Hon. Raquel Montoya-Lewis

IN THE NOOKSACK TRIBAL COURT

ELILE ADAMS, et al., Plaintiffs, v. ROBERT KELLY, et al., Defendants.	NO. 2013-CI-CL-004 RESPONSE TO DEFENDANTS' MOTION TO DISMISS ***Hearing: 10 a.m., December 3, 2013***

Plaintiffs, enrolled members of the Nooksack Indian Tribe ("Tribe"), oppose Defendants' Motion to Dismiss and reiterate their request that the Court halt constitutional violations that Defendants are currently committing, or are slated to commit. Plaintiffs are entitled to move forward with their claims to discovery and trial.

I. INTRODUCTION

Defendants seek to dismiss Plaintiffs' complaint based on sovereign immunity, lack of jurisdiction, failure to state a claim, failure to exhaust administrative remedies, and for "raising nonjusticiable political questions." Defendants' Motion to Dismiss Plaintiffs' Complaint, at 1.

Defendants cannot meet their burden as to any basis for dismissal. Defendants have also opened the door for jurisdictional discovery.

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II. FACTS

As explained below, the Court must treat the facts in Plaintiffs' Complaint as true. To that end, Plaintiffs incorporate the facts alleged in their Complaint here.

Since Plaintiffs filed their Complaint in this action, Defendants have, yet again, failed to call the Regular Meeting of the Nooksack People, for Tuesday, November 5, 2013. Declaration of Nooksack Tribal Councilwoman Michelle Roberts ("Roberts Declaration"), at ¶ 2.

Defendants have now failed to call that customary meeting of the Nooksack People for at least the last eleven consecutive months. *Id.* There still has not been a single public meeting of the Nooksack People, as required by the Nooksack Tribal Constitution and Bylaws and Nooksack Indian customs and traditions, **for this entire year 2013**. *Id.*

Consistent with Defendants' claims that they can drag their feet on the 27-person meeting indefinitely, Defendants continue to refuse to meet with Tribal members – even those who are not members of the Nooksack 306. Declaration of Elile Adams at ¶ 2.

Defendants have also, yet again, failed to allow Tribal Council Secretary Rudy St. Germain or Councilwoman Roberts to attend those special meetings that Defendants do see fit to call. Roberts Declaration, at ¶ 3. There is no "conflict of interest" that prevents them from being notified of those special meetings; or from being allowed to attend those meetings, if even by teleconference, whereby Chairman Kelly controls input through the use of a mute button. Roberts Declaration, at ¶ 5.

Defendants have never set forth competent facts of a conflict of interest. *Id.* Nor have Defendants ever set forth competent facts of any "security concern." *Id.* That is because both of those allegations are red herrings, designed to mislead this Court into believing that Defendants' refusal to honor the clear procedural mandates of Nooksack Tribal law serves some legitimate purpose. *See id.*

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Again, all of the facts in Plaintiffs' Complaint must be taken as true.

III. ARGUMENT

A. Defendants Misapply Or Ignore The Correct Legal Standards

1. Rule 12(b)(1) and Nooksack *Ex parte Young*

Tribal sovereign immunity, an issue of subject matter jurisdiction pursuant to Rule 12(b)(1), is a question of law. *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974, 977 (9th Cir. 2006). A party challenging a court's jurisdiction through a Rule 12(b)(1) motion may do so in one of two ways: (1) on the face of the pleading, or (2) by presenting extrinsic evidence for the court's consideration. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). But the Court must fundamentally understand that an attack on the sufficiency of an *Ex parte Young* claim "does not include an analysis of the merits of the claim." *Verizon Maryland, Inc. v. Public Service Commission*, 535 U.S. 635, 646 (2002); *see also McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 416 (5th Cir. 2004) ("[A]nalyzing the applicability of the *Ex parte Young* exception should generally be a simple matter, which excludes questions regarding the validity of the plaintiff's cause of action.") (emphasis added). In other words, a motion to dismiss a claim arising under *Ex parte Young* may <u>only</u> be facial. *Id.*

Because Defendants have mounted a facial challenge to the legal sufficiency of Plaintiffs' jurisdictional allegations, the Court must accept as true the factual allegations in the Complaint and consider those allegations in the light most favorable to Plaintiffs. *Erby v. U.S.*, 424 F.Supp.2d 180, 182 (D.D.C., 2006). To the extent Defendants have attempted to insert extrinsic evidence into the equation, it must be disregarded. *See Blue Lake Rancheria v. Morgenstern*, 2011 WL 6100845, *3 (E.D. Cal. 2011) (extrinsic evidence not relevant to Indian jurisdictional challenge, requires court to treat motion to dismiss as a facial attack).

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Very simply, the only questions for the Court under Fed. R. Civ. P. 12(b)(1) and *Ex parte Young* are: (1) whether there is an allegation that Defendants have violated applicable law; and (2) whether the suit seeks a nonmonetary injunction that would prospectively abate the alleged violation. *Verizon*, 535 U.S. 635; *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007). Alternatively, as a facial matter the Court can hold (incorrectly) that Nooksack *Ex parte Young* liability does not exist. What the Court cannot properly do is look at extrinsic evidence. The Court should therefore disregard all extrinsic evidence offered by Defendants in connection with their claims to sovereign immunity.

2. Rule 12(b)(6)/56 – Defendants' Illegal Behavior

Motions to dismiss for failure to state a claim under Rule 12(b)(6) are viewed with disfavor, and, accordingly, dismissals for failure to state a claim are "rarely granted." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). Because Defendants have introduced extrinsic evidence in their motion regarding their compliance with Nooksack law, it must be treated as a motion for summary judgment. *See* Fed. R. Civ. P. 12(d) ("[if] matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment."). Courts evaluating a motion for summary judgment must view the evidence in the light most favorable to the non-moving party; here, the Plaintiffs. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 2000). All reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *MetroPCS, Inc. v. City & County of S.F.*, 400 F.3d 715, 720 (9th Cir. 2005). Summary judgment is inappropriate if there are material factual disputes or where different ultimate inferences as to these facts may be drawn. *Sonkovich v. Ins. Co. of N. Am.*, 638 F.2d 136, 140 (9th Cir. 1981).

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1 **3. Rule 12(b)(6)/56 – Failure To Exhaust Administrative Remedies**

2 Although not mentioned by Defendants, the standard for a motion to dismiss based on
3 failure to exhaust non-jurisdictional administrative remedies is the same as that for a 12(b)(6)
4 motion. *Hodge v. United Airlines*, 666 F.Supp.2d 14, 17 (D.D.C. 2009). Courts must presume
5 exhaustion is non-jurisdictional unless the applicable law states in clear, unequivocal terms that
6 the judiciary is barred from hearing an action remedies are exhausted. *Avocados Plus Inc. v.*
7 *Veneman*, 370 F.3d 1243, 1248 (D.C.Cir. 2004). However, because Defendants have introduced
8 matters outside the pleadings in relation to their exhaustion claims, their motion must be treated
9 as one for summary judgment. Fed. R. Civ. P. 12(d). And, again, here that means that the Court
10 must view the evidence in the light most favorable to the Plaintiffs.

11 **4. Rule 12(b)(1)/12(b)(6)/56 – Political Question**

12 In federal courts, dismissal based on a political question is in most instances a
13 jurisdictional inquiry. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir.2007) ("The
14 Supreme Court has indicated that disputes involving political questions lie outside of the Article
15 III jurisdiction of federal courts."). But the U.S. Constitution limits the jurisdiction of federal
16 courts in a manner the Nooksack Constitution does not. Critically, the Nooksack Constitution
17 expressly recognizes jurisdiction in the Nooksack Tribal Court "over all matters concerning the
18 establishment and functions of the tribal government[,]" albeit without waiving sovereign
19 immunity in that clause. Constitution, Art. VI, Sec. 2(a)(3). In light of the distinctly broader
20 review powers of the Nooksack Tribal Court, political questions are more properly cast as
21 prudential issues before the Court, which trigger 12(b)(6), as opposed to 12(b)(1) treatment. *See*
22 *Corrie*, 503 F.3d at 982. Again, because Defendants rely on extrinsic material related to the
23 alleged "political question" in their motion, it must be treated as one for summary judgment —
24 and the Court must view the evidence in the light most favorable to the Plaintiffs.

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B. Sovereign Immunity Does Not Bar Plaintiffs' Claims

Sovereign immunity does not bar Plaintiffs' suit. Defendants' motion to dismiss must fail because Plaintiffs have met their burden on *Ex parte Young*.

Defendants' argument regarding sovereign immunity can be divided into three parts. First, Defendants argue that *Ex parte Young* does not apply to Nooksack officials. Defendants' Response In Opposition To Plaintiffs' Motion For Temporary Restraining Order And Defendants' Brief In Support Of The Motion To Dismiss ("Motion"), at 6-9. Second, Defendants argue that even if *Ex parte Young* does apply, the Court is allowed to look at the merits of Plaintiffs' claims. *Id.* at 10-12. Third, Defendants argue that they have complied with applicable laws. *Id.* at 12-21. Defendants are wrong on all three fronts. Plaintiffs take each argument in order.

1. *Ex parte Young* Applies At Nooksack

Ex parte Young in fact applies, because Nooksack courts have employed it or referred to it previously. When a court employs a test or simply, "confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law . . . regardless of whether doing so is necessary in some strict logical sense." *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) (*citing United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc)). It is not clear whether Defendants concede that *Ex parte Young* is Nooksack law. *See* Motion, at 9-10. It is clear that they mistakenly argue it only applies when Defendants are acting outside the "scope of their authority under tribal law." *Id.* at 10. But that is not the law. Again, *Ex parte Young* applies to halt future illegal activity of a government office, not simply conduct beyond the scope of an official's job description.[1] It is not, in other words, a question of agency — a government office does not have

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[1] This is why a party pleading the *Ex parte Young* exception must name the Defendant in his or her "official capacity." *See Welch v. Laney*, 57 F.3d 1004, 1009 (11th Cir. 1995) ("[W]here a plaintiff brings an action against a

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a job description, other than its constitutional mandate to act in compliance with superior law. And again, *Ex parte Young* applies because Nooksack courts have used it:

- The Nooksack Court of Appeals held in *Lomeli v. Kelly* that under Nooksack law, when "an official commits an act prohibited by law, he acts beyond his authority and is not protected by sovereign immunity." Order Denying Permission For Interlocutory Appeal, at 4, n. 4.

- In *Roberts v. Kelly*, this court held on August 22, 2013, that: Defendants could be sued in two ways, if they waived their sovereign immunity or "if they lost their protection of sovereign immunity by committing an act which violates the law." Second Amended Order Denying Emergency Temporary Order, at 4. Assuming the Court was referring to a forward-looking injunction, this is a correct exposition of *Ex parte Young*. Future acts of this Court must comport with its order in *Roberts v. Kelly*.

- In *Olson v. Nooksack Indian Housing Authority*, 6 NICS App. 49, 54-55 (Nooksack Ct. App. 2001), the court observed without holding that "[i]ndividual tribal officers and employees have 'no immunity to declaratory and injunctive relief.'") (quoting *Smith d/b/a Frosty's v. Confederated Salish & Kootenai Tribes*, 23 Ind. L. Rep. 6256, 6257-58, (C.S. & K.T. Ct. App. 1996)). While it is clear the *Olson* Court carefully left open the question of *Ex parte Young* (because it had not been pled correctly), this Court must honor well-considered *dicta*. *See Tate v. Showboat Marina Casino P'ship*, 431 F.3d 580 (7th Cir.2005) (Posner, J.) ("[T]he holding of a case includes, besides the facts and the outcome, the reasoning essential to that outcome"). Clearly the *Olson* Court's resolution of the *Ex parte Young* question was essential to the outcome of the case.

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public official in his official capacity, the suit is against the office that official represents, and not the official himself.").

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1 • In *Cline v. Cunanan*, No. NOO-CIV-02/08-5, at 6 (Nooksack Ct. App. Jan. 12,
2 2009), the court held that *Ex parte Young* provides the "framework to determine whether
3 injunctive or declaratory relief is available." In *Cline*, *Ex parte Young* did not apply because
4 Appellants presented the argument incorrectly, suing officers in their legislative capacities and
5 seeking retrospective relief, rather than for prospectively enjoining actions in furtherance of an
6 unconstitutional law. *Id.*, at 1. But like *Olson*, *Cline* binds this Court to use the *Ex parte Young*
7 analysis as the framework.
8 • Plaintiffs are not aware of any other tribal court in which *Ex parte Young* has been
9 rejected. *See e.g. Arendt v. Ward*, 9 Am. Tribal Law 443 (Ho–Chunk Trial Ct. 2011) (holding
10 that the *Ex parte Young* exception applies, but only when a plaintiff requests nonmonetary relief);
11 *Cleveland v. Garvin*, 8 Am. Tribal Law 21, 35 (Ho–Chunk Trial Ct. 2009) (holding that the *Ex*
12 *parte Young* exception applies and that where the exception is properly plead, an "assertion of
13 sovereign immunity is premature" until the parties have completed discovery and the court has
14 evaluated the allegations at trial); *Honyaoma v. Nuvamsa*, 7 Am. Tribal Law 320, 324 (Hopi Ct.
15 App. 2008) (citing the *Ex parte Young* exception and holding that "where a tribal official acts and
16 such action is based upon an unconstitutional law, then that official is not protected by the
17 doctrine of sovereign immunity."); *Fox v. Brown*, 6 Am. Tribal Law 446, 449 n.2 (Mohegan Trial
18 Ct. 2005) ("A limited exception to the general principle of sovereign immunity has long been
19 recognized, where prospective injunctive or declaratory relief is sought challenging the actions of
20 state officials.") (citing *Ex parte Young*, 209 U.S. 123); *Kirkwood v. Decorah*, 6 Am. Tribal Law
21 188 (Ho–Chunk Trial Ct. 2005) (same); *Whiteagle v. Cloud*, 5 Am. Tribal Law 178 (Ho–Chunk
22 Trial Ct. 2004) (same); *Fletcher v. Grand Traverse Band Tribal Council*, 2004 WL 5714967, at
23 *9 (Grand Traverse Tribal Ct. Jan. 8, 2004) (discussing the *Ex parte Young* exception and
24 differentiating it from qualified immunity*); McDade v. Individual Members of Te-Moak Council*,
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No. SF-CV-004-99, 2000 WL 35782656, Nev. Inter–Tribal Ct. App. Mar. 8, 2000 ("Because the Appellant alleged unconstitutional acts by Appellees, they have no immunity through the doctrine of sovereign immunity.") (citing *Ex parte Young*, 209 U.S. 123); *Lynch v. Yomba Shoshone Tribe*, Nos. CVC–YT–003–96, CVC–YT–004–96, CVC–YT–005–96, 1997 WL 34704354, at *4 (Nev. Inter–Tribal Ct. App. Jul. 16, 1997) ("Because the appellant alleged unconstitutional acts by Appellees . . . they have no immunity through the doctrine of sovereign immunity.") (citing *Ex Parte Young*, 209 U.S. 123).

- Title 10 implicitly provides for *Ex parte Young* review. N.T.C. § 10.00.050 states that nothing in Title 10 "shall be construed as a waiver of the sovereign immunity of the Tribe or its officers or enterprises unless specifically denominated as such . . . ." This clause has no relation to *Ex parte Young* because *Ex parte Young* does not depend on a waiver of immunity. N.T.C. § 10.00.050 continues: "[T]he court is expressly prohibited from exercising jurisdiction over the Nooksack Indian Tribe without an express wavier (sic) of sovereign immunity." Critically, this jurisdiction-stripping provision does not mention officers. Of course, it could. The Tribe could try to strip the Court of its *Ex parte Young* jurisdiction. Indeed, this is the kind of desperate move Plaintiffs have come to expect from Defendants since March. Legislatures uncomfortable with the will of the governed often turn to jurisdiction-stripping mechanisms as last-ditch efforts to stymie dissent. *See* H.R. 3893, 108th Cong. § 3 (2004) (We the People Act of 2004 attempting to strip jurisdiction for marriage equality claims); H.R. 1546, 108th Cong. § 2 (2003) (Life-Protecting Judicial Limitation attempting to strip jurisdiction for abortion cases); H.R. 3799, 108th Cong. § 101 (2004) (attempting to strip Supreme Court jurisdiction to review government officers' acknowledgement of God as the sovereign source of law, liberty, or government.) Defendants argue that their latest recitation of Title 10 supports their argument

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regarding *Ex Parte Young* – whatever that argument might, or might next, be. In reality, Title 10 suggests the opposite result.

Plaintiffs thus invite the Court to clearly address *Ex parte Young*. Does it apply? Yes. Does it apply when a government will violate the law? Yes. If the Court finds later – that Defendants' acts in furtherance of illegal laws will not violate Nooksack law – Defendants will be absolved. But the Court and Defendants should at least exercise the intellectual honesty necessary to create or rehabilitate the Nooksack Rule of Law, under which the acts of government offices must comport with the Nooksack Constitution, Bylaws, and other superior Tribal law.

2. The Court Cannot Analyze The Merits

As discussed above, "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon*, 535 U.S. at 646. "[W]hether the tribal officials are subject to suit under the doctrine of *Ex Parte Young* is separate from the underlying merits of [the plaintiff]'s claim." *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) (citation omitted). In conducting the *Ex parte Young* analysis, the Court must ask whether a party (1) alleges an ongoing violation of tribal law, and (2) seeks prospective relief. *Indiana Protection and Advocacy Svc. v. Indiana Family and Social Services Admin.*, 603 F.3d 365, 371 (7th Cir. 2010). If these factors are met, the *Ex parte Young* exception applies, and the suit must proceed.

"A motion to dismiss tests the sufficiency of the complaint, not its merits." *Cooney v. Casady*, 652 F.Supp.2d 948, 951 (N.D. Ill. 2009) (citing *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990)). Thus, as to whether a plaintiff has sufficiently pled an ongoing violation of tribal law, a mere non-frivolous "*allegation* of an ongoing violation of [tribal] law [is] sufficient" to defeat a motion to dismiss. *Verizon*, 535 U.S. at 646 (emphasis in original, quotation omitted). Put differently, the *Ex parte Young* analysis "is limited to whether the *alleged*

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violation is a substantial, and not frivolous, one; [the court] need not reach the legal merits of the claim." *In re Deposit Ins. Agency*, 482 F.3d 612, 621 (2nd Cir. 2007) (emphasis added; citing *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 374 (2d Cir. 2005)); *see also Cardenas v. Anzai*, 311 F.3d 929, 935 n.3 (9th Cir. 2002) ("The Supreme Court has recently clarified . . . that the *Ex parte Young* inquiry does not include an analysis of the merits of the claim."); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 474 (6th Cir. 2008) ("The test for determining whether the *Ex parte Young* exception applies is a straightforward one. . . . The focus of the inquiry remains on the allegations only; it does not include an analysis of the merits of the claim.") (quotation and citation omitted); *Dubuc v. Michigan Bd. of Law Examiners*, 342 F.3d 610, 616 (6th Cir. 2003) ("Importantly, determining whether the *Ex parte Young* doctrine applies does not involve an analysis of the merits of a plaintiff's claims."); *South Carolina Wildlife Federation v. Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008) (same); *Williams v. Board of Parole Hearings*, No. 08-0402, 2008 WL 4809213, at *2 (C.D. Cal. Nov. 3, 2008) ("[T]he inquiry into whether suit lies under *Ex Parte Young* does not include an analysis of the merits . . . .").

Accordingly, the Court should not entertain Defendants' invitation to look at whether they have violated Nooksack law. Because (1) Plaintiffs have made a non-frivolous non-monetary allegation that Defendants, ***in their official capacities***, are violating Nooksack law, and (2) an injunction could stop such violations, Defendants' motion must be denied.

This approach is consistent with existing Nooksack law related to discovery. The discovery rules now dictate that if Nooksack officials move to dismiss based on sovereign immunity, discovery is stayed pending resolution of a dispositive motion. N.T.C. § 10.05.110. Once a motion to dismiss is denied, discovery begins, and a plaintiff can propound discovery in order to make a case on the merits. If an evaluation of the merits were part of the *Ex Parte Young* calculus a plaintiff would be entitled to discovery into such conduct. But, as Defendants have

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most recently legislated, this is not the case. If merits were part of the *Ex parte Young* calculus, discovery could not be stayed pending a motion to dismiss; all plaintiffs would be barred from seeking the very information necessary to survive a motion to dismiss.

3. Defendants Are Violating And Will Violate Nooksack Law

Whether Defendants are actually violating Nooksack law is irrelevant on a motion to dismiss an *Ex parte Young* claim, for reasons offered above. But because the Court previously has accepted Defendants' invitation to delve into the merits of Plaintiffs' claims, Plaintiffs feel obliged to address them here. These are factual matters, which will require discovery and trial, and are not ripe for disposition under a Fed. R. Civ. P. 12(b) motion. Again, the Court must accept as true the factual allegations in the Complaint and consider those allegations in the light most favorable to Plaintiffs. *Erby v. U.S.*, 424 F.Supp.2d 180, 182 (D.D.C. 2006).

a. Defendants are violating Nooksack law related to the petition

Nooksack law is clear; Defendants had 30 days to "either accept. . . or reject the Petition as invalid." They took 31 days to do so and therefore violated the law. Their actions stemming from and in furtherance of such a violation are and will be illegal. It is impossible to read the law and come to the legal conclusion that Defendants have not violated it.

Even if the Petition did not contain all the required elements (which is a factual dispute that cannot be resolved here, *see* Declaration of Honorato "Bo" Rapada III ("Rapada Decl."), ¶ 3), Defendants did not timely reject it.

Defendants do not even contest the fact they did not reject Mr. Rapada's Recall Petition within thirty days, as required by N.T.C. § 60.03.020. Defendants' subsequent rejection of the Recall Petition is irrelevant, as is whatever appeal of that rejection which is available under N.T.C. § 60.02.050(A). As of October 22, 2013, the last day that Defendants could have issued a rejection of the Recall Petition, there was no rejection. The late rejection was barred as untimely,

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and is null. Because the Petition was not rejected as invalid within the time allotted by N.T.C. § 60.03.020, a special recall election must be held between November 21, 2013 and December 20, 2013. Const., art. V, § 4(a). All of the extrinsic facts alleged by Defendants should be disregarded. This Court should not further insulate Bob Kelly from accountability to the Nooksack electorate.

b. Defendants are violating Nooksack law related to special meetings

Defendants offer the absurd argument that they are not violating the law on calling a special meeting because there is no timeframe for calling a meeting under the law. They do not allege they have held the required special meeting; they do not allege they will hold special meetings. The facts and law cannot be clearer: Nooksack law requires a special meeting when over 25 Nooksacks request it; over 25 Nooksacks have requested a special meeting; and Defendants refuse to hold a special meeting. (The Court should not be further misled to believe that all properly requested special meetings have occurred. They have not.) If the law were what Defendants argue it is, they could continue to refuse to hold a special meeting indefinitely because of the lack of a temporal requirement for doing so.

While it is true that "[t]he Bylaws do not require the Council to schedule a special meeting within a certain period of time," delays in legally mandated assemblages must not be "unreasonably long" or based on some "dilatory motive." *Blankenship v. Secretary of HEW*, 587 F.2d 329, 333-34 (6th Cir. 1978) (scheduling of administrative hearings); *see also Blankenship v. Secretary of Health & Human Services*, 858 F.2d 1188 (6th Cir. 1988) (issuance of an administrative decision); *Caswell v. Califano*, 583 F.2d 9 (1st Cir. 1978) ("[T]he Secretary is under a statutory duty to hold hearings within a time that is reasonable under the circumstances"); *Jablonsky v. Sierra Kings Health Care Dist.*, No. 06-1299, 2007 WL 2202051, at *3 (E.D. Cal. Jul. 30, 2007) (delays in holding an administrative hearing may be unconstitutional).

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Defendants' failure to yet even acknowledge, let alone act on, a special meeting requested signed by 27 Nooksack members and submitted well over a month ago, on October 11, 2013, evinces their dilatory motive. This Court must finally restore integrity to the Nooksack Tribe's constitutionally mandated democratic processes.

c. Defendants violated Nooksack law by disenrolling persons they promised not to disenroll

Should the Court wish to require Defendants to honor orders of the Nooksack Judiciary, this claim is ripe.

The Order and Stipulation expressly and unequivocally mandate that Defendants shall not disenroll any person prior to completion of the meetings before the Tribal Council. But Defendants did disenroll *at least* four people before the hearings before the Tribal Council even commenced. Although sanctions for violating an order are generally administered in the action wherein the court issued the violated order, *see Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, (1998), courts ultimately do have the ancillary power to "exercise jurisdiction to adjudicate an alleged violation of an . . . order issued in a[nother] proceeding." *Minnesota Mut. Life Ins. Co. v. Ensley*, 174 F.3d 977, 986 (9th Cir. 1999).

The relief sought in this regard is squarely prospective. The Court has the authority to restore the status quo moving forward. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir.), *aff'd and remanded*, 546 U.S. 418 (2006) ("[C]ourts . . . have long issued preliminary injunctions requiring parties to restore the *status quo ante*").

The Court is obliged to rule on the merits of this claim at some point.

d. Defendants have violated Nooksack law and will continue to violate Nooksack law by frustrating regular Tribal Council meetings

Article II, Section 2 of the Nooksack Bylaws requires Defendants to meet "regularly on the first Tuesday of each month. Regular meetings shall be held at the tribal office." Defendants

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have violated this section and do not offer any argument or proof to the contrary. The Court must view Plaintiffs' allegations as true since there is a factual dispute as to whether such meetings have taken or will take place. At the very least, there is a factual question regarding whether special or regular meetings have taken place or will take place, requiring the Court to dismiss Defendants' motion.

Further, Article III, Section 2 of the Nooksack Constitution dictates that the governing body of the Nooksack Tribe is an **eight-person** body, comprising particular officers and members. Defendants have illegally excluded particular members of this governing body and therefore are violating Section 2 of the Constitution.

e. Defendants have violated Nooksack law and will continue to violate Nooksack law by illegally employing counsel

Nooksack law clearly requires tribal attorney engagements to be approved by the Secretary of Interior. Article VI, Section 1(d) requires the choice of attorneys of record and fixing of fees "to be subject to the approval of the Secretary of the Interior." Defendants essentially argue that the Secretary lacks the authority to approve or disapprove of engagement and therefore Defendants need not obtain such approval. Whether the Secretary has such authority is irrelevant. As one of Defendants' attorneys wrote in 2000:

> [W]ith the amendment of section 81, attorney contracts with non-IRA tribes are exempt from secretarial approval. However, many tribal constitutions require secretarial approval of attorneys contracts. **<u>These statutory changes do not change the tribal constitutional provisions</u>**; however, it will remove BIA's objection to amendments of tribal constitutions that take out an approval requirement.

Thomas P. Schlosser, "Why Doing Business On Reservations Is Unique," (June 16, 2000) (emphasis added).[2] Indeed, it does not matter that 25 U.S.C. § 81 was amended, or that the Tribe might meet resistance in having contracts approved or disapproved. The fact is, engagements

[2] http://www.msaj.com/papers/SEMINAR.HTM (accessed October 1, 2013).

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with the Tribe must be Secretarially approved as a matter of the Nooksack Constitution. Defendants' self-serving interpretation of the Constitution is also irrelevant (and not just because Defendants illegally prevented certain Tribal Councilpersons from deliberating on Resolution #13-56 (Roberts Declaration, at ¶ 3)). It does not matter that Defendants received a clearly conflicted opinion from their attorneys regarding those attorneys. If Defendants do not wish to comply with the Constitution, they should attempt to amend it. They have already (illegally) done so once this year.

f. Defendants have violated Nooksack law and will continue to violate Nooksack law by operating under unapproved Disenrollment Procedures

The Nooksack Constitution clearly requires Disenrollment Procedures to be approved by the Secretary. Parsed correctly, it requires that (1) ordinances (2) governing, inter alia, loss of membership (3) are "subject to the approval of the Secretary of the Interior." Constitution, Art. II, Sec. 2. Defendants' sole argument that their law regarding disenrollment is constitution is that the term "ordinance" does not include laws like the Disenrollment Procedures. Ordinance is a broad term that means "a rule established by authority." Black's Law Dictionary at 757 (7th ed. 1991). It includes almost everything Defendants undertake formally. Defendants are operating under unapproved procedures, and are therefore violating the Nooksack Constitution. Any acts in furtherance of such regulations are illegal and must be enjoined. Plaintiffs have more than met their burden to move forward with this claim.

C. Plaintiffs Have Adequately Stated A Claim

Preliminarily, the Court must treat Defendants Rule 12(b)(6) arguments under the summary judgment standard since they have introduced extrinsic evidence. This means any factual disagreements require dismissal of the motion.

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Defendants argue that Plaintiffs fail to state a claim in four ways. They argue (1) Defendants "validly rejected Plaintiff Rapada's Recall Petition on October 22, 2013." Motion, at 23. That cannot be true since Defendants did so a day after they were required to do so under law. This factual dispute is a mixed legal and factual question and requires dismissal. Moreover, Plaintiffs have not sought retrospective relief; they seek prospective relief halting Defendants from illegally interfering with the election that must now take place.

Defendants argue that (2) "Plaintiffs have not violated any law by not yet scheduling special meeting requested" by elected Nooksack councilpersons or "27 tribal members" because "[t]here is no set timeframe for scheduling special meetings under Article II, Section 5 of the Bylaws." Motion, at 23. Again, this argument is absurd.

Defendants argue that (3) Secretarial approval of the Disenrollment Procedures and attorney engagements is not necessary. The Constitution requires approval. It does not matter how Defendants interpret the constitution when it clearly requires approval. If Defendants want the Constitution to say something else, they should amend it as they did when they wanted to eliminate non-adopted Nooksacks with only ¼ Indian blood.

Defendants argue that (4) they were not required to keep their promise to refrain from disenrolling anyone pending disenrollment hearings. Defendants make Grett Hurley a witness yet again (Motion, at 24), and introduce factual disputes related to whether certain Plaintiffs requested meetings with Defendants. Discovery will shed light into such claims. For now, they must be rejected.

D. Exhaustion Does Not Bar Plaintiffs' Claims

Defendants argue that all of their actions related to automatic disenrollment and recall are final, but that the Court should still dismiss Plaintiffs claims under an exhaustion theory. Defendants' argument can be discarded. First, any pretextual administrative exhaustion would be

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futile because, as Defendants admit, they contend their actions are final and not subject to any further review. Motion, at 26; *Goodin v. Innovative Technical Solutions, Inc.*, 489 F.Supp.2d 1157, 1163 (D. Hawai'i, 2007). Second, administrative exhaustion is not required when there are no administrative remedies available to Plaintiffs. There are none, by Defendants' own admissions. Motion at 26. Third, administrative exhaustion is not required in the *Ex parte Young* context. *See Alleghany Corp. v. Haase*, 896 F.2d 1046, 1050 (7th Cir. 1990) (exhaustion of state remedies before federal court action "would spell the demise of *Ex parte Young* . . . We are not authorized to issue a death warrant for *Ex parte Young*.").

Plaintiffs are not challenging past administrative action or behavior – they are seeking to enjoin future illegal conduct in furtherance of unconstitutional Tribal action. There can be no exhaustion requirement for enjoining future unconstitutional acts by Defendants. Plaintiffs cannot pre-exhaust.

E. No Political Question Bars Plaintiffs' Claims

Defendants argue that Defendants' (1) holding telephonic special meetings and (2) excluding members for conflicts of interest, entail political questions that cannot be heard by the Court. This request for dismissal must be viewed as a motion for summary judgment. Defendants have not provided competent proof regarding their holding of telephonic special meetings or excluding tribal council people, thus Plaintiffs' allegations must be taken as true:

Defendant Chairman Kelly has convened those special meetings that he has seen fit to call, exclusively by conference call and remote access from off-reservation in Fairhaven, Bellingham, Washington, in violation of Article II of the Nooksack Bylaws. Defendant Kelly uses a mute button in order to control who speaks, and who does not speak during the Special Meetings, also in violation of Article II of the Nooksack Bylaws, as well as Article III, Section 2 of the Nooksack Constitution. Complaint for Prospective Equitable Relief, ¶ 23. On August 8,

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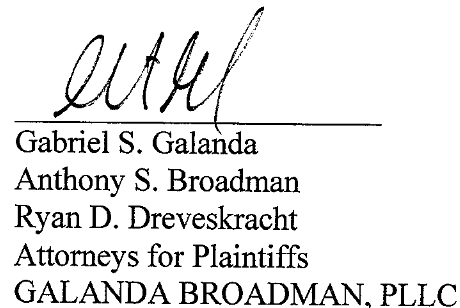
2013, Defendants met in secret during a Special Meeting and passed a set of Disenrollment Procedures upon an unlawful six-Councilperson "vote of 5 FOR, 0 OPPOSED, and 1 ABSTENTION." Plaintiffs Tribal Council Secretary Rudy St. Germain and Councilmember Michelle Roberts were (once again) excluded from attending that meeting. *Id.*, at ¶25; *see also* Roberts Declaration, at ¶ 3. In sum, these facts must be taken as true.

As a purely legal matter, taking up Defendants' future illegal execution of actions stemming from past "political" decisions does not create a nonjusticiable political question. If it did, there would be no *Ex parte Young*. Political questions would swallow the rule. Defendants describe a litany of retrospective bad behavior that has been immunized by the political question doctrine. But they fail to cite to any authority for the proposition that the political or internal nature of government acts leading to future illegal behavior can serve as a basis for dismissal.

IV. CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' motion and allow Plaintiffs to move forward with discovery and trial on the merits. It is time to restore the Nooksack Rule of Law.

DATED this 21st day of November, 2013.



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DECLARATION OF SERVICE

I, Gabriel S. Galanda, say:

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

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

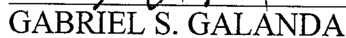
Grett Hurley
Rickie Armstrong
Tribal Attorney
Office of Tribal Attorney
Nooksack Indian Tribe
5047 Mt. Baker Hwy
P.O. Box 157
Deming, WA 98244

A copy was emailed to:

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

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

DATED this 21st day of November, 2013.



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