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

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

6                                   vs.

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

Case No.: 2013-CI-CL-005

**ORDER ON MOTION FOR ORDER TO  
SHOW CAUSE RE: CONTEMPT**

9 THIS COURT held a hearing on January 9, 2014 on the Plaintiffs' *Motion for Order to Show Cause*  
10 *Re: Contempt*. The Plaintiffs' attorneys, Ryan Dreverskracht, Anthony Broadman, and Gabe  
11 Galanda appeared by telephone. The Defendants' attorneys, Thomas Schlosser, Grett Hurley, and  
12 Rickie Armstrong appeared in person. After hearing argument and reviewing the written  
13 submissions, the Court issues the following:

14                                   **DECISION**

15                                   On December 18, 2013, this Court issued an *Order Granting on Motion for Temporary*  
16 *Restraining Order*, finding that the Defendants had violated the Nooksack Indian Tribe's  
17 Constitution under Resolution 13-171 when the Defendants approved \$250 Christmas Support  
18 checks for enrolled tribal members not subject to pending disenrollment proceedings. As the Court  
19 found in that Order, that Resolution was passed on December 3, 2013. The Nooksack Tribe's  
20 Communication page on Facebook notified the community of the planned distribution on December  
21 5, 2013, stating that checks would be distributed by U.S. mail only beginning on December 12,  
22 2013. In its December 18<sup>th</sup> *Order*, the Court stated:

1           Therefore, the Court finds that, *at this preliminary TRO stage in this matter*, the Defendants  
2           have violated the Nooksack Indian Tribe’s Constitution, Article IX and the Equal Protection  
3           clause of the Indian Civil Rights Act in passing Resolution 13-171 and acting upon it. **The**  
4           **Court orders that the Defendants be enjoined from treating the proposed disenrollees**  
5           **differently from other tribal members with respect to the Christmas Support**  
6           **distribution. However, the Court finds that the Court cannot order specific relief**  
7           **requiring the expenditure of tribal funds.**

8           As the Court noted in its December 18<sup>th</sup> *Order*, on December 13, 2013 the Tribal Council  
9           passed a subsequent resolution superceding Resolution 13-171 that attempted to remedy the  
10          Constitutional problems presented in 13-171 by resolving that “currently enrolled Nooksack Tribal  
11          members whose disenrollment proceedings are subsequently concluded to a final decision by the  
12          Tribal Council and that do not result in disenrollment will receive said 2013 Christmas Support  
13          following a favorable final decision of Tribal Council.” This reflects a “carve out” similar to one  
14          this Court found did not violate the Nooksack Constitution in a prior case that is now on appeal. *See*  
15          *Roberts v. Kelly*, 2013-CI-CC-003.

16          As the Court found in its December 18<sup>th</sup> order, the Christmas Support checks that were  
17          actually issued were issued under the authority of Resolution 13-171. Those checks had already  
18          been issued and mailed prior to the passage of Resolution 13-181 and prior to the hearing held on  
19          December 18<sup>th</sup>. Following its December 18<sup>th</sup> Order, the Plaintiffs filed this *Motion for Order to*  
20          *Show Cause Re: Contempt* asking that this Court hold the Defendants in Contempt of Court arguing  
21          that “Defendants were directing staff of the Nooksack Accounting Department to print, issue, and  
22          mail approximately 20 new Christmas Support checks to Tribal members not target for  
23          disenrollment.” This allegation is supported by a declaration from Leah Zapata, a former employee  
24          of the Nooksack Accounting Department.

          Ms. Zapata, who was terminated from her position for cause on December 27, 2013, states in  
her declaration that “The only thing that I was allowed to do in regard to this year’s Christmas

1 support distributions was help issue new checks to people who did not get them in the original  
2 mailing . . . On Thursday December 19, and Friday December 20, 2013, Jennifer [George] and I  
3 helped issue approximately 20 Christmas support checks to Tribal members.” *Plaintiffs’ Declaration*  
4 *of Leah Zapata*, January 2, 2014. This is contradicted by Elizabeth Ames, Controller of the  
5 Nooksack Indian Tribe, who stated in her Declaration filed by the Defendants:

6 “9. After reviewing the records of the Nooksack Indian Tribe’s Accounting Department, I  
7 verified that 22 checks were issued on December 19, 2013, all in the normal course of business and  
8 none of which concerned a Christmas distribution.

9 10. After reviewing the records of the Nooksack Indian Tribe’s Accounting Department, I  
10 verified that 11 checks were issued on December 20, 2013.

11 (a) Four of the eleven checks concerned other matters such as a claim for a mileage  
12 reimbursement, a TANF activity, and a vendor payment.

13 (b) In addition, I found records that the Tribe issued 7 Christmas distribution checks on  
14 December 20, 2013; all seven check were reissued checks wherein the Tribe has placed a Stop  
15 Payment order or voided the original check. These checks were reissued in accordance with Tribal  
16 Council Resolution 13-181. Our internal records conflict with Ms. Zapata’s declaration concerning  
17 the number of checks reissued and the date of reissuance.”

18 *Defendants’ Declaration of Elizabeth Ames*, 1/8/2014. The seven re-issued checks were  
19 reissued due to addressing errors. *Declaration of Agripina Smith*, 1/8/2014.

20 Defendants argue that this Court should not hold them in Contempt of Court because they did  
21 not violate this Courts’ order of December 18, 2013. They note “This Court’s December 18, 2013  
22 Order only and preliminarily found that Resolution No. 13-171 violated the law, but the Order did  
23 not conclude that Resolution 13-181 violated any law.” *Defendants’ Response to Plaintiff’ Motion*

1 *for Order to Show Cause Re: Contempt*, 6. They further express concern regarding this Court’s  
2 finding in its *Order* that “While 13-181 appears to carve out a means by which the proposed  
3 disenrollees could access the Christmas Support, the fact remains that the Christmas Support check  
4 distribution took place under the authority of Resolution 13-171 and 13-181 does not, at least in the  
5 Court’s preliminary view, fix that.”

6         Since the Plaintiffs’ *Motion*, the Nooksack Court of Appeals issued its decision in *Lomeli v.*  
7 *Kelly*, clarifying the means by which the Tribal Council officials may be sued. In *Lomeli*, the  
8 Nooksack Court of Appeals held that the Nooksack Tribal Court has jurisdiction to hear suits against  
9 Tribal Council members. “The threshold question is whether a complaint alleges civil matters  
10 “concerning members of the Nooksack Indian Tribe” or “matters concerning the establishment and  
11 functions of the tribal government. If the allegations are the former, the Tribal Court has subject  
12 matter jurisdiction regardless of whether the Tribe’s officials and employees are clothed with the  
13 Tribe’s sovereign immunity. If, however, the allegations concern the “establishment and functions  
14 of the tribal government,” the court has no subject matter jurisdiction unless the Tribe expressly  
15 waives sovereign immunity.” *Lomeli*, at 11. The Court further explains “These functions [of tribal  
16 government] require either the exercise of discretion in applying government authority or the use of  
17 value judgments in making decisions for the government. Elected Council members, and the Tribe’s  
18 agents, must be free from intimidation, harassment, and the threat of lawsuits in executing the  
19 functions of tribal government. The Tribe’s officers necessarily enjoy the discretion to determine  
20 the manner and method in which it administers the Tribe’s governmental functions.” However, if a  
21 tribal officer, employee or agent acting in his or her official capacity loses the protection of  
22 sovereign immunity if s/he “enforces or threatens to enforce an unconstitutional law or policy  
23 because he or she does not have the “authority” to enforce laws that do not comply with the  
24

1 constitution.” *Id.* at 13. In a suit against officers alleging that they are acting in contravention with  
2 the Constitution, “the Tribal Court must make a threshold finding on the constitutionality of the law  
3 or policy.” If the Court finds such an order warranted, the Court may enjoin or restrain the officers.  
4 *Id.* at 14.

5 In its December 18, 2013, the Court made just such a threshold finding regarding Resolution  
6 13-171, because it expressly found that Resolution 13-171 governed the actual issuance of the  
7 checks and the fix presented in Resolution 13-181 came *after* the issuance of the checks. The Court  
8 ordered that the Defendants were enjoined from violating the Nooksack Indian Tribe’s Constitutional  
9 protection that “All members of the Nooksack Indian Tribe shall be accorded equal rights pursuant  
10 to tribal law.” Article IX. The Court made no findings as to the constitutionality of Resolution 13-  
11 181 because the checks issued on December 12<sup>th</sup> were issued before 13-181, which was passed on  
12 December 13<sup>th</sup>.

13 The checks issued following the passage of 13-181 were issued under the authority of  
14 Resolution 13-181, which this Court did not reach the merits of for the above reasons. According to  
15 the declarations of Ms. Ames and Tribal Council Treasurer/Defendant Agripina Smith, the seven re-  
16 issued checks were issued under the authority of 13-181 and were issued because of address errors.

17 The Plaintiffs state in their *Motion* that they asked Defendants’ counsel on December 19 and  
18 20<sup>th</sup> “Could you please let us know what your client’s [sic] plan of action is as it relates to th[e]  
19 order? Are your clients going to continue to issue checks to all Nooksacks, including our clients? Or  
20 have they stopped issuing checks altogether?” The Plaintiffs’ proposition appears to be that the only  
21 means of compliance with the Court’s order was to either issue checks to the proposed disenrollees  
22 (something this Court *expressly noted its inability to order*) or to stop issuing Christmas checks in  
23 their entirety. (If the Defendants took the latter option, the seven individuals whose addresses were  
24

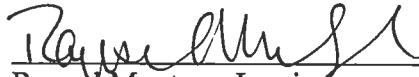
1 incorrect would have not received checks; this would not have resulted in checks being distributed to  
2 the proposed disenrollees.)

3 In fact, the Defendants' reissuance of seven checks occurred under the authority of  
4 Resolution 13-181, which did not violate this Court's order of December 18, 2013. That Order  
5 prohibited the continued issuance of checks under Resolution 13-171. After December 13, 2013 no  
6 checks were issued under Resolution 13-171. The vast majority of checks had been issued under 13-  
7 171, but seven had to be reissued and were issued under 13-181. Thus, the Defendants did not  
8 violate this Court's *Order* of December 18<sup>th</sup>, 2013 and they are not in Contempt of Court.

9 The *Motion for Order to Show Cause Re: Contempt* IS DENIED.

10 **SO ORDERED.**

11 **DATED** this 7 day of FEB, 2014

12 

13 Raquel Montoya-Lewis  
14 Chief Judge, Nooksack Tribal Court