Nooksack Indian  
2 Tribe's Constitution. Christmas Distribution checks were printed and mail before Resolution 13-181  
3 was passed; the fact remains that the Plaintiff proposed-disenrollees were treated differently under  
4 13-171, which was the authority under which the Tribe acted when sending out the Christmas  
5 Support checks.

6 The Court notes here that is addressed a similar issue that is now on appeal in the *Roberts v.*  
7 *Kelly* matter regarding Back to School Support. In that order, the Court found that the so-called  
8 "carve out" that allows the proposed disenrollees to receive the Back to School support in the event  
9 that they are not disenrolled resolved the issues related to equal protection. This case is distinct from  
10 that one in that action by the Tribe had already been taken in furtherance of Resolution 13-171  
11 before 13-181 was passed. While 13-181 appears to carve out a means by which the proposed  
12 disenrollees could access the Christmas Support, the fact remains that the Christmas Support check  
13 distribution took place under the authority of Resolution 13-171 and 13-181 does not, at least in the  
14 Court's preliminary view, fix that.

15 The Court asked the parties to address the question of the relief available to the Plaintiff  
16 proposed disenrollees, and therein lies the most difficult aspect of the TRO. The *Young* remedies  
17 explicitly prohibit courts from ordering the expenditure of public funds as a remedy. "[A] suit may  
18 fail, as one against the sovereign, *even if it is claimed that the officer being sued has acted*  
19 *unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by*  
20 *merely ordering the cessation of the conduct complained of but will require affirmative action by the*  
21 *sovereign of unquestionably sovereign property.*" *Shermoen v. U.S.*, 982 F.2d 1312, 1320 (9<sup>th</sup> Cir.  
22 1992)(citations omitted).

23 In addition, Title 10 of the Nooksack Tribal Code specifically prohibits the Court from  
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1 ordering anything other than “declaratory or prospective injunctive relief” in an officer suit. NTC  
2 10.00.100(b). Defendants also note that the Court cannot “issue an order to the Nooksack Indian  
3 Tribe that involves the expenditure of funds, without the Nooksack Indian Tribe’s consent.” NTC  
4 10.00.90(a). That provision only applies when the Tribe has consented to the jurisdiction of this  
5 Court, which it has not done in this case and declines to apply that section of Title 10 to this case.  
6 Nevertheless, the Court does not have the authority to order the expenditure of public funds, both  
7 based upon the common law as well as the Nooksack Tribal Code.

8           While the Plaintiffs attempt to tap dance around this issue, it’s clear from their filings they  
9 recognize the limitations on this Court’s authority (indeed, any courts’ authority as it applies to  
10 issuing monetary relief) as well. Plaintiffs propose that the Court issue an injunction that states that  
11 the Defendants be “enjoined from enforcing that provision of Resolution 13-171 that restricts the  
12 availability of Christmas Support checks to Nooksack Tribal members “not subject to pending  
13 disenrollment proceedings.”” *Plaintiffs’ Brief in Support of TRO Relief*, page 7. However, the  
14 Plaintiffs’ attorney, Ryan Dreveskracht, filed an email exchange with this Court regarding the  
15 scheduling of this hearing in which he wrote to the Tribe’s attorneys: “In the interim, we would  
16 simply request that your clients refrain from taking acts in furtherance of the portion [sic] Resolution  
17 No. 13-171 to which we have objected . . . We assume that this matter can be resolved by December  
18 18, at the latest, *which would give your clients plenty of time to issue Christmas Support checks*  
19 *before the Christmas Holiday.*” *Letter to Judge with Exhibits*, Email dated December 12, 2013,  
20 10:47 AM.

21           The Court finds here that the Defendants have acted in violation of the Nooksack Indian  
22 Tribe’s Constitution by treating the proposed disenrollees differently from other enrolled tribal  
23 members with regard to the issuance of Christmas Support checks. If the Court issued an injunction  
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1 as written by the Plaintiffs, the Court would, in fact, be ordering that the Nooksack Indian Tribe  
2 issue checks in the amount of \$250 per tribal member who has not yet received a check. As Plaintiff  
3 and Tribal Council member Michelle Roberts acknowledges herself, this requires the Tribe to spend  
4 \$75,000.00. *Declaration of Nooksack Tribal Councilwoman Michelle Joan Roberts*, page 3, point 9.  
5 (The authority of the Defendants to expend the Tribe’s discretionary funds is the subject of the larger  
6 Complaint, which the Court does not address today.) Those monies would come from the Nooksack  
7 Indian Tribe and its treasury and not the Defendants themselves. The Court simply cannot order  
8 such relief.

9 The purpose of issuing a TRO in this matter is to preserve the status quo, which is also the  
10 position of the Nooksack Court of Appeals in the *Lomeli* matter. In *Lomeli*, a stay exists prohibiting  
11 the disenrollment proceedings against any of the proposed disenrollees until the Court of Appeals  
12 rules. The issuance of that stay was, according to the Court of Appeals, intended to preserve the  
13 status quo of the proposed disenrollees as tribal members. Preserving the status quo in this matter  
14 means ordering that the Defendants act in accordance with the status quo, by treating the Plaintiff  
15 proposed disenrollees as enrolled tribal members.

16 The Court notes that it has been quoted extensively as criticizing the Defendants’ decision to  
17 withhold Back to School Support as “distasteful.” The Court is aware of the public attention to its  
18 own decisions, as well as the actions of all of the parties in this and related cases. It is the job of the  
19 judge to “respect and comply with tribal law and always conduct herself . . . in such a way as to  
20 promote respect for the law. . . A judge shall not let . . . criticism or praise influence the decision . . .  
21 she makes in court.” Nooksack Tribal Code, Title 10, 10.03.070, *Fairness and Diligence*. The  
22 Court acknowledges that issuing a decision in which it finds the Defendants to have acted  
23 unconstitutionally with respect to Resolution 13-171, but also finds it unable to specifically order the  
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1 Defendants to expend tribal dollars for Christmas Support to the proposed disenrollees will be  
2 viewed as unjust and unfair. But it is not the judge's job to create the law as she might wish it to be;  
3 instead, it is the Court and judge's job to respect and comply with the law as she finds it.  
4

5 One option in front of the Court would be to enjoin the issuance of Christmas Support checks  
6 wholly. Indeed, this Court seriously considered this action prior to the issuance of the checks and  
7 suspects that the Defendants feared this result and may have even rushed the checks in order to avoid  
8 it. Even if the Court had enjoined the issuance of all Christmas Support checks, it could not have  
9 ordered the expenditure of tribal funds to tribal members in any case, as it has found above. The  
10 checks have been issued, sent, and received and likely spent. The simple fact is that Christmas is  
11 one week away. The Court sees no point to enjoining the issuance of the checks in total and  
12 somehow fashioning a remedy for the return of those funds to the tribal treasury. Such a resolution  
13 punishes the body of the Tribe and, more importantly, its children. Further, the Plaintiffs have not  
14 sought this remedy actively and indeed it would be a pyrrhic victory.

15 In a TRO, the Court must assess whether the Plaintiffs would be likely to prevail on the  
16 merits of the claim. The Plaintiffs are likely to prevail on the issue of the Christmas Check  
17 distribution as a violation of the Nooksack Constitution, though they are not able to prevail on any  
18 specific monetary relief. The irreparable harm suffered here should the Court not issue a TRO is the  
19 Constitutional violation itself. While the Tribal Council Defendants have tried to remedy that  
20 violation with 13-181, at this point, the Court is not persuaded that this is successful. The balance of  
21 the equities in, at least, obtaining a TRO on the limited basis that the Court can issue tips in favor of  
22 the Plaintiffs. Injunctive relief is in the public interest. At minimum, the Court needs to be explicit  
23 here that Resolution 13-171 violates the Nooksack Indian Tribe's Constitution Article IX and the  
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1 ICRA's promise of Equal Protection.

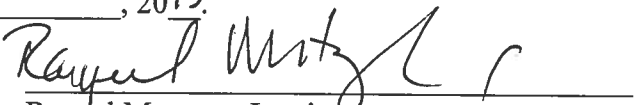
2 Therefore, the Court finds that, *at this preliminary TRO stage in this matter*, the Defendants  
3 have violated the Nooksack Indian Tribe's Constitution, Article IX and the Equal Protection clause  
4 of the Indian Civil Rights Act in passing Resolution 13-171 and acting upon it. **The Court orders**  
5 **that the Defendants be enjoined from treating the proposed disenrollees differently from other**  
6 **tribal members with respect to the Christmas Support distribution. However, the Court finds**  
7 **that the Court cannot order specific relief requiring the expenditure of tribal funds.** The Court  
8 hopes, however, that the Defendants will consider the implications of Resolution 13-171 and treat  
9 the Plaintiff proposed-disenrollees fairly, despite the fact that the Court is prohibited by the law from  
10 ordering them to do so.

11

12 **SO ORDERED.**

13 **DATED** this 18 day of DEC., 2013.

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Raquel Montoya-Lewis  
Chief Judge, Nooksack Tribal Court

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