

1
2 **RECEIVED**

03-26-14 A11:36 IN

3 **MAR 28 2014**

Becky Hutchins

4 **Galanda Broadman PLLC**

5
6 IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE
7 NOOKSACK INDIAN TRIBE

8 ST. GERMAIN, *et al.*,

Case No. 2013-CI-CL-005

9 Plaintiffs,

DEFENDANTS' RESPONSE IN
OPPOSITION TO PLAINTIFFS' CROSS
MOTION FOR PARTIAL SUMMARY
JUDGMENT

10 v.

11 KELLY, *et al.*,

Hearing Date: April 9, 2014

12 Defendants.

Time: 10:00 AM

13 **COPY**

14
15 COME NOW Defendants in the above-entitled action, by and through the Office of
16 Tribal Attorney, without waiving other defenses and objections, and provide this Response in
17 Opposition to Plaintiffs' Cross Motion for Partial Summary Judgment.¹

18 **I. INTRODUCTION**

19 On December 9, 2013, Plaintiffs initiated a fourth lawsuit against Defendants in Tribal
20 Court for equitable relief. Plaintiffs' Complaint alleges that Defendants have violated Due
21 Process and Equal Protection through passage of Resolution No. 13-171 related to Christmas
22 Support funds, Defendants have wrongfully failed to call a special meeting, and Defendants have

23
24 ¹ Plaintiffs did not coordinate with Defendants' counsel regarding a hearing date for the
25 Cross Motion for Partial Summary Judgment prior to submitting it as required by Title 10,
Section 10.05.050(f)(4).

1 violated the Indian Gaming Regulatory Act (IGRA) through issuance of the Christmas Support
2 funds. On January 9, 2014, defendants moved to dismiss. On February 20, 2014, Plaintiffs filed
3 a Brief in Opposition to Defendants' Motion to Dismiss/ Cross motion for Partial Summary
4 Judgment. Defendants will separately reply regarding the Motion to Dismiss and here respond to
5 the cross motion only. Plaintiffs' Cross Motion for Partial Summary Judgment alleges that
6 "Plaintiffs are entitled to judgment as a matter of law on their equal protection claim." Cross
7 Mot. for Partial Summ. J. at 18:5.

8 Plaintiffs are not entitled to judgment as a matter of law, because Defendants are immune
9 from suit when they act within the scope of their authority, and this Court lacks jurisdiction.
10 Defendants have acted within the scope of their authority; Defendants have not violated Equal
11 Protection principles.

12 **II. LEGAL ARGUMENT**

13 Defendants need not respond to Plaintiffs' Cross Motion for Partial Summary Judgment,
14 because Plaintiffs failed to adhere to Section 10.05.050(f)(4), but Defendants respond as follows
15 for the sake of efficiency. Defendants incorporate all applicable arguments raised in their
16 Motion to Dismiss Plaintiffs' Complaint, which was filed on January 9, 2014.

17 **A. This Court Lacks Jurisdiction Due to Sovereign Immunity.**

18 Defendants are immune from suit, and this Court lacks jurisdiction, because Defendants
19 have not violated the Nooksack Constitution. *Cline v. Cunanan*, Case No. NOO-CIV-02/08-5, 5-
20 6 (Nooksack Ct. App. 2009); *Lomeli v. Kelly*, Case No. 2013-CI-APL-002, Opinion, at 11-14
21 (January 15, 2014). Federal Rule of Civil Procedure 56 does not automatically apply in the
22 Nooksack Court. Even if FRCP 56 does apply by analogy, Plaintiffs fail to demonstrate that they
23 are entitled to judgment as a matter of law on their Equal Protection claim regarding Resolution
24

1 No. 13-181.² Plaintiffs correctly state that there is no genuine issue of material fact here. Cross
2 Mot. for Partial Summ. J. at 18:15-17.

3 The federal Supreme Court has explained that Equal Protection review requires that
4 legislation “be rationally related to a legitimate governmental purpose” when there is no suspect
5 class involved. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Under
6 rational basis review, legislation must not be “enacted for arbitrary or improper purposes.”
7 *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 996 (N.D. Cal. 2012). A law that
8 does not involve fundamental rights or a suspect class “is accorded a strong presumption of
9 validity[.]” and it “must be upheld against equal protection challenge if there is any reasonably
10 conceivable state of facts that could provide a rational basis for the classification[.]” *Philips v.*
11 *Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997) (internal citations omitted).

12 There is no suspect class here.³ The Council has shown a rational basis for delaying
13 Christmas Support payments to potential disenrollees; it would be irresponsible to immediately
14 provide funds to potential disenrollees when there is prima facie evidence that they are not
15 eligible for membership. Delaying payments protects the entire membership’s interest in the
16 Tribe’s funds—including potential disenrollees’ interests in Christmas Support funds. Plaintiffs
17 fail to demonstrate any arbitrary or improper purposes underlying the Council’s action. This
18 Court must deny Plaintiffs’ Cross Motion for Partial Summary Judgment.

19 **B. Plaintiffs Lack Any Form of Relief.**

20 The Nooksack Court of Appeals recently affirmed this Court’s dismissal of a claim
21 challenging the delay of Back to School support payments for potential disenrollees. *Roberts v.*

22 ² Resolution No. 13-171 was superseded by Resolution No. 13-181, which means any
23 claims related to Resolution No. 13-171 are moot.

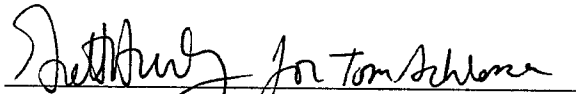
24 ³ See *Lomeli v. Kelly*, No. 2013-CI-CL-001, Amended Order Granting Defs.’ Mot. to
25 Dismiss at 15 (Aug. 7, 2013); *Lomeli*, No. 2013-CI-CL-001, Request to Take Judicial Notice,
Attachment 3 (Order at 9-10, Case No. C13-945RAJ, U.S.D.C. – Western Washington, dated
June 19, 2013).

1 Kelly, No. 2013-CI-APL-003, Opinion, at 10 (March 18, 2014). Since potential disenrollees will
2 receive the funding if they are found to be properly enrolled, “the only relief available to the
3 children is a court order that the Nooksack Tribe make immediate financial payment to
4 Appellants while disenrollment proceedings are pending or stayed.” *Id.* The Court of Appeals
5 explained that the “sovereign immunity of the Tribe prevents the Nooksack courts from ordering
6 an immediate payment of funds, or any other remedy that creates a money judgment in favor of
7 Appellants.” *Id.* As explained above, there is no equal protection violation here, and there is no
8 relief for Plaintiffs, because this Court cannot order the Tribe to make immediate Christmas
9 Support payments to Plaintiffs. *See id.*

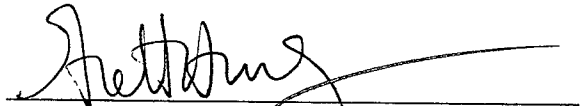
10 III. CONCLUSION

11 For the foregoing reasons, Defendants request that the Court deny Plaintiffs’ Cross
12 Motion for Partial Summary Judgment.

13
14 Respectfully submitted this 26th day of March, 2014.

15
16 
17 Thomas P. Schlosser

18 Rebecca JCH Jackson
19 Morisset, Schlosser, Jozwiak & Somerville
20 Attorneys for Defendants

21 

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

T:\WPDOCS\0282\09738\St Germain Resp in Opp'n to Cross MSJ.doc
rsj:3/25/14

Betty J. ...

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

ST. GERMAIN, et al.,

Appellants,

Case No. 2013-CI-CL-005

v.

KELLY, et al.,

Appellees.

DECLARATION OF SERVICE

COPY

I Declare:

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

On March 26, 2014, I duly mailed by first class mail, a copy of Defendants' Response in Opposition to Plaintiffs' Cross Motion for Partial Summary Judgment to Galanda Broadman PLLC, Attn: Gabriel Galanda, P.O. Box 15146, Seattle, WA 98115.

Also, on March 26, 2014, I emailed Gabriel S. Galanda at gabe@galandabroadman.com a courtesy copy of the above-referenced documents.

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

Signed at Deming, Washington on March 26, 2014.

CBernard

Charity Bernard, Paralegal
Office of Tribal Attorney, Nooksack Indian Tribe