12-02-13 A11:25 IN

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

ADAMS, *et al.*, Plaintiffs, v. KELLY, *et al.*, Defendants.	Case No. 2013-CI-CL-004 DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO THE MOTION TO DISMISS Date: December 3, 2013 Time: 10:00 AM COPY

COME NOW Defendants in the above-entitled action, by and through the Office of Tribal Attorney, without waiving other defenses and objections, and provide this Reply to Plaintiffs' Response to Defendants' Motion to Dismiss.

I. INTRODUCTION

On October 23, 2013, Plaintiffs initiated a third lawsuit against Defendants in Tribal Court for equitable relief. Plaintiffs allege that Defendants are violating the Nooksack Constitution by failing to validate a recall petition, failing to schedule two requested special meetings, disenrolling four individuals, conducting Council meetings telephonically, employing counsel without the Secretary of the Interior's (Secretary) approval, and passing Disenrollment

Procedures.

Defendants move this Court to dismiss Plaintiffs' Complaint for lack of jurisdiction, failure to state a claim upon which relief can be granted, failure to exhaust administrative remedies, and raising nonjusticiable claims under the political question doctrine.

II. LEGAL ARGUMENT

Defendants have appropriately applied proper legal standards throughout this case. Defendants are immune from suit, the Tribe has not waived sovereign immunity, and this Court lacks jurisdiction to hear this case. Additionally, Plaintiffs failed to exhaust administrative remedies, and Plaintiffs present nonjusticiable political issues.

A. Defendants Have Appropriately Applied Proper Legal Standards.

Defendants move to dismiss Plaintiffs' complaint for sovereign immunity and lack of jurisdiction under Nooksack and federal law, lack of subject matter jurisdiction, failure to state a claim, failure to exhaust administrative remedies, and raising nonjusticiable political questions. This is a dispositive motion under Section 10.05.050(f) of Title 10, which states that a "party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move for a summary judgment in his favor upon all or any part thereof." Plaintiffs unnecessarily complicate the applicable legal standards.

Under Nooksack law, 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). 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) (holding that tribal employees retained sovereign immunity even though the plaintiff alleged that the employees acted outside the scope of their authority, because the plaintiff failed to legally or factually support this allegation). Tribal sovereign immunity "extends to actions brought against tribes in tribal court." *Olson*, 6 NICS App. at 51.

No Nooksack Court has decided whether *Ex parte Young* or even an *Ex parte Young*-like exception to sovereign immunity applies in Nooksack Tribal Court. *Cline*, Case No. NOO-CIV-02/08-5. 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.*" *Id.* at 6 (emphasis added). As noted in Defendants' Brief in Support of the Motion to Dismiss (Defendants' Brief), at 10-11, the federal application of *Ex parte Young* has become increasingly convoluted.

Plaintiffs allege that the *Verizon Maryland v. Public Service Commission* (*Verizon*), 535 U.S. 635 (2002) case sets forth a clear standard, and that analysis of the merits of a claim is not appropriate when determining whether *Ex parte Young* applies. Pls.' Resp. to Defs.' Mot. to Dismiss (Pls.' Resp.) at 3:9-16. Yet just this year, the Ninth Circuit specifically analyzed whether tribal officials were acting within the scope of their authority when they allegedly assessed unconstitutional taxes. *Miller v. Wright*, 705 F.3d 919, 927-28 (9th Cir. 2013) *cert.*

denied, 133 S. Ct. 2829 (U.S. 2013). The *Miller* Court held that the plaintiffs could not "circumvent tribal immunity by naming tribal officials as defendants." *Id.* at 928. *Cline* and *Miller* suggest that Defendants retain sovereign immunity, because there has been no waiver, and Defendants have acted within the scope of their authority. In addition, even the more technical Federal Rule of Civil Procedure (FRCP) 65(a)(2) allows courts to consider evidence received on a motion for a preliminary injunction as part of the trial record.

Although Plaintiffs correctly state that a FRCP 12(b)(1) motion may consist of a facial or factual attack, Pls.' Resp. at 3:7-9, Plaintiffs continue to misrepresent the holdings of several other cases used to support their arguments to this Court. Significantly, *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974, 977 (9th Cir. 2006) does not stand for the proposition that tribal sovereign immunity must be analyzed under FRCP 12(b)(1) as Plaintiffs allege, and *Verizon* does not bar Defendants from launching a factual challenge under FRCP 12(b)(1)—especially since *Verizon* and FRCP 12(b)(1) do not automatically apply in Nooksack courts. *See* Pls.' Resp. at 3:5-7. Additionally, Plaintiffs' characterization of the holding in *Blue Lake Rancheria v. Morgenstern*, 2:11-CV-01124 JAM, 2011 WL 6100845, at *3 (E.D. Cal. Dec. 6, 2011) is also misguided; the Court in *Blue Lake Rancheria* disregarded extrinsic evidence only because it was irrelevant. There is no reason to disregard Defendants' extrinsic evidence here.[1]

---

[1] This Court has already ruled in a related matter that Section 10.05.040(a) allows parties to file "more than simple pleadings...." *Lomeli, et al. v. Kelly, et al.*, Case No. 2013-CI-CL-001, Decision and Order Denying Defs.' Mot. to Strike in Part and Granting in Part, at 3-4 (2013). This Court also relied on Section 10.06.010, which states that "[t]he purpose of these rules of evidence is to ensure that the Tribal Court is able to determine the truth of the matter with a minimum of delay, confusion and uncertainty[,]" in finding that Nooksack law leans "in favor of the admission of evidence rather than the limiting of evidence." *Id.* at 4. As noted above, Title 10 provides for dispositive motions, so the Court need not rely on all the inflexible standards surrounding FRCP 12(b)(1). *See* Title 10, § 10.05.050(f).

Moreover, the Court may choose to analyze this case under the FRCP 56 Summary Judgment standard since this is a dispositive motion.[2] There is no genuine issue of material fact here, and even viewing all the evidence in the light most favorable to Plaintiffs, Defendants are entitled to judgment as a matter of law. In determining whether there is any dispute involving material facts, the federal Supreme Court has explained that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *accord British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952-53 (9th Cir. 1978).

Under FRCP 12(b)(6), courts assume factual allegations in a complaint are true, but conclusions of law disguised as fact and unwarranted inferences of fact are not accepted as true – nor are they viewed in the light most favorable to the plaintiffs. *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."); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968) (when "testing the legal sufficiency of the complaint the well-pleaded allegations are taken as admitted but conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted."); *Ogden River Water Users' Ass'n v. Weber Basin W. Cons.*, 238 F.2d 936, 940 (10th Cir. 1956) ("[c]onclusions of law and unwarranted inferences of fact are excluded from consideration."). The issue of whether Defendants acted within the scope of their authority is a legal question. For the purposes of Defendants' motion, the Court should not rely on Plaintiffs' conclusions of law

[2] Again, however, the Court does not need to import every intricacy of the FRCP 56 standard, because Section 10.05.050(f) provides for "a summary judgment[.]"

disguised as fact and unwarranted inferences of fact contained in their complaint as true under the 12(b)(6) standard.[3]

Plaintiffs, relying on *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007), also allege that the political questions at issue in this case should not be addressed as a jurisdictional bar to suit, but they should be viewed as presenting prudential issues under FRCP 12(b)(6) standards. Pls.' Resp. at 5:12-24. Plaintiffs' reliance on *Corrie* is misplaced; the Court in *Corrie* stated that the defendant's motion was "more appropriately construed as a Rule 12(b)(1) motion for dismissal for lack of subject matter jurisdiction" and held that "if a case presents a political question, we lack subject matter jurisdiction to decide that question," 503 F.3d at 982.

B. Defendants are Immune from Suit and This Court Lacks Jurisdiction.

As explained above in Section A, the Nooksack Tribe, the Tribal Council and tribal officials acting within the scope of their authority are immune from suit. *See Cline*, Case No. NOO-CIV-02/08-5, 5-6. In *Cline*, the Nooksack Tribal Court of Appeals explained that the *Ex parte Young* doctrine[4] 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.[5] Case No. NOO-CIV-02/08-5. There is no reason for

---

[3] For example, Plaintiffs allege that no public meetings have taken place, but under the Bylaws, all meetings of the Tribal Council are public except executive sessions. *See* Bylaws, art. II, § 6. Plaintiffs' assertion to the contrary is a conclusion of law disguised as fact.

[4] This doctrine is based on the need to protect the supremacy of federal law, and there is no basis to apply it when a tribal official is accused of violating a tribal law. *See 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).

[5] Plaintiffs allege that *Ex parte Young* applies in Nooksack courts, and they allege that it applies regardless of whether Defendants have acted outside the scope of their authority. *See* Pls.' Resp.

this Court to reach whether a *Young*-like doctrine applies in this Court, because here Appellees have acted within the scope of their authority under tribal law, which means they retain sovereign immunity, and this Court lacks jurisdiction.

The *Verizon* case and its progeny do not control this Court. *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)). Additionally, the Ninth Circuit recently analyzed whether tribal officials exceeded their scope of authority in assessing allegedly unconstitutional taxes. *Miller*, 705 F.3d at 927-28. This Court must also determine whether Defendants have acted beyond the scope of their authority.[6] *See*

---

at 6:12-22. These allegations are contrary to the Nooksack Court of Appeals' *Cline* decision and this Court's decisions in *Lomeli* and *Roberts v. Kelly.* Plaintiffs further allege that "the *Olson* Court's resolution of the *Ex parte Young* question was essential to the outcome of the case." Pls.' Resp. at 7:21-22. The *Olson* Court, however, did not decide the *Ex parte Young* issue precisely because it was not essential to the outcome of the case. *Olson v. Nooksack Indian Housing Authority*, 6 NICS App. 49, 55 (Nooksack Ct. App. 2001) ("We reiterate that we do not decide today whether an *Ex parte Young* remedy is, in fact, available to parties aggrieved by alleged violations of ICRA. That issue is not directly before us and we leave that decision for another day...."). Lastly, Title 10 does not implicitly provide for *Ex parte Young* as appellants allege. Pls.' Resp. at 9-10. Title 10 instead expresses that nothing in Title 10 may be construed as a waiver of immunity. Title 10, §§ 10.00.050; 10.00.100. *Ex parte Young* acts as an exception to sovereign immunity when it applies, but Title 10 says nothing about the applicability of a federal doctrine concerned with the supremacy of federal law.

[6] Plaintiffs claim that new discovery rules support application of the *Verizon* line of cases. Pls.' Resp. at 11-12. Section 10.05.110 of Title 10 has not been interpreted by the Nooksack Tribal

Cline, Case No. NOO-CIV-02/08-5, at 6. *Ex parte Young* does not apply here, because Plaintiffs only allege violations of tribal law, and Defendants have acted within the scope of their authority.

1. The Council acted within its authority when it deemed Plaintiff Rapada's Recall Petition invalid.

The Constitutional Petition Ordinance states that the "Council shall have thirty (30) calendar days from receipt of the Petition to either accept it as valid or reject the Petition as invalid. The Petitioner will be notified of the Council's decision within five (5) days of the decision." Title 60, § 60.03.050. If the Council determines that a Petition does not meet the requirements of Title 60, the Petition is deemed invalid, and the Petitioner will be notified within five days of the decision. *Id.* at (A). In that instance, the Petitioner may file a written request for reconsideration with the Council within five days of receipt of notice of the invalid Petition. *Id.* The Council's decision is final. *Id.* If the Council finds that the Petition meets Title 60's standards, the Council must declare the Petition valid. *Id.* at (B). Only a finding of a valid Petition requires that a special election be held. *Id.*

In a related case, this Court has determined that it 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." *Lomeli*, Order Denying Mot. for Prelim. Inj., at 9:18-20 (May 20, 2013). Determining that Plaintiff Rapada's Recall Petition was invalid under Title 60 on the 31st day rather than the 30th

---

Court, and it remains to be seen how that section will be interpreted. Additionally, Plaintiffs have not propounded any discovery, and Defendants have not opposed any discovery, so Plaintiffs rely on a mere hypothetical argument in raising Section 10.05.110.

day constitutes a mere error of law at most.[7] Plaintiffs were not prejudiced or harmed in any manner by the one-day delay, because the Council timely notified Plaintiff Rapada of the invalidity of the Petition and the reasons for invalidity within five days of October 21, 2013—the 30th day for review.[8] *See* Decl. of R. George ¶6; Decl. of Service at 1 and Exhs. A-B. Moreover, Plaintiff Rapada still had five days to file a request for reconsideration. *See* Title 60, § 60.03.050(A). To date, no Plaintiff, including Plaintiff Rapada, has requested reconsideration of the Council's determination that the Recall Petition fails to meet Title 60's standards. Decl. of A. Johnny.

The Council properly found that Plaintiff Rapada's Recall Petition failed to satisfy the requirements of Title 60, because it lacked the statement required by Section 60.02.050, it failed to provide sufficient information to Chairman Kelly, the potential recallee, under Section 60.02.030(A), and there was insufficient proof of service under Section 60.02.030(B)[9]. *See* Decl.

---

[7] The Council attempted to determine the validity of the Recall Petition by the 30th day, October 21, 2013, but Secretary St. Germain demanded 24 hours' notice of the meeting. Decl. of R. George ¶6.

[8] Technically, the 30th day fell on the weekend before October 21, 2013, so the deadline became October 21, 2013. *See* Title 60, § 60.05.010. Plaintiffs seem to believe that the 30th day was October 22, 2013. Pls.' Resp. 12:23-24. If October 22nd was the 30th day, then the Council timely responded to the Recall Petition on October 22, 2013. Whether the 30th day fell on October 21, 2013 or October 22, 2013 is not a genuine issue of material fact. The only material fact here is whether Plaintiff Rapada was notified within five days of October 21, which he was.

[9] Council's rejection on the stated points was after an initial inquiry as to the "form" of the Petition. The Notice clearly stated that "[t]he Council does not make any decision on the sufficiency of the remainder of the petition." *See* Decl. of R. George, Exh. G, at 3. Assuming that Mr. Rapada submitted a petition that did not possess the stated deficiencies or he had requested and was granted a reconsideration, the Council would have been obligated to consider whether the Petition contained sufficient valid signatures of tribal members eligible to vote. *Const.*, art. VI, § 4(A); Title 63, § 60.03.040. Clearly, Plaintiffs' argument that the Petition is deemed accepted if Council fails to act within 30 days is without merit. Council cannot permit a recall election to go forward based upon a petition containing an insufficient number of valid

of R. George, Exh. G. Defendants acted within the scope of their authority as the Council in determining that the Recall Petition was invalid.

Additionally, this Court has found that it cannot order the Council to refrain from interfering with a special recall election, because doing so amounts to ordering the Tribal Government to hold a special recall election. Amended Order Denying Plaintiffs' Motion for TRO, at 5-6 (Nov. 15, 2013). Ordering such relief is prohibited by sovereign immunity, including any applicable exceptions to sovereign immunity. *Id.*

2. Plaintiffs' claims regarding special meeting requests are not ripe.

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 tribe. Such written request shall be filed with the chairman or the secretary of the tribal council, and he shall notify the tribal council members twenty-four (24) hours before the date of such tribal council meetings.

A matter is not ripe when "the existence of the dispute hangs on future contingencies that may or may not occur." *Porter v. Jones,* 319 F.3d 483, 490 (9th Cir. 2003) (quoting *Clinton v. Acequia Inc.* 94 F.3d 568, 572 (9th Cir. 1996)). The Bylaws do not require the Council to schedule a special meeting within a certain period of time.

Plaintiffs rely on inapposite federal case law under the Administrative Procedure Act (APA) in an attempt to impose Plaintiffs' preferred schedule on the Council. In *Blankenship v. Secretary of HEW*, 587 F.2d 329, 333-34 (6th Cir. 1978), the Court explained that the APA requires compelling action when it has been "unlawfully withheld or unreasonably delayed."

---

signatures from tribal members eligible to vote, regardless of how long it took the Tribal Council to act to validate or reject a petition.

Citation omitted. There, the plaintiffs were seeking "benefits for the necessities of life[,]" and the Court held that the Secretary of HEW had to develop rules addressing delay within 120 days. *Blankenship*, 587 F.2d at 333-34. In *Blankenship v. Secretary of Health & Human Services*, 858 F.2d 1188, 1189 (6th Cir. 1988), the Sixth Circuit merely remanded the case to the lower court for a determination related to whether a class action was appropriate when the Supreme Court held that courts could not "impose mandatory deadlines on the administrative process for the resolution of disability claims as a remedy for serious delays in that process." Similarly, the courts in *Caswell v. Califano*, 583 F.2d 9, 18 (1st Cir. 1978) and *Jablonsky v. Sierra Kings Health Care Dist.*, No. 06-1299, 2007 WL 2202051, at *3 (E.D. Cal. July 30, 2007), remarked on the government's failure to take action within a reasonable period of time. Plaintiffs' reliance on this line of cases is misplaced; these cases do not speak to special meetings requested prior to any deprivation, and they do not require Nooksack Tribal Council action within any specified time.

3. The Council complied with the Constitution and Title 63 when it disenrolled Nadine Rapada, Rose Hernandez, Cody Narte, and Kristal Trainor, and the Stipulation does not provide for relief.

Plaintiffs allege that the Stipulation in *Lomeli* prohibited disenrolling Nadine Rapada, Rose Hernandez, Cody Narte, and Kristal Trainor, but the Stipulation does not apply at all in this case – as this Court has previously recognized:

> Plaintiffs seek enforcement of a stipulation related to the *Lomeli* matter. As the Court has noted in a prior Order denying the *Plaintiffs' Motion for Contempt*, this case is not the appropriate vehicle by which to address the Stipulation or the actions taken with regard to it. As the Court attempted to make plain to the Plaintiffs, filing a motion regarding matters in *Lomeli* should be filed under the *Lomeli* caption. It's unclear how the Plaintiffs sought enforcement of that Stipulation in this case when the underlying theory of their suit is action for declaratory, injunctive *prospective* relief, but the fact that they sought

> enforcement under this case rather than the original case to which the Stipulation applies is fatal to this claim.

Roberts, Order Granting Defendant's [sic] Mot. to Dismiss, at 14:2-9 (October 17, 2013); *see also Roberts*, Second Amended Order Denying Emergency TRO, at 9:18 – 10:5 (August 21, 2013). *Minnesota Mut. Life Ins. Co. v. Ensley*, 174 F.3d 977, 986 (9th Cir. 1999) does not stand for the proposition that this Court may enforce a contract from another case. Instead, that case involved enforcement of an injunctive order. *Ensley*, 174 F.3d at 986. Even if the Stipulation did apply, it did not constitute an agreement by Defendants that the Tribe would cease all disenrollment proceedings.[10] On the contrary, the Stipulation only concerned disenrollment proceedings for those individuals represented by Galanda Broadman as of April 12, 2013. *Lomeli*, Hurley Decl., at ¶9 and Exh. 3. Nadine Rapada, Rose Hernandez, Cody Narte, and Kristal Trainor were not represented by Galanda Broadman by the deadline imposed by the Stipulation, April 12, 2013, and as such, the Council is in full compliance with the Stipulation. *See id.*

4. The Council has held special meetings in accordance with the Bylaws.

Plaintiffs allege that Defendant Kelly has convened special meetings in violation of Article II of the Bylaws and Article III, Section 2 of the Constitution.[11] Compl. 11:9-14. The

---

[10] Moreover, Plaintiffs could not obtain their requested relief, because "[i]t is well established that *Ex parte Young* does not permit individual officers of a sovereign to be sued when the relief requested would, in effect, require the sovereign's specific performance of a contract." *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp.*, 177 F.3d at 1226.

[11] Plaintiffs again argue that failure to call regular meetings on the first Tuesday of the month and failure to hold those meetings in the tribal office warrants a waiver of immunity and relief. *See* Pls.' Resp. at 14-15. This Court has already held that "[c]anceling meetings for holidays, public safety reasons or other reasons of public concern do not give rise to the loss of sovereign immunity on the part of the Defendants." *Lomeli*, Amended Order Granting Defendants' Motion to Dismiss Second Amended Complaint, at 18.

Bylaws do not specify where a special meeting must take place, and the Bylaws do not demand physical presence at a special meeting. Article III, Section 2 of the Constitution merely states the composition of the Tribal Council, and the absence of certain members of the Council does not violate Section 2. Additionally, there is no material factual dispute regarding Council meetings, and aside from a conclusory allegation, Plaintiffs fail to point to any dispute. *See* Pls.' Resp. at 14-15. The Council has discretion to set its own procedures, and Plaintiffs' allegations related to those procedures raise nonjusticiable political questions. *See Const.* art. VI, § 1(J); discussion *infra* Section E. Defendants have acted within the scope of their authority by calling special meetings pursuant to tribal law.

5. Defendants have properly employed counsel.

The federal law underlying Article VI, Section 1(D) of the Constitution no longer applies, so the Tribe may interpret its Constitution in a manner that avoids the futile act of requesting Secretarial approval. On October 8, 2013, the Council approved Resolution 13-156, which interprets Article VI, Section 1(D) "as not requiring submission to BIA or Secretarial approval of the Nooksack Indian Tribe's 'choice of counsel' and 'fixing of fees'...." Decl. of R. George, Exh. A.

Plaintiffs also lack standing to raise this claim. The federal Supreme Court has found that:

> a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992); *see also United States v.*

Richardson, 418 U.S. 166 (1974) (dismissing a taxpayer suit alleging that the federal government's failure to disclose the Central Intelligence Agency's expenditures violated the federal Constitution). Plaintiffs stand in the same position as every tribal member in alleging that the Council's choice of legal counsel and fee agreements violates the Constitution; Plaintiffs allege only a "generally available grievance." *See id.* The Council has properly employed counsel to defend itself, the Tribe, and tribal officials against this litigation, and Plaintiffs lack standing.

6. The Disenrollment Procedures do not need Secretarial approval.

Plaintiffs allege that the Disenrollment Procedures violate the Constitution, because they were not approved by the Secretary. Pls.' Resp. at 16. Plaintiffs base their allegations on Article II, Section 2 of the Constitution, which 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." Plaintiffs raised this same issue in the pending appeal in *Roberts v. Kelly*, No. 2013-CI-APL-003. *See, e.g.*, Opening Brief of Appellants at 30 ("if the Procedures were not an "ordinance" …they were not "approved by the Secretary of Interior" as required by Article II, Section 2."). There is no reason to decide an issue here that the same plaintiffs have already presented to the Nooksack Court of Appeals.

The Constitution only requires ordinances governing membership to be approved by the Secretary. There is no approval requirement for mere meeting procedures.

Here, the Procedures do not alter Title 63, which has been approved by the Secretary, and the Procedures do not impose any substantive requirements. The Procedures simply provide

detail as to the process of one stage of the disenrollment proceedings—the meetings—in order to avoid confusion. The Constitution grants the Tribal Council the authority to "adopt resolutions regulating the procedures of the tribal council itself...[,]" and this authority allowed the Council to adopt the Disenrollment Procedures. *Const.*, art. VI § 1(J).

C. Plaintiffs Fail to State a Claim Upon Which Relief Can Be Granted.

Plaintiffs' claims fail to state a claim upon which relief can be granted under Title 10 and FRCP 12(b)(6).[12] In order to survive a Rule 12(b)(6) motion to dismiss, 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 . . . ." *Twombly*, 550 U.S. at 555. That is, a petition must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (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 the misconduct alleged." *Id.* There must be more than "a sheer possibility that a defendant has acted unlawfully." *Id.*

While courts assume factual allegations in a complaint are true, conclusions of law disguised as fact and unwarranted inferences of fact are not accepted as true – nor are they viewed in the light most favorable to the plaintiffs. *Western Mining Council*, 643 F.2d at 624; *Hiland Dairy, Inc.*, 402 F.2d at 973; *Ogden River Water Users' Ass'n*, 238 F.2d at 940. Plaintiffs' facts do not present cognizable claims, because there is no redressable wrongdoing as

[12] Plaintiffs alternate between directing the Court the ignore any of Defendants' extrinsic evidence and directing the Court to utilize a summary judgment standard due to extrinsic evidence. Plaintiffs also fail to point to any genuine issues of material fact.

explained above in Section B. Plaintiffs simply have not introduced facts sufficient to allow this Court to infer that Defendants are liable for any misconduct.

D. Plaintiffs Failed to Exhaust Administrative Remedies.

Plaintiffs have not exhausted their remedies with the Tribal Council on their claims related to the Recall Petition and disenrollment of Plaintiffs Nadine Rapada, Rose Hernandez, and Kristal Trainor.[13] Plaintiffs allege that exhaustion is not required when it would be futile, when there are no available administrative remedies, and when *Ex parte Young* applies. Pls.' Resp. at 17-18. Yet, exhaustion would only be required here if the Court determines that it has jurisdiction. Thus, there would be no futility in requiring exhaustion. Additionally, the mere fact that Plaintiffs' administrative appeals have been waived by Plaintiffs' failure to exhaust does not mean exhaustion was not required. The Ninth Circuit held that a tribal member waived an Indian Civil Rights Act claim by failing to present it to the tribal appellate court. *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998). If exhaustion required a present remedy, there would never be a dismissal for failure to exhaust administrative remedies. Plaintiffs' reliance on *Ex parte Young* is incorrect, as it does not apply here, and it does not bar the exhaustion requirement. *See supra* Sections A and B. Plaintiffs must still exhaust their administrative remedies, which they have not, and therefore, their claims as to the Recall Petition and the automatic disenrollments must be denied.

E. Plaintiffs Raise Nonjusticiable Political Questions.

This Court lacks jurisdiction to review nonjusticiable political questions regardless of the

---

[13] Plaintiff Cody Narte requested reconsideration of his disenrollment on September, 12, 2013. *Lomeli,* Fourth Decl. of C. Bernard, at ¶23. While Plaintiff Narte has not failed to exhaust his administrative remedies, his claim is not ripe, as the reconsideration process must be allowed to run its course.

remedy sought. The political question doctrine does not swallow any aspect of *Ex parte Young*. In *U.S. v. Ballin*, the Supreme Court held that "[t]he power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal." *U.S. v. Ballin* 144 U.S. 1, 5 (1892).; *see also Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 349-40 (Alaska 1987) (holding that it is the legislature's prerogative to make, interpret, and enforce its own procedural rules, and the judiciary cannot compel the legislature to exercise a purely legislative prerogative). Legislatures may also disregard their own rules and still avoid judicial review. *State ex rel. City Loan & Sav. Co. v. Moore*, 177 N.E. 910, 911 (Ohio 1931) ("[h]aving made the rule, it should be regarded, but a failure to regard it is not the subject-matter of judicial inquiry").

Here, Article VI, Section 1(J) of the Constitution reserves to the Council alone the authority to adopt internal procedures, and questions concerning the Council's application and interpretation of those procedures are nonjusticiable political questions. Plaintiffs' claims for equitable relief regarding holding special meetings telephonically and excusing members for conflicts of interest concern only the Council's internal procedures, and these claims should be dismissed as nonjusticiable political questions.[14]

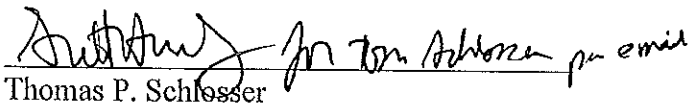
III. CONCLUSION

For the foregoing reasons, Defendants request that the Court grant Defendants' Motion to Dismiss Plaintiffs' Complaint.

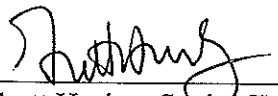
---

[14] Whether Defendants have violated any law is a legal question and not a fact question. The Court need not accept Plaintiffs' legal conclusions as true.

Respectfully submitted this 2nd day of December, 2013.



Thomas P. Schlosser
Rebecca JCH Jackson
Morisset, Schlosser, Jozwiak & Somerville
Attorneys for Defendants



Grett Hurley, Senior Tribal Attorney
Rickie Armstrong, Tribal Attorney
Attorneys for Defendants
Office of Tribal Attorney, Nooksack Indian Tribe

T:\WPDOCS\0282\09738\Adams Reply to Opp to MTD FILE 120213.doc
rsj:12/2/13

12-02-13 A11:25 IN

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

ADAMS, et al., Appellants, v. KELLY, et al., Appellees.	Case No. 2013-CI-CL-004 DECLARATION OF SERVICE COPY

I Declare:

That I am over the age of 18 years and competent to be a witness.

On December 2, 2013, I duly mailed by first class mail, a copy of Defendants; Reply to Plaintiffs' Response to the Motion to Dismiss to Galanda Broadman PLLC, Attn: Gabriel Galanda, P.O. Box 15146, Seattle, WA 98115.

Also, on December 2, 2013, I emailed Gabriel S. Galanda at gabe@galandabroadman.com a courtesy copy of the above-referenced document.

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

Signed at Deming, Washington on November 19, 2013.

Susan Steadle, Legal Assistant
Office of Tribal Attorney, Nooksack Indian Tribe

Nooksack Indian Tribe
Office of Tribal Attorney
P.O. Box 63
5047 Mt. Baker Hwy.
Deming, WA 98244
Tel. (360) 592-4158
Fax (360) 592-2227