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**Galanda Broadman PLLC**

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' REPLY TO  
PLAINTIFFS' BRIEF IN OPPOSITION  
TO DEFENDANTS' MOTION TO  
DISMISS/CROSS MOTION FOR  
PARTIAL SUMMARY JUDGMENT

Hearing Date: April 9, 2014  
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' Brief in Opposition to Defendants' Motion to Dismiss/Cross Motion for Partial Summary Judgment.

**I. INTRODUCTION**

On December 9, 2013, Plaintiffs initiated a fourth lawsuit against Defendants in Tribal Court for equitable relief. Plaintiffs' Complaint alleges that Defendants have violated Due Process and Equal Protection through passage of Resolution No. 13-171 related to Christmas Support funds, Defendants have wrongfully failed to call a special meeting, and Defendants have violated the Indian Gaming Regulatory Act (IGRA) through issuance of the Christmas Support

1 funds.

2 Defendants move to dismiss Plaintiffs' Complaint, because Defendants are immune from  
3 suit when they act within the scope of their authority, and this Court lacks jurisdiction.

4 Defendants have acted within the scope of their authority; Defendants have not violated Due  
5 Process or Equal Protection principles. Additionally, Plaintiffs' claims related to Resolution No.  
6 13-171 are moot because Resolution No. 13-171 has been superseded and was only in effect  
7 from December 3, 2013 to December 13, 2013.

## 8 **II. LEGAL ARGUMENT**

9 Federal Rule of Civil Procedure 56 does not apply in this Court. Defendants are immune  
10 from suit, the Tribe has not waived sovereign immunity, and this Court lacks jurisdiction to hear  
11 this case. Additionally, Plaintiffs' claims related to Resolution No. 13-171 are moot.

### 12 **A. Nooksack Law Governs This Case, and Federal Rule of Civil Procedure 56 Does Not 13 Apply.**

14 Plaintiffs attempt to force this Court to apply Federal Rule of Civil Procedure (FRCP) 56,  
15 but that rule does not apply in the Nooksack Tribal Court. Plaintiffs' imposition of FRCP 56 on  
16 the Tribal Court unnecessarily confuses the applicable legal standards and ignores the process set  
17 out in *Lomeli v. Kelly*, Case No. 2013-CI-APL-002, Opinion (January 15, 2014). Additionally,  
18 Section 10.05.050(f) of Title 10 provides rules for dispositive motions, which means there is no  
19 reason to resort to FRCP 56.

20 In *Lomeli*, the Court of Appeals recently explained the process for reviewing lawsuits  
21 brought by a tribal member against an employee, officer, or agent acting in their official  
22 capacity. This Court must first determine whether the lawsuit concerns "the establishment and  
23 functions of the tribal government" or nonjusticiable political questions, which includes  
24 consideration of "adherence to Bylaws." *Lomeli*, Case No. 2013-CI-APL-002, Opinion at 11, 21  
25 and n.26. If the suit concerns governmental functions and there has been no waiver of immunity,

1 the Court lacks jurisdiction; if the suit concerns nonjusticiable political questions, the Court lacks  
2 jurisdiction. *Id.* The Court must dismiss any claims over which it lacks subject matter  
3 jurisdiction. If any claims remain, the Court must determine whether they regard “civil matters  
4 concerning members of the Nooksack Indian Tribe.” *Id.* at 12. If so, the Court “must make a  
5 threshold finding on the constitutionality of the law or policy the member seeks to have the  
6 Tribal officers or employees enjoined from enforcing.”<sup>1</sup> *Id.* at 14. This process, a process  
7 established as Nooksack precedent, differs greatly from the Plaintiffs’ proposed FRCP 56  
8 process. *See* Br. in Opp’n at 7-10. Nothing compels this Court to hold a trial when baseless,  
9 conclusory allegations confront the plain facts and the express language of tribal enactments.

10 Even if FRCP 56 does apply, Defendants should prevail. There is no genuine issue of  
11 material fact here, and even viewing all the evidence in the light most favorable to Plaintiffs,  
12 Defendants are entitled to judgment as a matter of law. In determining whether there is any  
13 dispute involving material facts, the federal Supreme Court has explained that “the mere  
14 existence of *some* alleged factual dispute between the parties will not defeat an otherwise  
15 properly supported motion for summary judgment; the requirement is that there be no *genuine*  
16 issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *accord*  
17 *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952-53 (9th Cir. 1978). When a defendant  
18 moves for summary judgment, a plaintiff must provide “evidence on which the jury could  
19 reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252. There is no such evidence here.

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

21 This Court lacks jurisdiction because the Nooksack Indian Tribe, the Council, and tribal  
22 officials are immune from suit. An Indian tribe is immune from suit because it is a sovereign

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23 <sup>1</sup> *Lomeli* does not indicate that a plaintiff need only make “a minimal ‘threshold’ showing  
24 that the acts of the officer, employee, or agent violate the Nooksack Constitution or superior  
25 Nooksack law.” *See* Br. in Opp’n to Defs.’ Mot. to Dismiss/Cross Mot. for Partial Summ. J. (Br.  
in Opp’n) at 7:14-15.

1 entity with common law immunity. *Cline v. Cunanan*, Case No. NOO-CIV-02/08-5, 5-6  
2 (Nooksack Ct. App. 2009); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Sovereign  
3 immunity acts as a jurisdictional bar to bringing suits against tribes unless Congress has  
4 authorized the lawsuit or a tribe has waived its immunity. *Martinez*, 436 U.S. at 58-59; *Kiowa*  
5 *Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Waivers of immunity  
6 must be clear, express, unequivocal, and cannot be implied. *Olson v. Nooksack*, 6 NICS App.  
7 49, 52-53 (Nooksack Ct. App. 2001) (citing *Martinez*, 436 U.S. at 60). Sovereign immunity also  
8 applies to tribal officials and employees acting within the scope of their authority. *Cline*, Case  
9 No. NOO-CIV-02-08-5, at 6; *see also Mitchell v. Pequette*, CV-07-38, 2008 WL 8567012 at \*7-  
10 9 (Leech Lake Tribal Court May 9, 2008). Tribal sovereign immunity “extends to actions  
11 brought against tribes in tribal court.” *Olson*, 6 NICS App. at 51.

12         The Nooksack Court of Appeals held that the Tribal Court lacks subject matter  
13 jurisdiction over matters concerning “the establishment and functions of the tribal government”  
14 unless the Tribe waives its sovereign immunity. *Lomeli*, Case No. 2013-CI-APL-002, Opinion at  
15 11. The Court of Appeals explained that “[e]lected Council members, and the Tribe’s agents,  
16 must be free from intimidation, harassment and the threat of lawsuits in executing the functions  
17 of tribal government.” *Id.* Moreover, the “Tribe’s officers necessarily enjoy the discretion to  
18 determine the manner and method in which it administers the Tribe’s governmental functions.”  
19 *Id.*

20         The Tribal Court does have jurisdiction over “civil matters concerning members of the  
21 Nooksack Indian Tribe[,]” however. *Id.* at 12. When an officer, employee, or agent, “acting in  
22 his or her official capacity, enforces or threatens to enforce an unconstitutional law or policy,”  
23 sovereign immunity does not protect the officer, employee, or agent because there is no authority  
24 “to enforce laws that do not comply with the Constitution.” *Id.* at 13. That is, when:

1 a suit is brought by a Tribal member against an officer, employee or agent of the  
2 Tribe acting in his or her official capacity and alleges the law or policy the officer,  
3 employee or agent is enforcing or threatening to enforce is unconstitutional, the  
Tribal Court has subject matter jurisdiction... to order declaratory or injunctive  
relief.

4 *Id.* at 14. In this instance, the “Tribal Court must make a threshold finding on the  
5 constitutionality of the law or policy the member seeks to have the Tribal officers or employees  
6 enjoined from enforcing.” *Id.* This threshold finding “may not be made, however, when the  
7 Complaint centers on ‘non-justiciable political questions.’” Order Den. Pls.’ Mot. for Prelim.  
8 Inj./Writ of Mandamus at 4:17-18 (quoting *id.* at 21). The Court of Appeals has explained that a  
9 political question may arise when there is:

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

14 *Lomeli*, 2013-CI-APL-002, Opinion at 21 n.26.

15 However, Plaintiffs mischaracterize the Court’s holding as:

16 Sovereign immunity does not protect suits by a member of the Nooksack Indian  
17 Tribe against an officer, employee, or agent of the Tribe acting in his or her  
18 official capacity if a plaintiff can make a minimal “threshold” showing that the  
acts of the officer, employee, or agent violate the Nooksack Constitution or  
superior Nooksack law. The Nooksack Court of Appeals has recently held that  
19 when a tribal member properly pleads under this exception, this Court possesses a  
“constitutional grant of jurisdiction.”

20 Br. in Opp’n, at 7:12-17. Plaintiffs fail to explain that this Court lacks jurisdiction over matters  
21 concerning governmental functions without a waiver of immunity and nonjusticiable political  
22 questions. *See Lomeli*, 2013-CI-APL-002, Opinion at 11-14, 21 and n.26. Defendants have not  
23 violated Nooksack or federal law, and this Court lacks jurisdiction over Plaintiffs’ claim  
24 regarding the special meeting request because it is a nonjusticiable political question.

25 1. Defendants Have Not Violated Nooksack or Federal Law.

1 The Christmas Support funds comply with Due Process and Equal Protection. Resolution  
2 No. 13-181, the only effective Resolution relating to Christmas Support funds, contains the same  
3 “carve out” that was held valid by this Court and the Nooksack Court of Appeals in *Roberts*, and  
4 similarly valid “carve outs” have been approved by the federal courts. *See Roberts v. Kelly*,  
5 2013-CI-APL-003, Opinion at 10 (March 18, 2014); Opp’n to TRO, Exh. A; *Alto*, 12-56145,  
6 2013 WL 6813816, at \*4-7; *see also Mathews v. Eldridge*, 424 U.S. 319, 335-41 (1976); *Ass’n*  
7 *for Los Angeles Deputy Sheriffs v. Cnty. of Los Angeles*, 648 F.3d 986, 992 (9th Cir. 2011); *Gary*  
8 *v. Nichols*, 447 F. Supp. 320, 325 (D. Idaho 1978).

9 a. *Resolution No. 13-181 complies with Procedural Due Process.*

10 Plaintiffs allege that “Resolution No. 13-171’s grant of Christmas Support deprived  
11 Nooksacks of a public benefit without providing a hearing at all, and was therefore patently  
12 unconstitutional.” Br. in Opp’n at 10:14-15. First, Due Process protections only attach to  
13 entitlements. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78 (1972). Here, the  
14 Council created a Resolution defining eligibility for discretionary Christmas Support funds—a  
15 valid exercise of the Council’s powers. There is no law or understanding that turns these  
16 discretionary funds into an entitlement, which means Due Process protections do not attach. *See*  
17 *Berry v. Arapahoe & Shoshone Tribes*, 420 F. Supp. 934, 942 (D. Wyo. 1976) (finding that the  
18 plaintiffs were not entitled to a tribal liquor license, because applicable state law clearly  
19 established that there is no vested right to a liquor license).

20 Second, Defendants have provided sufficient Due Process. The *Mathews* test requires the  
21 Court to balance three factors: (1) the private interest at stake, (2) the risk of erroneous  
22 deprivation and any value in providing additional safeguards, and (3) the government’s interest,  
23 which includes the function involved and any monetary and administrative burdens in providing  
24

1 additional procedures. *Mathews*, 424 U.S. at 335.<sup>2</sup> Plaintiffs' interest in a one-time Christmas  
2 Support check is minimal compared to a person's interest in ongoing disability benefits. The  
3 *Mathews* Court explained that disability benefits could be terminated upon an initial eligibility  
4 challenge, because the plaintiff would be made whole if the plaintiff proved eligibility, eligibility  
5 is not based on financial need, and the plaintiff's need is less than that of a welfare recipient. *Id.*  
6 at 340-343.

7 Here, the Council has prima facie evidence that Plaintiffs were erroneously enrolled,  
8 because they do not descend from the claimed Nooksack ancestor.<sup>3</sup> The Council has distributed  
9 this evidence to Plaintiffs and invited and provided the opportunity for Plaintiffs to rebut this  
10 evidence, but Plaintiffs have not provided any rebuttal evidence at this point. *See Roberts*, Order  
11 Granting Defs.' Mot. to Dismiss, at 9-10 (Oct. 17, 2013).<sup>4</sup> The Council therefore decided to  
12 delay payment of Christmas Support funds for those members subject to their pending  
13 disenrollment proceedings until the Council decides that any such member remains enrolled. *See*  
14 *Opp'n to TRO*, Exh. A. Even if Due Process protections attach to the Christmas Support funds,  
15 and they do not, the protections afforded by Resolution No. 13-181 completely comport with  
16 *Mathews*. Plaintiffs will receive the Christmas Support funds if they are not ultimately  
17 disenrolled, eligibility for Christmas Support funds is not based on financial need, and Plaintiffs'  
18 need for the one-time Christmas Support payment is far less than a welfare recipient's need for  
19 public assistance. *See Opp'n to TRO*, Exh. A.

20 There is no value in additional procedures either, because the Council must determine

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21 <sup>2</sup> The Nooksack Court of Appeals adopted the *Mathews* test for "analyzing procedural  
22 due process claims under the Nooksack Constitution, absent a showing Nooksack custom or  
tradition [that] favors a different test." *Roberts*, 2013-CI-APL-003, Opinion at 6.

23 <sup>3</sup> Even the federal government requires that a tribe's members "descend from a historical  
Indian tribe" as a prerequisite for official recognition. 25 CFR § 83.7(e); *see also Adoptive*  
24 *Couple v. Baby Girl*, 133 S. Ct. 2552, 2585 (2013) (Sotomayor, J., dissenting).

25 <sup>4</sup> Plaintiffs could also utilize the provision in Title 63 to update their records with  
information demonstrating that they are properly enrolled. *See Title 63*, § 63.05.001(C).

1 whether Plaintiffs are erroneously enrolled before they are eligible for these benefits. Providing  
2 notice and a hearing to each Disenrollee prior to dissemination of Christmas Support funds  
3 would constitute an incredible burden on the Tribe's time and fiscal resources; such a burden is  
4 far from warranted when non-essential and purely discretionary benefits are involved.

5 Plaintiffs allege that Resolution No. 13-171 was not superseded by Resolution No. 13-  
6 181, because Defendants failed to submit a declaration authenticating Resolution No. 13-181,  
7 and it was not properly enacted. Br. in Opp'n at 11:3-13. There is no requirement to submit a  
8 declaration authenticating evidence in the Tribal Court, and FRCP 56(c) does not apply. Title 10  
9 explains that the "purpose of these rules of evidence is to ensure that the Tribal Court is able to  
10 determine the truth of the matter with a minimum of delay, confusion, and uncertainty." Title  
11 10, § 10.06.010. Moreover, the "rules of evidence used in state or federal courts shall not apply  
12 to hearings in the Nooksack Tribal Court[.]..." Title 10, § 10.06.020(a). The "judge may take  
13 notice of facts, which are a matter of official public record, even if no party introduces them as  
14 evidence." Title 10, § 10.06.020(e). Resolution No. 13-181 was enacted by a vote of 5 to 0, and  
15 five members constitutes a quorum under Article II, Section 4 of the Bylaws. See Opp'n to  
16 TRO, Exh. A; *Roberts*, Case No. 2013-CI-CL-003, Order Granting Defs.' Mot. to Dismiss, at 6  
17 (Oct. 17, 2013). Even if a vote of 5 to 0 did not constitute a quorum under the Bylaws, however,  
18 this Court lacks jurisdiction over the Council's adherence to the Bylaws. *Lomeli*, 2013-CI-APL-  
19 002, Opinion at 21.<sup>5</sup> Resolution No. 13-171 is no longer in effect, because it was superseded by  
20 Resolution No. 13-181. See Opp'n to TRO, Exh. A.

21 Plaintiffs further argue that Resolution No. 13-181 does not provide adequate Due  
22 Process protections. Br. in Opp'n. at 11:14-15. The Council chose to supersede Resolution No.  
23 13-171 after it realized that the "carve out," which expressly ensures that any person subject to

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24 <sup>5</sup> Plaintiffs' case citations to the contrary are not controlling and they are not persuasive,  
25 as no member of the Council here illegally sat and a quorum voted on Resolution No. 13-181.



1 pending disenrollment proceedings will receive the Christmas Support funds if the Council  
2 determines that any such person is properly enrolled, was inadvertently omitted. *See* Opp'n to  
3 TRO, Exh. A; Defs.' Resp. to Pls.' Mot. for Order to Show Cause Re: Contempt, Decl. of A.  
4 Smith ¶¶ 5, 10. Resolution No. 13-181 thus provides the same protection that the School  
5 Support funds Resolution provided, which this Court and the Nooksack Court of Appeals upheld  
6 in *Roberts*. *See Roberts*, 2013-CI-APL-003, Opinion at 10. Plaintiffs' claims related to an  
7 impartial hearing body do not apply here. Potential disenrollees will receive a disenrollment  
8 meeting, and at that point, the Council will decide whether the disenrollees are to remain  
9 enrolled or are to be disenrolled. If any potential disenrollee remains enrolled, s/he will then  
10 receive the Christmas Support funds. The Council is the sole and final decision maker on  
11 membership determinations; eligibility for Christmas Support funds hinges on a potential  
12 disenrollee's continued enrollment and nothing more. The Council's role as decision maker is a  
13 legal necessity under tribal law. *See Const.* art. II, §§ 2, 4; Title 63, § 63.04.001(B).

14 Plaintiffs also allege that the timing of disenrollment meetings is problematic because  
15 those meetings have not yet been scheduled. Br. in Opp'n at 12-13. Disenrollment meetings  
16 have not been scheduled because the Court of Appeals has issued stays and/or instructions to this  
17 Court to issue injunctions, and this Court has issued injunctions, preventing the Council from  
18 proceeding with disenrollment meetings. *See e.g., Roberts*, No. 2013-CI-APL-003, Opinion at 9-  
19 10 (March 18, 2014); *Roberts*, No. 2013-CI-CL-003 (March 31, 2014). It is disingenuous at best  
20 for Plaintiffs to allege that pending disenrollment meetings do not provide meaningful hearings  
21 when Plaintiffs have sought stays to prevent the scheduling of those very meetings. *See Lomeli*  
22 *v. Kelly*, No. 2013-CI-CL-001, Emergency Motion for Stay Pending Appeal (May 23, 2013);  
23 *Lomeli*, No. 2013-CI-APL-002, Emergency Motion to Stay Pending Appeal (Aug. 12, 2013);  
24 *Roberts*, No. 2013-CI-CL-003, Second Mot. for TRO (Aug. 22, 2013). Plaintiffs' allegation that

1 delayed disenrollment meetings do meet due process standards further fails, because Plaintiffs  
2 admit that Christmas Support funds were issued “to support members during the Christmas  
3 holiday[,]” which “has long passed.” Br. in Opp’n at 12-13. Since the Christmas holiday has  
4 already passed, there is no greater injury to Plaintiffs in delaying the payments until  
5 disenrollment meetings have taken place.

6 Plaintiffs’ allegation that there are no pending disenrollment proceedings is patently false.  
7 *See e.g., Lomeli*, No. 2013-CI-CL-001, Pls.’ Br. Re: Order Extending Stay, at 1 (Sept. 18, 2013)  
8 (“On February 12, 2013, Defendants initiated disenrollment proceedings against 306 enrolled  
9 Nooksack Tribal members.”). The Council initiated involuntary disenrollment proceedings on  
10 February 12, 2013 when it passed Resolution No. 13-02. *See Lomeli*, 2013-CI-APL-002,  
11 Opinion at 3. If disenrollment proceedings have not been initiated, then there was no case or  
12 controversy in *Lomeli*, which challenged the Council’s authority to initiate disenrollment  
13 proceedings. The Court of Appeals explained that the *Lomeli* “Appellants requested the Tribal  
14 Court enjoin members of the Nooksack Tribal Council from conducting disenrollment  
15 proceedings against them.” *Id.* Defendants are surprised to learn that Plaintiffs here, including  
16 the *Lomeli* plaintiffs, must believe no such injunction was necessary.

17 Plaintiffs’ claim that this Court’s TRO Order constitutes the law of the case flies in the  
18 face of the purpose of a temporary restraining order and this Court’s statement that its Order was  
19 a preliminary order. *See Order Granting on Mot. for TRO* at 13 (Dec. 18, 2013) (“the Court  
20 finds that, *at this preliminary TRO stage in this matter*[.]...”). In addition, the TRO Order only  
21 concerned claims related to Resolution No. 13-171, which are now moot. *See infra* subsection  
22 C.

23 Lastly, the Nooksack Court of Appeals has held that where support payments have been  
24 delayed until a disposition on the enrollment eligibility of potential disenrollees, the only relief

1 available would be an “order that the Nooksack Tribe make immediate financial payment to  
2 [Plaintiffs] while disenrollment proceedings are pending or stayed. Under... *Lomeli*, the  
3 sovereign immunity of the Tribe prevents the Nooksack courts from ordering immediate  
4 payment of funds, or any other remedy that creates a money judgment in favor of” Plaintiffs.  
5 *Roberts*, 2013-CI-APL-003, Opinion at 10. Thus, Plaintiffs cannot obtain any relief, and  
6 Plaintiffs claims related to the Christmas Support funds must be dismissed.

7       ***b. Resolution No. 13-181 Complies with Equal Protection.***

8       While the Equal Protection clause of ICRA is not the same as the federal Equal  
9 Protection clause, there has not been an Equal Protection violation here even if the federal  
10 standard is used. *See Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge*  
11 *Reservation*, 507 F.2d 1079, 1082-83 (8th Cir. 1975). Under federal law, when a suspect class is  
12 not involved, Equal Protection review requires that legislation “be rationally related to a  
13 legitimate governmental purpose.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432,  
14 446 (1985). Under rational basis review, legislation must not be “enacted for arbitrary or  
15 improper purposes.” *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 996 (N.D. Cal.  
16 2012). A law that does not involve fundamental rights or a suspect class “is accorded a strong  
17 presumption of validity[.]” and it “must be upheld against equal protection challenge if there is  
18 any reasonably conceivable state of facts that could provide a rational basis for the  
19 classification[.]” *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997) (internal citations  
20 omitted).

21       There is no suspect class here,<sup>6</sup> which leaves only rational basis review. There are  
22 rational reasons to treat properly enrolled members differently from those whose membership

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23  
24       <sup>6</sup> *See Lomeli*, No. 2013-CI-CL-001, Amended Order Granting Defs.’ Mot. to Dismiss at  
25 15 (Aug. 7, 2013); *Lomeli*, No. 2013-CI-CL-001, Request to Take Judicial Notice, Attachment 3  
(Order at 9-10, Case No. C13-945RAJ, U.S.D.C. – Western Washington, dated June 19, 2013).

1 relies on what appear to be false statements. The Council determined that persons subject to  
2 pending disenrollment proceedings are not immediately eligible for the Christmas Support  
3 funding. *See* Opp'n to TRO, Exh. A. Only properly enrolled members of the Tribe are eligible  
4 to receive tribal funding, and limiting the immediate disbursement of funds to those members  
5 who are not subject to disenrollment proceedings is rationally related to the Council's obligation  
6 to responsibly administer tribal funds. *See Const.* art. VI, § 1(K). Despite prima facie evidence  
7 indicating that Plaintiffs are not properly enrolled, the Council does not conclusively presume  
8 that persons subject to pending disenrollment proceedings are erroneously enrolled; rather, the  
9 Council has chosen to delay Christmas Support funding for those subject to pending  
10 disenrollment proceedings until any such person is found to be properly enrolled, and Plaintiffs'  
11 equal protection challenge must fail because Resolution No. 13-181 is rationally related to one of  
12 the Council's most important duties.

13         The Council has not delayed payments out of animosity or a desire to harm Plaintiffs as  
14 suggested by Plaintiffs' counsel. *See* Br. in Opp'n at 13:17-18. Instead, the Council seeks to  
15 protect all Nooksack members' interests, including the interest of those subject to pending  
16 disenrollment proceedings in Christmas Support funds. If the Tribe immediately provided funds  
17 to potential disenrollees who are ultimately disenrolled, the Tribe would have provided funds to  
18 an ineligible recipient, and those funds could not be recovered. By delaying these payments, the  
19 Council ensures that only eligible recipients receive the Tribe's funds, and any potential  
20 disenrollee's right to those funds is also protected. Additionally, the Nooksack Court of Appeals  
21 has upheld similarly delayed payments to school children—finding that Nooksack Courts cannot  
22 order the Tribe to immediately expend funds. *Roberts*, 2013-CI-APL-003, Opinion at 10.

23         Plaintiffs claim that this Court found Resolution No. 13-181 to violate the Equal  
24  
25

1 Protection clause of the Constitution,<sup>7</sup> but this Court has not ruled on the merits of Resolution  
2 No. 13-181. Order on Mot. for Order to Show Cause Re Contempt, at 5 (Feb. 7, 2014).  
3 Plaintiffs' law of the case claim must be rejected not only because this Court has yet to rule on  
4 Resolution No. 13-181, but also because this Court's preliminary decision in its TRO Order does  
5 not constitute the law of the case, as explained above in subsection B(1)(a). The Nooksack Court  
6 of Appeals' dismissal of a nearly identical claim in the *Roberts* case also requires dismissal here.  
7 *See Roberts*, 2013-CI-APL-003, Opinion at 10.

8 2. This Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Special Meeting  
9 Claim.

10 The Court of Appeals has held that the "Tribal Council has the sovereign authority to  
11 determine its meeting procedures. CONST. Art. VI, § 1.J. The adherence to Bylaws is a  
12 political question not subject to judicial review." *Lomeli*, 2013-CI-APL-002, Opinion at 21.  
13 Article II, Section 5 of the Bylaws specifies when special meetings will be held, and the  
14 Constitution is silent as to the calling of special meetings. Plaintiffs allege that this Court may  
15 compel the Council to schedule a special meeting requested by two former Council members.  
16 Br. in Opp'n at 16:6-10. Plaintiffs' mislead this Court by continuing to raise allegations related  
17 to special meetings without disclosing relevant, controlling precedent adverse to Plaintiffs'  
18 allegations;<sup>8</sup> this Court plainly may not review whether the Council has adhered to the Bylaws  
19 under *Lomeli*. *See Lomeli*, 2013-CI-APL-002, Opinion at 21. There are no questions of fact  
20 before the Court, because there is no jurisdiction, and this issue is *res judicata*.

21 <sup>7</sup> Br. in Opp'n at 14:1-4.

22 <sup>8</sup> Plaintiffs' counsel have a duty to disclose adverse, controlling authority under  
23 Washington Rule of Professional Conduct (RPC) 3.3(a)(3) and Title 10, § 10.02.020. This Court  
24 has also already warned counsel about the failure to include adverse, controlling authority.  
25 *Adams*, No. 2013-CI-CL-004, Order Den. Pls.' Mot. to Disqualify, at 5 (Feb. 7, 2014). In  
addition, counsel may not knowingly make a false statement of material fact or law to the  
tribunal under RPC 3.3(a)(3), and counsel may not "engage in conduct involving dishonesty,  
fraud, deceit or misrepresentation" under RPC 8.4(c).

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

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

8           Plaintiffs allege that disbursement of the Christmas Support funds violates 25 U.S.C.  
9 §§ 2710(a)(3)(A-D) and (d)(1)(A)(ii) and 25 C.F.R. §§ 290.16 and 290.21.<sup>9</sup> Plaintiffs claim that  
10 net gaming revenue, at least in part, funded the Christmas Support payments, and the Tribe lacks  
11 a revenue allocation plan. Plaintiffs are mistaken; the Christmas Support payments were funded  
12 by sales tax revenue and not gaming revenue. Defs.' Resp. to Pls.' Mot. for Order to Show  
13 Cause Re: Contempt, Decl. of J. Meyer ¶4. The Tribe has not violated IGRA or any other law by  
14 funding Christmas Support payments through sales tax revenue.

15           Plaintiffs allege that this question must be treated under FRCP 56 due to an intertwined  
16 jurisdictional and factual challenge. Br. in Opp'n at 8-10. Again, FRCP 56 does not apply in the  
17 Nooksack Tribal Court. One of the very cases Plaintiffs cite also explains that federal courts  
18 need not turn a factual attack on jurisdiction into a FRCP 56 motion when "the alleged claim  
19 under the constitution or federal statutes clearly appears to be immaterial and made solely for the  
20 purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and  
21 frivolous." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (internal  
22 citations omitted). Plaintiffs' claims related to IGRA are frivolous and meritless; the Tribe's

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23  
24           <sup>9</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 Chief Financial Officer has stated under oath that sales tax revenue alone funded the Christmas  
2 Support payments, and a former Council member's conclusory allegation to the contrary does  
3 not suffice to give this Court jurisdiction. *See* Defs.' Resp. to Pls.' Mot. for Order to Show  
4 Cause Re: Contempt, Decl. of J. Meyer ¶4.

5 Even if this Court does apply FRCP 56 standards, there is no genuine issue of material  
6 fact, and Defendants are entitled to judgment as a matter of law. The federal Supreme Court has  
7 found that when "the record taken as a whole could not lead a rational trier of fact to find for the  
8 non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v.*  
9 *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Plaintiffs only get "the benefit of reasonable  
10 inferences that may be drawn without resorting to speculation." *Hitt v. Harsco Corp.*, 356 F.3d  
11 920, 923-24 (8th Cir. 2004). This Court cannot reasonably infer that the Tribe would utilize  
12 unlawful sources of revenue to fund discretionary Christmas Support funds when the Tribe could  
13 have used, and did use, lawful sources of revenue.

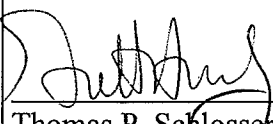
14 **C. Plaintiffs' Claims Related to Resolution No. 13-171 Are Moot.**

15 An issue is moot if a change in circumstance has "forestalled any occasion for  
16 meaningful relief." *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir. 2007).  
17 Voluntary cessation moots an issue as long as "subsequent events [have] made it absolutely clear  
18 that the allegedly wrongful behavior cannot reasonably be expected to recur." *F.T.C. v.*  
19 *Affordable Media*, 179 F.3d 1228, 1238 (9th Cir. 1999) (internal citations omitted). Resolution  
20 No. 13-171 was completely superseded by Resolution No. 13-181. *See* Opp'n to TRO, Exh. A.  
21 Since Resolution No. 13-171 is no longer in effect, Plaintiffs' allegations related to it are moot.  
22 There are no genuine issues of material fact related to whether Resolution No. 13-181  
23 superseded Resolution No. 13-171, as explained above in subsection B(1)(a).

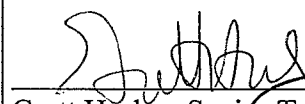
24 **III. CONCLUSION**

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

3  
4 Respectfully submitted this 4th day of April, 2014.

5  
6  for Tom Adams

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11 

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17 rsj:4/3/14