

*Deanna Francis*

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. 2014-CI-CL-006

DEFENDANTS' RESPONSE IN  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION – WRIT OF MANDAMUS

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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 Response in Opposition to Plaintiffs' Motion for Preliminary Injunction – Writ of Mandamus.

**I. INTRODUCTION**

On January 21, 2014, Plaintiffs initiated a fifth lawsuit against Defendants in Tribal Court for equitable relief and a Motion for Preliminary Injunction – Writ of Mandamus (Mot. for Prelim. Inj.). The Tribal Court has dismissed two related lawsuits against Defendants based on sovereign immunity and standing. *See Roberts, et al. v. Kelly, et al.*, Case No. 2013-CI-CL-003, Order Granting Defendants' Motion to Dismiss (2013); *Lomeli, et al. v. Kelly, et al.*, Case No. 2013-CI-CL-001, Amended Order Granting Defendants' Motion to Dismiss Second Amended Complaint (2013). The Court of Appeals recently affirmed this Court's dismissal in *Lomeli. Lomeli v. Kelly*, 2013-CI-APL-002, Opinion (January 15, 2014). Here, Plaintiffs allege that

1 former Secretary St. Germain and former Councilmember Roberts were unlawfully removed  
2 from office. Mot. for Prelim. Inj.

3 Defendants oppose Plaintiffs' Motion for Preliminary Injunction, because Plaintiffs are  
4 not likely to succeed on the merits, there is no irreparable injury, and injunctive relief is not in  
5 the public interest. Defendants are immune from suit, and this Court lacks jurisdiction. The  
6 Tribal Council lawfully found two council positions vacant due to three consecutive absences  
7 from special meetings without sufficient reason under Article V, Section 1 of the Constitution.

## 8 **II. FACT STATEMENT**

9 On January 16, 2014, at 3:13 PM, Tribal Council Chairman Kelly called a special  
10 meeting for 3:15 PM on January 17, 2014 at the Chairman's office. Decl. of Robert Kelly, Jr.,  
11 Exh. A. Neither former Secretary St. Germain nor former Councilmember Roberts attended the  
12 meeting. *Id.* at 3. On January 17, 2014, at 3:04 PM, Tribal Council Chairman Kelly called a  
13 special meeting for 3:15 PM on January 18, 2014 at the Chairman's office. *Id.* and Exh. D.  
14 Neither former Secretary St. Germain nor former Councilmember Roberts attended the meeting.  
15 *Id.* at 4. On January 19, 2014, at 10:35 AM, Tribal Council Chairman Kelly called a special  
16 meeting for 10:40 AM on January 20, 2014 at the Chairman's office. *Id.* and Exh. H. Neither  
17 former Secretary St. Germain nor former Councilmember Roberts attended the meeting. *Id.* at 5.  
18 All other Council members attended the special meetings on January 17, January 18, and  
19 January 20, 2014. *Id.* at 3, 4, 5.

20 On January 20, 2014, the Council passed Resolution No. 14-03, which found that former  
21 Secretary St. Germain was absent from three consecutive special meetings without sufficient  
22 reason and declared his council position vacant. Decl. of Robert Kelly, Jr., Exh. K. The Council  
23 also passed Resolution No. 14-04 on January 20, 2014, which found that former Councilmember  
24 Roberts was absent from three consecutive special meetings without sufficient reason and  
25

1 declared her council position vacant. *Id.* at Exh. L; Decl. of Rick George at 4 and Exh. D, E.

### 2 III. LEGAL ARGUMENT

3 To be entitled to injunctive relief, a movant must demonstrate (1) that s/he is likely to  
4 succeed on the merits, (2) that s/he is likely to suffer irreparable harm in the absence of  
5 preliminary relief, (3) that the balance of equities tips in his or her favor, and (4) that an  
6 injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008);  
7 *National Meat Ass'n v. Brown*, 599 F.3d 1093, 1097 (9th Cir. 2010); *see also Beardslee v.*  
8 *Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). The burden of persuasion falls on the movant,  
9 and the movant must make “a clear showing.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)  
10 (*per curiam*). An injunction is an “extraordinary remedy never awarded as of right.” *Winter*,  
11 555 U.S. at 24.

12 A plaintiff may obtain a preliminary injunction by demonstrating either: “(1) a likelihood  
13 of success on the merits and the possibility of irreparable injury, or (2) the existence of serious  
14 questions going to the merits and the balance of hardships tipping in [the movant's] favor.”  
15 *MAISys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993). Plaintiffs cannot  
16 meet their high burden.

#### 17 A. Plaintiffs Are Not Likely to Succeed on the Merits.

18 There is no likelihood that Plaintiffs will prevail on the merits. Black’s Law Dictionary  
19 defines the “likelihood-of-success-on-the-merits test” as “[t]he rule that a litigant who seeks  
20 [preliminary relief] must show a reasonable probability of success . . . .” Black’s Law Dictionary  
21 1012 (9th ed. 2009).

##### 22 1. Defendants are immune from suit.

23 This Court lacks jurisdiction because the Nooksack Indian Tribe, the Council, and tribal  
24 officials are immune from this suit. The Court of Appeals recently held that:

1 Where a suit is brought by a Tribal member against an officer, employee or agent  
2 of the Tribe acting in his or her official capacity and alleges the law or policy the  
3 officer, employee or agent is enforcing or threatening to enforce is  
4 unconstitutional, the Tribal Court has subject matter jurisdiction under both  
5 Article VI, § 2.A.3 of the Nooksack Constitution and Title 10 of the Nooksack  
6 Tribal Code to order declaratory or injunctive relief.

7 *Lomeli*, 2013-CI-APL-002, Opinion at 14. Here, it appears that Plaintiffs challenge the  
8 constitutionality of Resolution Nos. 14-03 and 14-04. However, it is plain that these Resolutions  
9 exercise the authority vested in the Tribal Council by art. V, § 1, which states:

10 If any officer or member of the tribal council shall be absent from any three (3)  
11 consecutive regular or special meetings without sufficient reason, the other  
12 members may declare the council position vacant by a four-seventh (4/7) vote of  
13 the tribal council. The councilmember subject to the removal may not participate  
14 in the vote of the tribal council.

15 The Court of Appeals also held that in such a suit, “the Tribal Court must make a threshold  
16 finding on the constitutionality of the law or policy the member seeks to have Tribal officers or  
17 employees enjoined from enforcing. That finding dictates whether the Tribal Court has  
18 jurisdiction to enter an order enjoining or restraining its enforcement[.]...” *Id.* Of course, a  
19 plaintiff must show that “such an order is warranted as a matter of equity or law” as well. *Id.*

20 The Court of Appeals did not set out standards for this threshold finding. Nooksack case  
21 law, however, indicates that Plaintiffs should be held to a heightened pleading standard. It is not  
22 enough to allege that “none of the [requirements of Article V] occurred.” Mot. for Prelim. Inj.  
23 at 6. In *Cline*, the plaintiff-appellants sued the Council Chairman and the Council for  
24 declaratory relief based on allegations of civil rights violations and a challenge to the Nooksack  
25 Tribal Election Ordinance. *Cline v. Cunanan*, Case No. NOO-CIV-02/08-5, 1 (Nooksack Ct.  
App. 2009). The Nooksack Court of Appeals found that the defendant-appellees retained  
sovereign immunity even though the complaint named individual officers. *Id.* at 7. Importantly  
the Court found that, “[t]he Nooksack Tribal Council and its officers need to be able to enact  
ordinances and conduct business without constantly having to defend themselves against suit.”

1 *Id.* Without a heightened pleading standard, the Tribal Council may be so bogged down in  
2 frivolous litigation that it will not be able to properly govern; a heightened pleading standard  
3 would protect against frivolous litigation while allowing meritorious cases to continue.

4 Defendants suggest that this Court adopt pleading standards similar to those required in  
5 federal fraud cases under Federal Rule of Civil Procedure (FRCP) 9(b).<sup>1</sup> FRCP 9(b) requires a  
6 plaintiff to “state with particularity the circumstances constituting fraud or mistake.” The Ninth  
7 Circuit has explained that particularity means specifying “times, dates, places, or other details  
8 of . . . alleged fraudulent involvement . . .” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir.  
9 1985). This particularity “ensures that allegations of fraud are specific enough to give  
10 defendants notice of the particular misconduct which is alleged to constitute the fraud charged so  
11 that they can defend against the charge and not just deny that they have done anything wrong[,]”  
12 and it “prevents the filing of a complaint as a pretext for the discovery of unknown wrongs and  
13 protects potential defendants—especially professionals whose reputations in their fields of  
14 expertise are most sensitive to slander—from the harm that comes from being charged with the

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15  
16 <sup>1</sup> Plaintiffs “do not object” to the idea that the Federal Tort Claims Act (FTCA) might  
17 provide a standard for whether this threshold requirement has been met. *See* Mot. for Prelim. Inj.  
18 at 5 n.28. While Defendants did not address that question in the *Lomeli* briefing, the FTCA  
19 requirements for a waiver of immunity do point in the same direction as the heightened pleading  
20 standards for fraud. Under the FTCA, sovereign immunity is only waived if the suit is:

21 [1] against the United States, [2] for money damages, ... [3] for injury or loss of  
22 property, or personal injury or death [4] caused by the negligent or wrongful act  
23 or omission of any employee of the Government [5] while acting within the scope  
24 of his office or employment, [6] under circumstances where the United States, if a  
25 private person, would be liable to the claimant in accordance with the law of the  
place where the act or omission occurred.

*Hamm v. United States*, 483 F.3d 135, 137 (2d Cir. 2007) (quoting *FDIC v. Meyer*, 510 U.S. 471  
(1994)). Trial courts may “refer to evidence outside the pleadings and the plaintiff asserting  
subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it  
exists.” *Id.* Thus, sovereign immunity bars an FTCA claim unless Plaintiffs plead sufficient  
facts demonstrating that Defendants have acted outside the scope of their authority.

1 commission of fraudulent acts.” *Id.* The purposes behind the heightened pleading standards in  
2 the fraud context apply equally here. A complaint against a Tribal official acting in his or her  
3 official capacity must provide sufficient detail to allow the official to defend against the claims  
4 and to prevent frivolous yet damaging lawsuits.

5 Here, Plaintiffs allege that former Secretary St. Germain and former Councilmember  
6 Roberts were unlawfully removed from office. Mot. for Prelim. Inj. Former Secretary St.  
7 Germain and former Councilmember Roberts were removed from office, because they failed to  
8 attend three consecutive special meetings. *See Const.* art. V, § 1; Decl. of Rick George, Exhs. D  
9 and E. Chairman Kelly provided 24 hours’ notice for each special meeting called between  
10 January 16 and January 20, 2014 to be held at the Chairman’s office. Decl. of Robert Kelly, Jr.,  
11 Exh. A, D, H. Despite having received notice of the meetings, neither former Secretary St.  
12 Germain nor former Councilmember Roberts attended the meetings or gave sufficient reason for  
13 their absences. Decl. of Robert Kelly, Jr., Exhs. K and L.

14 Plaintiffs provide no credible evidence to support the claim that the constitutional  
15 removal conditions were not satisfied. The Council voted 5-0 in favor of the determination that  
16 neither former Secretary St. Germain nor former Councilmember Roberts attended the meetings,  
17 or provided sufficient reason for their absences, and in favor of removing them from office under  
18 Article V, Section 1 of the Constitution. *Id.* Former Secretary St. Germain and former  
19 Councilmember Roberts were properly removed from office, and Defendants retain sovereign  
20 immunity. Plaintiffs fail to allege any credible facts demonstrating that Defendants acted outside  
21 the scope of their authority.<sup>2</sup>

22  
23  
24 <sup>2</sup> Plaintiffs are mistaken in their beliefs that the special meetings were not held in  
25 compliance with Nooksack law, that the Council has not found insufficient reason for the  
absences, and that a four-seventh (4/7) vote was not properly obtained. *See* Mot. for Prelim. Inj.  
at 6-7; Decl. of Robert Kelly, Jr., Exhs. A – L. Proper notice was given, but even if it was not,

1           Additionally, this Court lacks jurisdiction to determine whether Plaintiffs' reasons for  
2 failing to attend three consecutive special meetings were sufficient, because that determination is  
3 a political question reserved to the Tribal Council. *Const.* art. V, § 1; *Lomeli*, 2013-CI-APL-002,  
4 Opinion at 21-22 and n.26. The Nooksack Court of Appeals has explained that a political  
5 question may arise when there is:

6           ‘a textually demonstrable constitutional commitment of the issue to a coordinate  
7 political department; or a lack of judicially discoverable and manageable  
8 standards for resolving it; or the impossibility of deciding without an initial policy  
9 determination of a kind clearly for nonjudicial discretion; or the impossibility of a  
10 court’s undertaking independent resolution without expressing lack of the respect  
11 due coordinate branches of government[.]...’

12           *Lomeli*, 2013-CI-APL-002, Opinion at 21 n.26. The Constitution specifically reserves the  
13 question of the sufficiency of a Council member’s reason for absence to the Council. *Const.* art.  
14 V, § 1. Furthermore, there are no judicial standards governing this question, and the Court’s  
15 determination of this issue would impinge on the Council’s authority.

16           2.       The Council’s removal actions comply with Due Process.

17           Due Process protections only attach to entitlements. *Bd. of Regents of State Colleges v.*  
18 *Roth*, 408 U.S. 564, 577-78 (1972). Property interests “are created and their dimensions are  
19 defined by existing rules or understandings that stem from an independent source such as state  
20 law-rules or understandings that secure certain benefits and that support claims of entitlement to  
21 those benefits.” *Id.* at 577; *see also Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Khan v.*  
22 *Bland*, 630 F.3d 519, 528 (7th Cir. 2010); *E. St. Louis Fed'n of Teachers, Local 1220, Am. Fed'n*  
23 *of Teachers, AFL-CIO v. E. St. Louis Sch. Dist. No. 189 Fin. Oversight Panel*, 178 Ill. 2d 399,  
24 416, 687 N.E.2d 1050, 1060 (1997) (“school board members as individuals have no property or  
25 liberty right to their offices secured by the federal due process clause, an elected official may

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the Nooksack Court of Appeals has made plain that “adherence to Bylaws is a political question not subject to judicial review.” *Lomeli*, 2013-CI-APL-002, Opinion at 21.

1 have a property right in his office if such an interest is given to him under state law” and an  
2 “interest is a property right subject to due process protections if that interest is secured by rules  
3 or mutually explicit understandings that support the claim of entitlement”); *Collins v. Morris*,  
4 263 Ga. 734, 735, 438 S.E.2d 896, 897 (1994) (“an official takes his office subject to the  
5 conditions imposed by the terms and nature of the political system in which he operates”).

6 Article V, Section 1 of the Constitution expressly permits removal of Council members.  
7 Thus, former Secretary St. Germain and former Councilmember Roberts have no property  
8 interest in their positions because the Nooksack Constitution expressly provides for the removal  
9 of Council members under certain circumstances; circumstances met by three consecutive  
10 absences from special meetings without sufficient justification.<sup>3</sup> There is no Due Process  
11 violation, because there is no entitlement here. Moreover, the Council’s actions fully comply  
12 with the process outlined in the Constitution for removal of Council members, which means this  
13 Court has no jurisdiction over this matter.

14 **B. Plaintiffs Fail to Demonstrate Irreparable Harm.**

15 Plaintiffs have not demonstrated irreparable harm. The alleged irreparable injury “must  
16 be both certain and great; it must be actual and not theoretical.” *Wis. Gas Co. v. Fed. Energy*  
17 *Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Associated General*  
18 *Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991)  
19 (a plaintiff seeking injunctive relief must do more than merely allege imminent harm sufficient to  
20 establish standing; s/he must demonstrate immediate, threatened injury as a prerequisite).

21 Plaintiffs allege grave injury but fail to include any facts demonstrating actual harm. *See Mot.*  
22 *for Prelim. Inj.* at 7. There can be no injury when Plaintiffs were properly removed from office  
23 under Nooksack law.

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24 <sup>3</sup> Article V, Section 2 also permits the Council to remove with a four-seventh (4/7) vote  
25 any member of the Tribal Council who is convicted of a felony while in office.



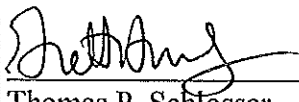
1 **C. The Public Interest Weighs in Favor of Denying Injunctive Relief.**

2 The public interest also weighs heavily in favor of denying injunctive relief here.  
3 Granting Plaintiffs' requested relief would thwart Article V, Section 1 of the Constitution. In  
4 addition, the Court can take judicial notice of the fact that a Tribal Council election is under way.  
5 The public interest demands that this Court uphold authorities of the Tribal Council as vested by  
6 the Constitution.

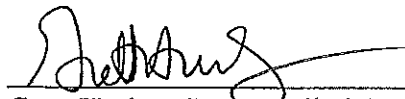
7 **IV. CONCLUSION**

8 For the foregoing reasons, Defendants request that the Court deny Plaintiffs' Motion for  
9 Preliminary Injunction – Writ of Mandamus.

10 Respectfully submitted this 29th day of January, 2014.

11  
12  *Jr Tom Schlosser by email*

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