

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

01-09-14 A08:37 IN

*Betty J. ...*

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

ST. GERMAIN, *et al.*,

Plaintiffs,

v.

KELLY, *et al.*,

Defendants.

Case No. 2013-CI-CL-005

DEFENDANTS' MOTION TO DISMISS  
PLAINTIFFS' COMPLAINT FOR  
PROSPECTIVE EQUITABLE RELIEF  
AND BRIEF IN SUPPORT OF MOTION  
TO DISMISS

Date: February 27, 2014

Time: 10:00 AM

COPY

MOTION

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 Motion to Dismiss Plaintiffs' Complaint for Prospective Equitable Relief.<sup>1</sup> Defendants are immune from suit, this Court lacks jurisdiction, Defendants have acted within the scope of their authority, and Defendants have not violated Nooksack or federal law. In addition Plaintiffs' claim regarding the special meeting request is not ripe, and Plaintiffs' claims regarding Resolution No. 13-171

<sup>1</sup> Defendants coordinated with opposing counsel and the Court regarding the date and time for hearing in compliance with Title 10, Section 10.05.050.

1 are moot. Defendants' motion is based on the accompanying Brief in Support of the Motion to  
2 Dismiss and the files and records in this action.

3 **BRIEF IN SUPPORT OF MOTION TO DISMISS**

4 **I. INTRODUCTION**

5 On December 9, 2013, Plaintiffs initiated a fourth lawsuit against Defendants in Tribal  
6 Court for equitable relief. The Tribal Court has dismissed two related lawsuits against  
7 Defendants based on sovereign immunity and standing. *See Roberts, et al. v. Kelly, et al.*, Case  
8 No. 2013-CI-CL-003, Order Granting Defendants' Motion to Dismiss (2013); *Lomeli, et al. v.*  
9 *Kelly, et al.*, Case No. 2013-CI-CL-001, Amended Order Granting Defendants' Motion to  
10 Dismiss Second Amended Complaint (2013). Plaintiffs' Complaint alleges that Defendants have  
11 violated Due Process and Equal Protection through passage of Resolution No. 13-171 related to  
12 Christmas Support funds, Defendants have wrongfully failed to call a special meeting, and  
13 Defendants have violated the Indian Gaming Regulatory Act (IGRA) through issuance of the  
14 Christmas Support funds.

15 Defendants move to dismiss Plaintiffs' Complaint, because Defendants are immune from  
16 suit when they act within the scope of their authority, and this Court lacks jurisdiction.  
17 Defendants have acted within the scope of their authority; Defendants have not violated Due  
18 Process or Equal Protection principles. Additionally, Plaintiffs' claim related to the special  
19 meeting request is not ripe, and Plaintiffs' claims related to Resolution No. 13-171 are moot  
20 because Resolution No. 13-171 has been superseded and was only in effect from December 3,  
21 2013 to December 13, 2013.

1 **II. FACT STATEMENT**

2 On December 3, 2013, the Tribal Council passed Resolution No. 13-171, which provided  
3 Christmas Support funds to Nooksack Tribal members in the amount of \$250. Decl. of M.  
4 Roberts, Exh B. On December 8, 2013, Councilmember Roberts and Secretary St. Germain  
5 requested a special meeting. *Id.* at Exh. C. The special meeting request was sent at 6:36 PM on  
6 December 8, and the request stated that Secretary St. Germain and Councilmember Roberts  
7 would assume the Council denied their special meeting request if there was no response by 6 PM  
8 on December 9. *Id.* at Exhs. C-D. Plaintiffs filed their Complaint, in part alleging wrongful  
9 denial of their special meeting request, at 2:12 PM on December 9. Compl. 1. On December 13,  
10 2013, the Council superseded Resolution No. 13-171 through passage of Resolution No. 13-181.  
11 *See* Defs.' Resp. in Opp'n to Pls.' Mot. for TRO (Opp'n to TRO), Exh. A, Resolution 13-181.  
12 Resolution No. 13-181 makes clear that while Disenrollees are not immediately eligible to  
13 receive Christmas Support funds, any Disenrollee whom the Council ultimately decides should  
14 not be disenrolled will receive the funds at that time. *See id.*

15 **III. LEGAL ARGUMENT**

16 Defendants are immune from suit, the Tribe has not waived sovereign immunity, and this  
17 Court lacks jurisdiction to hear this case. Additionally, Plaintiffs claim regarding the special  
18 meeting is not ripe.

19 **A. Defendants are Immune from Suit and This Court Lacks Jurisdiction.**

20 This Court lacks jurisdiction because the Nooksack Indian Tribe, the Council, and tribal  
21 officials are immune from suit. An Indian tribe is immune from suit because it is a sovereign  
22 entity with common law immunity. *Cline v. Cunanan*, Case No. NOO-CIV-02/08-5, 5-6

1 (Nooksack Ct. App. 2009); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Sovereign  
2 immunity acts as a jurisdictional bar to bringing suits against tribes unless Congress has  
3 authorized the lawsuit or a tribe has waived its immunity. *Martinez*, 436 U.S. at 58-59; *Kiowa*  
4 *Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Waivers of immunity  
5 must be clear, express, unequivocal, and cannot be implied. *Olson v. Nooksack*, 6 NICS App.  
6 49, 52-53 (Nooksack Ct. App. 2001) (citing *Martinez*, 436 U.S. at 60). Sovereign immunity also  
7 applies to tribal officials and employees acting within the scope of their authority. *Cline*, Case  
8 No. NOO-CIV-02-08-5, at 6 (citing *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476,  
9 479 (9th Cir. 1985); *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986),  
10 *cert. denied*, 481 U.S. 1069 (1987)); *see also Mitchell v. Pequette*, CV-07-38, 2008 WL 8567012  
11 at \*7-9 (Leech Lake Tribal Court May 9, 2008) (holding that tribal employees retained sovereign  
12 immunity even though the plaintiff alleged that the employees acted outside the scope of their  
13 authority, because the plaintiff failed to legally or factually support this allegation). Tribal  
14 sovereign immunity “extends to actions brought against tribes in tribal court.” *Olson*, 6 NICS  
15 App. at 51. Generally, federal courts lack jurisdiction over the membership decisions of an  
16 Indian tribe. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978); *Alto v. Black*, 12-  
17 56145, 2013 WL 6813816, at \*8 (9th Cir. Dec. 26, 2013) (acknowledging that courts have  
18 regularly declined to exercise jurisdiction over an appeal of a tribe’s membership determination);  
19 *Jeffredo v. Macarro*, 599 F.3d 913, 915, 917-18 (9th Cir. 2010); *Lewis v. Norton*, 424 F.3d 959,  
20 960 (9th Cir. 2005).

21 In the *Cline* case, the plaintiff-appellants sued the Council Chairman and the Council for  
22 declaratory relief and damages based on allegations of civil rights violations and a challenge to

1 the Nooksack Tribal Election Ordinance. *Cline*, Case No. NOO-CIV-02-08-5, at 1. The  
2 Nooksack Court of Appeals found that the appellees retained sovereign immunity even though  
3 the complaint named individual officers. *Id.* at 7. Importantly the Court found that, “[t]he  
4 Nooksack Tribal Council and its officers need to be able to enact ordinances and conduct  
5 business without constantly having to defend themselves against suit.”

6 The Nooksack Constitution entrusts the Council with the authority to establish the Tribal  
7 Court by ordinance. *Const.*, art. VI, § 2(A)(1). Article VI, § 2(A)(3) of the Constitution  
8 provides that the Tribal Court shall have jurisdiction “over all matters concerning the  
9 establishment and functions of tribal government, provided that nothing herein shall be construed  
10 as a waiver of sovereign immunity by the tribal government.” Under this jurisdictional  
11 provision, a suit against the Tribal Government and the Council can only proceed when there is  
12 an express waiver of sovereign immunity. *Cline*, Case No. NOO-CIV-02/08-5, at 6.

13 The Council acted upon its constitutional authority to establish a tribal court by ordinance  
14 when it adopted Title 10—the Nooksack Indian Tribe’s Tribal Court System and Court Rules.  
15 The Tribal Court has limited civil and criminal subject matter jurisdiction only as to matters  
16 “specifically enumerated in the Nooksack Code of Laws. Title 10, § 10.00.030. Title 10,  
17 § 10.00.050 provides for exclusive, original jurisdiction in the Tribal Court in any matter where  
18 the Tribe or its officers and employees are parties in their official capacities, but this jurisdiction  
19 is limited by the following sentence:

20 Nothing contained in the preceding sentence or elsewhere in this Code shall be  
21 construed as a waiver of the sovereign immunity of the Tribe or its officers or  
22 enterprises unless specifically denominated as such and the court is expressly  
23 prohibited from exercising jurisdiction over the Nooksack Indian Tribe without  
24 and [sic] express wavier [sic] of sovereign immunity.

1 Title 10, § 10.00.050. Title 10 also explains that nothing in Title 10 or any other law waives the  
2 Tribe's, its officials', its entities', or its employees' immunity without an express waiver enacted  
3 by the Council. Title 10, § 10.00.100. In addition, Title 10 limits the remedies in a suit against  
4 the Tribe's agent or employee to declaratory and prospective injunctive relief. Title 10,  
5 § 10.00100(b). Neither Congress<sup>2</sup> nor the Council has expressly waived the Tribe's sovereign  
6 immunity, as required under the Constitution, Title 10, and federal law.

7 1. The *Ex parte Young* doctrine, to the extent it applies in the tribal context, does not  
8 strip Defendants of their sovereign immunity.

9 Under *Ex parte Young*, 209 U.S. 123 (1908),<sup>3</sup> state officials may be sued in their official  
10 capacity for violating a federal law when the plaintiff seeks prospective, equitable relief. *Puerto*  
11 *Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). This doctrine  
12 is based on the need to protect the supremacy of federal law, and it expressly does not apply  
13 against a state official when that official is accused of violating a state law. *Pennhurst State Sch.*  
14 *& Hosp. v. Halderman (Pennhurst)*, 465 U.S. 89, 105-06 (1984); *AUTO v. Washington*, 175 Wn.  
15 2d 214, 231, n.3 (2012). When a state official is accused of violating a state law, the "entire  
16 basis for the doctrine of *Young* . . . disappears." *Pennhurst*, 465 U.S. at 106. Similarly, there is  
17 no basis to apply *Ex parte Young* when a *tribal* official is accused of violating *tribal* law.

18 In *Cline*, the Nooksack Tribal Court of Appeals explained that the *Ex parte Young*

19 \_\_\_\_\_  
20 <sup>2</sup> Inclusion of the Indian Civil Rights Act in the Constitution does not constitute a waiver  
of sovereign immunity. *Cline*, Case No. NOO-CIV-02/08-5, at 6; *Martinez*, 436 U.S. at 58-73;  
*Gallegos v. Jicarilla Apache Nation*, 97 F. App'x 806, 811 (10th Cir. 2003).

21 <sup>3</sup> Plaintiffs cite *Schlender v. Quinault Indian Nation*, No. CV-12-078 (Quinault Tribal Ct.  
22 Dec. 5, 2013) in support of their proposition that *Ex parte Young* allows this suit. Compl. 6:6-8.  
23 Plaintiffs' counsel, Gabriel Galanda, authored *Schlender* and filed it the Friday before filing this  
lawsuit. See Opp'n to TRO, Exh. B.

1 doctrine allows “individual governmental officers [to] be sued for declaratory or injunctive relief  
2 where the actions taken exceed his or her authority.” Case No. NOO-CIV-02/08-5, at 6; *see also*  
3 *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985) (“tribal immunity  
4 extends to individual tribal officials acting in their representative capacity and within the scope  
5 of their authority”). However, the *Cline* Court did not hold that the *Ex parte Young* doctrine  
6 would ever apply in the Nooksack tribal context. Case No. NOO-CIV-02/08-5. Even if a  
7 *Young*-like doctrine does apply in this Court, it would not allow Appellants to continue this suit,  
8 because Appellees acting within the scope of their authority under tribal law retain sovereign  
9 immunity, which means this Court lacks jurisdiction.

10 2. Defendants Have Acted Within the Scope of Their Authority.

11 Neither the Constitution nor the Bylaws requires the Council to respond to a special  
12 meeting request within a certain timeframe. Similarly, the Council may proceed with business as  
13 long as a quorum is present regardless of whether all council members are present. The  
14 Christmas Support funds comply with Due Process and Equal Protection. Resolution No. 13-  
15 181, the only effective Resolution relating to Christmas Support funds, contains the same “carve  
16 out” that was upheld by this Court in *Roberts*, and similar “carve outs” have been commonly  
17 used in federal courts. *See* Opp’n to TRO, Exh. A; *Alto*, 12-56145, 2013 WL 6813816, at \*4-7;  
18 *see also Mathews v. Eldridge*, 424 U.S. 319, 335-41 (1976); *Ass’n for Los Angeles Deputy*  
19 *Sheriffs v. Cnty. of Los Angeles*, 648 F.3d 986, 992 (9th Cir. 2011); *Gary v. Nichols*, 447 F. Supp.  
20 320, 325 (D. Idaho 1978). Here, Plaintiffs sue Defendants for actions taken by and within the  
21 scope of the authority of the whole Council. *Imperial Granite Co. v. Pala Band of Mission*  
22 *Indians*, makes clear that voting as members of a tribe’s governing body does not allow for *Ex*

1 *parte Young* liability, because such a suit is a suit against the Tribe itself. 940 F.2d 1269, 1271-  
2 72 (9th Cir. 1991).

3 a. *Defendants have complied with Article II, Section 5 of the Bylaws.*

4 Article II, Section 5 of the Bylaws does not require the Council to hold a special meeting  
5 within any timeframe. *See* Bylaws, art. II, § 5. The Council has discretion to respond to special  
6 meeting requests as it sees fit. If this Court determines that the Council must respond to a  
7 meeting request within a reasonable time, this surely allows the Council at least 90 days to  
8 schedule such a meeting. The Council is the Tribe's governing body, and it carries out a wide  
9 variety of duties; imposing a narrow timeframe for a response to a special meeting request would  
10 hinder the Council's ability to weigh competing priorities and govern effectively.

11 Importantly, Plaintiffs gave Defendants less than 24 hours to respond to the special  
12 meeting request at issue in this matter. *See* Decl. of M. Roberts, Exhs. C-D. No government  
13 body could be expected to respond to a meeting request within less than 24 hours. Defendants  
14 have not violated any Nooksack law related to the special meeting request.<sup>4</sup>

15 b. *Resolution No. 13-181 complies with Procedural Due Process.*

16 Due Process protections only attach to entitlements. *Bd. of Regents of State Colleges v.*  
17 *Roth*, 408 U.S. 564, 577-78 (1972). Property interests "are created and their dimensions are  
18 defined by existing rules or understandings that stem from an independent source such as state

19 <sup>4</sup> Plaintiffs also allege that passage of former Resolution No. 13-171 violated Article II,  
20 Section 2 of the Bylaws and Article III, Section 2 of the Constitution. Article II, Section 2 of the  
21 Bylaws concerns regular meetings of the Tribal Council. The Council may conduct business  
22 once a quorum is reached. Bylaws, *art.* II, § 4. Both Resolution Nos. 13-171 and 13-181 were  
23 passed with a quorum. *See, e.g.,* Opp'n to TRO, Exh. A. Article III, Section 2 of the  
24 Constitution merely states the composition of the Council. The Council is so composed, and the  
25 absence of certain members of the Council does not violate this provision. Plaintiffs fail to state  
a claim upon which relief can be granted under both of these provisions.



1 law-rules or understandings that secure certain benefits and that support claims of entitlement to  
2 those benefits.” *Id.* at 577; *see also Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Khan v.*  
3 *Bland*, 630 F.3d 519, 528 (7th Cir. 2010). Here, the Council created a Resolution defining  
4 eligibility for discretionary Christmas Support funds. There is no law or understanding that turns  
5 these discretionary funds into an entitlement, which means Due Process protections do not  
6 attach. *See Berry v. Arapahoe & Shoshone Tribes*, 420 F. Supp. 934, 942 (D. Wyo. 1976)  
7 (finding that the plaintiffs were not entitled to a tribal liquor license, because applicable state law  
8 clearly established that there is no vested right to a liquor license).

9       Even if Due Process protections did attach, however, Defendants have provided sufficient  
10 Due Process. The *Mathews* test requires the Court to balance three factors: (1) the private  
11 interest at stake, (2) the risk of erroneous deprivation and any value in providing additional  
12 safeguards, and (3) the government’s interest, which includes the function involved and any  
13 monetary and administrative burdens in providing additional procedures. *Mathews*, 424 U.S. at  
14 335. In *Mathews*, the plaintiff’s disability benefits had been terminated after an initial eligibility  
15 challenge, and the plaintiff alleged that due process considerations required a pre-termination  
16 hearing. *Id.* at 323-25. The federal Supreme Court held that no pre-termination hearing was  
17 necessary, because full retroactive relief would be provided if the plaintiff ultimately prevailed  
18 on the eligibility challenge, and the procedures provided complied with Due Process. *Id.* at 340,  
19 349.

20       Plaintiffs’ interest in a one-time Christmas Support check is minimal compared to a  
21 person’s interest in ongoing disability benefits. The *Mathews* Court explained that disability  
22 benefits could be terminated upon an initial eligibility challenge, because the plaintiff would be

1 made whole if the plaintiff proved eligibility, eligibility is not based on financial need, and the  
2 plaintiff's need is less than that of a welfare recipient. *Id.* at 340-343. Here, the Council has  
3 prima facie evidence that Plaintiffs were erroneously enrolled, because they do not descend from  
4 the claimed Nooksack ancestor.<sup>5</sup> The Council has distributed this evidence to Plaintiffs and  
5 invited and provided the opportunity for Plaintiffs to rebut this evidence. *See Roberts*, Order  
6 Granting Defs.' Mot. to Dismiss 9-10.<sup>6</sup> The Council therefore decided to delay payment of  
7 Christmas Support funds for those members subject to their pending disenrollment proceedings  
8 until the Council decides that any such member remains enrolled. *See Opp'n to TRO, Exh. A.*  
9 This completely comports with *Mathews*, as Plaintiffs will receive the Christmas Support funds  
10 if they are not ultimately disenrolled, eligibility for Christmas Support funds is not based on  
11 financial need, and Plaintiffs' need for the one-time Christmas Support payment is far less than  
12 the need of a welfare recipient. *See Opp'n to TRO, Exh. A.* Resolution No. 13-171 is no longer  
13 in effect, because it was superseded by Resolution No. 13-181. *See id.*

14 The Council chose to supersede Resolution No. 13-171 after it realized that the "carve  
15 out," which expressly ensures that any person subject to pending disenrollment proceedings will  
16 receive the Christmas Support funds if the Council determines that any such person is properly  
17 enrolled, was inadvertently omitted. *See id.*; Defs.' Resp. to Pls.' Mot. for Order to Show Cause  
18 Re: Contempt, Decl. of A. Smith ¶¶ 5, 10. Resolution No. 13-181 thus provides the same  
19 protection that the School Support funds Resolution provided, which this Court upheld in

---

21 <sup>5</sup> Even the federal government requires that a tribe's members "descend from a historical  
22 Indian tribe" as a prerequisite for official recognition. 25 CFR § 83.7(e); *see also Adoptive*  
*Couple v. Baby Girl*, 133 S. Ct. 2552, 2585 (2013) (Sotomayor, J., dissenting).

23 <sup>6</sup> Plaintiffs could utilize the provision in Title 63 to update their records with information  
24 demonstrating that they are properly enrolled. Title 63, § 63.05.001(C).

1 *Roberts* as compliant with Nooksack law. The effect of including the protective clause in  
2 Resolution No. 13-181 is also the same as if the clause was not erroneously omitted from former  
3 Resolution No. 13-171.

4 There is no value in additional procedures either, because Plaintiffs' membership status is  
5 uncertain. The Council must determine whether Plaintiffs are erroneously enrolled before they  
6 are eligible for these benefits. Plaintiffs will receive a hearing and may submit written evidence  
7 prior to any final determination on eligibility. *Roberts*, Order Granting Defs.' Mot. to Dismiss 8-  
8 10. Lastly, providing notice and a hearing to each Disenrollee prior to dissemination of  
9 Christmas Support funds would constitute an incredible burden on the Tribe's time and fiscal  
10 resources; such a burden is far from warranted when purely discretionary benefits are involved.

11 *c. Resolution No. 13-181 Complies with Substantive Due Process and Equal*  
12 *Protection.*

13 Substantive Due Process and Equal Protection protect different interests. *Powers v.*  
14 *Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004). Substantive Due Process "provides heightened  
15 protection against government interference with certain fundamental rights and liberty  
16 interests[]" even when the challenged regulation affects all persons equally." *Id.* (quoting  
17 *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)) (internal citations omitted). However,  
18 "the essence of the equal protection requirement is that the state treat all those similarly situated  
19 similarly[.]" *Id.* (quoting *Bartell v. Aurora Pub. Schs.*, 263 F.3d 1143, 1149 (10th Cir. 2001)).

20 Plaintiffs fail to adequately allege a violation of Substantive Due Process. The federal  
21 Supreme Court has explained that "only the most egregious executive action can be said to be  
22 'arbitrary' in the constitutional sense,... [and] the cognizable level of executive abuse of power  
23 is that which shocks the conscience[.]" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 834-35

1 (1998). For example, only an extreme intrusion, such as forced stomach pumping, has been  
2 found to violate Substantive Due Process. *See Rochin v. California*, 342 U.S. 165, 172-73  
3 (1952).

4 Here, the Council determined that persons subject to pending disenrollment proceedings  
5 would not be immediately eligible for discretionary Christmas Support funds until the Council  
6 makes a final decision that such a person will not be disenrolled. *See Opp'n to TRO, Exh. A.*  
7 This decision fulfills the Council's authority to "administer any funds or property within the  
8 control of the tribe...." *Const. art. VI, §1(K)*. This decision is not arbitrary, and it does not  
9 shock the conscience, because the Council is administering funds in a responsible manner by  
10 reserving them for tribal members whose membership status is certain; once any potential  
11 Disenrollees' membership status is certain and any such person is not disenrolled, then they will  
12 be able to receive these benefits. Again, Resolution No. 13-181 provides the same protection  
13 that the School Support funds Resolution provided in *Roberts*, which this Court upheld.

14 Plaintiffs' Equal Protection claims related to Christmas Support funds also fail.  
15 Importantly, "the equal protection clause of the ICRA is not coextensive with the equal  
16 protection clause of the fourteenth amendment to the United States Constitution." *Wounded*  
17 *Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079, 1082  
18 (8th Cir. 1975). Federal Equal Protection analyses may not be forced upon Tribes. *Id.* at 1083.  
19 Even if federal Equal Protection principles are applied, however, there has not been an Equal  
20 Protection violation here.

21 Under federal law, when a suspect class is not involved, Equal Protection review requires  
22 that legislation "be rationally related to a legitimate governmental purpose." *City of Cleburne*,

1 *Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Under rational basis review, legislation  
2 must not be “enacted for arbitrary or improper purposes.” *Golinski v. U.S. Office of Pers. Mgmt.*,  
3 824 F. Supp. 2d 968, 996 (N.D. Cal. 2012). A law that does not involve fundamental rights or a  
4 suspect class “is accorded a strong presumption of validity[,]” and it “must be upheld against  
5 equal protection challenge if there is any reasonably conceivable state of facts that could provide  
6 a rational basis for the classification[.]” *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997)  
7 (internal citations omitted).

8 Here, the Council determined that persons subject to pending disenrollment proceedings  
9 are not immediately eligible for the Christmas Support funding. *See* Opp’n to TRO, Exh. A.  
10 Only properly enrolled members of the Tribe are eligible to receive tribal funding, and limiting  
11 the immediate disbursement of funds to those members who are not subject to disenrollment  
12 proceedings is rationally related to the Council’s obligation to responsibly administer tribal  
13 funds. *See Const.* art. VI, § 1(K). Despite prima facie evidence indicating that Plaintiffs are not  
14 properly enrolled, the Council does not conclusively presume that persons subject to pending  
15 disenrollment proceedings are erroneously enrolled; rather, the Council has chosen to delay  
16 Christmas Support funding for those subject to pending disenrollment proceedings until any such  
17 person is found to be properly enrolled, and Plaintiffs’ equal protection challenge must fail  
18 because Resolution 13-171 is rationally related to one of the Council’s most important duties.

19 This type of delayed payment is not uncommon. For example, the Ninth Circuit and  
20 District Court for the Southern District of California approved of the Bureau of Indian Affairs’  
21 Memorandum Order advising the San Pasqual Band of Mission Indians to place per capita  
22 distributions for members subject to disenrollment proceedings in an escrow account pending

1 review of a BIA decision directing that the plaintiffs' names be deleted from the Band's  
2 membership rolls. *Alto*, 12-56145, 2013 WL 6813816, at \*4-7. As explained above, the  
3 *Mathews* Court upheld the termination of disability benefits after an initial eligibility challenge.  
4 *Mathews*, 424 U.S. at 335-41; *accord Gary*, 447 F. Supp. at 325. The Ninth Circuit also recently  
5 upheld the suspension of plaintiffs who were suspended without a hearing once it was confirmed  
6 that they were charged with a felony, and the Court held that Due Process only required post-  
7 suspension hearings. *Ass'n for Los Angeles Deputy Sheriffs*, 648 F.3d at 992.

8         The ability of the Tribe to provide Christmas Support payments to any potential  
9 Disenrollees who are ultimately found to be properly enrolled is unquestioned.<sup>7</sup> *See* Decl. of J.  
10 Meyer ¶4. Delaying payment for those subject to pending disenrollment proceedings protects all  
11 parties involved in this case. If the Tribe provided the Christmas Support funds to those subject  
12 to pending disenrollment proceedings and if any person subject to pending disenrollment  
13 proceedings is disenrolled, the Tribe would have provided discretionary funds to an ineligible  
14 recipient, and those funds could not be recovered. Such a result would punish the entire  
15 membership. Additionally, Christmas Support payments are one-time payments, so there is no  
16 risk of ongoing deprivation, and interest rates are so low that there is little to no loss due to  
17 interest accrual. The Tribal Council has lawfully acted to protect all Nooksack members'  
18 interests, including the interest of those subject to pending disenrollment proceedings in  
19 Christmas Support funds.

20         3.         This Court Lacks Subject-Matter Jurisdiction Over Plaintiffs' IGRA Claims.

21  
22         <sup>7</sup> If there is any concern, the Tribal Council could be asked to consider placing sufficient  
23 funds in an escrow account for the purpose of making retroactive payments to any potential  
24 Disenrollees who are found to be properly enrolled.

1 Under Federal Rule of Civil Procedure (FRCP) 12(b)(1), when a defendant factually  
2 attacks a plaintiff's allegations, no "presumptive truthfulness attaches to plaintiff's allegations,  
3 and the existence of disputed material facts will not preclude the trial court from evaluating for  
4 itself the merits of jurisdictional claims." *Thornhill Pub. Co., Inc. v. Gen. Tel. & Electronics*  
5 *Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (internal citation omitted). Also, the plaintiff bears the  
6 burden of proof that jurisdiction exists. *Id.*

7 Plaintiffs allege that disbursement of the Christmas Support funds violates 25 U.S.C.  
8 §§ 2710(a)(3)(A-D) and (d)(1)(A)(ii) and 25 C.F.R. §§ 290.16 and 290.21.<sup>8</sup> IGRA requires  
9 tribes to have approved revenue allocation plans when using net gaming revenue to fund a per  
10 capita payment. *See* 25 U.S.C. § 2710. Plaintiffs claim that net gaming revenue, at least in part,  
11 funded the Christmas Support payments, and the Tribe lacks a revenue allocation plan. Plaintiffs  
12 are mistaken, and this Court lacks jurisdiction under FRCP 12(b)(1).

13 The Christmas Support payments were funded by sales tax revenue and not gaming  
14 revenue. Decl. of J. Meyer ¶4. The Tribe has not violated IGRA or any other law by funding  
15 Christmas Support payments through sales tax revenue.

16 **B. Plaintiffs' Claim Related to the Special Meeting Request Is Not Ripe.**

17 Article II, Section 5 of the Bylaws states that:

18 [s]pecial meetings of the tribal council shall also be held upon written request of  
19 either two (2) members of the tribal council or by petition signed by twenty five  
20 (25) legal voters of the tribe. Such written request shall be filed with the  
21 chairman or the secretary of the tribal council, and he shall notify the tribal council  
22 members twenty-four (24) hours before the date of such tribal council  
23 meetings.

---

24 <sup>8</sup> 25 C.F.R. § 290.16 explains that certain per capita payments may not be deposited into  
25 accounts held by BIA or OTFM. 25 C.F.R. § 290.21 states that an Indian tribe may appeal an  
ABO's decision. Neither reference is on point.

1 A matter is not ripe when “the existence of the dispute hangs on future contingencies that may or  
2 may not occur.” *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003) (quoting *Clinton v. Acequia*  
3 *Inc.* 94 F.3d 568, 572 (9th Cir. 1996)). The Bylaws do not require the Council to schedule a  
4 special meeting within a certain period of time. Secretary St. Germain and Councilmember  
5 Roberts requested a special meeting on December 8, 2013. Compl. 7. The Council may  
6 schedule this meeting at any time as long as 24 hours’ notice is given to councilmembers. There  
7 is no dispute at this point.

8 **C. Plaintiffs’ Claims Related to Resolution No. 13-171 Are Moot.**

9 An issue is moot if a change in circumstance has “forestalled any occasion for  
10 meaningful relief.” *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir. 2007).  
11 Voluntary cessation moots an issue as long as “subsequent events [have] made it absolutely clear  
12 that the allegedly wrongful behavior cannot reasonably be expected to recur.” *F.T.C. v.*  
13 *Affordable Media*, 179 F.3d 1228, 1238 (9th Cir. 1999) (internal citations omitted). Resolution  
14 No. 13-171 was completely superseded by Resolution No. 13-181. *See* Opp’n to TRO, Exh. A.  
15 Plaintiffs allege that Defendants violated the Constitution through enactment of Resolution No.  
16 13-171, but Resolution No. 13-171 was only in effect from December 3, 2013 to December 13,  
17 2013. *See id.* Since Resolution No. 13-171 is no longer in effect, Plaintiffs’ allegations related  
18 to it are moot.

19 **IV. CONCLUSION**

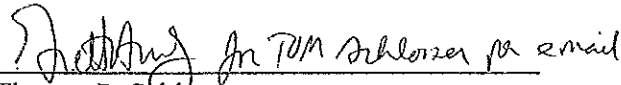
20 For the foregoing reasons, Defendants request that the Court grant Defendants’ Motion to  
21 Dismiss Plaintiffs’ Complaint.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

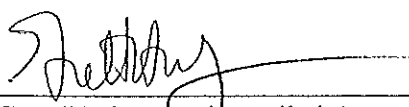
Respectfully submitted this 8th day of January, 2014.

---



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\St Germain MTD 010814 Final.doc  
rsj:1/8/14